

The SEC & Limited Waiver Of the Attorney-Client Privilege: Part II

BY ROY SIMON

May one of your corporate clients give government investigators the results of your law firm's privileged internal investigations into the client's possible violations of the federal securities laws without waiving the attorney-client privilege as to third parties?

Last month I addressed this question solely with respect to New York law. This month I examine the same question more generally, examining case law from New York and other jurisdictions in doctrinal and historical context. Broadly speaking, all jurisdictions fall into one of three broad categories:

- (1) selective waiver of the attorney-client privilege is permissible whether or not the government has entered into a confidentiality agreement with the disclosing party;
- (2) selective waiver is permissible only if the Government has entered into a confidentiality order with the disclosing party; and
- (3) selective waiver is not permissible under any situation, even if the government has entered into a confidentiality agreement with the disclosing party.

The origins of selective waiver doctrine

The earliest case to discuss the doctrine of selective waiver of the attorney-client privilege was *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir.1978) (en banc). Diversified sold copper. During some proxy fight litigation, it came to light that Diversified may have maintained a "slush fund" that was used to bribe various purchasing agents. After the proxy fight litigation ended, Diversified's Board hired Wilmer, Cutler & Pickering ("Wilmer") to investigate the alleged slush fund. Wilmer interviewed many corporate employees and wrote a lengthy report to the Board stating its conclusions. Independently, the slush fund attracted the interest of the SEC, which investigated and eventually sued Diversified. During its investigation, the SEC subpoenaed the Wilmer report, and Diversified voluntarily surrendered it to the SEC, apparently without obtaining the SEC's agreement to keep it confidential from third parties. (The Eighth Circuit's opinion says almost nothing about the circumstances under which Diversified gave the report to the SEC, and the district court's opinion is unpublished.)

At some point, a copper buyer named Weatherhead sued Diversified, alleging that Diversified had bribed Weatherhead employees to buy tons of inferior copper. During discovery, Weatherhead sought the Wilmer report that Diversified had given to the SEC. The district court held that the report was not protected by the attorney-client privilege, so it did not reach the waiver question. A panel of the Eighth Circuit affirmed, likewise not reaching the waiver question but hinting in a footnote how it would rule: "We would be reluctant to hold that voluntary surrender of privileged material to a governmental agency in obedience to an agency subpoena constitutes a waiver of the privilege for all purposes, including its use in subsequent private litigation in which the material is sought to be used against the party which yielded it to the agency."

The Eighth Circuit then heard the matter en banc and reversed the panel opinion, holding that the Wilmer report was protected by the attorney-client privilege. That forced the court to confront the waiver issue. The court ruled in favor of *Diversified*, stating:

As *Diversified* disclosed these documents in a separate and nonpublic SEC investigation, we conclude that only a limited waiver of the privilege occurred. To hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers.

With little analysis, therefore, the Eighth Circuit laid the cornerstone in the edifice of selective waiver doctrine.

In the next dozen years or so, several district courts followed the approach taken in *Diversified*, holding that disclosures to government agencies (typically to the SEC as part of a voluntary disclosure program) do not waive the attorney-client privilege. In *In re Grand Jury Subpoena Dated July 13, 1979*, 478 F. Supp. 368, 373 (D.Wis. 1979), for example, Miller Brewing Company had responded to an SEC investigation into Miller's questionable "slush fund" payments during the early 1970s by hiring Quarles & Brady to conduct an internal investigation, then releasing the Quarles & Brady report to the SEC. Stating that cooperation with the SEC "should be encouraged," the court held that Miller had not waived the attorney-client privilege as to the law firm's notes underlying the report by releasing the report to the SEC, the IRS, and a New York grand jury. The court reasoned that "voluntary cooperation with the Securities and Exchange Commission or with an Internal Revenue Service or grand jury investigation would be substantially curtailed if such cooperation were deemed to be a waiver of a corporation's attorney-client privilege."

In *In re LTV Securities Litigation*, 89 F.R.D. 595, 605 (N.D.Tex.1981), the court found that LTV did not intend to waive its attorney-client privilege with respect to the sub-group of documents selected by counsel for internal discussion with LTV management, and concluded that "LTV's production of numerous pieces of the jigsaw puzzle to the SEC is not inconsistent with its current claim of privilege with regards to the puzzle's solution." In *Byrnes v. IDS Realty Trust*, 85 F.R.D. 679, 689 (S.D.N.Y.1980), a case devoted primarily to analyzing the *Diversified* opinion, the court directly followed *Diversified* and held that "voluntary submissions to agencies in separate, private proceedings should be a waiver only as to that proceeding."

However, no United States Circuit Court of Appeals has followed the Eighth Circuit's approach in *Diversified*. All other circuits have demanded something more.

The need for a confidentiality agreement

The first case to suggest that the *Diversified* approach was not stringent enough was *Teachers Insurance & Annuity Association of America v. Shamrock Broadcasting Co.*, 521 F. Supp. 638 (S.D.N.Y.1981). The SEC, investigating whether Shamrock had entered into a series of questionable loans and debentures, subpoenaed numerous documents, stating in the subpoena that the SEC intended to use the documents "principally for the purpose of investigating possible violations of the federal securities laws," but might also use them "[i]n any proceeding where the Federal securities laws are in issue or in which the Commission or past or present members of its staff is a party or otherwise involved in an official

capacity." Shamrock produced the relevant documents without entering into any confidentiality agreement with the SEC, and without even challenging the subpoena on grounds of privilege. Eventually, the SEC obtained a consent judgment in which Shamrock acknowledged violating the securities laws.

TIAA, which owned shares of Shamrock, then sought to obtain the same information that Shamrock had disclosed to the SEC. After reviewing the case law, the court held that "disclosure to the SEC should be deemed to be a complete waiver of the attorney-client privilege *unless the right to assert the privilege in subsequent proceedings is specifically reserved at the time the disclosure is made.*" (Emphasis added.)

Conversely, the court said, no waiver would occur "if the documents were produced to the SEC under a protective order, stipulation or other express reservation of the producing party's claim of privilege as to the material disclosed." Such an agreement would "make clear that ... the disclosing party had made some effort to preserve the privacy of the privileged communication, rather than having engaged in abuse of the privilege by first making a knowing decision to waive the rule's protection and then seeking to retract that decision in subsequent litigation." Another New York district court decision, *Schnell v. Schnell*, 550 F. Supp. 650 (S.D.N.Y. 1982), adopted the analysis in Shamrock, finding that disclosures to the SEC did not waive the attorney-client privilege.

The Second Circuit finally spoke in *In re Steinhardt Partners L.P.*, 9 F.3d 230 (2d Cir. 1993). As detailed in last month's article in this column, the case addressed a situation in which a company had produced a privileged memorandum to the SEC during an SEC investigation into irregularities in the treasuries market. The company had marked the memorandum "FOIA Confidential Treatment Requested," but had not reached any confidentiality agreement with the SEC before turning over the privileged materials. Rejecting the Eighth Circuit's liberal approach in *Diversified*, and generally condemning the doctrine of selective waiver, the court held that Steinhardt's disclosures had waived the attorney-client privilege. But the court left the door ajar by declining to "adopt a per se rule that all voluntary disclosures to the government" waive the privilege. Rather, the court said, analyzing possible waivers of privilege during governmental investigations "must be done on a case-by-case basis" because "a rigid rule would fail to anticipate situations in which the disclosing party and the government may share a common interest in developing legal theories and analyzing information, or situations in which the SEC and the disclosing party have entered into an explicit agreement that the SEC will maintain the confidentiality of the disclosed materials." (Emphasis added.)

The First and Seventh Circuits and the District of Colorado similarly issued opinions leaving the door open to selective waiver when a company conditioned production of privileged documents on the presence of a confidentiality agreement. In *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122 (7th Cir.1997), Chief Judge Posner remarked that courts rejecting the possibility of selective waiver seemed to believe that the company producing the privileged information "should have been more careful, as by obtaining an agreement by the person to whom they made the disclosure not to spread it further." In *United States v. Billmyer*, 57 F.3d 31 (1st Cir.1995), the First Circuit stated:

If there were ever an argument for limited waiver, it might well depend importantly on just what had been disclosed to the government and on what understandings. Without intending to preclude such an argument in a future case, we think that it is enough in this one to say that no such claim of limited waiver has been argued to us.

Finally, in *In re M & L Business Machine Company, Inc. v. Bank of Boulder*, 161 B.R. 689, 695 (D.Colo. 1993), a matter arising out of an adversary proceeding in the Bankruptcy Court, the court adopted the Shamrock approach as "a compromise position." When a bankrupt company named M & L Business Machine Company was under criminal investigation in 1991, the Bank of Boulder, which handled some of M & L's accounts, gave the United States Attorney certain information about M & L on the condition (reflected in a Letter Agreement) that the U.S. Attorney and the grand jury would hold the information in confidence. The bank obtained no benefit for itself by providing this information. Later in 1991, in an effort to recover preferential transfers, the bankruptcy trustee for M & L attempted to subpoena all records that had been provided to the grand jury, including the records supplied by the Bank of Boulder. The bank moved to quash, arguing that its production of records to the U.S. Attorney during the criminal investigation of M & L had not waived the attorney-client privilege as to anyone except the U.S. Attorney and the grand jury. The court agreed, concluding that the Shamrock view "strives to balance the policy goal of encouraging cooperation with the government ... with the strict requirement of confidentiality" usually mandated by the attorney-client privilege. The court noted the efforts that the bank had taken to ensure the continuing confidentiality of the information it had disclosed, and observed that the bank had not disclosed the information "for the purpose of obtaining some benefit for itself." The court believed that this distinguished the M & L Business Machine case from the numerous cases involving the SEC's voluntary disclosure program, in which disclosure of privileged information was motivated by the company's hope that the SEC would return the favor by giving the company more favorable treatment.

Most courts reject selective waiver

However, the vast majority of courts have rejected the doctrine of selective waiver. The District of Columbia Circuit long ago rejected it in *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981). In that case, Occidental Petroleum Corporation (which wholly owned Permian Corporation) had proposed to exchange shares of Occidental for shares of Mead Corporation. Mead filed suit to enjoin the exchange. Separately, the SEC expressed concern about the adequacy of Occidental's registration statement for the proposed exchange offer. Occidental, of course, wanted the SEC to approve the registration statement, so it made some 1.2 million pages of documents available to the SEC. This was too many documents for the SEC to handle, so the SEC staff asked Occidental for permission "to secure the confidential Occidental information directly from Mead which had organized them around its adversarial issues and claims." Occidental had delivered those documents to Mead under a strict confidentiality agreement, but the SEC made it clear that access to the Occidental documents in Mead's possession would greatly facilitate the SEC's processing of Occidental's registration statement. Conversely, without that access, considerable delay could result. The district court found that, to avoid this delay, Occidental's counsel had negotiated with the SEC staff and Mead a procedure whereby the SEC would obtain confidential documents directly and expeditiously from Mead. Moreover, the SEC would stamp each document with a legend stating:

This Document constitutes a Trade Secret and/or Commercial or Financial Information which is Privileged and Confidential and may not be Released or Disclosed.

Pursuant to procedures adopted by Occidental & the Securities & Exchange Commission, this Document may not be disclosed by the Commission to any third-party unless prior notice of such proposed disclosure has been given to Occidental.

In addition, after an exchange of letters between Mead, the SEC, and Occidental, the SEC agreed not to "deliver any of the [Occidental] Documents to any person other than a member of the Commission or the Staff or any other government agencies, offices or bodies or to the Congress for a reasonable period of time after notice to Occidental of the Staff's intention to deliver the Documents to such person." The letters evidencing Occidental's understandings with Mead and the SEC did not explicitly state that the SEC was forbidden to release confidential Occidental information to other government agencies, but the district court found that the restriction on disclosure to other government agencies "was an essential element of the discussions between the SEC staff and Occidental." Accordingly, the district court held that the documents written by outside counsel for Permian (Occidental's subsidiary) were privileged and that the privilege had not been waived. The district court also issued an injunction prohibiting the SEC from disclosing the documents.

On appeal, the United States did not challenge the privileged character of the documents, but it argued that the attorney-client privilege had been waived. In an opinion written by the legendary Judge Abner Mikva, the D.C. Circuit agreed that disclosure to the SEC had waived the attorney-client privilege.

The Third Circuit has joined the same chorus. In *Westinghouse Electric Corp. v. Republic of the Philippines*, 951F.2d 1414 (3d Cir. 1991), Westinghouse showed SEC officials a privileged written report regarding an internal investigation of Westinghouse by Kirkland & Ellis concerning alleged misconduct by Westinghouse in connection with a Philippine nuclear plant. Kirkland & Ellis augmented the written report with an oral report to the SEC. At the time, SEC regulations provided that information or documents obtained by the SEC "in the course of any investigation or examination, unless made a matter of public record, shall be deemed non-public," and that SEC employees and officers would keep the documents confidential unless disclosure was specifically authorized. Some years later, in response to a grand jury subpoena, Westinghouse produced the same documents to the federal grand jury - but only after Westinghouse had entered into a confidentiality agreement with the United States Department of Justice ("DOJ"). The agreement, which was subsequently memorialized in a stipulated court order entered in the district court for the Western District of Pennsylvania, provided that the DOJ could review (but not keep copies of) attorney-client privileged materials in the files of Kirkland & Ellis, that the information contained therein would not be disclosed to anyone outside of the DOJ, and that such review of the Kirkland & Ellis documents would not constitute a waiver of Westinghouse's attorney-client privilege. Nevertheless, the Third Circuit decided in *Westinghouse* that a party that discloses information protected by the attorney-client privilege in order to cooperate with a government agency that is investigating it "waives the privilege ...completely, thereby exposing the documents to civil discovery in litigation between the discloser and a third party."

The Sixth Circuit, in a recent scholarly opinion, has likewise weighed in against selective disclosure. In *In Re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289 (6th Cir. 2002), Columbia/HCA had disclosed certain information to the DOJ and to the Health Care Finance Administration, but had "expressly reserved the right to assert attorney-client privilege" pursuant to the confidentiality agreement it had negotiated with the DOJ. The Sixth Circuit gave no weight to the confidentiality agreement. "After due consideration," the court said, "we reject the concept of selective waiver, in any of its various forms." The court gave three reasons.

First, the court said that the "uninhibited approach adopted out of whole cloth by the *Diversified* court has little, if any, relation to fostering frank communication between a client and his or her attorney," which is

the purpose of the attorney-client privilege. Second, any form of selective waiver, even conditioned on a confidentiality agreement, transforms the attorney-client privilege into "merely another brush on an attorney's palette, utilized and manipulated to gain tactical or strategic advantage." Third, the attorney-client privilege is a matter of common law right, "not a creature of contract, arranged between parties to suit the whim of the moment." Allowing selective waiver "certainly protects the expectations of the parties to the confidentiality agreement," but it does little to serve the "public ends" of adequate legal representation that the attorney-client privilege is designed to protect.

The Sixth Circuit acknowledged that by waiving privilege as to an investigative arm of the government, a client furthers the "truth-finding process," enables the government (and thus the public) to save considerable time and money when investigating crimes and civil frauds, and increases the likelihood that corporations will engage in self-policing. But the Sixth Circuit said this argument had no logical end because private litigants also serve the truth-finding process and vindicate the public interest. Moreover, the Sixth Circuit questioned whether the government should "assist in obfuscating the 'truth-finding process' by entering into such confidentiality agreements at all. The investigatory agencies of the Government should act to bring to light illegal activities, not to assist wrongdoers in concealing the information from the public domain." And just as the attorney-client privilege itself provides certainty to litigants that information communicated to the litigant's own attorney will not be disclosed, "rejection of selective waiver provides further certainty that waiver of the privilege ensures that the information will be disclosed."

Even the First Circuit, which once suggested that it would recognize the possibility of selective waiver under certain circumstances, has moved away from that position. In *United States v. Massachusetts Institute of Technology*, 129 F.3d 681 (1st Cir. 1997), the court admitted that the arguments against selective waiver were "far from overwhelming," but said that "the general principle that disclosure normally negates the privilege is worth maintaining. To maintain it here makes the law more predictable and certainly eases its administration."

What about selective waiver of work product?

Despite the hostility of nearly every federal circuit court to the doctrine of selective waiver of the attorney-client privilege, advocates of selective waiver have not lost their audience with respect to work product. Waiver of work product protection entails different considerations from waiver of the attorney-client privilege, and waiver of the privilege does not necessarily waive work product protection. In *Permian Corp. v. United States*, *supra*, the D.C. Circuit distinguished the two privileges as follows:

The attorney-client privilege exists to protect confidential communications, to assure the client that any statements he makes in seeking legal advice will be kept strictly confidential between him and his attorney; in effect, to protect the attorney-client relationship. Any voluntary disclosure by the holder of such a privilege is inconsistent with the confidential relationship and thus waives the privilege.

By contrast, the work product privilege does not exist to protect a confidential relationship, but rather to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of the opponent.... A disclosure made in the pursuit of such trial preparation, and not inconsistent with maintaining secrecy against opponents, should be allowed without waiver of the privilege.

The Permian court therefore concluded that "while the mere showing of a voluntary disclosure to a third person will generally suffice to show waiver of the attorney-client privilege, it should not suffice in itself for waiver of the work product privilege."

State courts have also distinguished between waiver of the attorney-client privilege and waiver of the work product protection. In the past year, at least two state courts have ruled that the disclosure of work product materials to the SEC does not necessarily waive work product protection as to third parties. The powerful Delaware Court of Chancery recognized selective waiver of work product in *Saito v. McKesson HBOC, Inc.*, 2002 WL 31657622 (Del. Chancery 2002). The Georgia Court of Appeals (Georgia's intermediate appellate court) recognized selective waiver of work product in *McKesson HBOC, Inc. v. Adler*, 562 S.E.2d 809 (Ga. App. 2002).

Some courts, however, have flatly rejected selective waiver in the work product context. For example, in *Westinghouse, supra*, 951 F.2d at 1428, the Third Circuit was "persuaded that the standard for waiving the work-product doctrine should be no more stringent than the standard for waiving the attorney-client privilege." The court therefore held that Westinghouse's disclosure of work product to the SEC and the DOJ "waived the work-product doctrine as against all other adversaries." The Sixth Circuit painted with an even broader brush. Finding "no compelling reason for differentiating waiver of work product from waiver of attorney-client privilege," the Sixth Circuit stated: "Many of the reasons for disallowing selective waiver in the attorney-client privilege context also apply to the work product doctrine." *In Re Columbia/HCA Healthcare Corp. Billing Practices Litigation, supra*, 293 F.3d at 307.

As this brief sketch shows, courts have not yet reached a consensus regarding selective waiver of work product. The disagreements among different courts about selective waiver of work product protection should provide plenty of material for another article -- but that article will have to await another day.

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