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When Does a Limited Waiver of the Attorney-Client Privilege Occur?

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WHEN DOES A LIMITED WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE OCCUR?

Under the common law rules of evidence and procedure, privileges[1] exist to protect certain confidential communications from being revealed against the wishes of the communicator.[2] These privileges operate as an exception to the general duty, imposed on every individual under the American system of justice, to give testimony or divulge evidence when requested.[3] Privileges, however, are granted only when the public's interest in preserving and protecting a confidential relationship outweighs the general duty to testify.[4] Procedural and evidentiary common law currently recognizes privileges for the communications between attorney and client,[5] husband and wife,[6] and physician and patient.[7] The theory behind each of these recognized privileges is that secrecy and confidentiality are necessary to foster the relationship encompassed by the privilege.[8] The focus for privileged communications, therefore, is upon the relationship between the parties to whom the privilege has been granted.[9]

Before a court accepts an assertion of privilege to protect certain communications, two issues must be considered. First, the court must decide whether

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[1] The word "privilege" is used in this article to mean privileged communications, defined as those statements made by certain persons within a protected relationship, which the law protects from forced disclosure. BLACK'S LAW DICTIONARY 1078 (rev. 5th ed. 1979).

[2] Privileges may also be established by statute. For example, the great majority of states provide a statutory privilege for the communications between priest and penitent. A compilation of such statutes can be found in 8 J. WIGMORE, EVIDENCE IN TRIALS OF COMMON LAW § 2395, at 873-77 (J. McNaughton rev. 1961 & Supp. 1982) [hereinafter cited as WIGMORE]. Some states have enacted statutes creating a privilege for communications to, *inter alia*, accountants and psychologists. *Id.* § 2286, at 533. In addition, a privilege against self-incrimination is identified in the federal and most state constitutions. *See* U.S. CONST. amend. V; *see also* WIGMORE, *supra*, § 2252, at 319 (privilege against self-incrimination included in constitutions of all but two states).

[3] WIGMORE, *supra*, note 2, § 2192, at 70 ("... [T]here is a general duty to give what testimony one is capable of giving...."); *Id.* § 2285, at 527.

[4] Dean Wigmore has stated four fundamental conditions necessary to establish a privilege, which emphasize the interest in protecting a confidential relationship:

> (1) The communications must originate in a confidence that they will not be disclosed.
>
> (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
>
> (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation.

Id. § 2285, at 527.

[5] *See id.* §§ 2290-2329.

[6] *See id.* §§ 2332-2341.

[7] *See id.* §§ 2380-2391.

[8] *In re* Penn Central Commercial Paper Litig., 61 F.R.D. 453, 463-64 (S.D.N.Y. 1973).

[9] MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 72, at 152 (2d ed. 1972) [hereinafter cited as MCCORMICK].

the communications for which privilege is being asserted are, in fact, privileged.[10] To be considered privileged, the communications must meet an initial requirement that they are confidential — that they were not made in the presence of a third party.[11] The communications must also meet the particular requirements for the type of privilege being asserted. For example, a husband and wife must have been married at the time of the communication for the marital privilege to be asserted.[12] Second, if the communications are privileged, the court must consider whether the privilege has been waived in some manner.[13] Disclosure of the confidential communications by the holder of the privilege, or with his consent, may cause the privilege to be waived.[14] If the privilege has been waived, the communications are no longer protected from discovery or from being introduced into evidence.

Waiver of the attorney-client privilege generally is held to occur whenever some disclosure of the confidential communications is made by the client, or with his consent.[15] The common law, however, recognizes certain situations in which disclosure is made, but either no waiver is deemed to occur, or the waiver is deemed limited to the precise subject matter of the information disclosed.[16] In recent years, a few courts have suggested a third limitation on waiver of the attorney-client privilege. Under this limitation, certain disclosures of the client's confidential communications are deemed to waive the privilege only with respect to the recipient of that communication.[17] This additional limitation, which has been applied only to disclosures made by a corporate client,[18] would preclude all non-recipient third parties from asserting waiver of the attorney-client privilege for the information previously disclosed.[19] This "recipient limitation" to the waiver of the attorney-client privilege has sparked debate among the courts.[20] Currently, a split exists

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[10] *See* WIGMORE, *supra* note 2, § 2286, at 527-28.

[11] *Id.* § 2311, at 599, 601.

[12] MCCORMICK, *supra* note 9, § 81, at 167. For the elements necessary to a claim of attorney-client privilege, *see infra* notes 44-49 and accompanying text.

[13] *See, e.g.,* Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1978) (en banc), in which the court, after concluding that confidential communications were entitled to the attorney-client privilege, then considered the issue of whether the privilege had been waived. In addition, in the description of the elements of the attorney-client privilege by Wigmore, *see infra* note 45, the first seven elements go to a determination of whether the communication is privileged, while the final element considers whether that privilege has been waived.

[14] *See infra* notes 73-95 and accompanying text.

[15] MCCORMICK, *supra* note 9, § 93, at 194.

[16] *See infra* notes 96-118 and accompanying text.

[17] *See* Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1978) (en banc); Byrnes v. IDS Realty Trust Co., 85 F.R.D. 679 (S.D.N.Y. 1980).

[18] *See* Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1978) (en banc); Byrnes v. IDS Realty Trust, 85 F.R.D. 679 (S.D.N.Y. 1980); *In re* Grand Jury Subpoena Dated July 13, 1979, 478 F. Supp. 368 (E.D. Wis. 1979).

[19] *See* Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1978) (en banc).

[20] *See infra* notes 124-68 and accompanying text.

among the federal circuit courts over the use of such a recipient-limited waiver for corporate clients.[21]

This note will focus upon waiver of the attorney-client privilege, and specifically, when that waiver may be limited. The note considers whether waiver should be limited in situations in which a corporate client has disclosed confidential information to a government agency. The note begins with a review of the attorney-client privilege.[22] Next, it defines waiver and describes the traditional rule for waiver.[23] The note then discusses situations under the common law in which the scope of waiver may be limited with respect to the subject matter disclosed.[24] The new concept of recipient-limited waiver by corporate clients, introduced in *Diversified Industries, Inc. v. Meredith,*[25] is presented, followed by a discussion of subsequent cases elaborating upon that holding.[26] Cases from other circuits which have opposed such a concept of recipient-limited waiver are then presented,[27] along with a modified approach suggested by one district court.[28] In the final section, the note analyzes the reasons for rejecting this new rule of limited waiver.[29] The note concludes that the concept of a recipient-limited waiver of the attorney-client privilege, solely for use by corporate clients, should not be adopted.

I. THE ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege is the oldest known privilege for confidential communications.[30] Originally, the privilege was designed to protect the attorney, who was upon his oath and honor to keep the secrets of this clients.[31] Because the privilege protected the attorney, he was permitted to waive it.[32] By the late Eighteenth Century, however, the focus of the privilege had shifted to the protection of the client.[33] Under the modern rule, therefore, it is the client's prerogative to assert[34] or waive the privilege.[35]

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[21] *Compare* Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1978) (en banc) (holding waiver by corporate client limited to recipient of privileged information) *with* Permian Corp. v. Untied States, 665 F.2d 1214 (D.C. Cir. 1981) (rejecting concept of recipient-limited waiver).

[22] *See infra* notes 30-72 and accompanying text.

[23] *See infra* notes 73-95 and accompanying text.

[24] *See infra* notes 96-118 and accompanying text.

[25] 572 F.2d 596 (8th Cir. 1978) (en banc).

[26] *See infra* notes 119-49 and accompanying text.

[27] *See infra* notes 150-68 and accompanying text.

[28] *See infra* notes 169-80 and accompanying text.

[29] *See infra* notes 182-249 and accompanying text.

[30] WIGMORE, *supra* note 2, § 2290, at 542. *See also* Gergacz, *Attorney-Corporate Client Privilege,* 37 BUS. LAW. 461, 473-74 (1982), for a discussion of historical antecedents of the attorney-client privilege.

[31] WIGMORE, *supra* note 2, § 2290, at 543.

[32] *Id.* at 545.

[33] *Id.* §§ 2290, 2291.

[34] *In re* Grand Jury Investig. of Ocean Transp., 604 F.2d 672, 675 (D.C. Cir. 1979); MCCORMICK, *supra* note 9, § 92, at 192.

[35] WIGMORE, *supra* note 2, § 2327, at 635; MCCORMICK, *supra* note 9, § 93, at 194; *see,*

The privilege nevertheless benefits both the attorney and the client.[36] The purpose of the privilege is to encourage full and free communication between attorneys and their clients,[37] by providing for the client's freedom from apprehension when consulting with his attorney about sensitive matters.[38] Clients may speak more freely if they know that the confidentiality of their communications is protected, and that the information cannot be used against them without their consent. At the same time, the privilege recognizes that sound legal advice depends upon the lawyer being fully informed by the client.[39] The attorney, therefore, will be benefitted when the client feels free to make a full disclosure of all the facts to him.

The attorney-client privilege may be invoked in several different contexts to protect confidential communications. Originally, the attorney-client privilege developed as a testimonial privilege, applicable only to judicial and administrative proceedings.[40] The privilege has since developed into a broader evidentiary rule. In addition to protecting testimony, this rule also prohibits introducing into evidence any statements or documents protected by privilege.[41] Moreover, the privilege may be invoked at the discovery stage, to prevent discovery of privileged material.[42] In addition, an even broader duty of non-disclosure, not limited merely to discovery and trial contexts, is imposed upon the attorney-client relationship by the attorney's professional ethical considerations.[43]

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e.g., Schnell v. Schnall, 550 F. Supp. 650, 653 (S.D.N.Y. 1982) (because privilege belongs to client, corporation did not waive privilege by mere fact that attorney testified before Securities and Exchange Commission).

[36] Gergacz, *supra* note 30, at 462-72. The general public has been identified as a third beneficiary of the attorney-client privilege. *Id.*

[37] Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); Fisher v. United States, 425 U.S. 391, 403 (1976); WIGMORE, *supra* note 2, § 2306, at 590.

[38] WIGMORE, *supra* note 2, § 2290, at 543; *Id.* § 2291, at 545.

[39] *See* Trammel v. United States, 445 U.S. 40, 51 (1980).

[40] Rosenfeld, *The Transformation of the Attorney-Client Privilege: In Search of an Ideological Reconciliation of Individualism, the Adversary System, and the Corporate Client's SEC Disclosure Obligations*, 33 HASTINGS L.J. 495, 495-96 (1982). At the time the attorney-client privilege developed, the testimony of witnesses was the common source of proof in jury trials. WIGMORE, *supra* note 2, § 2290, at 542-43. There was no provision for discovery prior to trial. *Id.*

[41] *See generally* WIGMORE, *supra* note 2, §§ 2306-2310.

[42] *E.g.*, FED. R. CIV. P. 26(b)(1) states that parties generally may obtain discovery regarding any relevant matter which is not privileged.

[43] *See* Burke, *The Duty of Confidentiality and Disclosing Corporate Misconduct*, 36 BUS. LAW. 239, 241, 244-45 (1981). The ethical obligations in the attorney-client relationship are broader than the evidentiary privilege for three reasons. First, under the ethical obligations, any information from the client will be protected, not just that obtained in the context of legal advice. *Id.* at 244. Second, confidentiality will not be waived despite the presence of a third person. *Id.* Finally, information from sources other than the client will also be protected. *Id. See also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-4 (1979), which states that the attorney-client privilege is more limited than the ethical obligation of a lawyer.

The essential elements for a finding of attorney-client privilege have been stated in definitions by courts[44] and commentators.[45] One element emphasized in all definitions is that the attorney-client relationship must be clearly established. The person making the communication, therefore, must be a client in order to claim the privilege.[46] In addition, the communication must be made to an attorney, acting in his legal capacity,[47] or to his subordinate.[48] Finally, the privilege exists only if it has not been waived.[49]

Judicial interpretations have further delineated the characteristics of the attorney-client privilege. First, courts have determined that the privilege protects both the communications made by the client to the attorney and by the attorney to the client.[50] In addition, courts have allowed communications between the client and someone acting as an agent for the attorney to be protected.[51] For the privilege to attach to any communications, however, those communications must be made for the purpose of securing legal advice.[52] The

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[44] The description by Judge Wyzanski in United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950), is frequently cited as the definition of the essential elements for a finding of attorney-client privilege:

> 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.

[45] The essential elements necessary for a finding of attorney-client privilege have been stated in the definition by Dean Wigmore:

> (1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived.

WIGMORE, *supra* note 2, § 2292, at 554.

[46] *See supra* notes 44-45. *See also* WIGMORE, *supra* note 2, § 2317, at 618-19.

[47] *See supra* notes 44-45. *See also* WIGMORE, *supra* note 2, § 2300, at 580-81; *Id.* § 2303, at 584.

[48] *See supra* note 44. *See also* WIGMORE, *supra* note 2, § 2301, at 583.

[49] *See supra* notes 44-45.

[50] Natta v. Hogan, 392 F.2d 686, 692-93 (10th Cir. 1968); Schwimmer v. United States, 232 F.2d 855, 863 (8th Cir. 1956); *see also* WIGMORE, *supra* note 2, §§ 2292, 2320, at 628-29; MCCORMICK, *supra* note 9, § 89, at 182-83.

[51] United States v. Kovel, 296 F.2d 918, 920-21 (2d Cir. 1961) (complexities of modern existence require that attorneys frequently need assistance of others, who are not attorneys, such as secretaries and clerks); Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 40 (D. Md. 1974) (attorney-client privilege extends to agents or subordinates of attorney, but they must be those persons essential to lawyer's performance of legal services); *see also* WIGMORE, *supra* note 2, § 2301, at 583.

[52] *See, e.g.,* United States v. Davis, 636 F.2d 1028, 1043 (5th Cir. 1981) (communications with attorney in preparing client's tax returns not privileged because not in nature of legal advice); Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 610 (8th Cir. 1978) (en banc)

privilege does not extend to business advice given by an attorney.[53] Furthermore, a client cannot protect pre-existing documents which have no claim of privilege, from disclosure simply by transferring them to an attorney.[54] Finally, the privilege will be denied for any communication which is prompted by the desire to commit a crime or fraud.[55]

It is now well established by the courts that the attorney-client privilege can be asserted by a corporation.[56] Problems arise in applying the attorney-client privilege to a corporate client, however, because as an abstract legal entity, a corporation can only act through its agents and employees.[57] In recent years, many cases dealing with attorney-client privilege in the corporate context have focused upon which employees could assert the privilege on the cor-

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(stating that court must first determine whether communications were made to secure legal advice).

[53] Georgia-Pacific Plywood Co. v. United States Plywood Corp., 18 F.R.D. 463, 464 (S.D.N.Y. 1956); Zenith Radio Corp. v. Radio Corp. of America, 121 F. Supp. 792, 794 (D. Del. 1954); *see also* Underwater Storage, Inc. v. United States Rubber Co., 314 F. Supp. 546, 548 (D.D.C. 1970) (communications dealing with patent activities not privileged because they can as easily be handled by non-lawyers). Similarly, there is no provision for a confidential accountant-client privilege under federal law. Couch v. United States, 409 U.S. 322, 335 (1973).

[54] In Fisher v. United States, 425 U.S. 391 (1976), taxpayers received from their accountants documents used in the preparation of their tax returns. *Id.* at 394. The taxpayers then transferred those documents to their attorneys for legal assistance in connection with an investigation by the Internal Revenue Service. *Id.* When the IRS sought to obtain these documents, the attorneys refused to comply with the summons. *Id.* at 395. The United States Supreme Court, however, ordered production of the documents, even though they had been given to the attorneys for the purpose of securing legal advice. *Id.* at 414. The Court explained that pre-existing documents, which if in the hands of the client would not be subject to court process, would thus be protected from disclosure when placed in the hands of the attorney. *Id.* at 404. The Court found that the summons to produce the documents did not involve the taxpayers' fifth amendment privilege against self-incrimination. *Id.* at 414. Since the documents in question had no privilege in the hands of the client, they could not be protected by the attorney-client privilege simply by virtue of their transfer to the attorney. *Id.* at 409.

Fisher has been interpreted as establishing two conditions for the attorney-client privilege to protect pre-existing documents transferred to an attorney. United States v. Davis, 636 F.2d 1028, 1040 (5th Cir. 1981). First, the information in the documents must be confidential and the transfer to the attorney must be made for the purpose of securing legal advice. *Id.* Second, the documents must have been privileged in the client's hands before the transfer. *Id.*

[55] *See* WIGMORE, *supra* note 2, § 2298, at 572 ("[T]he privilege cannot avail to protect the client in concerting with the attorney a crime or other evil enterprise"); *see also* Clark v. United States, 289 U.S. 1, 15 (1933) (fraud); United States v. Calvert, 523 F.2d 895, 909 (8th Cir. 1975), *cert. denied,* 424 U.S. 911 (1976) (at common law, confidential communications from client to attorney are not privileged if made for purposes of obtaining aid in commission of future criminal acts); United States v. Friedman, 445 F.2d 1076, 1085 (9th Cir. 1971) ("confidential attorney-client communications lose their privileged character when they concern contemplated unlawful acts by the client").

[56] Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 323 (7th Cir. 1963); *see* Upjohn Co. v. United States, 449 U.S. 383, 389-90 (1981) (Supreme Court assumed that privilege also applied when client was a corporation).

[57] *See, e.g.,* Upjohn Co. v. United States, 449 U.S. 383, 389-90 (1981) ("Admittedly complications in the application of the privilege arise when the client is a corporation, which in theory is an artificial creature of the law, and not an individual. . . .").

poration's behalf.[58] In *Upjohn Co. v. United States,*[59] the Supreme Court of the United States declined to lay down a broad rule to analyze the scope of attorney-client privilege in the corporate context, preferring instead a case-by-case determination.[60]

Finally, great emphasis is placed upon the requirement that the communications between attorney and client be made and maintained in confidence for privilege to attach.[61] There is no privilege if the communication between client and attorney is made in the presence of a third party,[62] because that contradicts the purpose of the privilege — to protect confidentiality. Similarly, no privilege may be asserted for a communication which the client intends to have the attorney impart to others.[63]

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[58] Various tests were developed by the courts for determining which employees' communications to corporate counsel would be protected by attorney-client privilege. The first test to be formulated was the "control group" test. City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483 (E.D. Pa.), *mandamus and prohibition denied sub. nom.,* General Elec. Co. v. Kirkpatrick, 312 F.2d 743 (3d Cir. 1962), *cert. denied,* 372 U.S. 943 (1963). This test required, for a communication to be privileged, that the employee making the communication be in a position to control, or take a substantial part in, the decision about any action to be taken by the corporation on the advice of the attorney. *Id.* at 485.

The "control group" test was subsequently rejected in Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970), *aff'd per curiam by an equally divided Court,* 400 U.S. 348 (1971), in favor of a "subject matter" test. Under this analysis, an employee of a corporation — even though not within its control group — could claim attorney-client privilege when the employee made the communication at the direction of his supervisors, and the subject matter of the communication involved the performance of the employee's duties. *Id.* at 491-92.

A "modified subject matter" test then was presented in Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1978) (en banc). The court specified five factors that must exist for the attorney-client privilege to be applicable to an employee's communications with the attorney. *Id.* at 610-11. First, the communication must be made for the purpose of securing legal advice; second, the employee must have made the communication at the direction of his corporate superior; third, the superior must have made the request so that the corporation could secure legal advice; fourth, the subject matter of the communication must be within the scope of the employee's duties; and finally, the communication must not be disseminated beyond those persons who because of the corporate structure need to know its contents. *Id.*

For a description and analysis of the three main tests, *see generally,* Comment, *The Corporate Attorney-Client Privilege: The Subject Matter Test v. The Control Group Test: Will Reasonableness Prevail? — United States v. Upjohn,* 5 DEL. J. CORP. L. 480, 484-91 (1980); Note, *Application of the Attorney-Client Privilege to Corporations: New Directions and a Proposed Solution,* 20 B.C. L. REV. 953 (1979); Note, *Corporate Attorney-Client Privilege — Diversified Industries, Inc. v. Meredith — The Modified Harper & Row Test,* 4 J. CORP. LAW 226 (1978).

[59] 449 U.S. 383 (1981).

[60] *Id.* at 386.

[61] United States v. Tellier, 255 F.2d 441, 447 (2d Cir. 1958). *See* WIGMORE, *supra* note 2, § 2311, at 599; MCCORMICK, *supra* note 9, § 91, at 187.

[62] *See, e.g.,* United States v. Blackburn, 446 F.2d 1089, 1091 (5th Cir. 1971); *cert. denied,* 404 U.S. 1017 (1972); Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 37 (D. Md. 1974); WIGMORE, *supra* note 2, § 2311, at 601.

[63] *See, e.g.,* United States v. Tellier, 255 F.2d 441, 447 (2d Cir. 1958) (attorney's advice to client held not privilged because client expected attorney to prepare letter to third party setting forth attorney's objections); *see also* MCCORMICK, *supra* note 9, § 91, at 188.

The use of the attorney-client privilege, however, presents a conflict between the desire, on one hand, to protect confidential communications, and the desire on the other hand, to achieve truth in our system of justice.[64] The conflict is inherent in any privilege, because assertion of a privilege allows certain information to be withheld from the adversarial process.[65] Since the privilege is an exception to the general duty to testify and to disclose relevant evidence,[66] there is a notion of unfairness in the assertion of privilege; despite its benefits, the privilege stands as an obstacle to the investigation of truth.[67] Due to this conflict between confidentiality and truth inherent in the use of privileges, the scope of the attorney-client privilege is narrowly construed.[68] The privilege, therefore, will be applied only when necessary to achieve its purpose of protecting the confidential relationship between the attorney and client.[69] Furthermore, the attorney-client privilege is to be construed narrowly because it protects materials which would otherwise be discoverable, and thus limits the opposing party's access to evidence.[70] Many courts speak of a need for a balancing approach, so that the interest in preserving the purpose of the privilege is balanced with the need for disclosure of all relevant information.[71] A slightly different view refers to a tension reflected in the attorney-client privilege between the rights of the individual and the good of society.[72] A narrow construction of the scope of the attorney-client privilege thus achieves a balance between those competing interests.

In summary, therefore, the attorney-client privilege exists to protect the confidential relationship between attorney and client. The purpose of the privilege is to encourage frank and full communications between the attorney

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[64] *See, e.g.*, United States v. Nixon, 418 U.S. 683, 709-10 (1974) (privileges against forced disclosure, established in the Constitution, by statute, or at common law, are "... exceptions to the demand for every man's evidence [and] are not lightly created nor expansively construed, for they are in derogation of the search for truth").

[65] For example, FED. R. CIV. P. 26-37 grant broad discovery procedures, yet privileged material is immune from discovery under FED. R. CIV. P. 26(b)(1). *See* Hickman v. Taylor, 329 U.S. 495, 507-08 (1947) (discovery rules are to be accorded a broad and liberal treatment, but there will still be a limitation upon discovery when it encroaches upon private areas).

[66] *See supra* note 3 and accompanying text. *See also In re* John Doe Corp., 675 F.2d 482, 489 (2d Cir. 1982) ("The privilege itself is an exception to the critically important duty of citizens to disclose relevant evidence in legal proceedings.").

[67] WIGMORE, *supra* note 2, § 2291, at 554.

[68] *See* Underwater Storage, Inc. v. United States Rubber Co., 314 F. Supp. 546, 547-48 (D.D.C. 1970); WIGMORE, *supra* note 2, § 2291, at 554.

[69] Fisher v. United States, 425 U.S. 391, 403 (1976).

[70] *See In re* Horowitz, 482 F.2d 72, 81 (2d Cir.), *cert. denied*, 414 U.S. 867 (1973). *Cf.* WIGMORE, *supra* note 2, § 2192, at 70 ("fundamental maxim that the public ... has a right to every man's evidence").

[71] *See, e.g, In re* Ampicillin Antitrust Litig., 81 F.R.D. 377, 384 (D.D.C. 1978) (court's duty is to achieve "a balance between the need for disclosure of all relevant information and the need to encourage free and open discussion by clients in the course of legal representation"); International Business Mach. Corp. v. Sperry Rand Corp., 44 F.R.D. 10, 13 n.2 (D. Del. 1968).

[72] *See* Rosenfeld, *supra* note 40, at 496-99, for a discussion of the tensions inherent in the attorney-client privilege, relating to a theory of individualism.

and the client. The privilege, however, is to be narrowly construed in keeping with this purpose. One restriction upon the attorney-client privilege, which helps keep it narrowly construed, is that the privilege can be lost through waiver. This note next considers the doctrine of waiver, and the way in which it operates upon the attorney-client privilege.

II. WAIVER

A. *Waiver Defined*

"Waiver" is the intentional relinquishment or abandonment of a known right or privilege.[73] The traditional rule on waiver is one of strict construction,[74] so that any disclosure of confidential communications to a third party waives privilege for those communications.[75] The effect of waiver is that the communications which have been disclosed may no longer be barred from production,[76] or from admission at trial,[77] on the grounds of privilege. Once waiver has occurred, therefore, the former holder of the privilege may no longer assert that privilege to avoid answering questions or producing documents.[78]

For waiver to occur, the information which is disclosed must be privileged. Production of material to which no privilege could attach does not waive

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[73] Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

[74] In determining an issue of waiver, the courts frequently make a distinction between claims of protection based on attorney-client privilege and those based on the work product doctrine. The courts are often willing to consider a more liberal standard for waiver of work product, because of the different purpose of each privilege. *See, e.g.*, Permian Corp. v. United States, 665 F.2d 1214, 1219 (D.C. Cir. 1981) (question of waiver depended upon nature of privilege asserted). While the purpose in granting the attorney-client privilege is to protect the confidentiality of communications and to protect the attorney-client relationship, the purpose of the work product doctrine is to protect the material soley from the opposing party, rather than to prevent the outside world generally from obtaining the information. *See* United States v. American Tel. & Tel. Co., 642 F.2d 1285, 1299 (D.C. Cir. 1980). The work product privilege thus protects the attorney. *Id.; see also* GAF Corp. v. Eastman Kodak Co., 85 F.R.D. 46, 52 (S.D.N.Y. 1979).

The majority rule for waiver of the work product privilege, therefore, is that disclosure of work product information to a third party does not constitute waiver of that privilege, unless the disclosure substantially increases the possibility that the opposing party could obtain the information. GAF Corp. v. Eastman Kodak Co., 85 F.R.D. at 51-52.

[75] *In re* Horowitz, 482 F.2d 72, 81 (2d Cir.), *cert. denied,* 414 U.S. 867 (1973); *In re* Penn Central Commercial Paper Litig., 61 F.R.D. 453, 463 (S.D.N.Y. 1973); *see also* MCCORMICK, *supra* note 9, § 93.

[76] *See, e.g., In re* Horowitz, 482 F.2d 72 (2d Cir.), *cert. denied,* 414 U.S. 867 (1973) (court refusing to quash a *subpoena duces tecum* requiring accountant to produce documents which had lost their confidentiality); Eglin Federal Credit Union v. Cantor, Fitzgerald Securities, Inc., 91 F.R.D. 414, 419 (N.D. Ga. 1981) (motion to compel production granted with respect to documents for which attorney-client privilege had been waived).

[77] *See, e.g.*, United States v. Pauldino, 487 F.2d 127, 130 (10th Cir. 1973), *cert. denied,* 415 U.S. 981 (1974).

[78] *See, e.g., In re* Weiss, 596 F.2d 1185 (4th Cir. 1979); *In re* Horowitz, 482 F.2d 72 (2d Cir.), *cert. denied,* 414 U.S. 867 (1973); W.R. Grace & Co. v. Pullman, Inc., 446 F. Supp. 771, 775 (W.D. Okla. 1976).

privilege with respect to other, protected communications.[79] In addition, privilege cannot be waived by failure to assert it, absent any disclosure.[80] Furthermore, the mere action of bringing or defending a lawsuit cannot waive privilege.[81] Waiver occurs only when privileged material is disclosed, without any assertion of privilege.[82]

Another characteristic of waiver is that the disclosure must be voluntary.[83] There is no waiver of the attorney-client privilege if disclosure is compelled by a court order.[84] Courts have disagreed, however, as to whether an intention to waive privilege is necessary for waiver to occur.[85] A person would never intend to waive, if intention alone could control the privilege.[86] Waiver may be implied by some courts, however, from the conduct of a party, even when waiver is not express or intentional.[87] For example, an implied waiver of the attorney-client privilege has been found when the attorney and client become adverse parties in a lawsuit arising out of their relationship.[88]

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[79] International Business Mach. Corp. v. Sperry Rand Corp., 44 F.R.D. 10, 13 (D. Del. 1968); *see* United States v. Aronoff, 466 F. Supp. 855, 860 (S.D.N.Y. 1979) (failure to object to lawyer's disclosure of unprivileged information did not waive privilege).

[80] United States v. Jacobs, 322 F. Supp. 1299, 1303 (C.D. Cal. 1971).

[81] 4 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶26.60(6) (2d ed. 1982) ("Some [privileges], such as the attorney-client privilege, could not normally be held to be waived by bringing or defending suit, for in the attorney-client situation the privilege is designed to promote confidential relations that may well deal with the very suit in question.").

[82] United States v. Jacobs, 322 F. Supp. 1299, 1303 (C.D. Cal. 1971).

[83] Transamerica Computer Co. v. International Business Mach. Corp., 573 F.2d 646, 651 (9th Cir. 1978); *see* Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1161 (D.S.C. 1974); FED. R. EVID. 511 (Proposed Draft 1973) (privilege waived if holder of privilege "voluntarily discloses or consents to disclosure of any significant part of the matter or communication").

[84] *E.g.*, Transamerica Computer Co. v. International Business Mach. Corp., 573 F.2d 646, 651 (9th Cir. 1978) (court held that IBM had not waived its attorney-client privilege through an inadvertant production of privileged documents during a court-ordered accelerated discovery period).

[85] *Compare* International Business Mach. Corp. v. Sperry Rand Corp., 44 F.R.D. 10, 13 (D. Del. 1968) (waiver must be clear and intentional) *with In re* Grand Jury Investig. of Ocean Transp., 604 F.2d 672, 675 (D.C. Cir. 1979) (intent to waive one's privilege not necessary for waiver to occur) *and* Champion Int'l Corp. v. International Paper Co., 486 F. Supp. 1328, 1332 (N.D. Ga. 1980) (intent to waive attorney-client privilege not necessary for waiver).

[86] WIGMORE, *supra* note 2, § 2327, at 636 ("A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation.").

[87] *See, e.g.*, Permian Corp. v. United States, 665 F.2d 1214, 1219-20 & n.11 (D.C. Cir. 1981). In *Permian*, the corporation inadvertantly released privileged documents to the target corporation of their exchange offer during discovery. When the corporation subsequently allowed the SEC to have access to those documents through the target corporation, with no assertion of privilege, the court held that the attorney-client privilege had been waived. *See also In re* Grand Jury Investig. of Ocean Transp., 604 F.2d 672, 674-75 (D.C. Cir. 1979) (inadvertant disclosure constituted effective waiver of privilege); Hearn v. Rhay, 68 F.R.D. 574, 580-81 (E.D. Wash. 1975) (discussing elements of an implied waiver of attorney-client privilege).

[88] Pruitt v. Peyton, 243 F. Supp. 907, 909 (E.D. Va. 1965); MCCORMICK, *supra* note 9, § 91, at 191; WIGMORE, *supra* note 2, § 2327, at 638.

The rationale behind the traditional rule regarding waiver is that privilege exists to protect confidentiality.[89] Any violation of the confidentiality therefore destroys the purpose of the privilege because there is no longer any need for protection of the confidential communications.[90] The disclosure of information by the holder of the privilege is viewed as inconsistent with the confidential relationship, and thus waiver of privilege is held to occur.[91] A further reason for the strict rule of waiver deals with the fairness required in an adversarial system.[92] Privilege operates to preclude the admission of certain information into the adversarial process.[93] If a party were allowed to disclose some information, and yet withhold the remainder, that could be misleading to the opposing party.[94] The traditional rule, holding that complete waiver occurs once some disclosure is made, seeks to guard against such unfairness.[95]

B. *Limitations on Waiver of the Attorney-Client Privilege*

1. Limits Under the Common Law

Under a strict construction of the waiver doctrine, any disclosure of confidential communications is equivalent to a waiver of privilege.[96] Despite this traditional rule on waiver,[97] the common law recognizes certain circumstances when the scope of waiver of the attorney-client privilege may be limited. Indeed, any one of three results may follow a disclosure of privileged information. First, the disclosure may trigger a complete waiver of the attorney-client privilege — the result decreed by the traditional rule of waiver.[98] Second, a disclosure may be made, and some waiver of privilege may be deemed to occur, but that waiver is limited to the specific subject matter disclosed.[99] Finally, a disclosure may be made, but no waiver of the attorney-client privilege may be

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[89] *In re* Penn Central Commercial Paper Litig., 61 F.R.D. 453, 464 (S.D.N.Y. 1973); *see* WIGMORE, *supra* note 2, § 2311, at 599.

[90] *See* Underwater Storage, Inc. v. United States Rubber Co., 314 F. Supp. 546, 548-49 (D.D.C. 1970) (once confidentiality is breached, basis for continued existence of privilege is destroyed); United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461, 464-65 (E.D. Mich. 1954) (privilege deemed waived when policy behind privilege can no longer be served).

[91] United States v. American Tel. & Tel. Co., 642 F.2d 1285, 1299 (D.C. Cir. 1980).

[92] Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 926, 929 (N.D. Cal. 1976) (important consideration in assessing issue of waiver is fairness); Lee Nat'l Corp. v. Deramus, 313 F. Supp. 224, 227 (D. Del. 1970) (patently unfair for client to disclose in some instances and withhold in others); *see* WIGMORE, *supra* note 2, § 2327, at 636.

[93] *See supra* notes 41-42 and accompanying text.

[94] United States v. Aronoff, 466 F. Supp. 855, 862 (S.D.N.Y. 1979) (assertions about privileged communications without full disclosure may be false or misleading); *see* WIGMORE, *supra* note 2, § 2327, at 636.

[95] WIGMORE, *supra* note 2, § 2327, at 636.

[96] *See supra* notes 74-78 and accompanying text.

[97] *See supra* notes 74-75 and accompanying text.

[98] *See, e.g.*, Permian Corp. v. United States, 665 F.2d 1214 (D.C. Cir. 1981); *In re* Penn Central Commercial Paper Litig., 61 F.R.D. 453 (S.D.N.Y. 1973).

[99] *See infra* notes 101-14 and accompanying text.

found to have occurred.[100] This section will discuss the circumstances under which the courts may follow the second and third results and not find a complete waiver of the attorney-client privilege, despite the fact that some disclosure of confidential communications has been made.

a. *Limited to Subject Matter*

A disclosure which normally would waive the attorney-client privilege may nevertheless result in a waiver limited to the subject matter of the disclosure.[101] Under this doctrine of subject matter-limited waiver, disclosure of a particular communication will constitute a waiver only with respect to the subject matter of that communication. Thus, for example, testimony by an attorney or client concerning a specific communication will be a waiver only as to all other communications on that same subject.[102] The waiver of the privilege is limited, since it does not compel disclosure of all the communications that occurred between the attorney and client, but only those communications which dealt with the subject matter revealed by the disclosure.[103] Communications between the attorney and client on other subject matters, therefore, will remain privileged.

Similarly, waiver of the attorney-client privilege may be limited to subject matter when only part of a privileged communication is disclosed. For example, in *R.J. Herely & Son Co. v. Stotler & Co.*,[104] the defendant brought a motion to compel production of a memorandum, from which the plaintiff's attorney had read portions aloud at a settlement meeting.[105] The court held that the voluntary disclosure of a portion of a privileged communication constituted a waiver with respect to the rest of the communication on the same subject.[106] Nevertheless, other confidential communications between the attorney and client, on other subjects, have not been waived by the partial disclosure, and thus retain their claims of privilege.

The reasoning behind the common law recognition of a limited waiver when either the subject matter or the partial contents of a communication are

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[100] *See, e.g.*, Sylgab Steel & Wire Corp. v. Imoco-Gateway Corp., 62 F.R.D. 454 (N.D. Ill. 1974), *aff'd*, 534 F.2d 330 (7th Cir. 1976); American Optical Corp. v. Medtronic, Inc., 56 F.R.D. 426 (D. Mass. 1972).

[101] *See, e.g.*, Weil v. Investment/Indicators, Research & Management, Inc., 647 F.2d 18 (9th Cir. 1981); Goldman, Sachs & Co. v. Blondis, 412 F. Supp. 286 (N.D. Ill. 1976).

[102] WIGMORE, *supra* note 2, § 2327, at 638.

[103] *See, e.g.*, Goldman, Sachs & Co. v. Blondis, 412 F. Supp. 286 (N.D. Ill. 1976) (holding waiver limited to specific subject of particular conversation with attorney which client revealed at deposition); Lee Nat'l Corp. v. Deramus, 313 F. Supp. 224, 227 (D. Del. 1970) (finding attorney-client privilege waived only with respect to particular subject matter of conference between president of corporation and counsel).

[104] 87 F.R.D. 358 (N.D. Ill. 1980).

[105] *Id.* at 359.

[106] *Id. See also* International Tel. & Tel. Corp. v. United Tel. Co. of Fla., 60 F.R.D. 177, 185-86 (M.D. Fla. 1973); *see* WIGMORE, *supra* note 2, § 2327, at 638; MCCORMICK, *supra* note 9, § 93, at 194-95.

disclosed relates to the notion of fairness, one element of waiver.[107] Fairness requires that the remainder of the subject matter or of the particular communication be disclosed, although communications on other subjects may still be privileged.[108] A partial disclosure of subject matter or of the particular communication could result in unfairness to the recipient of the disclosure because of the possibility of being misled by incomplete information.[109] This common law exception to the traditional rule of complete waiver is therefore still consistent with the concern for fairness which is an underlying rationale for the doctrine of waiver.[110]

b. *Disclosure for Negotiation Purposes*

Several courts have held that a limited waiver or no waiver of the attorney-client privilege occurs when confidential information is disclosed, normally by the attorney, for negotiation purposes.[111] The courts that give a narrow reading to the scope of waiver in these circumstances have held that the waiver is limited to that information which is disclosed during negotiations.[112] The use of confidential information for negotiations, therefore, does not constitute waiver of the entire attorney-client privilege.[113] These courts have held that to deny protection would destroy the attorney-client privilege whenever a party entered into negotiations, and thus would defeat the policy of encouraging parties to resolve their differences through negotiation.[114]

Other courts, adopting a more liberal standard, have concluded that no waiver of the attorney-client privilege occurred, even though some level of disclosure resulted during the parties' negotiations.[115] The basis for these decisions was that no disclosure of the contents of specific communications was made during negotiations,[116] so that the statements made during negotiations did not constitute a waiver. These courts have rejected the notion that a party

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[107] *See* WIGMORE, *supra* note 2, § 2327, at 636.

[108] *Id.* at 638.

[109] Teachers Ins. & Annuity Ass'n of Am. v. Shamrock Broadcasting Co., 521 F. Supp. 638, 641 (S.D.N.Y. 1981); United States v. Aronoff, 466 F. Supp. 855, 862 (S.D.N.Y. 1979); *see* Lee Nat'l Corp. v. Deramus, 313 F. Supp. 224, 227 (D. Del. 1970).

[110] *See supra* notes 92-95 and accompanying text.

[111] *See* Sylgab Steel & Wire Corp. v. Imoco-Gateway Corp., 62 F.R.D. 454 (N.D. Ill. 1974), *aff'd*, 534 F.2d 330 (7th Cir. 1976); International Business Mach. Corp. v. Sperry Rand Corp., 44 F.R.D. 10 (D. Del. 1968). *But see* Sicpa North Am., Inc. v. Donaldson Enterprises, Inc., 179 N.J. Super. 56, 430 A.2d 262, 266 (1981) (disclosure of privileged report for limited purpose of settlement negotiations waived privilege so that report discoverable).

[112] *See, e.g.*, Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 46 (D. Md. 1974); International Business Mach. Corp. v. Sperry Rand Corp., 44 F.R.D. 10, 13 (D. Del. 1968).

[113] Burlington Indus. v. Exxon Corp., 65 F.R.D. at 46.

[114] *See* International Business Mach. Corp. v. Sperry Rand Corp., 44 F.R.D. at 13 n.2.

[115] *See, e.g.*, Sylgab Steel & Wire Corp. v. Imoco-Gateway Corp., 62 F.R.D. 454, 457-58 (N.D. Ill. 1974), *aff'd*, 534 F.2d 330 (7th Cir. 1976); American Optical Corp. v. Medtronic, Inc., 56 F.R.D. 426, 431-32 (D. Mass. 1972).

[116] *Sylgab*, 62 F.R.D. at 458; *American Optical*, 56 F.R.D. at 432.

would waive the attorney-client privilege if the lawyer, bargaining on his client's behalf, revealed the client's position on an issue.[117] The courts further reasoned that negotiations involved pre-trial matters, not evidence, and that positions taken during negotiations did not have to be supported by proof.[118] The common law, therefore, has recognized that disclosures of confidential matters may be made during negotiations which, due to the policy of favoring negotiated settlements, will not be considered a waiver, or at most will constitute a limited waiver of the attorney-client privilege.

2. Limited Waiver for Corporate Clients

In recent years, a few courts have introduced another situation in which only a limited waiver of the attorney-client privilege has been recognized. These courts have suggested that the scope of waiver should be limited when disclosure of privileged information is made by a corporation to a government agency.[119] Under this proposed limitation, a client's waiver would be limited soley to the government agency which received the privileged information.[120] The client, therefore, would retain the right to assert the attorney-client privilege against attempts by other parties to obtain the same information disclosed to the agency.[121] Thus, this waiver is not limited in terms of subject matter or for negotiation purposes, the circumstances of limited waiver generally recognized under the common law.[122] Rather, the courts following this concept of limited waiver for corporate clients have held that the waiver is limited with respect to the recipient of the disclosed privileged information.[123]

The recipient-limited waiver, however, has not been unanimously accepted by the courts.[124] There is currently a split among the circuit courts over the acceptance of this new concept of limited waiver for corporate clients.[125] This section will first examine those decisions which have adopted this concept of recipient-limited waiver, and the policy reasons used in its support. The sec-

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[117] *Sylgab,* 62 F.R.D. at 458 ("Clients and lawyers should not have to fear that positions on legal issues taken during negotiations waive the attorney-client privilege so that the private opinions and reports drafted by an attorney for his client become discoverable.") (citing *American Optical,* 56 F.R.D. at 432).

[118] *See, e.g., American Optical,* 56 F.R.D. at 432.

[119] *See* Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1978) (en banc); Byrnes v. IDS Realty Trust, 85 F.R.D. 679 (S.D.N.Y. 1980); *In re* Grand Jury Subpoena Dated July 13, 1979, 578 F. Supp. 368 (E.D. Wis. 1979).

[120] Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1978) (en banc); Byrnes v. IDS Realty Trust, 85 F.R.D. 679, 689 (S.D.N.Y. 1980).

[121] *See, e.g.,* Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1978) (en banc) (plaintiff's motion to compel production of documents previously disclosed to SEC by defendant corporation denied).

[122] *See supra* notes 101-18 and accompanying text.

[123] *See* Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1978) (en banc); Byrnes v. IDS Realty Trust, 85 F.R.D. 679 (S.D.N.Y. 1980); *In re* Grand Jury Subpoena Dated July 13, 1979, 578 F. Supp. 368 (E.D. Wis. 1979).

[124] *See, e.g.,* Permian Corp. v. United States, 665 F.2d 1214 (D.C. Cir. 1981).

[125] *Compare* Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1978) (en

tion will then present the decisions which have rejected the concept of recipient-limited waiver for corporate clients, and their reasons for doing so.

a. *Recognition of the Recipient-Limited Waiver*

The concept of a waiver limited to the particular agency to which a corporate client's communication was disclosed was first articulated by the United States Court of Appeals for the Eighth Circuit.[126] In *Diversified Industries, Inc. v. Meredith,*[127] the corporate defendant, Diversified Industries, had turned over to the Securities and Exchange Commission (SEC), in response to a subpoena, certain confidential material that its attorneys had prepared in the course of an investigation into improper payments made by the corporation.[128] When a corporate customer brought suit against Diversified Industries and sought to obtain that same material through discovery, the corporation claimed that the confidential material was protected by attorney-client privilege.[129]

The Eighth Circuit, sitting *en banc*, upheld the claim of privilege for those corporate communications.[130] The appeals court concluded that the disclosure of confidential information by the corporation to the SEC constituted only a limited waiver,[131] such that the information was protected against discovery by the plaintiff.[132] The circuit court reasoned that since the disclosure by Diversified Industries had occurred in a separate and nonpublic SEC investigation, the waiver of privilege was limited to the regulatory agency's use.[133] The court also stated that it did not want to thwart the developing procedure among corporations of employing outside counsel to conduct in-house investigations.[134]

Subsequently, two federal district courts relied upon the holding of *Diversified* to reach decisions that either a limited waiver[135] or no waiver[136] had occurred when a corporation released privileged information to government

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banc) (recognizing recipient-limited waiver for corporate clients) *with* Permian Corp. v. United States, 665 F.2d 1214 (D.C. Cir. 1981) *and In re* Weiss, 596 F.2d 1185 (4th Cir. 1979) (rejecting concept of limited waiver).

[126] Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1978) (en banc). *See generally* Comment, *The Evaluative Report Privilege, and Diversified Industries, Inc. v. Meredith*, 40 OHIO ST. L.J. 699, 714-21 (1979).

[127] Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1978) (en banc).

[128] Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 599 (8th Cir. 1977), *modified,* 572 F.2d 596, 606 (8th Cir. 1978) (en banc).

[129] *Id.*

[130] Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1978) (en banc).

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id. But see In re* Sealed Case, 676 F.2d 793, 823-24 (D.C. Cir. 1982) (limited waiver might encourage corporations to hide documents from SEC or hope that SEC did not discover, so they could claim privilege against other government agencies).

[135] Byrnes v. IDS Realty Trust, 85 F.R.D. 679 (S.D.N.Y. 1980).

[136] *In re* Grand Jury Subpoena Dated July 13, 1979, 478 F. Supp. 368 (E.D. Wis. 1979).

agencies. These courts expanded the policy suggested in *Diversified*,[137] reasoning that limiting the scope of waiver would encourage cooperation with government agencies.[138] Both district courts concluded that adherence to the traditional rule of waiver would discourage disclosure to government agencies by corporations.[139] In *In re Grand Jury Subpoena Dated July 13, 1979*,[140] the district court relied upon *Diversified* to hold that release of a law firm's report to the SEC and the Internal Revenue Service (IRS), regarding its investigation into questionable payments and tax liabilities of the corporate client, did not waive the attorney-client privilege with respect to notes made by the lawyers in compiling the report and interviewing employees.[141] Similarly, the district court in *Byrnes v. IDS Realty Trust*,[142] noting that the facts presented were indistinguishable from *Diversified*, held that circuit court decision to be controlling.[143] *Byrnes* involved the disclosure of various documents prepared by the corporations's attorneys to the Securities and Exchange Commission in response to a nonpublic investigation by that agency.[144] The plaintiffs in *Byrnes* sued IDS Realty Trust for violations of federal and state securities laws and breach of fiduciary duty.[145] The action came before the court on a motion by the plaintiffs to compel deposition testimony and document production by the law firm and several individual attorneys who had been counsel to IDS Realty Trust.[146] The defendant's attorneys argued that the limited disclosure made to the SEC did not constitute a waiver of attorney-client privilege.[147] The *Byrnes* court ruled that the plaintiff could not obtain the corporate defendant's report because the attorney-client privilege protecting it had not been waived, despite the disclosure of the report to SEC.[148] According to the court, voluntary submissions to agencies in separate, private proceedings should be a waiver only as to those proceedings.[149]

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[137] *See supra* text accompanying note 134.

[138] *See* Byrnes v. IDS Realty Trust, 85 F.R.D. 679, 688 (S.D.N.Y. 1980); *In re* Grand Jury Subpoena Dated July 13, 1979, 478 F. Supp. 368, 372-73 (E.D. Wis. 1979).

[139] *See, e.g., In re Grand Jury Subpoena*, 478 F. Supp. at 372-73.

[140] *Id.*

[141] *Id.*

[142] 85 F.R.D. 679 (S.D.N.Y. 1980).

[143] *Id.* at 685.

[144] *Id.* at 681-83. The documents consisted of (1) those generated by corporate counsel or received from the corporate client to enable the counsel to give legal advice; (2) tables, analyses and reports based on factual data prepared by the client corporation, on which counsel placed notes in connection with furnishing legal advice; (3) those received after litigation was threatened or commenced which enabled counsel to prepare for litigation, withheld under the work product doctrine; and (4) those previously withheld by the magistrate during earlier discovery proceedings. *Id.* at 682-83.

[145] *Id.* at 681.

[146] *Id.* at 680-81.

[147] *Id.* at 682.

[148] *Id.* at 689.

[149] *Id.*

b. *Rejection of the Recipient-Limited Waiver for Corporate Clients*

Since the decision in *Diversified*, two circuit courts have expressly rejected the concept of a recipient-limited waiver for corporate clients.[150] The first court to do so was the United States Court of Appeals for the District of Columbia Circuit in *Permian Corp. v. United States*.[151] *Permian* involved the disclosure of documents to the Securities and Exchange Commission, in cooperation with an informal investigation by the SEC into Permian's proposal for an exchange offer.[152] When the United States Department of Energy sought those same documents in connection with an investigation of petroleum pricing, Permian asserted an attorney-client privilege.[153] The appeals court held that the corporation's privilege had been waived by its voluntary disclosure to the SEC.[154] Moreover, although the facts in *Permian* were similar to those in *Diversified*, the circuit court stated that it found the limited waiver theory from that case "wholly unpersuasive."[155]

The circuit court in *Permian* presented three reasons for rejecting the recipient-limited waiver theory announced in *Diversified*. First, the *Permian* court stated that the limited waiver rule of *Diversified* had very little to do with the interest behind the attorney-client privilege in promoting the confidential relationship between the attorney and client.[156] The *Permian* court rejected the policy reasoning in *Diversified*, stating that while voluntary cooperation with government investigations may be a laudable activity, it is irrelevant to the attorney-client relationship.[157] Second, the appeals court stated that the attorney-client privilege was not designed for tactical employment.[158] The court did not want the use of a limited waiver to permit selective disclosure, whereby a client might pick and choose among its opponents.[159] Finally, the

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[150] Permian Corp. v. United States, 665 F.2d 1214 (D.C. Cir. 1981); *In re* Weiss, 596 F.2d 1185 (4th Cir. 1979).

[151] 665 F.2d 1214 (D.C. Cir. 1981). *See also* Maryville Academy v. Loeb Rhodes & Co., Inc., 559 F. Supp. 7, 8 (N.D. Ill. 1982) (following holding in *Permian* that voluntary disclosure of privileged documents and testimony to SEC was complete waiver of attorney-client privilege).

[152] Permian Corp. v. United States, 665 F.2d 1214, 1216 (D.C. Cir. 1982).

[153] *See id.* at 1217.

[154] *Id.* at 1222.

[155] *Id.* at 1220.

[156] *Id.* at 1220-21

[157] *Id.*

[158] *Id.* at 1221.

[159] *Id. See also In re* John Doe Corp., 675 F.2d 482 (2d Cir. 1982), in which the Second Circuit found that a corporation was not entitled to a claim of attorney-client privilege after it had shown a report on internal business ethics, prepared by its legal department, to outsiders. *In re* John Doe Corp., 675 F.2d at 485. The appeals court's decision did not expressly mention the term limited waiver, although the court referred to *Permian* as an analogous case. *Id.* at 489. The court stated that it agreed with the holding in *Permian* rejecting a "pick and choose" theory of attorney-client privilege. *Id.* There were additional reasons, however, for the circuit court to find that waiver had occurred in *John Doe Corp.* The court stated that there was probable cause to believe that the corporation had used the report in furtherance of ongoing criminality. *Id.* at 488. In addition, the court held that the disclosure of the report to outsiders either waived the privilege,

court in *Permian* held that there was no public policy requiring the traditional doctrine of waiver to be overriden.[160] If public policy should demand cooperation with government agencies, the court reasoned, the corporation could not withhold from the Department of Energy privileged information which it had already voluntarily disclosed to the SEC.[161] The court stated that it could not rationalize placing a higher value on cooperation with the SEC than with other regulatory agencies, including the Department of Energy.[162] Thus, the court concluded that Permian had waived the attorney-client privilege completely when it disclosed confidential documents to the SEC.[163]

Another circuit court also refused to follow the decision in *Diversified* to limit a corporate client's waiver of its attorney-client privilege to a particular government agency.[164] That court, however, based its decision on narrow grounds. In *In re Weiss*,[165] the attorney for a corporation had testified before the SEC in a private investigative proceeding, and the corporation had waived its attorney-client privilege with regard to that testimony.[166] When the attorney attempted to assert the privilege in a subsequent grand jury proceeding, the United States Court of Appeals for the Fourth Circuit denied the claim, stating that it found no compelling reason to interfere with the grand jury proceeding.[167] The appeals court refused to find *Diversified* controlling, since that earlier case had involved a request for discovery in a private litigation, and had not required judicial intervention into the grand jury process.[168]

Finally, one district court has suggested a modified approach to the absolute rule of waiver when a corporate client releases privileged information to the SEC. In *Teachers Insurance Annuity Association of America v. Shamrock Broadcasting Co., Inc.*,[169] the defendant corporation sought to compel production of documents which the plaintiff association had turned over to the SEC in response to a subpoena.[170] The plaintiff association had brought the action to recover damages for the defendant's failure to honor stock warrants at the agreed upon exercise price.[171] The defendant raised an affirmative defense regarding transactions between principals and directors of the defendant corporation and the plaintiff, which had been the subject of an SEC investigation.[172] At issue was

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or evidenced a corporate decision to use the report for purposes other than seeking legal advice, which would remove the privilege. *Id.*

[160] 665 F.2d at 1221.

[161] *Id.*

[162] *Id.*

[163] *Id.* at 1222.

[164] *In re* Weiss, 596, F.2d 1185 (4th Cir. 1979).

[165] *Id.*

[166] *Id.* at 1186.

[167] *Id.*

[168] *Id.*

[169] 521 F. Supp. 638 (S.D.N.Y. 1981).

[170] *Id.* at 639.

[171] *Id.*

[172] *Id.* at 639-40.

whether the plaintiff had waived the right to assert the attorney-client privilege by virtue of the disclosure of the documents to the SEC.[173] The district court held that the disclosure to the SEC would be deemed a complete waiver of the privilege, unless the right to assert the privilege was specifically reserved at the time disclosure was made.[174] The court ruled that no waiver would occur if the documents were given to the SEC under a protective order, stipulation, or other express reservation of the disclosing party's claim to its attorney-client privilege.[175]

The district court in *Teachers Insurance* presented a three part rationale in support of its modified approach. First, the court stated that an express reservation of privilege would not be difficult to assert.[176] Second, a reservation would not substantially curtail the investigative ability of the SEC, since stipulations or protective orders had been used previously by the SEC, and SEC regulations already provided for designation of documents as confidential under the Freedom of Information Act.[177] Third, an express reservation would make it clear that the disclosing party had made some effort to comply with the requirement of maintaining confidentiality for the attorney-client privilege.[178] When the modified approach was applied to the facts in *Teachers Insurance*, the court was unable to rule as a matter of law that the plaintiff association had not waived its attorney-client privilege.[179] Instead, the district court arranged for a further hearing on the specific issues of whether the documents to the SEC were in fact privileged, and whether the association had turned them over without making any express claims of confidentiality or attorney-client privilege.[180]

In summary, the Eighth Circuit introduced the concept of a limited waiver for corporate clients in *Diversified Industries, Inc. v. Meredith*. The policy behind the decision in *Diversified* — to encourage cooperation with government agencies by corporations — was adopted by two district courts. In contrast, however, two circuit courts have rejected the use of a limited waiver for corporate clients when they have disclosed privileged information. These courts have relied upon the traditional rule of waiver, holding that any disclosure by a corporation constituted a complete waiver of the attorney-client privilege. They have refused to adopt a rule which would allow for selective disclosures by a corporation to a government agency. The district court in *Teachers Insurance*,[181] however, suggested a modification of that viewpoint, holding that disclosure to the SEC would constitute a complete waiver unless the corporation made an express reservation of the attorney-client privilege at the time of disclosure.

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[173] *Id.* at 639.
[174] *Id.* at 644-45.
[175] *Id.* at 646.
[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] 521 F. Supp. 638 (S.D.N.Y. 1981).

III. Criticism of the Recipient-Limited Waiver Concept

While any disclosure of privileged communications traditionally constitutes a complete waiver of the attorney-client privilege, courts generally recognize that the scope of the waiver may be limited in three circumstances. First, when the subject matter of a confidential communication is disclosed, the waiver will be limited to that subject matter.[182] Second, when partial disclosure of a privileged communication is made, the waiver will be limited to the extent of revealing the remainder of the communication on that subject matter.[183] Third, when privileged information is used for negotiation purposes, the courts have held that either waiver is limited to that information,[184] or that no waiver has occurred.[185] A fourth limitation on waiver — introduced by the Eighth Circuit in *Diversified Industries, Inc. v. Meredith*[186] — has not garnered unanimous support.[187] This fourth limitation, a recipient-limited waiver, restricts waiver of the attorney-client privilege in the context of corporate clients who disclose privileged information to government agencies.[188] This section begins with a criticism of the decision in *Diversified* regarding limited waiver.[189] The section then presents three major reasons for not adopting the concept of recipient-limited waiver.[190] The analysis in this section demonstrates that there are insufficient policy reasons for adopting such a rule, that it is in conflict with the principle of fairness underlying the doctrine of waiver, and that such a concept of limited waiver does nothing to promote the confidential relationship between attorney and client. Finally, this section considers the modified approach, providing for a reservation of privilege at the time of disclosure, and concludes that, for similar reasons, it also should not be adopted.[191]

The decision of the *Diversified* court regarding recipient-limited waiver can be sharply criticized for several reasons. First, the appeals court, although introducing a new context for limited waiver of the attorney-client privilege, gave only cursory treatment to the topic. The discussion of limited waiver was confined to one paragraph at the end of the opinion.[192] The court failed to define what it meant by "limited waiver,"[193] and did not explain in what way the waiver was being limited — whether in terms of the material already disclosed to the SEC, or in terms of to whom it had been disclosed. Since the circuit court

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[182] *See supra* notes 101-03 and accompanying text.

[183] *See supra* notes 104-06 and accompanying text.

[184] *See, e.g.*, Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 46 (D. Md. 1974).

[185] *See, e.g.*, Sylgab Steel & Wire Corp. v. Imoco-Gateway Corp., 62 F.R.D. 454, 457-58 (N.D. Ill. 1974), *aff'd*, 534 F.2d 330 (7th Cir. 1976).

[186] 572 F.2d 596 (8th Cir. 1978) (en banc).

[187] *See, e.g.*, Permian Corp. v. United States, 665 F.2d 1214 (D.C. Cir. 1981).

[188] *See* Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1978) (en banc).

[189] *See infra* notes 192-210 and accompanying text.

[190] *See infra* notes 211-40 and accompanying text.

[191] *See infra* notes 241-49 and accompanying text.

[192] Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1978) (en banc).

[193] *Id.*

ruled against discovery of the material by a third party, the opinion presumably means that the waiver was limited solely to the SEC, since the SEC already had received the privileged information.[194] It is not clear from the court's decision, however, whether the corporation would be allowed to assert the attorney-client privilege in response to any further demands for confidential information by the SEC.

In addition, the cursory treatment of the concept of limited waiver by the *Diversified* court provides little guidance for other courts wishing to follow that holding. The court failed to explain adequately the reasoning behind its finding of a limited waiver. The opinion made reference to the fact that the disclosure occurred in a separate and nonpublic SEC proceeding.[195] The appeals court also cited two cases in support of its holding, both of which found that no waiver had occurred when disclosures had been made in separate proceedings.[196] Those cases, however, cannot be considered adequate precedent for the decision in *Diversified*. The first case, *Bucks County Bank & Trust Co. v. Storck*,[197] came before a federal district court on a motion to compel the defendant's attorney to answer questions at a deposition.[198] The court found that those questions sought to elicit privileged communications between the attorney and his client.[199] The defendant client, however, previously had testified before the court on a motion seeking the return of property taken from him by an alleged illegal search and seizure.[200] The court held that the client's testimony had been given solely for the purpose of that motion, and thus did not constitute a general waiver of the attorney-client privilege.[201]

The second case referred to by the *Diversified* court was *United States v. Goodman*,[202] in which the court held that waiver must occur in the same proceeding in which it is sought.[203] *Goodman*, however, involved waiver of the constitutional right against self-incrimination, not waiver of the attorney-client privilege.[204] In addition, the *Goodman* court, in reaching its decision, relied solely upon cases involving the fifth amendment privilege against self-incrimination.[205]

The *Diversified* court's reliance upon the nonpublic nature of the SEC investigation also is not warranted, for two reasons. First, since the purpose of

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[194] *Id.*

[195] *Id.*

[196] *Id.* (citing Bucks County Bank & Trust Co. v. Storck, 297 F. Supp. 1122 (D. Hawaii 1969); United States v. Goodman, 289 F.2d 256 (4th Cir.), *vacated on other grounds*, 368 U.S. 14 (1961)).

[197] 297 F. Supp. 1122 (D. Hawaii 1969).

[198] *Id.* at 1123.

[199] *Id.*

[200] *Id.*

[201] *Id.*

[202] 289 F.2d 256 (4th Cir.), *vacated on other grounds*, 368 U.S. 14 (1961).

[203] *Id.* at 259.

[204] *Id.*

[205] *Id.*

the attorney-client privilege is to protect confidentiality,[206] any disclosure of privileged information to a third person breaches the confidentiality of the communications between attorney and client, and thus destroys the purpose of the privilege.[207] There is no provision under the common law for privilege to be maintained if disclosure is made to a third party who then promises to keep the information confidential.[208] Thus, the confidentiality of the attorney-corporate client communications has still been breached by virtue of the disclosure to the SEC, even if the SEC does not plan on making the information public. Second, while the court labelled the SEC proceeding nonpublic, the privileged information disclosed to the SEC therein could be made public if the SEC determined that its investigative proceeding should result in litigation.[209] Additionally, there is the possibility that the privileged information about the corporation could be obtained by another party from the SEC under the Freedom of Information Act.[210]

Besides these specific criticisms of the decision in *Diversified*, three major reasons exist for not permitting the use of a recipient-limited waiver by corporate clients. First, the policy rationales, employed as the primary grounds by the courts to support their grant of the recipient-limited waiver in the corporate context, are wholly inadequate. The *Diversified* court indicated that its decision was based upon a policy of not discouraging corporations from employing counsel to conduct independent investigations into possible corporate misdeeds.[211] Subsequently, the two district courts which relied upon *Diversified* extended that reasoning to a broad policy of encouraging cooperation with government agencies.[212] While that policy of cooperation may be commendable, the courts relying upon it have failed to demonstrate how it justifies introducing a new context for a limited waiver of the attorney-client privilege based upon the disclosure's recipient. Those courts have not substantiated their claim with any evidence that a complete waiver of privilege would discourage any cooperation by corporations with government agencies. In fact,

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[206] WIGMORE, *supra* note 2, § 2285, at 527; *Id.* § 2311 at 599.

[207] *See, e.g., In re* Grand Jury Investig. of Ocean Transp., 604 F.2d 672, 675 (D.C. Cir. 1979); *In re* Penn Central Commercial Paper Litig., 61 F.R.D. 453, 464 (S.D.N.Y. 1973).

[208] WIGMORE, *supra* note 2, § 2286, at 528.

[209] *See, e.g.,* Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 600 (8th Cir. 1977) (SEC investigated slush fund maintained by Diversified and later filed suit for an injunction against Diversified).

[210] 5 U.S.C. § 552 (1974). *See generally,* A.B. LEVENSON & H.L. PITT, GOVERNMENT INFORMATION — FREEDOM OF INFORMATION ACT, SUNSHINE ACT, PRIVACY ACT (1978). It should be noted, however, that amendments to the Freedom of Information Act passed under the Privacy Act of 1974, 5 U.S.C. § 552a (1974), permit the SEC to exempt records from forced disclosure. 5 U.S.C. § 552a(j). The SEC has promulgated regulations providing a procedure whereby persons submitting information to the Commission can request confidential treatment under the Freedom of Information Act. 17 C.F.R. § 200.83.

[211] 572 F.2d at 611 (8th Cir. 1978) (en banc).

[212] *See* Byrnes v. IDS Realty Trust, 85 F.R.D. 679, 688 (S.D.N.Y. 1980); *In re* Grand Jury Subpoena Dated July 13, 1979, 478 F. Supp. 368, 372-73 (E.D. Wis. 1979).

corporations frequently cooperate with government agencies because it serves their own purposes. For example, in *Permian Corp. v. United States*,[213] the corporation willingly allowed the SEC to obtain privileged material in the hopes that it would speed up SEC approval of its exchange offer.[214]

Furthermore, the *Permian* court was correct in observing that a policy of encouraging cooperation with certain government agencies has not been mandated by congressional directive nor been widely recognized by the courts.[215] By contrast, however, the limited waiver exception granted for negotiation purposes is based upon a well-recognized policy of the judicial system to encourage settlement and avoid litigation.[216] Adopting a policy of encouraging cooperation with government agencies as the basis for granting a limited waiver would also lead to a wide application of the recipient-limited waiver rule, in view of the large number of government agencies.[217] Moreover, adopting such a policy could lead to a confused application of the recipient-limited waiver rule, as in *Permian*, where the corporation was willing to cooperate with one government agency by releasing privileged information, but sought to invoke the attorney-client privilege to protect against discovery by another government agency. As the *Permian* court stated, there is no priority system which places a higher value upon cooperation with one agency over another.[218] The policy reasoning of the *Diversified* court's holding, therefore, is an inadequate basis for adopting a rule which would allow for limited waiver by corporate clients who make disclosures of privileged information to government agencies.

Second, the concept of a recipient-limited waiver for corporate clients should be rejected because it is in conflict with an underlying principle of the doctrine of waiver.[219] The concept of a limited waiver for corporate clients violates the element of fairness in the doctrine of waiver.[220] The traditional rule for waiver is based upon a notion of fairness in the adversarial system, so that once a disclosure of privileged information is made, the opposing party should have the right to obtain the remainder of the privileged communications in order not to be unfairly misled by incomplete information.[221] Similarly, the traditionally

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[213] 665 F.2d 1214 (D.C. Cir. 1981).

[214] *Id.* at 1216.

[215] *Id.* at 1221. Nevertheless, courts frequently do base their decisions on public policy reasons. *Cf.* Byrnes v. IDS Realty Trust, 85 F.R.D. 679, 688 (S.D.N.Y. 1980); *In re* Grand Jury Subpoena Dated July 13, 1979, 478 F. Supp. 368, 372-73 (E.D. Wis. 1979).

[216] *See* International Business Mach. Corp. v. Sperry Rand Corp., 44 F.R.D. 10, 13 n.2.

[217] The number of federal administrative authorities probably exceeds one thousand. S.G. BREYER & R.B. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 6-7 (1979). Federal administrative authorities include the thirteen Cabinet departments, federal agencies within the departments, such as the Internal Revenue Service in the Department of Treasury, administrative agencies outside the departments such as the Environmental Protection Agency, and independent regulatory commissions, such as the Securities and Exchange Commission. *Id.*

[218] Permian Corp. v. United States, 665 F.2d 1214, 1221 (D.C. Cir. 1981).

[219] *See supra* notes 92-95 and accompanying text.

[220] *See* WIGMORE, *supra* note 2, § 2327, at 636.

[221] United States v. Aronoff, 466 F. Supp. 855, 862 (S.D.N.Y. 1979).

accepted common law rules allowing for a limited waiver of privilege in certain circumstances[222] are also based upon a notion of fairness.[223] Once disclosure of subject matter or partial disclosure of a privileged communication is made, fairness demands that the entire subject or the entire communication on that subject be revealed, although the waiver is limited to that extent.[224]

Since fairness is an important element in the doctrine of waiver, it can be argued that the standard of fairness should apply not only in terms of the scope of the information disclosed, but should also include fairness in the treatment of the parties involved in the disclosure of privileged information. The concept of recipient-limited waiver as used in *Diversified* cannot meet this standard of fairness because it discriminates against both who may use the limited waiver and to whom it can apply. First, limited waiver in this context has been granted so far exclusively to corporate clients. The courts favoring the recipient-limited waiver rule have promoted it as a means of encouraging corporate cooperation with government agencies.[225] Those courts have not made any suggestion that the recipient-limited waiver would apply to individual clients who might make disclosures of privileged information to government agencies, such as the Internal Revenue Service.[226] Yet all other rules regarding the attorney-client privilege and the doctrine of waiver apply with equal force to individual and corporate clients.[227] Fairness, an essential element in the doctrine of waiver,[228] would seem to dictate that any new context for limited waiver be available to all clients seeking protection under the attorney-client privilege.

Second, and more significantly, this new rule for recipient-limited waiver is unfair in the way in which waiver would be limited. Under the contexts for limited waiver already recognized by the common law, the limit upon waiver turns upon the extent to which the information has lost its claim of privilege.[229] Thus, anyone would be able to obtain those particular attorney-client communications for which privilege had been waived. Communications which were not affected by the limited disclosure would still be protected by privilege,

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[222] Waiver of the attorney-client privilege may be limited to subject matter of the confidential communication when that subject matter is revealed, when a partial disclosure is made, or when disclosure is made for negotiation purposes. *See supra* notes 101-06 and notes 111-18 and accompanying text.

[223] *See* WIGMORE, *supra* note 2, § 2327, at 636.

[224] *See supra* notes 101-10 and accompanying text.

[225] *See supra* notes 137-39 and accompanying text.

[226] An individual taxpayer, in the course of reporting his income to the Internal Revenue Service, cannot disclose privileged attorney-client communications, and still protect that information from further discovery by third parties by claiming the attorney-client privilege. *See, e.g.*, United States v. Cote, 456 F.2d 142, 145 (8th Cir. 1972) (court enforced IRS summonses against attorney and accountant where disclosure of individual clients' confidential information on amended tax returns effectively waived attorney-client privilege); United States v. Mierzwicki, 500 F. Supp. 1331, 1334-35 (D. Md. 1980).

[227] *See* Upjohn Co. v. United States, 449 U.S. 383, 390 (1981); Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 323 (7th Cir. 1963).

[228] WIGMORE, *supra* note 2, § 2327, at 636.

[229] *See, e.g.*, Weil v. Investment/Indicators, Research & Management, 647 F.2d 18, 25 (9th Cir. 1981); Lee Nat'l Corp. v. Deramus, 313 F. Supp. 224, 227 (D. Del. 1970).

since their confidentiality was not breached. In contrast, the rule for limited waiver from *Diversified* would shift the meaning of the extent of waiver. Instead of waiver being limited in terms of what information was disclosed, waiver would be limited in terms of *who* received the privileged information. The new context for limited waiver would allow a corporate client to waive privilege only in regard to the government agency that received the privileged information, yet in all other respects, the attorney-client privilege would remain intact for that information.[230] In this sense, the holding in *Diversified* actually involves a selective waiver, not a limited waiver. The recipient-limited waiver rule, if adopted, would permit a corporation to select to whom the waiver of privilege would apply, or in which proceedings, while allowing the corporation to continue to assert the privilege against other parties. The court in *Permian* was correct in stating that the attorney-client privilege was not designed for tactical employment, so that the client cannot be permitted to pick and choose among his opponents, waiving his privilege for some and invoking it against others.[231] Such a concept of limited waiver violates the maxim that the attorney-client privilege may be used as a shield, but may not be converted into a sword.[232] Since the rationale for the doctrine of waiver is focused upon fairness in the adversarial system,[233] a rule which would permit a corporate client to use limited waiver offensively against certain opposing parties[234] is inconsistent with the element of fairness.

Third, the concept of recipient-limited waiver from *Diversified* is inconsistent with the principles of the attorney-client privilege. The purpose of the privilege is to promote full and frank communication between the attorney and client, through the assurance of confidentiality.[235] As with all the common law privileges, the emphasis is on the relationship between the parties who are protected by the privilege. The *Permian* court correctly observed that the limited waiver rule articulated in *Diversified* has little to do with the confidential relationship between the attorney and client.[236] By comparison, the other circumstances for limited waiver under the common law do operate in the interest of the attorney-client relationship. For example, when a limited waiver is granted for negotiation purposes, the attorney-client relationship is still being promoted

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[230] *See, e.g.*, Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1978) (en banc).

[231] Permian Corp. v. United States, 665 F.2d 1214, 1221 (D.C. Cir. 1981).

[232] Byrnes v. IDS Realty Trust, 85 F.R.D. 679, 688-89 (S.D.N.Y. 1980); *see* Teachers Ins. & Annuity Ass'n of Am. v. Shamrock Broadcasting Co., 521 F. Supp. 638, 641 (S.D.N.Y. 1981); WIGMORE, *supra* note 2, § 2327, at 638.

[233] Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 926, 929 (N.D. Cal. 1976); Lee Nat'l Corp. v. Deramus, 313 F. Supp. 224, 227 (D. Del. 1970); WIGMORE, *supra* note 2, § 2327, at 636.

[234] *E.g.*, Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1978) (en banc) (use of limited waiver permitted corporate defendant to withhold certain material from plaintiff that had been turned over to SEC).

[235] Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

[236] Permian Corp. v. United States, 665 F.2d 1214, 1220-21 (D.C. Cir. 1981).

because the attorney is using the privileged information to argue on behalf of his client.[237] The attorney is thus fulfilling one function of his role within the attorney-client relationship.[238] Similarly, a limited waiver based on subject matter or partial disclosure, whereby the confidentiality of other communications between the attorney and client is still protected, continues to preserve the attorney-client relationship.[239] Under the concept of recipient-limited waiver from *Diversified*, however, a corporation could disclose an entire attorney-corporate client communication to the SEC or other government agency, and still be granted a limited waiver.[240] There seems little purpose, therefore, in establishing a confidential attorney-client relationship. While granting the limited waiver in those circumstances may not harm the attorney-client relationship, it does nothing to preserve or improve it.

Finally, the modified approach to limited waiver for corporate clients, suggested by the district court in *Teachers Insurance*,[241] is not an appropriate rule to adopt. The proposal of that court was that a disclosure to the SEC would not constitute a complete waiver of attorney-client privilege if the right to assert privilege in subsequent proceedings was specifically reserved at the time of disclosure.[242] The court undoubtedly was correct in stating that such a reservation of privilege would not be difficult to assert.[243] Nevertheless, the modified approach should be rejected for the same reasons as the broad concept of recipient-limited waiver from *Diversified*. The provision for a reservation of privilege when disclosure is made to the SEC appears to be grounded still upon a policy of encouraging cooperation with investigations conducted by government agencies.[244] The *Teachers Insurance* court noted that such a reservation would not curtail the investigative ability of the SEC.[245] The policy of encouraging cooperation with government agencies has already been rejected as an insufficient reason for adopting another context of limited waiver.[246] While *Teachers Insurance* involved disclosures to the SEC, presumably the reservation could apply to any government agency which was able to preserve confidentiality by stipulation or protective order.[247] Indeed, an agreement to reserve privilege could be made by a disclosing party with anyone to whom he desired to limit waiver. Such a provision for reserving privilege when disclosure is made

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[237] *See, e.g.*, Sylgab Steel & Wire Corp. v. Imoco-Gateway Corp., 62 F.R.D. 454, 458 (N.D. Ill. 1974), *aff'd*, 534 F.2d 330 (7th Cir. 1976).

[238] *See, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1979).

[239] *See, e.g.*, Goldman, Sachs & Co. v. Blondis, 412 F. Supp. 286 (N.D. Ill. 1976).

[240] Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1978) (en banc).

[241] 521 F. Supp. 638 (S.D.N.Y. 1981); *see supra* notes 169-78 and accompanying text.

[242] 521 F. Supp. at 644-45.

[243] *Id.* at 646.

[244] *See supra* notes 137-39 and accompanying text.

[245] 521 F. Supp. at 646.

[246] *See supra* notes 211-18 and accompanying text.

[247] *See* Teachers Ins. & Annuity Ass'n of Am. v. Shamrock Broadcasting Co., 521 F. Supp. 638, 646 (S.D.N.Y. 1981).

violates the element of fairness in the doctrine of waiver. It would still permit selective waiver, so that a party could choose in which proceedings, or to whom to disclose privileged information, yet prevent others from obtaining that same information. While the reservation of privilege does demonstrate an effort by the disclosing party to protect confidentiality, nevertheless, that confidentiality has been breached by the disclosure. The purpose of the attorney-client privilege, therefore, is no longer served,[248] and the reservation of privilege does nothing to promote the attorney-client relationship.[249] Since the modified approach providing for a reservation of privilege at the time of disclosure is inconsistent with the principles of the attorney-client privilege and waiver, it, too, should be rejected.

CONCLUSION

The circumstances under which the common law grants a limited waiver of the attorney-client privilege should not be extended to include a provision for limiting waiver by corporate clients making disclosures to government agencies. While the circuit courts currently are split on this issue, it seems likely that most courts will refuse to follow the decision of the Eighth Circuit in adopting a limited waiver. Only two district courts so far have been persuaded to follow that view, while two circuit courts have rejected such a concept of limited waiver. Furthermore, any context for limited waiver of the attorney-client privilege, other than those already generally recognized under the common law, should be rejected, unless it can meet several requirements. First, there should be strong policy reasons for adopting another form of limited waiver. Next, any rule of limited waiver which is adopted should be consistent with the element of fairness in the doctrine of waiver. Finally, that concept of limited waiver should serve the purpose of the attorney-client privilege — to protect and promote the confidential relationship between the attorney and client. Since the recipient-limited waiver articulated in *Diversified* satisfies none of these three basic requirements for a rule of limited waiver, courts should reject its application.

NANCY MAYER HUGHES

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[248] *See supra* notes 37-38 and accompanying text.

[249] *See supra* notes 236-40 and accompanying text.