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EVIDENCE—PRIVILEGE LAW—HOW ARKANSAS’S NEW RULE OF EVIDENCE CODIFIES “SELECTIVE WAIVER” OF THE ATTORNEY-CLIENT PRIVILEGE AND WORK-PRODUCT PROTECTION AND AN ARGUMENT FOR A MORE MODERATE APPROACH

I. INTRODUCTION

When a corporation waives its attorney-client privilege to cooperate with a government investigation into possible wrongdoing, is it thereby exposed to litigation from third parties who would seek to use the disclosed information in a private lawsuit? Bank of America recently took this risk when it disclosed privileged documents to the Securities and Exchange Commission (SEC) in a federal lawsuit related to the bank’s merger with Merrill Lynch. One of the SEC’s allegations was that the bank’s leaders knew about large losses at Merrill Lynch and sought to prove that the corporation wrongfully withheld this information from its shareholders.¹

Bank of America gave the SEC access to documents prepared by its counsel relating to the Merrill Lynch merger, expressing a desire to “fully cooperate with all of the inquiries[,]” and asserting that it had “nothing to hide.”² Many corporate-law commentators speculated that the bank hoped its disclosure would fall under the protection of the newly-enacted Federal Rule of Evidence 502, concerning waiver of the attorney-client privilege. One analyst, however, alleged that the bank misread the new rule by assuming that, with a judge’s consent, it could waive the privilege to the SEC while continuing to maintain the privilege against third parties in civil cases—some fifty-eight of which had been filed against the bank regarding the matter at the time of disclosure.³

The bank seems to have assumed that Federal Rule 502(d) allowed it to “selectively waive” its privilege to the SEC while still retaining the privilege against discovery by third parties. This might not, however, be the case. Indeed, one of the drafters of Federal Rule 502 has pointed out that the bank’s attempt at selective waiver does not comport with 502(d).⁴ Notwithstanding the new Federal Rule 502, voluntary disclosure of information protected by attorney-client privilege or attorney work-product protection

1. Zach Lowe, *Did BofA Mess Up Its Privilege Waiver?*, THE AM. LAW DAILY (Oct. 17, 2009), <http://amlawdaily.typepad.com/amlawdaily/2009/10/did-bofa-screw-up-its-privilege-waiver.html>.

2. Marie Leone, *Bank of America Waives Attorney-Client Privilege*, CFO.COM (Oct. 13, 2009), <http://www.cfo.com/article.cfm/14447248>.

3. Zach Lowe, *Parsing the BofA Privilege Waiver and its [sic] Impact on Wachtell*, SHEARMAN, THE AM. LAW DAILY (Oct. 15, 2009), <http://amlawdaily.typepad.com/amlawdaily/2009/10/parsing-the-bofa-privilege.html>.

4. Gregory P. Joseph, *Bank of America Privilege Waiver Order—Not Authorized by Federal Rule of Evidence 502*, <http://www.josephnyc.com/blog/?blogID=1129> (last visited Dec. 4, 2009).

results in a “general waiver” of that privilege in the majority of federal jurisdictions.⁵ After any waiver of privileged or protected information, the disclosing party may not seek to suppress the information in subsequent litigation.⁶

State rules of evidence usually lack provisions for situations like this. The state of Arkansas, however, does allow clients to selectively disclose privileged material to the government while still upholding the privilege with respect to third parties. Arkansas recently established the doctrine of “selective waiver” in a new provision in its Rules of Evidence, whereby privileged information disclosed to the government retains its protection, despite the breach of strict confidentiality.⁷ Arkansas has little case law on the subject, and the state is the first in the nation to introduce the concept into its rules. The Eighth Circuit, in which Arkansas lies, has embraced selective waiver in its case law,⁸ yet even among that circuit’s states, Arkansas is the only one that has made the doctrine part of its state rules of evidence.

This note discusses why both general and specific waiver are problematic and argues for a more moderate approach. There are compelling policy considerations for allowing corporations to disclose privileged information to the government without fear of legal reprisal from third parties, but the policy implications for the attorney-client privilege are critical enough that Arkansas should have taken less dramatic action. Instead, the state should have endorsed selective waiver only where the waiving party and the investigating agency have executed an agreement to maintain the confidentiality of the information.

Part two of this note discusses Arkansas’s new rule and contrasts it with federal case law, which is split on the effects of waiver of the attorney-client privilege and work-product protection.⁹ Part three examines the dilemma facing corporate clients and their counsel, placing particular emphasis on the internal policies of the SEC during an investigation into alleged corporate wrongdoing.¹⁰ Part four compares the policy arguments behind both selective waiver and the majority’s general waiver rule.¹¹ Part five concludes the note by advocating for the approach suggested by the Second

5. Michael H. Dore, *A Matter of Fairness: The Need for a New Look at Selective Waiver in SEC Investigations*, 89 MARQ. L. REV. 761, 761 (2006) (“[C]ourts—including the First, Second, Third, Fourth, Sixth, Seventh, and D.C. Circuits—have rejected selective waiver, holding that waiver as to one generally is waiver as to all.”).

6. *Id.*

7. ARK. R. EVID. 502(f).

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

9. See discussion *infra* Part II.

10. See discussion *infra* Part III.

11. See discussion *infra* Part IV.

Circuit's dicta in *In re Steinhardt Partners*,¹² whereby selective waiver would exist only pursuant to the execution of a confidentiality agreement between the parties to the initial waiver.¹³

II. ARKANSAS'S NEW RULE OF EVIDENCE AND ITS ORIGIN IN FEDERAL CASE LAW

It is perhaps remarkable that Arkansas chose to amend its state rules of evidence to introduce the controversial doctrine of selective waiver, as the state has little case law pertaining to the issue. The new rule instead seems influenced by the Eighth Circuit's minority position in the current federal inter-circuit split.¹⁴ To understand the concepts behind general and selective waiver doctrines, one must consequently examine waiver under federal law, which normally involves investigations by the SEC.

The Federal Rules of Evidence do not purport to detail the actual scope of the attorney-client privilege and attorney work-product protection. Though the newly amended Federal Rule 502 outlines some procedural rules regarding the concepts, all privileges at the federal level remain "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."¹⁵ Accordingly, the case law of the various circuits shapes federal privilege waiver law, and this case law is split.¹⁶ While the Eighth Circuit has specifically embraced the concept of selective waiver, the majority of federal jurisdictions decline to accept the doctrine and commonly hold that any waiver is inconsistent with further assertion of the privilege.¹⁷

A typical case that reflects the majority "general waiver" approach is the District of Columbia Circuit's decision in *Permian Corporation v. United States*.¹⁸ Appellee Permian was a subsidiary of Occidental Corporation, a petroleum company involved in an SEC investigation related to an exchange of shares with another corporation.¹⁹ The SEC had not alleged any wrongdoing by either party to this transaction, yet Permian requested the SEC's approval so that the parties could complete the exchange more rapid-

12. 9 F.3d 230 (2d Cir. 1993).

13. See discussion *infra* Part V.

14. *In re Ark. R. Civ. P. 4 and 26*; Admin. Order No. 20; and R. Evid. 502, 372 Ark. App'x 592, ____ (2008) (per curiam).

15. FED. R. EVID. 501.

16. Dore, *supra* note 5, at 761.

17. Douglas R. Richmond, *The Case Against Selective Waiver of the Attorney-Client Privilege and Work-Product Immunity*, 30 AM. J. TRIAL ADVOC. 253, 255 (2006) ("Courts have generally rejected selective waiver.").

18. 665 F.2d 1214 (D.C. Cir. 1981).

19. *Id.* at 1215-16.

ly.²⁰ In response, the SEC asked for certain documents to aid them in the voluntary investigation—corporate documents falling variously under the attorney-client privilege and work-product protection.²¹

The SEC agreed to keep the documents confidential from any third party, including any other governmental organizations that would seek to discover them.²² The Department of Energy, conducting its own investigation to determine if Permian was in compliance with gas pricing regulations, sought access to the same documents Permian had shared with the SEC.²³ Permian balked, and sought an injunction in federal district court to bar the SEC from releasing the documents to the Department of Energy.²⁴ The District Court enjoined release of the documents, but the D.C. Circuit Court of Appeals overturned that injunction, firmly rejecting Permian's argument that the confidentiality agreement with the SEC allowed them to continue to assert the privilege against third parties.²⁵ Stating that "[a]ny voluntary disclosure by the holder of such a privilege is inconsistent with the confidential relationship and thus waives the privilege," the court declined to hold that Permian could "selectively" waive the privilege.²⁶

Permian is typical of federal waiver cases. The only federal jurisdiction to explicitly disagree with this approach and embrace the doctrine of selective waiver is the Eighth Circuit.²⁷ In *Diversified Industries v. Meredith*, the Eighth Circuit Court of Appeals held that documents "disclosed . . . in a separate and nonpublic SEC investigation" were disclosed under a "limited waiver of the privilege."²⁸

In *Diversified*, a corporate plaintiff—Weatherhead—brought suit against Diversified Industries, Inc., alleging a conspiracy to bribe Weatherhead employees to purchase "large amounts of inferior copper" from Diversified.²⁹ Diversified had hired outside counsel to conduct an internal investigation into the matter, and had disclosed the results of this investigation to the SEC.³⁰ Weatherhead sought to discover the material in the report that was disclosed to the SEC.³¹ The court of appeals initially found that when Diversified volunteered these materials to the SEC, the corporation effected a complete waiver of both the attorney-client privilege and work-product

20. *Id.* at 1215.

21. *Id.* at 1216.

22. *Id.*

23. *Id.* at 1217.

24. *Permian Corp. v. United States*, 665 F.2d 1214, 1217 (D.C. Cir. 1981).

25. *Id.* at 1222.

26. *Id.* at 1219 (citing *United States v. AT&T*, 642 F.2d 1285, 1299 (D.C. Cir. 1980)).

27. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (1978) (en banc).

28. *Id.* at 611.

29. *Id.* at 600.

30. *Id.* at 600-01.

31. *Id.* at 600.

protection.³² Upon an en banc rehearing, however, the court reversed its initial stance.³³ Delving more deeply into the policies behind the attorney-client privilege and again noting that the SEC investigation was “nonpublic,” the court held that the documents sought by Weatherhead were still protected against discovery in the Weatherhead litigation.³⁴

One federal court has embraced, at least in dicta, a third approach. The Court of Appeals for the Second Circuit, in *In re Steinhardt Partners, L.P.*, refused to adopt either the majority’s general waiver or the Eighth Circuit’s selective waiver rules.³⁵ Though the actual disposition of the case was similar to a majority general waiver decision, commentators have treated the decision as a third alternative to answering the waiver question.³⁶ A corporate defendant, Steinhardt Partners, had voluntarily disclosed protected attorney work-product to the SEC.³⁷ Steinhardt sought to assert the protection for the same documents in a subsequent class action lawsuit.³⁸ The Second Circuit Court of Appeals held that the disclosure to the SEC constituted a voluntary waiver, characterizing Steinhardt’s litigation strategy as little more than “another brush on an attorney’s palette, utilized and manipulated to gain tactical or strategic advantage.”³⁹ Despite the disposition of the case at bar, the court noted disapproval of the majority’s general waiver approach.⁴⁰ Asserting that “a rigid rule would fail to anticipate 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,” the court declined to adopt a “*per se* rule that all voluntary disclosures to the government waive work product protection.”⁴¹

At the state level, few jurisdictions have defined the scope of privilege law in rules of evidence. Arkansas, however, is an exception. Arkansas Rule of Evidence 502 states that “[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client [between the client or his representative and the attor-

32. *Id.* at 604.

33. *Diversified*, 572 F.2d at 611.

34. *Id.*

35. 9 F.3d 230 (2d Cir. 1993).

36. Jody E. Okrzesik, Note, *Selective Waiver: Should the Government Be Privy to Privileged Information Without Waiving the Attorney-Client Privilege and Work Product Doctrine?*, 34 U. MEM. L. REV. 115, 145–46 (2003) (“This implies that the Second Circuit may recognize selective waiver with a confidentiality agreement, especially if the parties could show that the relationship is non-adversarial.”).

37. *Steinhardt*, 9 F.3d at 231.

38. *Id.*

39. *Id.* at 235.

40. *Id.* at 236.

41. *Id.*

ney and/or his representative].”⁴² Arkansas’s rule also codifies the doctrine of “selective waiver,” stating that

[d]isclosure of a communication or information covered by the attorney-client privilege or the work-product doctrine to a governmental office or agency in the exercise of its regulatory, investigative, or enforcement authority does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities.⁴³

The newly amended rule has not been particularly controversial at a local level, as it merely echoed the Eighth Circuit’s selective waiver rule in *Diversified*. Upon approving the Arkansas Supreme Court Committee on Civil Practice’s proposed rule, which became Arkansas Rule of Evidence 502, the Arkansas Supreme Court acknowledged the rule’s codification of *Diversified*’s selective waiver approach.⁴⁴ The court also noted that the Federal Advisory Committee on Evidence had proposed a similar codification of this minority approach to the Federal Rules.⁴⁵ This seems to have reflected a misguided belief that the minority approach of *Diversified* was soon to become federal law.

The proposed version of Federal Rule 502 that would have allowed selective waiver, however, proved too controversial at a national level to make it into the federal rules.⁴⁶ Though the currently enacted version of Federal Rule 502 deals with *inadvertent* disclosure and the validity of an intentional waiver in a state proceeding for federal trial purposes, the rule as enacted does nothing to codify either general or selective waiver. The United States Judicial Conference’s Advisory Committee on Evidence Rules agrees that selective waiver should be introduced into the federal rules, asserting that, “[a] rule protecting selective waiver in these circumstances furthers the important policy of cooperation with government agencies, and maximizes the effectiveness and efficiency of government investigations.”⁴⁷ After the fail-

42. ARK. R. EVID. 502(b).

43. ARK. R. EVID. 502(f).

44. *In re* Ark. R. Civ. P. 4 and 26; Admin. Order No. 20; and R. Evid. 502, 372 Ark. App’x 592, ____ (2008) (per curiam).

45. *Id.* at 8.

46. *Advisory Committee Modifies Proposed Evidence Rule 502 in Light of Public Comment Received, and Recommends Approval by Standing Committee* (May 16, 2007), <http://www.ediscoverylaw.com/2007/05/articles/federal-rules-amendments/advisory-committee-modifies-proposed-evidence-rule-502-in-light-of-public-comment-received-and-recommends-approval-by-standing-committee/>.

47. Letter from Jerry E. Smith, Chair Advisory Comm. on Evidence Rules, to Hon. David F. Levi, Chair Standing Comm. on Rules of Practice and Procedure, Rep. of the Advisory Comm. on Evidence Rules, May 15, 2006 (Rev. June 30, 2006) (on file with author).

ure of this proposed amendment, there is little possibility that the federal circuit split will change in the near future.

III. THE DILEMMA FACING CORPORATIONS IN A SECURITIES AND EXCHANGE COMMISSION INVESTIGATION

A corporation's motives in disclosing privileged information are important in order to understand the implications of waiver; so, a consideration of what actually happens in a typical government investigation is informative. Though Bank of America's recent waiver dilemma occurred during actual litigation with the SEC, most case law on the topic involves investigations conducted prior to the filing of actual criminal charges. The SEC, working in tandem with the Department of Justice (DOJ), investigates corporations accused or suspected of wrongdoing and determines whether to bring federal criminal charges.⁴⁸ Depending on whom one asks in the corporate community, one gets a varied picture of the actual machinations of an SEC investigation. The history of the administrative procedures that lawyers and government investigators use in these investigations demonstrates that the government is not blind to the implications that waiver has on continued assertions of the attorney-client privilege and work-product protection for subsequent litigation.⁴⁹

Of course, even without government involvement, corporations often conduct internal investigations when circumstances indicate wrongdoing or failure to comply with the law. These investigations allow the corporation to assess its own criminal and civil liability, remedy the problem, and prepare for potential litigation from the government or private parties.⁵⁰ In an SEC investigation, the Commission often seeks access to the results of these internal corporate investigations to help determine criminal liability.⁵¹

These investigations typically begin when the SEC learns of a possible violation of federal securities law.⁵² At this point, officials choose whether to conduct an informal inquiry that involves a broad exploration of the background information and circumstances of the issues warranting investigation.⁵³ Investigators often use this stage in the investigation to informally

48. See generally Ralph C. Ferrara & Philip S. Khinda, *SEC Enforcement Proceedings: Strategic Considerations for When the Agency Comes Calling*, 51 ADMIN. L. REV. 1143 (1999) (outlining the general process of an SEC investigation).

49. *SEC Review of Enforcement Remedies, Proposed Legislation on Administrative Proceedings, FOIA Privilege*, 16 SEC. REG. & L. REP. (BNA) 456, 461 (Mar. 2, 1984) (expressing the SEC's concern that investigated corporations withhold privileged information in government investigations due to fear of potential civil litigation).

50. Richmond, *supra* note 17, at 253-54.

51. *Id.*

52. Ferrara & Khinda, *supra* note 48, at 1148 (citing 17 C.F.R. § 202.5(a) (1999)).

53. *Id.*

interview relevant agents and employees of the corporation.⁵⁴ This is the SEC's first opportunity to contact the corporation's general counsel and, accordingly, its first opportunity to request a privilege waiver.⁵⁵ Hesitance by the general counsel to respond to a document request issued pursuant to one of these informal inquiries may result in an escalation of this process to a formal inquiry.⁵⁶ Consequently, while cooperation with the government at this stage in the game is voluntary, cooperation could mean the difference between termination of the investigation or escalation to more formal and adversarial scrutiny from the SEC.⁵⁷

Once the SEC makes the decision to begin a formal investigation—a power delegated to it under section 21(a) of the Securities Exchange Act—the agency's full subpoena power comes into play.⁵⁸ As the DOJ controls who is prosecuted, the Office of the Attorney General occasionally issues formal memoranda outlining the procedures whereby the SEC demands or requests privileged information.⁵⁹ Often, congressional action or other current events cause the DOJ to publicly amend these policies.

For example, in the late 1990s, then Deputy Attorney General (and current Attorney General in the Obama administration) Eric Holder, Jr. issued a memorandum now commonly known as the "Holder Memo."⁶⁰ The Holder Memo, while not sanctioning a demand of information protected by the privilege, nevertheless listed waiver of the privilege as a factor the prosecutor could consider when deciding whether to bring formal charges against a corporation.⁶¹

In 2006, Deputy Attorney General Paul McNulty issued the "McNulty Memo," which changed the policies of the "Holder Memo" to some extent.⁶² McNulty's new procedures dictated that the DOJ could no longer request a waiver of privileged information without showing "a legitimate need for the privileged information to fulfill [the Department's] law enforcement obligations."⁶³ This determination would depend on several factors, including "the collateral consequences to a corporation of a waiver"—

54. *Id.* at 1148–49.

55. *Id.*

56. *Id.*

57. *Id.*

58. Ferrara & Khinda, *supra* note 48, at 1148–49, 1154–55.

59. See, e.g., Memorandum from Deputy Att'y Gen. Paul J. McNulty on Principles of Fed. Prosecution of Bus. Orgs. (Dec. 12, 2006) [hereinafter *The McNulty Memo*], available at http://www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf.

60. Memorandum from Deputy Att'y Gen. Eric H. Holder on Bringing Criminal Charges Against Corp. (June 16, 1999) [hereinafter *The Holder Memo*], available at <http://www.justice.gov/criminal/fraud/documents/reports/1999/charging-corps.pdf>.

61. *Id.* at 8.

62. See generally *The McNulty Memo*, *supra* note 59.

63. *The Holder Memo*, *supra* note 60, at 8.

ostensibly the possibility of exposure to litigation by third parties. These newer policies retreated from the methods sanctioned by the "Holder Memo," yet the policies still allowed the SEC to consider waiver in its assessment of a corporation's cooperation.

Administrative policies that encroach upon the attorney-client privilege and work-product protection are generally met with resistance from Congress.⁶⁴ Senator Arlen Specter of Pennsylvania has been particularly vocal about the threat the attorney-client privilege faces from SEC and DOJ investigations.⁶⁵ In 2008, in response to the "McNulty Memo," Specter sponsored a bill, later named the Attorney-Client Privilege Act of 2009, that sought to protect the privilege against waiver requests by the government.⁶⁶ The bill argues that

[d]espite the existence of numerous investigative tools that do not impact the attorney-client relationship, the Department of Justice and other agencies have increasingly created and implemented policies that tend to undermine the adversarial system of justice, such as encouraging organizations to waive attorney-client privilege and work product protections to avoid indictment or other sanctions.⁶⁷

Specter's bill purports to end government elicitation of privileged information in investigations by placing limits on the government's ability to request or coerce this information from corporations.⁶⁸ The Attorney-Client Privilege Act would prevent government agencies from demanding or even requesting that a corporate entity reveal privileged or protected information, a practice the bill characterizes as an "encroach[ment] on the constitutional rights and other legal protections of employees."⁶⁹ The Act would also forbid the government from offering favorable treatment to the corporation for voluntary disclosure or from threatening "adverse treatment or penal[ty]" if the corporate entity refuses to voluntarily waive the privilege.⁷⁰

After Specter introduced his bill in 2008, Deputy Attorney General Mark R. Filip amended the DOJ's policies to answer congressional concerns.⁷¹ During the debate over Specter's bill, Filip appeared in the Senate

64. DOJ's McNulty Memo in *Evaluating Corporate Cooperation Is No Longer DOJ Policy*, FULCRUM INQUIRY (July 2008), available at <http://fulcrum.com/DOJ-McNulty.htm>.

65. See *id.*

66. See *id.*

67. S. 445, 111th Cong. § 2(a) (2009).

68. *Id.*

69. *Id.*

70. *Id.*

71. Julie R. O'Sullivan, *Does DOJ's Privilege Waiver Policy Threaten the Rationales Underlying the Attorney-Client Privilege and Work Product Doctrine? A Preliminary "No,"* 45 AM. CRIM. L. REV. 1237, 1274 (2008).

in 2008 to discuss changes he planned to make at the DOJ.⁷² In a 2008 letter to Specter's Committee on the Judiciary, Filip outlined a new approach whereby the DOJ would measure corporate cooperation by the "extent to which a corporation discloses relevant facts and evidence, not [by] its waiver of privileges."⁷³ The new procedures would bar the government from *demanding* that a corporate entity waive the attorney-client privilege.⁷⁴ Filip's approach did not go as far as the Protection Act, however, as the government would still be free to *request* a waiver in a corporate investigation.⁷⁵ Filip's concessions led to tabling the 2008 version of the Attorney-Client Privilege Protection Act, but Specter nevertheless reintroduced the bill in February of 2009 and continues to argue that only a legislative solution to waiver requests will adequately protect the privilege and protection.⁷⁶

Specter's reservations are not without merit. Even the amended policies outlined in the Filip Letter do not help a corporation decide whether to voluntarily waive the privilege. Current policies measuring cooperation by a corporation's "disclos[ure] of relevant facts and evidence"⁷⁷ essentially favor a corporation that chooses to waive the privilege, despite the attempt to placate those in Congress who would argue that the SEC is too intrusive. The fact that the cooperation is measured by disclosure of facts, rather than by a waiver of the privilege, offers little comfort to a corporation that wishes to disclose facts *covered* by the privilege. A corporate client seeking to predict the consequences of waiver can expect little guidance from current DOJ policies. Under current case law, the disclosure of these facts will constitute a privilege waiver regardless of whether the government explicitly requests one. It is not difficult to imagine a situation where a corporation must waive in fact, if not in name.

72. *Id.* at 1273.

73. Letter from Deputy Att'y Gen. Mark Filip to Sen. Patrick Leahy and Sen. Arlen Specter (July 9, 2008) [hereinafter *The Filip Letter*], available at <http://www.gibsondunn.com/publications/Documents/FilipLetter070908.pdf>.

74. O'Sullivan, *supra* note 71, at 1274.

75. *The Filip Letter*, *supra* note 73, at 2.

76. S. 445, 111th Cong. (2009).

77. O'Sullivan, *supra* note 71, at 1274.

IV. THE POLICY ARGUMENTS FOR AND AGAINST SELECTIVE WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE AND WORK-PRODUCT PROTECTION

A. Examining the Majority's General Waiver Rule

There is no shortage of commentary and case law explaining the policy concepts behind the majority's general waiver rule. Advocates of general waiver principally stress that selective waiver does not further the underlying policies of the attorney-client privilege and work-product protection.⁷⁸ These commentators characterize the tactical advantage wielded by corporations allowed to selectively waive the privilege as unfair.⁷⁹ This section will examine the arguments for and against the majority rule.

1. *The Arguments for General Waiver*

Judges endorsing the majority's general waiver approach—and the commentators supporting this rule—repeatedly stress the fundamental policy reasons behind the attorney-client privilege and work-product protection. The United States Supreme Court's decision in *Upjohn Co. v. United States*⁸⁰ clarified the scope of the attorney-client privilege for corporations, explaining that

[i]ts purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.⁸¹

Those commentators and courts supporting general waiver argue that allowing clients to selectively waive the privilege to the government while still asserting it against third parties does nothing to further this policy.⁸² This argument counsels that a general waiver rule is preferable because selective waiver allows corporate clients to use the privilege as a litigation

78. *Westinghouse Elec. Corp. v. Republic of Phil.*, 951 F.2d 1414, 1425 (3d Cir. 1991) (“[S]elective waiver does not serve the purpose of encouraging full disclosure to one's attorney in order to obtain informed legal assistance[.]”).

79. *Richmond*, *supra* note 17, at 284.

80. 449 U.S. 383 (1981).

81. *Id.* at 389.

82. *See Richmond*, *supra* note 17, at 281 (arguing that “[t]he attorney-client privilege has never been intended to ensure full disclosure to the government.”).

tactic, a practice often characterized as a “sword and shield.”⁸³ That is, corporate clients can disclose privileged information when the disclosure would operate to their advantage, such as when cooperating with a government investigation, and still assert the attorney-client privilege when this waiver would be a disadvantage, such as in litigation with third parties.⁸⁴

The Sixth Circuit recently addressed this criticism of selective waiver. Stating that “[t]he decision to enter into settlement negotiations, and to disclose otherwise confidential information in the process, is a tactical one[.]” this circuit rejected continued assertion of the privilege in *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*.⁸⁵ Though the court found that clients seeking this approach were “rational,” the court also observed that those clients’ goals did not coincide with the policy objectives behind the attorney-client privilege and work-product protection.⁸⁶

Courts rejecting the Eighth Circuit’s approach have argued that *Diversified*’s “sole justification . . . was to encourage corporations to undertake internal investigations.”⁸⁷ Emphasizing that the minority approach does not serve the underlying policy rationales of the attorney-client privilege, courts advocating general waiver allege that selective waiver would allow corporations to tactically avoid litigation, even though the previous disclosure was made for “entirely different purposes.”⁸⁸

Arguing that the minority rule limits full disclosure of the truth,⁸⁹ critics of selective waiver reject the argument that it allows for more efficient truth finding in government investigations.⁹⁰ This argument carries little weight, they assert, as the increased truth finding in the government investigation comes at the expense of the truth-finding province of the courts.⁹¹

2. *The Arguments Against General Waiver*

Critics of general waiver assert that the failure to further the policies of the attorney-client privilege and work-product protection is not tantamount to usurping them. The “sword and shield” criticism characterizes the disclosing party’s reliance on selective waiver as a tactical tool, a “sword” that they can use to their advantage in the current SEC investigation and a

83. *Id.* at 284.

84. *Id.*

85. 293 F.3d 289 (6th Cir. 2002).

86. *Id.* at 305–06.

87. *Westinghouse Elec. Corp. v. Republic of Phil.*, 951 F.2d 1414, 1425 (3d Cir. 1991).

88. *Id.*

89. Richmond, *supra* note 17, at 265.

90. *Columbia*, 293 F.3d at 307 (Boggs, J., dissenting).

91. See Richmond, *supra* note 17, at 288 (noting that “civil litigation often yields more meaningful results than related criminal prosecutions”).

“shield” that they can wield in subsequent litigation.⁹² The party attempting to discover protected material in private litigation, however, is also using the previous disclosure as a tactical tool. Tactical advantages, even those that are objectively “unfair,” are not anathema to the practice of law. The ability to identify and exploit a tactical advantage is an admirable quality in an attorney. An argument that selective waiver gives corporate defendants an unfair advantage in later litigation ignores the similar advantage *plaintiffs* have in a general waiver jurisdiction.

The work-product doctrine is said to “promote the adversary system by safeguarding the fruits of an attorney’s trial preparations from the discovery attempts of the opponent”⁹³ by “establish[ing] a zone of privacy for strategic litigation planning and to prevent one party from piggybacking on the adversary’s preparation.”⁹⁴ Critics of selective waiver argue that a rule like *Diversified*’s does not further this policy.⁹⁵ General waiver, though, does not serve this policy any more significantly. The tactical advantage gained by a plaintiff allowed to disclose generally waived work product permits that plaintiff to piggyback on the government agency’s work at the expense of the corporate defendant.

The “shield and sword” argument also implies that corporate clients are choosing to disclose their materials to one “adversary” (the government) and shield themselves from discovery by another (third-party plaintiffs). Characterizing the government as an adversary, however, presupposes entirely opposing motives of the government and of corporations. Though the parties’ motives would rarely be completely harmonious (to be fair, the government has the motive of maintaining securities laws and protecting the public, while a corporation has its own bottom line to consider), their motives often overlap when it comes to remedying wrongdoing and protecting shareholders.

Advocates of general waiver recoil at any suggestion that the government and its investigative target are anything less than adversaries. In his article “The Case Against Selective Waiver of the Attorney-Client Privilege and Work Product Immunity,” Douglas Richmond argues that the concept of a corporation and the government sharing the interest of compliance with the law would rub out all boundaries between them. Indeed, all members of the public have a common interest with the government in the company’s lawful behavior. This simply is not the type of common interest that the

92. See *Permian Corp. v. United States*, 665 F.2d 1214, 1221 (D.C. Cir. 1981) (“The client cannot be permitted to pick and choose among his opponents The attorney-client privilege is not designed for such tactical employment.”).

93. *Id.* at 1219 (citing *United States v. AT&T*, 642 F.2d 1285, 1299 (D.C. Cir. 1980)).

94. Richmond, *supra* note 17, at 282 (citing *United States v. Aldman*, 68 F.3d 1495, 1501 (2d Cir. 1995)).

95. *Id.*

common interest exception to the attorney-client privilege and work-product doctrine was intended to protect.⁹⁶

Though the respective motives of government and corporation might diverge in some respects once a full SEC investigation has commenced, the corporation's primary motive in an internal investigation is similar to the one the government will later have—determining whether wrongdoing occurred.⁹⁷ The assertion that the parties here could never be anything less than adversaries is something of an oversimplification, as the *Steinhardt* dicta suggests.⁹⁸ Furthermore, it retroactively imputes the corporation's motives in a government investigation to its motives in an internal investigation. While corporate counsel does investigate the possibility of civil and criminal liability when conducting internal investigations, the primary goal is truth finding.⁹⁹ This motive is similar to the government's in an investigation, and the adversarial characterization is only partly accurate.

B. Examining the Minority's Selective Waiver Rule

As the Eighth Circuit's opinion in *Diversified* has little companion law, most of the commentary supporting selective waiver comes from secondary legal authority. In addition to the desirability of cooperation with the government in their investigative and law enforcement capacities, commentators note that "[t]he absence of selective waiver deprives government agencies of potentially valuable information that could otherwise assist them in the enforcement of applicable laws."¹⁰⁰ Advocates of selective waiver contend that the doctrine puts private litigants in no worse a position than they would be in without it¹⁰¹ and encourages corporations to conduct internal investigations.¹⁰² Finally, selective waiver advocates maintain that when corporations voluntarily disclose privileged information, this disclosure mitigates the costs of government investigations to taxpayers.¹⁰³ This section examines the arguments for the Eighth Circuit's selective waiver rule.

96. *Id.* at 282–83.

97. See Andrew J. McNally, Comment, *Revitalizing Selective Waiver: Encouraging Voluntary Disclosure of Corporate Wrongdoing by Restricting Third Party Access to Disclosed Materials*, 35 SETON HALL L. REV. 823, 857 (2005) (analogizing the corporation's motive in sharing privileged information with the government as seeking legal advice).

98. See discussion *supra* Part II (discussing the *Steinhardt* court's hesitance to adopt general waiver because the possibility of converging government and corporate goals).

99. See generally Richard M. Strassberg & Sarah E. Walters, *Is Selective Waiver of Privilege Viable?*, N.Y. L.J., July 7, 2003 (discussing the motives of corporations conducting internal investigations).

100. McNally, *supra* note 97, at 850.

101. *Id.* at 851.

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

103. McNally, *supra* note 97, at 850.

1. *The Arguments for Selective Waiver*

Selective waiver advocates argue that general waiver will cause corporations to cease conducting internal investigations.¹⁰⁴ One of the policy reasons the Eighth Circuit emphasized in *Diversified* was that assuring corporate clients that the results of its internal investigations would be safe in the government's hands would encourage corporations to continue these investigations.¹⁰⁵ Again, many of the facts ascertained in SEC investigations were originally discovered in these internal investigations, and the *Diversified* court argued that general waiver would result in corporations choosing not to conduct their own internal investigations for fear of subsequent legal repercussions.¹⁰⁶ The court reasoned that "[t]o hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers."¹⁰⁷

Selective waiver advocates also contend that the minority rule puts third-party plaintiffs in no worse a situation than they would be without the disclosure to the government.¹⁰⁸ Internal SEC policies also support this principle:

The Commission also finds that preserving the privilege or protection for internal reports shared with the Commission does not harm private litigants or put them at any kind of strategic disadvantage. At worst, private litigants would be in exactly the same position that they would have been in if the Commission had not obtained the privileged or protected materials.¹⁰⁹

Finally, general waiver seems unfair to those corporations not yet found to have violated any law. While the basic concept of "fairness" requires that a corporation guilty of criminal activity should not be able to pick and choose how it faces the repercussions of its actions, an SEC investigation might not necessarily lead to penalties, criminal convictions, or even charges. General waiver could have the result of exposing innocent corporate parties to civil litigation as a natural result of their good-faith co-operation.

104. Okrzesik, *supra* note 36, at 155–56 (noting that when "the burden of exposing a company's Achilles heel to a flood of adversaries is certain, corporations will be less likely to choose to disclose work product to the SEC").

105. *Diversified*, 572 F.2d at 611.

106. *Id.*

107. *Id.*

108. McNally, *supra* note 97, at 851.

109. SEC Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6296, 6312 (Feb. 6, 2003) (codified at 17 C.F.R. pt. 205).

One needs only to look at some of the relevant cases decided using the majority's general waiver approach to see that this effect is not far-fetched. In some of the most cited cases on point, the government had not yet completed its investigation when third parties sought to discover the information disclosed to the authorities.¹¹⁰ Sometimes the third party litigation has been ongoing before the government's involvement, and the third parties simply seek to discover the disclosed information to boost the strength of their own cases.¹¹¹

2. *The Arguments Against Selective Waiver*

There is little authority to support the suggestion that selective waiver increases the transparency and efficiency of government investigations. Though there may be some ambiguity over the distinction between requests of waiver or requests for disclosure of the underlying facts that might require a waiver, even an effective waiver is not the only indicator of cooperation with an investigation and is not the only way to accelerate the process. The government may also gauge cooperation by factors such as the corporation's corrective activity and prior record of wrongdoing.¹¹²

Commentator Douglas Richmond argues that the *Diversified* court is mistaken and contends that, "despite courts' nearly uniform hostility to corporate attempts to invoke selective waiver and their repeated rejection of it in published opinions," the negative consequences of waiver have not led corporations to discontinue internal investigations.¹¹³ In fact, Richmond argues the opposite—that selective waiver would have the perverse result of actually *limiting* disclosure in internal investigations.¹¹⁴ This is essentially an argument that selective waiver eliminates a reason to withhold information from the government. Without fear of third party legal consequences, corporations have less of an excuse to keep quiet during an investigation. As a result, their choice whether to disclose or maintain the privilege becomes meaningless.

However, Richmond's argument overlooks the fact that after the Eighth Circuit decided *Diversified*, participation in the SEC's Voluntary Disclosure Program increased markedly—ostensibly due to the perception that *Diversified* would result in a sea change in privilege waiver law.¹¹⁵ The

110. *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 232 (2d Cir. 1993).

111. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 600 (8th Cir. 1978) (en banc).

112. *The McNulty Memo*, *supra* note 59, at 8.

113. Richmond, *supra* note 17, at 275.

114. *Id.* at 280–81 (arguing that "selective waiver signals strongly to corporate officers and employees that communicating honestly and openly with the company's lawyers may lead to their indictment or ruinous civil liability.").

115. McNally, *supra* note 97, at 840.

argument that selective waiver might force a corporate client to conceal information from their counsel for fear of later disclosure to the government seems rational, but proponents of this argument offer very little research into corporate behavior to support their assertions. Perhaps this is understandable, as a corporation is not likely to keep records of what is *not* disclosed to counsel. While it is conceivable that selective waiver could cause some corporate clients to conceal information from their attorneys, there is little concrete evidence of this behavior in the corporate community.

V. ADVOCATING THE MIDDLE GROUND APPROACH OF *IN RE STEINHARDT PARTNERS*: SELECTIVE WAIVER PURSUANT ONLY TO A CONFIDENTIALITY AGREEMENT

This writer ultimately finds the argument for selective waiver more persuasive. Proponents of the majority's approach argue that selective waiver creates an unfair tactical advantage for corporations in subsequent litigation and stress this advantage as abhorrent to fundamental concepts of justice. They nevertheless fail to acknowledge the similar tactical advantage that third party litigants stand to gain as a result of these investigations. General waiver proponents argue that the policies behind the work-product protection and attorney-client privilege are not "furthered" by allowing selective waiver, but these arguments presuppose wrongdoing, an adversarial relationship between the government and the investigated party, and a relationship between government and subsequent litigant that approaches something like privity. The arguments for selective waiver speak more toward fundamental fairness and the practicality of compliance with a government investigation. In addition, there is evidence that a climate of selective waiver would result in more disclosure to the government.¹¹⁶

Nevertheless, the effect that selective waiver has on the privilege is not so slight that the arguments for general waiver should be entirely set aside. Selective waiver might not completely subvert the privilege, but it would at least change the privilege's nature. Some commentators have argued for a solution involving mandatory disclosure in all circumstances on the condition that no such disclosure to the government would constitute a waiver as to third parties.¹¹⁷ Still others argue for the creation of a completely new "corporation-government" privilege, a solution that would ostensibly swallow the entire waiver debate.¹¹⁸

116. *Id.*

117. See generally Matthew Altemeier, Note, *Rethinking Selective Waiver: The Argument for Mandatory Disclosure*, 28 REV. LITIG. 629 (2009).

118. McNally, *supra* note 97, at 861–62 (arguing that "[s]elective waiver should . . . be recognized as a new evidentiary privilege, a corporation-government privilege, rather than a mere extension of existing privileges").

The threat that *mandatory* disclosure would present toward the very nature of the attorney-client privilege counsels against its implementation. Efficacy of the program aside, one need only look at the controversy surrounding the SEC/DOJ's "Voluntary Disclosure Program" to predict how popular a "Mandatory Disclosure Program" would be.¹¹⁹ Similarly, creation of a new privilege would most likely need to be done at the case law level, and implementation would be problematic at best if the debate over selective waiver is any indication of the markedly opposing opinions legal scholars have over privilege policy.

The federal circuit split demonstrates that it is unrealistic to expect courts to change evidence law so drastically. Judges are bound to construe evidentiary rules narrowly,¹²⁰ and there is no provision for waiver under the current federal rules. Without guidance from an evidentiary rule, courts are forced to rely on the common law. This is one of the reasons for the current federal split. The memos issued by the DOJ show that administrative procedures are vague and malleable. So long as selective waiver is exclusively a creature of case law, courts will be free to interject whichever policy argument they find most appropriate to the disposition of the case at hand. Writing an exception to waiver law into the rules ensures that selective waiver actually becomes law.

Indeed, codification in an official rule of evidence is a more graceful way to effect change. Arkansas's decision to resolve the problem through its Rules of Evidence makes sense, as looking to administrative agencies or courts for the solution has proven puzzling, if not futile. The state chose the right method to implement change in privilege-waiver law; however, the state chose to introduce the bright-line rule of *Diversified*, where it should have, instead, made selective waiver the rule only pursuant to a confidentiality agreement between the client and the government agency.

After considering the arguments for general and selective waiver, the position of the Second Circuit Court of Appeals in *Steinhardt* is more understandable. The decision to "decline to adopt a per se rule that all voluntary disclosures to the government"¹²¹ waive the privilege acknowledges that neither side's argument is so persuasive that the other's should be completely rejected. Both general waiver and selective waiver advocates address relevant policy concerns, and a solution that attempts to meet the parties halfway is the most logical choice.

119. Compare McNally, *supra* note 97, at 840 (arguing that the opinion in *Diversified v. Meredith* increased corporate participation in the SEC's Voluntary Disclosure Program), with Richmond, *supra* note 17, at 280 (arguing that selective waiver will decrease voluntary disclosure since corporations will not be able to hide behind the threat of private litigation).

120. *Permian Corp. v. United States*, 665 F.2d 1214, 1221 (D.C. Cir. 1981).

121. *In re Steinhardt Partners, L.P.*, 9 F.3d 236 (2d Cir. 1993).

The most pragmatic legislative middle-ground approach is to introduce a rule of evidence allowing selective waiver only pursuant to a confidentiality agreement between the initial parties to the disclosure. The *Steinhardt* court acknowledged that the possibility of confidentiality agreements and common interests between government and corporation counseled against general waiver.¹²² The court nonetheless also acknowledged that the difficult choice a disclosing party faces in an investigation should not lead to a complete, “rigid” selective waiver exception to the privilege.¹²³

Arkansas’s version of selective waiver in Rule 502 takes federal law created as a response to federal SEC litigation and applies it to any “government office or agency” to which a party might waive the privilege and protection.¹²⁴ The current federal split is informed almost entirely by cases involving SEC investigations, which entail idiosyncratic procedures and have implications primarily at the federal level. It is odd to apply the exception to all state government agencies based on the policies outlined in these particularized federal procedures. A state agency large enough to deal with investigations analogous to the SEC’s would likely employ confidentiality agreements in response to waiver requests like these. Allowing the exception only pursuant to an express agreement would allow courts to deal with many smaller cases individually, implementing the policies of the Eighth Circuit without drastically changing evidence law for all litigants.

When parties execute a confidentiality agreement, that agreement can function as an express acknowledgement that the corporation and the government are working together with common interests, and not entirely as adversaries. Although commentators might argue that corporations and the government are always complete adversaries, the explicit acknowledgement that the parties are working together to achieve a mutually beneficial goal should be given some credulity. The argument that the parties to a confidentiality agreement have some diverging motives should not overshadow the motives they have which harmonize. The issue is simply not that straightforward.

Confidentiality agreements would also mitigate concerns over the rather amorphous regulations of the DOJ and SEC. Corporate clients would not have to weigh the possibility of private litigation consequences against their understanding of puzzling and flexible administrative procedures, which might be more indicative of political concerns than the realities of a securities investigation. Certainty over whether waiver (either direct or effective under current DOJ policies) could result in private litigation would

122. *Id.* at 236.

123. *Id.*

124. ARK. R. EVID. 502(f).

eliminate the Hobson's choice of the decision whether to waive or not.¹²⁵ This decision would, accordingly, be more meaningful, as clients could weigh the consequences of their waiver with more certainty.

Finally, legally enforceable confidentiality agreements would achieve the intended result selective waiver advocates seek—more efficient and fruitful government investigations. Like Bank of America, corporate parties often enter into these confidentiality agreements under the assumption that courts will honor them.¹²⁶ Removing the ambiguity of whether a court will actually be able to enforce a confidentiality agreement allows the government to assess the cooperation of the corporation more definitively. Where a client has assurance that third-party litigants will not be able to discover the disclosed information, that client's decision to disclose is not clouded by uncertainty over future civil litigation. The government may give proper consideration to that decision without considering the possibility that refusal to waive represents fear of a future lawsuit.

VI. CONCLUSION

If Bank of America is ultimately unsuccessful in its attempt to selectively waive its attorney-client privilege to the SEC, the bank's failure will be due in part to ambiguous and contradictory federal law. Though the currently enacted Federal Rule of Evidence 502 allows consequence-free disclosure to the SEC in some instances, the new rule does not end general waiver, which remains law in all federal jurisdictions except the Eighth Circuit. Misunderstandings about federal law can have dire consequences, as the Bank of America situation shows. Because the bank seems to have misunderstood that Federal Rule 502 "gives corporations the ability to disclose privileged documents in a limited way under the terms of a court order, not a waiver[.]" the bank has—perhaps fatally—misread the law to its future detriment.¹²⁷ A drafter of Rule 502 asserts that the documents the bank disclosed to the SEC are now "fair game for plaintiffs lawyers in . . . 58 cases."¹²⁸ Even if Bank of America's motives in disclosing this information to the SEC were completely honest, the bank's attempt at selective waiver still likely will not protect it in subsequent litigation. As the litigation that the bank's "privileged order" originated from was in the United States District Court for the Southern District of New York, law of the Second Circuit will ultimately control interpretations of its attempted "waiver."¹²⁹ Though this

125. See generally Strassberg & Walters, *supra* note 99.

126. Leone, *supra* note 2.

127. Lowe, *supra* note 1.

128. *Id.*

129. Disclosure Stipulation Agreement and Proposed Protective Order, SEC v. Bank of Am. Corp., (S.D.N.Y.) (No. 09 Civ. 6829).

is the circuit that decided *Steinhardt*, that case counseled against a bright line rule only in dicta—the case still adopted the majority’s general waiver rule.¹³⁰ This ersatz “waiver” may yet have disastrous results for the bank.

The possibility for a dilemma like Bank of America’s in a state court proceeding makes Arkansas’s codification of selective waiver into its state rules more understandable. Instead of simply introducing “strict” selective waiver, Arkansas should have specified that corporations could waive the privilege and protection only pursuant to a confidentiality agreement with the government. If the state had done so, it could have minimized reliance on the ill-favored rule of *Diversified* and introduced a novel approach to the waiver problem. Instead, Arkansas’s Rule 502 simply solidifies the state’s reliance on nebulous policy arguments, doing little to promote debate that might stimulate comparable change on the federal level. A more moderate approach would acknowledge the policy concerns raised by both sides of the debate while conceding the wisdom of reviewing disclosures on a case-by-case basis, à la *Steinhardt*. Ignoring this more practical solution makes Arkansas’s choice seem more apprehensive than ground-breaking and might likely give opponents of selective waiver more fuel for their arguments.

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130. See discussion *supra* Part II.

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