Limited Waiver of the Attorney-Client Privilege Upon Voluntary Disclosure to the SEC

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LIMITED WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE UPON VOLUNTARY DISCLOSURE TO THE SEC

INTRODUCTION

Although the attorney-client privilege is recognized in all jurisdic-

1. Professor Wigmore summarized the general principle of the attorney-client privilege as follows: "(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived." 8 J. Wigmore, Evidence in Trials at Common Law § 2292, at 554 (J. McNaughton rev. ed. 1961) (emphasis omitted). This statement of the privilege is widely accepted by the courts. E.g., United States v. Landof, 591 F.2d 36, 38 (9th Cir. 1978) (quoting 8 J. Wigmore, supra, § 2292, at 554); United States v. Stern, 511 F.2d 1364, 1367-68 (2d Cir.) (same), cert. denied, 423 U.S. 829 (1975); NLRB v. Harvey, 349 F.2d 900, 904 (4th Cir. 1965) (same). A concise and often-quoted formulation of the criteria for application of the privilege was set forth by Judge Wyzanski in United States v. United Shoe Mach. Corp., 89 F. Supp. 357 (D. Mass. 1950): "The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client." Id. at 358-59. The privilege is that of the client, not the attorney. Schwimmer v. United States, 232 F.2d 855, 863 (8th Cir.), cert. denied, 352 U.S. 833 (1956); C. McCormick, McCormick's Handbook of the Law of Evidence § 92, at 192 (E. Cleary 2d ed. 1972). The burden of proving that the privilege applies to a particular communication is placed upon the party asserting it. United States v. Stern, 511 F.2d 1364, 1367 (2d Cir.), cert. denied, 423 U.S. 829 (1975); United States v. Gurtner, 474 F.2d 297, 298 (9th Cir. 1973); International Paper Co. v. Fibreboard Corp., 63 F.R.D. 88, 93 (D. Del. 1974). For the privilege to attach, the communication must have been made and maintained in confidence under circumstances where it is reasonable to assume that disclosure to third persons was not intended. United States v. Bump, 605 F.2d 548, 551 (10th Cir. 1979); United States v. Pipkins, 528 F.2d 559, 563 (5th Cir.), cert. denied, 426 U.S. 952 (1976); In re Horowitz, 482 F.2d 72, 81-82 (2d Cir.), cert. denied, 414 U.S. 867 (1973); 8 J. Wigmore, supra, § 2311, at 599-603; see In re Victor, 422 F. Supp. 475, 476 (S.D.N.Y. 1976). The privilege does not apply to everything arising out of the attorney-client relationship. United States v. Pipkins, 528 F.2d 559, 563 (5th Cir.), cert. denied, 426 U.S. 952 (1976); United States v. Goldfarb, 325 F.2d 280, 282 (6th Cir.), cert. denied, 377 U.S. 976 (1964). "The attorney-client privilege . . . need not foreclose inquiry into the general nature of a lawyer's activities on behalf of a client, the conditions of the lawyer's employment, or any of the other external trappings of the relationship; the privilege is concerned only with confidential communications, not with the structural framework within which they are uttered." Cohen v. Uni-
tions, it has often been criticized by courts and commentators, and arguments have been advanced to limit its scope. The criticism focuses on the privilege's inhibitory effect on the truth-finding process.


2. 3 S. Gard, Jones on Evidence § 21:8, at 762 & n.61 (6th ed. 1972); see Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). The attorney-client privilege is the oldest of the privileges for protecting confidential communications. Id.; § J. Wigmore, supra note 1, § 2290, at 542; see C. McCormick, supra note 1, § 87, at 175. In 1888, the Supreme Court explained that the privilege is “founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.” Hunt v. Blackburn, 128 U.S. 464, 470 (1888). The premise underlying the privilege is that sound legal advice is in the public interest and such advice depends upon the attorney being fully informed by the client. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); Trammel v. United States, 445 U.S. 40, 51 (1980). By protecting their communications from discovery, the privilege serves to encourage full and frank communication between attorney and client. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); Fisher v. United States, 425 U.S. 391, 403 (1976). “If such communications were required to be made the subject of examination and publication, such enactment would be a practical prohibition upon professional advice and assistance.” United States v. Louisville & N.R.R., 236 U.S. 318, 336 (1915). The benefits of frank communication to the administration of justice are seen as outweighing the “detriment to justice from a power to shut off inquiry to pertinent facts in court.” C. McCormick, supra note 1, § 87, at 175; accord United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950). The privilege has also been justified by the “unfairness in an adversary system of forcing one party at the behest of his adversary to expose to the latter any secret revelations which the party has made to his own attorney.” 2 D. Louisell & C. Mueller, supra note 1, § 207, at 507 (footnote omitted).


5. See 8 J. Wigmore, supra note 1, § 2291, at 554. Regarding the privilege, Wigmore states: “Its benefits are all indirect and speculative; its obstruction is plain and concrete... It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its prin-
and its impairment of the public's "right to every man's evidence." In response, modern liberal discovery rules have taken a narrow view of the privilege. This tendency toward limiting the privilege is most clearly manifested in the strict standard of waiver, which provides that any loss of confidentiality through disclosure, even if inadvertent, destroys the privilege. Courts have, however, relaxed this standard in certain limited circumstances, to implement policies in addition to those underlying the privilege itself.

Several recent cases have considered whether the waiver standard can be relaxed in a particular corporate context—cooperation with the Securities and Exchange Commission (SEC) in a nonpublic investigation. When the SEC conducts an informal, or nonpublic, inves-

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10. E.g., Permian Corp. v. United States, 665 F.2d 1214, 1219, 1222 (D.C. Cir. 1981); United States v. American Tel. & Tel. Co., 642 F.2d 1285, 1299 (D.C. Cir. 1980). In contrast to the strict standard of waiver in the attorney-client privilege context, a more liberal standard is applied to the work-product privilege. Permian Corp. v. United States, 665 F.2d 1214, 1219 (D.C. Cir. 1981). "While the mere showing of a voluntary disclosure to a third person will generally suffice to show waiver of the attorney-client privilege, it should not suffice in itself for waiver of the work product privilege." United States v. American Tel. & Tel. Co., 642 F.2d 1285, 1299 (D.C. Cir. 1980) (emphasis omitted). While the attorney-client privilege exists to protect confidential communications, the work-product privilege exists to promote the adversary system by protecting an attorney's work product from discovery by his opponent. Thus, although a disclosure to a third party destroys the confidentiality of the attorney-client privilege, it is not inconsistent with maintaining secrecy as against the opposing party. Id.; see Transmirra Prods. Corp. v. Monsanto Chem. Co., 26 F.R.D. 572, 577-78 (S.D.N.Y. 1960) (the two privileges are distinct and waiver of one is not waiver of the other).

11. See infra notes 29-46 and accompanying text.

tigation, it seeks the cooperation of the corporation involved, even to
the extent of requesting that the corporation produce reports or other
documents prepared by its attorneys.13 In such a case, there is no
guarantee that confidentiality will be protected should unrelated par-
ties subsequently request the information,14 even if the SEC has
agreed not to disclose it pending a claim of privilege.15

The issue therefore arises whether such disclosure effects a general
waiver of the attorney-client privilege. The Eighth Circuit, in Diversi-
fied Industries v. Meredith,16 and the Southern District of New York,
in Byrnes v. IDS Realty Trust,17 have found a "limited waiver,"
holding that the privilege is lost only as to the SEC.18 They have
suggested that because corporations should be encouraged to cooper-
ate with government regulatory agencies, and because application of
the strict standard of waiver might discourage such cooperation, gen-
eral waiver rules should not apply.19 The District of Columbia Cir-
cuit, however, in Permian Corp. v. United States,20 rejected the con-

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13. E.g., Permian Corp. v. United States, 665 F.2d 1214, 1216 (D.C. Cir. 1981);
14. See infra notes 143-51, 171-73 and accompanying text.
16. 572 F.2d 596 (8th Cir. 1978) (en banc);
18. Diversified Indus. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1978) (en banc);
19. Diversified Indus. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1978) (en banc);
cept of limited waiver, adhering to the traditional view that disclosure to any third party waives the privilege entirely.\textsuperscript{21}

This Note argues that although application of the strict standard of waiver is appropriate in most instances, it should not be inflexibly applied. Part I describes the strict standard of waiver, examines various situations in which the courts have relaxed it for policy reasons, and develops an analysis upon which the relaxation is implicitly based. Employing the analysis developed in Part I, Part II concludes that a limited waiver is appropriate in SEC disclosure cases when the disclosing party has made a reservation of the privilege.

I. WAIVER OF ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege is a defensive mechanism that protects the client from forced disclosure of confidential communications with his attorney.\textsuperscript{22} Two basic assumptions underlie the privilege: First, the privilege encourages free and open communication between attorney and client;\textsuperscript{23} and second, the benefit of keeping the communication confidential outweighs the potential harm to the truth-finding process.\textsuperscript{24} However, because the benefits of the privilege are "indirect and speculative," and "its obstruction is plain and concrete,"\textsuperscript{25} the privilege has traditionally been read as narrowly as possible.\textsuperscript{26} Thus, waiver will result whenever confidentiality is lost\textsuperscript{27} and the rationale for granting the privilege no longer exists.\textsuperscript{28}

\textsuperscript{21} See infra pt. I(A). \textit{Permian}, 665 F.2d at 1219-22, is in accord with earlier cases that have found the privilege entirely waived by disclosure to the SEC. \textit{In re Weiss}, 596 F.2d 1185, 1186 (4th Cir. 1979) (per curiam); \textit{In re Penn Cent. Commercial Paper Litig.}, 61 F.R.D. 453, 463-64 (S.D.N.Y. 1973). \textit{See generally} 2 D. Louisell \& C. Mueller, supra note 1, § 209 (discussing the essentials of confidentiality).

\textsuperscript{22} United States v. Shibley, 112 F. Supp. 734, 741 (S.D. Cal. 1953); \textit{see supra} note 2.

\textsuperscript{23} \textit{Upjohn Co. v. United States}, 449 U.S. 383, 389 (1981); Fisher v. United States, 425 U.S. 391, 403 (1976); C. McCormick, supra note 1, § 87, at 175; 8 J. Wigmore, supra note 1, § 2291, at 545; \textit{see supra} note 2.


\textsuperscript{25} 8 J. Wigmore, supra note 1, § 2291, at 554.

\textsuperscript{26} See id.; 2 J. Weinstein \& M. Berger, supra note 4, ¶ 503[02], at 503-15 to -16.


A. The Traditional Standard

Waiver need not be express, nor is it necessary that the client waive the privilege knowingly. Waiver may be evidenced by word or act, but may also be inferred from a failure to speak or act when words or action would be necessary to preserve confidentiality. Courts regularly hold that the privilege is waived as to the material disclosed when the client or his attorney deliberately discloses the contents of a privileged communication, such as in answering interrogatories, testifying in court or at an examination before trial.

29. Blackburn v. Crawfords, 70 U.S. (3 Wall.) 175, 194 (1865) (waiver may be express or implied); Tasby v. United States, 504 F.2d 332, 336 (8th Cir. 1974) (same), cert. denied, 419 U.S. 1125 (1975).


34. Malco Mfg. Co. v. Elco Corp., 307 F. Supp. 1177 (E.D. Pa. 1969). "To the extent that a party answers an interrogatory relating to the contents of a privileged communication . . . the right to assert such privilege is waived." Id. at 1179 (citation omitted).

submitting affidavits or pleadings to the court, or in transacting business with a third party. If the client wishes to preserve the privileged status of the communication, it is incumbent upon him or his attorney to assert the privilege affirmatively by refusing to disclose the privileged matter; failure to do so is viewed as indicating that the client intended to compromise confidentiality and thereby waive the privilege's protection.

Waiver can also result from an inadvertent disclosure—that is, when the client fails to act affirmatively to safeguard the confidentiality of the privileged material. Careless handling of privileged docu-

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ments that leads to a loss of confidentiality destroys the privilege as to the material disclosed. The strict waiver standard has even been applied when a third person has overheard the privileged communication without the client's knowledge or has surreptitiously obtained the privileged material. The standard thus holds that any loss of confidentiality abrogates the privilege as to that communication or material.

Furthermore, less than full disclosure will often cause a waiver, not only as to the disclosed communications, but also as to communications relating to the same subject matter that were not themselves disclosed. By partial disclosure, the client may be voluntarily waiving the privilege as to material he considers favorable to his position, but attempting to invoke the privilege as to the remaining material, which he considers unfavorable. Selective assertion or disclosure usually involves a material issue in the proceeding, and there is a


44. United States v. Olmstead, 7 F.2d 760, 763 (W.D. Wash. 1925) (wiretapping); 8 J. Wigmore, supra note 1, § 2326.

45. Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc., 32 Fed. R. Serv. 2d (Callaghan) 653, 659 (N.D. Ill. Aug. 24, 1981); 8 J. Wigmore, supra note 1, §§ 2325, 2326; see C. McCormick, supra note 1, § 75.


47. See supra notes 29-46 and accompanying text.


great likelihood that the information disclosed is false or intended to mislead the other party.\textsuperscript{51} Thus, pleading an "advice of counsel" defense, which puts the attorney's advice in issue,\textsuperscript{52} is held to waive the privilege as to all communications relating to that advice.\textsuperscript{53} Similarly, a subject matter waiver is found when the client testifies at trial as to a privileged communication\textsuperscript{54} or produces parts of communications from his attorney in discovery or at trial.\textsuperscript{55}

The rationale for the "subject matter waiver" rule\textsuperscript{56} is one of fair-
ness. It is designed to prevent the client from using the attorney-client privilege offensively, as an "additional weapon." Sometimes, however, a partial disclosure will not place the communications in issue. An inadvertent or very minor disclosure of privileged material may not constitute an attempt, through selective disclosure, to use the privilege offensively. When the opposing party will suffer no prejudice, courts have been inclined to limit the waiver to what was actually disclosed.


58. Teachers Ins. & Annuity Ass'n of Am. v. Shamrock Broadcasting Co., 521 F. Supp. 638, 641 (S.D.N.Y. 1981); International Bus. Machs. Corp. v. Sperry Rand Corp., 44 F.R.D. 10, 13 (D. Del. 1968); C. McCormick, supra note 1, § 93, at 197 (quoting Green v. Crapo, 181 Mass. 55, 62, 62 N.E. 956, 959 (1902) (Holmes, C.J.)). Wigmore states that the privilege is "intended only as an incidental means of defense, and not as an independent means of attack, and to use it in the latter character is to abandon it in the former." 8 J. Wigmore, supra note 1, § 2327, at 638; accord 16 Minn. L. Rev. 818, 825 (1932). The rule "has given rise to such metaphors as the privilege may not be used as both a shield and a sword, and, the client may not have his cake and eat it too." Byrnes v. IDS Realty Trust, 85 F.R.D. 679, 688-89 (S.D.N.Y. 1980); accord United States v. Woodall, 438 F.2d 1317, 1326 (5th Cir. 1970), cert. denied, 403 U.S. 933 (1971).


61. See supra notes 47-58 and accompanying text.

look with disfavor upon attempts to exempt relevant information from the truth-finding process. It is nevertheless widely recognized that in certain circumstances a finding of waiver is not always appropriate.

B. Relaxation of the Traditional Standard

When waiver would inhibit implementation of important public policies, the traditional standard has been relaxed despite the undermining of absolute confidentiality. For example, courts discourage eavesdropping and theft of communications by sustaining claims of privilege when a third party has overheard the communication without the client's knowledge or has surreptitiously obtained the privileged material. These cases hold that the privilege is not waived when the attorney and client have taken reasonable precautions to ensure confidentiality, but confidentiality has nonetheless been lost.

Further, many courts have expanded the scope of the privilege to cover communications with employees or agents of the attorney with more than ministerial duties. The complexity of the law often

64. E.g., In re Horowitz, 482 F.2d 72, 80-81 (2d Cir.) (disclosure to accountant does not automatically result in waiver), cert. denied, 414 U.S. 867 (1973); In re LTV Sec. Litig., 89 F.R.D. 595, 604-05 (N.D. Tex. 1981) (joint defense exception to general waiver rule); Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 45 (D. Md. 1974) (waiver to be considered in light of the importance of facilitating negotiated settlements).
65. See, e.g., United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961) ("complexities of modern existence" require extension of the privilege's protection to accountants and other experts consulted by attorney); In re LTV Sec. Litig., 89 F.R.D. 595, 604 (N.D. Tex. 1981) (recognizing joint defense exception to general rule of absolute confidentiality); Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 45 (D. Md. 1974) (public policy of encouraging negotiated settlements requires a finding of no waiver of privilege by disclosure to opposing party).
66. See 2 D. Louisell & C. Mueller, supra note 1, § 209, at 529. This policy consideration is grounded in the realization that a finding of waiver "is unsupportable in an era of electronic eavesdropping and heightened dependence upon interceptible communications by telephone and the mails. . . . [T]here is no reason to impose upon the client absolute responsibility and absolute risk." Id. (footnote omitted); accord C. McCormick, supra note 1, § 75.
69. United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961). The "usual func-
requires that the attorney seek the help of experts in order to advise his client properly. Thus, when an attorney consults an accountant or other expert for assistance in providing legal advice to a client, no waiver of the privilege will result.

Additionally, a number of courts have endorsed a "joint defense" exception to the strict waiver standard. They extend the privilege's protection to the disclosure of information concerning common issues to actual or prospective codefendants, when such disclosure is made to facilitate a joint defense. Public interest in the efficient administration of justice is served by the ability of codefendants and their attorneys to undertake a cooperative preparation of their common defense. As stated by one court, "recognition [of a joint defense exception] makes savings in expense and effort likely." The joint

_\footnote{70} United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961); 2 D. Louisell & C. Mueller, _supra_ note 1, § 209, at 532; C. McCormick, _supra_ note 1, § 91, at 188-89.


_\footnote{72} Wilson P. Abraham Constr. Corp. v. Armco Steel Corp., 559 F.2d 250, 253 (5th Cir. 1977); Hunydee v. United States, 355 F.2d 183, 184-85 (9th Cir. 1965); Continental Oil Co. v. United States, 330 F.2d 347, 349-50 (9th Cir. 1964); _In re LTV Sec. Litig._, 89 F.R.D. 595, 604 (N.D. Tex. 1981); Transmirra Prods. Corp. v. Monsanto Chem. Co., 26 F.R.D. 572, 576-77 (S.D.N.Y. 1960). The "joint defense" privilege applies to shared communications "to the extent that they concern common issues and are intended to facilitate representation in possible subsequent proceedings." Hunydee v. United States, 355 F.2d 183, 185 (9th Cir. 1965). The privilege is available to co-respondents in a grand jury investigation as well as to parties made codefendants by formal indictment. Continental Oil Co. v. United States, 330 F.2d 347, 348-50 (9th Cir. 1964). The privilege also applies in a civil proceeding. Wilson P. Abraham Constr. Corp. v. Armco Steel Corp., 559 F.2d 250, 253 (5th Cir. 1977); _cf._ Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 43-45 (D. Md. 1974) (disclosure by party's counsel to nonparty third person with whom party had a "community of interest" does not waive the privilege).


_\footnote{74} In re LTV Sec. Litig., 89 F.R.D. 595, 604 (N.D. Tex. 1981)._
defense exception is consistent with the principle of confidentiality because the disclosure is made in confidence and "not . . . for the purpose of allowing unlimited publication and use."\textsuperscript{76}

Strong public policy in favor of encouraging the voluntary settlement of civil litigation is also held to justify a relaxation of the strict standard of waiver.\textsuperscript{77} In the course of settlement negotiations, an attorney may disclose privileged communications to the opposing party in contending that the law or facts favor his client's position.\textsuperscript{78} The few cases on point have found that although the privilege was waived as to what was intentionally disclosed, there was no subject matter waiver.\textsuperscript{79}

Although a liberal discovery policy conceptually conflicts with the privilege, expediting discovery in complex litigation may call for a relaxation of the traditional confidentiality requirement.\textsuperscript{80} Because massive discovery can result in inadvertent production of privileged material,\textsuperscript{81} a finding of waiver would effectively penalize efforts to comply with expedited discovery orders.\textsuperscript{82} Relaxation of the strict

\textsuperscript{75} Welles, supra note 73, at 325.

\textsuperscript{76} Wilson P. Abraham Constr. Corp. v. Armco Steel Corp., 559 F.2d 250, 253 (5th Cir. 1977).


\textsuperscript{82} See id. at 1234-35.
standard is justified if the party claiming the privilege has taken reasonable precautions by screening the documents as carefully as possible.  

Failure to take precautions, however, will result in waiver through application of the traditional standard.  

Tension between expeditious discovery and retention of the privilege can be obviated by agreement of the parties, given effect in a protective order issued by the court.  

For example, in Eutectic Corp. v. Metco, Inc., the court issued a protective order contemplating “a special method of discovery” and expressly providing that disclosure of privileged material would not operate as a waiver.  

Similarly, the court in Control Data Corp. v. International Business Machines Corp. issued an order providing that as long as IBM made reasonable inspection of its documents, the privilege would not be held waived.  

The courts in both Eutectic and Control Data were motivated by the important policy of facilitating discovery. As the Eutectic court noted, there was “no sound reason of public policy to rewrite an agreement which facilitates disclosure, closely protects a

83. See id.  


87. Id. at 42.  

88. Id. The protective order provided that the privilege would not be deemed waived by disclosure unless such waiver was “made expressly in writing.” Id. at 37.  

89. 16 Fed. R. Serv. 2d (Callaghan) 1233 (D. Minn. 1972).  

90. Id. at 1234, 1237. The district court had instituted an accelerated discovery program, pursuant to which IBM copied 80 million Control Data documents and Control Data sent, over a period of time, a staff of 61 persons to inspect IBM's documents. This program, however, resulted in the inadvertent production of a number of privileged documents by IBM, despite its efforts to screen them. IBM then placed a lawyer at its document storage room, where Control Data was microfilming the material, for a final inspection before permitting Control Data to duplicate them. Control Data complained that this procedure seriously impeded its discovery efforts and asked the court to order that the IBM lawyer be removed. In acceding to Control Data's request, the court forbade any later “argument that the privilege had been waived merely because the document had been seen by CDC and perhaps copied,” provided the parties made reasonable efforts of pre-inspection. Id. at 1234.
legitimate privilege, and contemplates a cooperative effort by both parties." 91

The interests in expediting discovery in complex litigation would be served by adoption of the protective order approach, which allows accommodation of the policies of full disclosure and protecting attorney-client communications. 92 To be truly effective, a protective order issued in one action must be adhered to in any later action in which the same waiver issue arises. The issue in fact arose in two antitrust suits brought against IBM after Control Data, when the plaintiffs contended that IBM's disclosure under the Control Data order had worked a waiver. In Transamerica Computer Co. v. International Business Machines Corp., 93 the Ninth Circuit found no waiver, emphasizing the extraordinary circumstances of the accelerated discovery 94 and recognizing that the judge in Control Data had effectively issued a protective order. 95 In International Business Machines Corp. v. United States, 96 however, the Second Circuit resisted the claim of privilege. Although the court dismissed on jurisdictional grounds an appeal from the district court's finding of waiver, 97 dictum suggests it agreed with the result the district court had reached. The court of appeals reasoned that at least part of the privileged material in Control Data must have been disclosed before the order was issued. 98 Had there been no question that the disclosure was made in reliance on the Control Data order, the district court might have abided by it. To the extent that a protective order shielded the privileged material at the time of disclosure, a claim of privilege in a later


93. 573 F.2d 646 (9th Cir. 1978).

94. Id. at 651.

95. Id. at 652-53. Relying on Judge Neville's holding in Control Data, the court observed that "[a]s the judicial officer directly in charge of supervising the discovery proceedings in that litigation, he was in an ideal position to determine whether the timetable he himself had imposed was so stringent that, as a practical matter, it effectively denied IBM the opportunity to claim the attorney-client privilege for documents it was producing for inspection by CDC." Id. at 652.

96. 480 F.2d 293 (2d Cir. 1973) (en banc), motion to file cert. denied, 416 U.S. 979 (1974).

97. Id. at 295.

98. Id. at 299. Judge Mulligan, who wrote the majority opinion, had discussed the facts fully in his dissent to the panel decision. 471 F.2d 507, 522-23 (2d Cir. 1972) (Mulligan, J., dissenting), appeal dismissed en banc, 480 F.2d 293 (2d Cir. 1973), motion to file cert. denied, 416 U.S. 979 (1974).
action should be sustained. By discouraging litigants from fully cooperating in discovery for fear of losing the privilege,"99 application of the traditional strict waiver standard prevents the implementation of liberal discovery policy that a more flexible approach would advance.

As indicated by the preceding discussion, courts that have relaxed the strict standard of waiver have been motivated by a desire to implement policies other than the one underlying the privilege.100 Policy considerations alone, however, are insufficient to justify a departure from the traditional rule. Cases that have sustained the privilege despite the absence of absolute confidentiality can be analyzed as establishing two conditions that must first be met: (1) The circumstances must indicate a clear intention by the client to retain the privilege; and (2) there must be no attempt to use the privilege offensively. Because the attorney-client privilege is usually guarded jealously,101 whenever a client does not take obvious or routine steps to preserve the privilege he is presumed to be indifferent to its loss.102 Thus, if confidentiality is breached through his own carelessness or lack of precautions, an intention to waive will be inferred and waiver will result.103 On the other hand, if a disclosure results even though reasonable precautions were taken, no intent to waive the privilege can be inferred.104 Further, when the client controls dissemination, making disclosure only to those necessary for the providing of legal advice, or to adversaries in a settlement negotiation, no inference of intention to waive may be drawn.105

99. See Upjohn Co. v. United States, 449 U.S. 383, 393 (1981) ("An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."); Kaminsky, supra note 92, at 927 & n.99 (fear due to strict view of waiver).
100. See supra notes 65-92 and accompanying text.
103. See supra notes 41-43 and accompanying text.
105. See Wilson P. Abraham Constr. Corp. v. Armco Steel Corp., 559 F.2d 250, 253 (5th Cir. 1977) (disclosure to codefendant); Hunydee v. United States, 355 F.2d
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The second condition that must be met before a court will relax the waiver standard to effectuate policy is grounded in a consideration of fairness: The disclosure must not involve an attempt to use the privilege offensively. For example, when a party has inadvertently produced privileged documents in the course of massive discovery, and the court is satisfied that the disclosure is truly inadvertent, no fairness inquiry is necessary because there is no selective disclosure in an attempt to mislead. Nor is such an attempt involved when a third party has eavesdropped on attorney-client communications, or when disclosures are limited to accountants or other experts, or to codefendants, solely for the purpose of rendering legal advice. A similar rationale is used in relation to disclosures made during settlement negotiations. Courts that have faced the issue have found that no unfairness results from such partial disclosures. The policy of encouraging settlements and promoting judicial economy overrides the fact of voluntariness and possible selectivity in disclosure. Moreover, if a party believes that he is being prejudiced by selective disclosures, he can break off negotiations and pursue a judicial remedy.


107. See supra notes 59-62 and accompanying text. In the unlikely event that the disclosure was not truly inadvertent, a subject matter inquiry may preclude relaxation of the waiver standard. If the party learns that privileged material has been inadvertently disclosed and does not recall the documents, a waiver as to those materials may result. Permian Corp. v. United States, 665 F.2d 1214, 1220 n.11 (D.C. Cir. 1981).

108. A disclosure not contemplated, but indeed guarded against, cannot be an offensive use of the privilege. See supra notes 49-51 and accompanying text.

109. Because of the nature of the disclosure, the courts do not even address the fairness issue. Rather, the inquiry is solely in terms of policy and confidentiality. E.g., In re Horowitz, 482 F.2d 72, 80-82 (2d Cir.) (accountant), cert. denied, 414 U.S. 867 (1973); In re LTV Sec. Litig., 89 F.R.D. 595, 604 (N.D. Tex. 1981) (codfendant).

II. Disclosure to the SEC—The Limited Waiver

A disclosure of privileged material to the SEC invites an evaluation of the circumstances to determine whether the waiver standard should be relaxed. Although the SEC has subpoena power, most of its investigations are conducted privately, through informal inquiry, interviewing and review of documents. In this regard, voluntary disclosures to the SEC "should be encouraged rather than requiring that agency requests or subpoenas be fought to the hilt." Relaxation of the waiver standard with respect to matters disclosed in non-public investigations serves the important policy of encouraging cooperation with the SEC. As stated by one court, "voluntary cooperation with the Securities and Exchange Commission ... would be substantially curtailed if such cooperation were deemed to be a waiver of a corporation's attorney-client privilege."

A large investigation may require the review of millions of documents or the interviewing of many witnesses; such a massive expenditure of time and effort may be, as a practical matter, beyond the limited resources of an agency such as the SEC. To lessen the burden, the SEC may request documents protected by the attorney-client privilege. If such reports are disclosed, the conventional notion that the privilege is based on absolute confidentiality requires a finding of waiver. Application of the strict waiver standard, however, would be a disincentive to cooperation. To encourage cooperation, several courts have found a "limited waiver," in which

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118. See supra pt. I(A).
the privilege is waived only with respect to the SEC. To warrant this relaxation, the disclosure must be made under circumstances indicating both that the disclosing party intended to protect the privilege to the greatest extent possible, and that no attempt to use the privilege unfairly was involved. By failing to give each of these considerations its proper weight, courts confronting the issue in the SEC limited waiver context have reached disparate results.

Analysis of the limited waiver situation is simplified by the circumstances of the disclosure. Limited disclosure to the SEC is distinguishable from partial disclosure cases, which require an inquiry into unfairness and prejudice. Because the limited waiver situation involves a full disclosure, there is no attempt to use the privilege offensively. Application of the doctrine of subject matter waiver is

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supra note 12, at 32. It appears that a more flexible standard is warranted by Fed. R. Evid. 501, which provides that privileges are to be "interpreted . . . in light of reason and experience." Id. The Supreme Court stated that rule 501 acknowledges the "authority of the federal courts to continue the evolutionary development of testimonial privileges." Trammel v. United States, 445 U.S. 40, 47 (1980). In enacting rule 501 instead of the rigid proposed rules, "Congress manifested an affirmative intention not to freeze the law of privilege. Its purpose rather was to 'provide the courts with the flexibility to develop rules of privilege on a case-by-case basis,' and to leave the door open to change." Id. (citations omitted); accord SEC v. Gulf & W. Indus., 32 Fed. R. Serv. 2d (Callaghan) 279, 282 (D.D.C. July 23, 1981); In re LTV Sec. Litig., 89 F.R.D. 595, 621 (N.D. Tex. 1981); Champion Int'l Corp. v. International Paper Co., 486 F. Supp. 1328, 1332 (N.D. Ga. 1980); 2 D. Louisell & C. Mueller, supra note 1, § 200, at 399-400.


121. See supra notes 101-10 and accompanying text.

122. E.g., Diversified Indus. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1978) (en banc) (fails to consider that voluntary disclosure indicates no intent to preserve confidentiality); Byrnes v. IDS Realty Trust, 85 F.R.D. 679, 688 (S.D.N.Y. 1980) (same).


124. See supra notes 50-55 and accompanying text.

125. See supra notes 56-58 and accompanying text.


thus analytically inappropriate. Because the SEC disclosure situation involves policy concerns that militate against a finding of waiver, the only remaining consideration is whether the disclosing party's acts evidence an intent to protect confidentiality to the greatest extent possible.

A. The Liberal Approach

The Eighth Circuit, in *Diversified Industries v. Meredith*, and the Southern District of New York, in *Byrnes v. IDS Realty Trust*, have adopted a liberal approach to the waiver issue which virtually ignores the confidentiality requirement underlying the privilege. These courts have held that a voluntary disclosure to the SEC made in the course of a nonpublic investigation effects a waiver only as to the SEC. The courts thus have deemed the policy consideration sufficiently important in itself to justify a relaxation of the strict standard of waiver. In both *Diversified* and *Byrnes*, the courts failed to consider disclosure to the SEC in terms of whether it met the privilege's traditional secrecy requirement. In both cases the disclosures were made voluntarily, without any attempt to ensure confidential-
Such a naked disclosure evidences a lack of interest in retaining the privilege and is thus inconsistent with the rationale for relaxing the standard in other contexts.

Courts employing the liberal approach in SEC situations erroneously assume that confidentiality will be preserved when the disclosure is made in a separate nonpublic proceeding. Given the discretion of the SEC in its investigative practices and procedures, however, the mere fact that the disclosure is made in a nonpublic proceeding does not provide the basis for an inference of an intent to preserve confidentiality. The "veil of secrecy" that ordinarily surrounds a private investigation may be lifted by the Commission, and the information disclosed or made a matter of public record. Thus, although the liberal approach recognizes and sustains the important public policy to be served by the limited waiver, it fails to condition relaxation upon evidence of the party's intent to maintain confidentiality. Under such circumstances, the finding of a limited waiver is unsupportable.

B. The Traditional Approach

In contrast to the policy emphasis of the liberal approach, courts taking the traditional approach emphasize the confidentiality require-
ment. In In re Penn Central Commercial Paper Litigation, involving an attorney who had testified as to privileged information in a private SEC investigation, the court found that the testimony destroyed confidentiality and thus waived the privilege. In Permian Corp. v. United States, a disclosure of privileged documents to the SEC was deemed a general waiver when a third party later sought the documents. While acknowledging that the public policy argument favoring a limited waiver has merit, these courts reasoned that such an independent policy consideration does not overcome the requirement of absolute confidentiality. As stated in In re Penn Central, "it is hornbook law that the voluntary disclosure or consent to the disclosure of a communication, otherwise subject to a claim of privilege, effectively waives the privilege."

Permian, however, was not a mere naked disclosure case; there was an agreement by which confidentiality could be maintained. The SEC had undertaken an informal investigation in connection with a registration statement filed by Permian's parent, Occidental. It was clear that processing of the registration statement would be greatly facilitated if the SEC had access to certain privileged documents. Occidental and the Commission therefore agreed that Occidental would retain the right to assert a claim of privilege should a third party request that the SEC disclose any of the documents. When the Department of Energy subsequently sought the privileged material from the SEC for its own investigation, Occidental raised a claim of privilege. The District of Columbia Circuit adhered to the traditional approach, holding that Occidental's disclosure to the SEC destroyed the privilege.

145. Id. at 456.
146. Id. at 463-64; cf. In re Weiss, 596 F.2d 1185 (4th Cir. 1979) (per curiam) (privilege held waived by testimony given before SEC when testimony later sought by grand jury).
148. Id. at 1222.
151. 61 F.R.D. at 463.
152. 665 F.2d at 1216-17.
153. Id. at 1222. The court's discussion of the privilege and rejection of the limited waiver argument was couched in traditional terms: "The privilege depends on the
Although it reviewed the agreement, the Permian court did not appreciate its significance in a relaxation of waiver analysis. The agreement provided Occidental with the opportunity to prevent a further disclosure by raising a claim of privilege. By demanding such an opportunity as well as asserting the privilege at the time disclosure was sought, Occidental took steps to preserve confidentiality.\footnote{154} By giving effect to Occidental’s intent, the court would have implemented the policy of encouraging cooperation with the SEC.

Although the Permian court acknowledged that cooperation was a “laudable activity”\footnote{155} and that the “SEC’s mission” was “important,”\footnote{156} it failed to see how a limited waiver would serve the underlying purpose of the privilege—freedom of communication between attorney and client.\footnote{157} The limited waiver is not intended, however, to enhance the attorney-client relationship, but is intended to further the policy of cooperation. Without the limited waiver, the client would simply withhold privileged material from the SEC and the attorney-client privilege would therefore remain intact. A finding of limited waiver would also leave the privilege intact but would at the same time implement the policy of encouraging cooperation with the SEC. The court also interpreted the problem as one of scope. It saw no reason to distinguish cooperation with the Department of Energy from cooperation with the SEC.\footnote{158} The court failed to perceive that without a relaxation of the waiver standard based upon affirmative conduct to preserve confidentiality, the original cooperation may never have ensued.

C. A Suggested Approach

The presence or absence of an agreement preserving confidentiality provides a touchstone for the determination of whether a limited waiver should be recognized. Although confidentiality in its strictest sense is compromised by disclosure, the disclosure can be viewed as essentially confidential in itself if made under conditions that provide assurance that the SEC will not divulge the privileged information to third parties. In such a case a limited waiver is proper. Teachers Insurance & Annuity Association of América v. Shamrock Broadcasting Co.\footnote{159} suggested this moderate approach to the limited

\footnote{154. See supra notes 101-05 and accompanying text.}
\footnote{155. Permian Corp. v. United States, 685 F.2d 1214, 1221 (D.C. Cir. 1981).}
\footnote{156. Id.}
\footnote{157. Id. at 1220.}
\footnote{158. Id. at 1221.}
\footnote{159. 521 F. Supp. 638 (S.D.N.Y. 1981).}
waiver issue. In Teachers, Shamrock sought production of certain privileged documents that Teachers had previously turned over to the SEC in response to an agency subpoena. The court held that because Teachers had not objected to the subpoena on grounds of privilege nor attempted any other reservation of the privilege, its decision to disclose indicated that it had no interest in keeping the documents confidential.\(^\text{160}\) Furthermore, it was reasoned that public policy should not "wholly outweigh" the confidentiality requirement.\(^\text{161}\) Thus, the court rejected the liberal approach by refusing to use policy considerations alone to support a finding of limited waiver. By the same token, however, it also rejected the traditional approach by stating that a reservation of privilege at the time of disclosure would work to prevent a waiver.\(^\text{162}\) Such a reservation would make it clear that . . . the disclosing party has made some effort to preserve the privacy of the privileged communication, rather than having engaged in abuse of the privilege by first making a knowing decision to waive the rule's protection and then seeking to retract that decision in connection with subsequent litigation.\(^\text{163}\)

A stipulation or other agreement between the disclosing party and the SEC providing for confidential treatment of the material disclosed, or a protective order issued in a prior proceeding with respect to the same disclosure, would satisfy the reservation prerequisite to limited waiver.\(^\text{164}\) If such an arrangement is made or a protective order entered, the disclosing party is entitled to rely on it. As an added measure of protection, the disclosing party should also employ the formal mechanism provided by SEC regulations for requesting confidential treatment\(^\text{165}\) pursuant to the Freedom of Information Act (FOIA).\(^\text{166}\) Although FOIA is primarily a disclosure statute that enables third parties to obtain documents from government agencies,\(^\text{167}\)

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\(^{160}\) Id. at 641-42.
\(^{161}\) Id. at 645-46.
\(^{162}\) Id. at 646 (dictum).
\(^{163}\) Id. Protective orders and stipulations have been used in investigations by the SEC on occasion. E.g., Permian Corp. v. United States, 665 F.2d 1214, 1216-17 (D.C. Cir. 1981); SEC v. Lockheed Aircraft Corp., 404 F. Supp. 651, 653 (D.D.C. 1975); see Block & Barton, supra note 12, at 30-31; Herlihy & Levine, Corporate Crisis: The Overseas Payment Problem, 8 Law & Pol’y Int’l Bus. 547, 591-94 (1976).
\(^{165}\) 17 C.F.R. § 200.83 (1981). Although rule 24b-2, 17 C.F.R. § 240.24b-2 (1981), also provides a means for requesting confidential treatment, it only applies to information required to be filed under the Act and thus does not pertain to voluntary disclosure of attorney-client communications. See id.
it contains nine exemptions from mandatory release. One such exemption is provided for "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Under this exemption, when a party discloses privileged or confidential material to a government agency, it simultaneously requests the agency not to disclose it to third parties.

It is doubtful, however, whether a FOIA request, when not coupled with an agreement or stipulation, will actually protect confidentiality. The Supreme Court has held that Congress intended FOIA exemptions to be discretionary with government agencies, not mandatory. Agencies are therefore free to disclose material even though it qualifies for exempt status. Furthermore, under the SEC's FOIA regulations, a determination as to whether exempt status will be granted is not made until a third party requests the documents. Thus, at the time of the disclosure there is no guarantee that the SEC will maintain confidentiality. A FOIA confidentiality request is therefore not by itself an adequate reservation. Nevertheless, when a reservation of the privilege is made, a formal request for confidential treatment under FOIA should also be made so that the record will be absolutely clear.

**CONCLUSION**

Whether disclosure of privileged material to the SEC in an informal investigation will result in a waiver of the attorney-client privilege remains unresolved. The conflicting emphases placed on the confidentiality requirement on the one hand, and on the policy consideration

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171. Chrysler Corp. v. Brown, 441 U.S. 281, 283, 293-94 (1979). The Court recognized that the greater access to governmental information provided by FOIA "undoubtedly cuts against the privacy concerns of nongovernmental entities, and as a matter of policy some balancing and accommodation may well be desirable," id. at 293, but held simply that "Congress did not design the FOIA exemptions to be mandatory bars to disclosure." Id. (footnote omitted).
173. Section 24(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78x(b) (1976), provides that the SEC may not disclose information in contravention of its FOIA rules and regulations or when it has determined pursuant to FOIA to treat the information confidentially. Id. It is arguable that this section would mandate that the SEC grant confidential treatment under FOIA when the Commission has previously agreed to maintain confidentiality, even though the agreement was not pursuant to FOIA.
on the other, have resulted in a good deal of uncertainty. Continued uncertainty or outright rejection of the limited waiver may substantially affect a decision of whether or not to cooperate with the SEC. Clear intent to preserve confidentiality is crucial to the determination of whether to relax the strict standard of waiver. A restrictive agreement with the SEC fully demonstrates such intent. Given the significance of encouraging cooperation to the efficacy of the SEC enforcement task, such agreements should be honored.

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