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SAFEGUARDING THE ATTORNEY-CLIENT PRIVILEGE IN THE
FACE OF FEDERAL SECURITIES REGULATIONS

Tiffany Seeman*

Executives and accountants do not work alone. In fact, in our cor-
porate world today . . . executives and accountants work day to day
with lawyers. They give them advice on almost each and every
transaction. That means when executives and accountants have
been engaged in wrongdoing, there have been some other folks at
the scene of the crime – and generally they are lawyers. – Senator
Jon Corzine, D-NJ, during Senate discussion of the 2002 Sarbanes-
Oxley Act.1

I. INTRODUCTION

In response to the erosion of corporate integrity exemplified by the
collapse of corporate giants such as Enron and WorldCom, Congress
enacted the Sarbanes-Oxley Act of 2002 (“Act”).2 The Act required
widespread changes in corporate governance.3 Specifically, Congress
directed the Securities and Exchange Commission (“SEC”) to require
that an attorney report evidence of a “material violation of securities
law or breach of fiduciary duty or similar violation by the company
or any agent thereof” to the company’s chief legal officer (“CLO”) or

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* J.D., DePaul University, College of Law expected 2006; B.S., University of Kansas 2000. The author would like to thank Professor Leonard Cavise for his direction in selecting a topic for this comment and Brad Hurwitz for his thoughtful critique of several drafts.


3. 15 U.S.C. §§ 7201–7266. In particular, § 307 of the Act directed the Securities and Exchange Commission (SEC) to create minimum standards of professional conduct for attorneys practicing before the SEC. See § 7245. Section 307 became § 7245 when the law was codified. However, § 7245 is still referred to as § 307. Litt, supra note 2, at C-3.
chief executive officer ("CEO"). The implementation of SEC Rule 205 brought attorney conduct, which had traditionally been regulated by the states, under federal regulation.

The new SEC rules have dramatically shifted the landscape in which corporate lawyers work. SEC Rule 205 not only applies to prevention of future conduct but also, in some circumstances, to events that have occurred in the past and regardless of whether or not the lawyer learned of this activity through confidential communications. Further, the SEC has suggested additional regulations requiring the attorney to withdraw from representing the corporation and notify the SEC of any material violations by the corporation. These rules are broader than most state professional responsibility rules that require an attorney to withdraw from the case if the client continues malfeasance and to report to officials only when the attorney is confident that his client may invoke imminent bodily harm on another individual.

6. Majed Zeineddine, Piercing the Corporate Attorney's Veil: The Impact to the Sarbanes-Oxley Act on the Attorney-Client Privilege, 20 T.M. COOLEY L. REV. 131, 135-36 (2003). STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 3 (2005). "ABA rules are not binding on any jurisdiction. . . . The courts of each state adopt the state's rules of professional conduct." Id. The ABA creates the Model Rules of Professional Conduct as a guide for attorney conduct. Id. The courts of each state adopt the state's rules of professional conduct. Id; see also James W. Semple, The Effect of the Sarbanes-Oxley Act on the Attorney-Client Privilege, 53 F.D.C.C. Q. 419, 423 (2003) (noting that SEC Chairman Harvey Pitt stated publicly on September 20, 2002 that if state bar licensing agencies would not discipline attorneys, the SEC would assume that task). Only attorneys practicing before the SEC are subject to the SEC rules and consequently, federal regulation. Id.
7. 17 C.F.R. § 205; see Litt, supra note 2, at C-10 (stating that the new SEC rules place the lawyer in an adversary position to a corporate client); see also John Paul Lucci, 4th and 205: How a Rush of Global Comments Blocked the SEC's First Attempted Punt of Attorney-Client Privilege Under Sarbanes-Oxley, 20 TOURO. L. REV. 363, 381-82 (2004). Section 205.3(b) imposes a duty on an attorney to report evidence of a material violation of the securities law or breach of fiduciary duty within the corporation to the chief legal officer (CLO). Id. This provision establishes that the attorney's client is the shareholder of the corporation and not necessarily its officers or employees. Id.
8. Litt, supra note 2, at C-6.
9. These proposed regulations are commonly referred to as "noisy withdrawal" but have not been implemented by the SEC. Litt, supra note 2, at C-6 (stating that "[t]his is a dramatic reversal of the attorney-client privilege, one that goes to the core of the attorney-client relationship").
10. Litt, supra note 2, at C-7; see also, MODEL R. PROF'L CONDUCT R. 1.6 (2003). In 2003 ABA Model Rule 1.6, the general provision addressing client confidences, was amended to provide limited exceptions where a lawyer may breach client confidentiality. Id. The main exception to ABA Model Rule 1.6 has traditionally been to prevent reasonably certain death or substantial bodily harm. Id. However, the 2003 amendments added "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests . . . ." Id.; see also, Litt supra note 2, at C-7. Before the 2003 amendment, ABA
The attorney plays a critical role in counseling a corporate client regarding compliance, remedy for non-compliance, and cooperation with government investigations of corporate wrongdoing. However, the SEC rules jeopardize the corporate attorney's role as counselor. For example, when investigating a claim of a material violation of the federal securities laws, the SEC often requests the assistance of the corporation by seeking confidential communication regarding the material violation. The corporate attorney may negotiate a confidentiality agreement with the SEC to ensure that any disclosed privileged information will be used only for the SEC investigation. While not new, the use of confidentiality agreements in corporate investigations is of increasing importance in light of the disclosure and reporting requirements outlined in the Act and SEC rules. These confidentiality agreements protect the corporation's privileged information from public release while still assisting the SEC in determining whether to

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Model Rule 1.13 addressed the particular situation of a lawyer representing an organization where the attorney knows that an officer or employee of the company is engaged in action, intends to act or refuses to act in manner that is related to the lawyer's representation that is a violation of law. The rule suggested that the attorney ask for reconsideration on the matter, advise that a separate legal opinion should be sought, or refer the matter to a higher authority in the organization. The rule permitted, but did not require a lawyer to withdraw.

11. Model R. Prof'l Conduct R. 1.6 cmt. 3 (2003); see also, Zeineddine, supra note 6, at 148 (discussing the importance of the attorney-client relationship under the old ABA Code of Professional Responsibility). But see John K. Villa, Ethical Issues for Inside Counsel Analysis, in Corp. Couns. Guidelines § 3 (2005). It should be noted that Rules 1.6 and 1.13 do not apply to lawyers who have been retained to investigate alleged violations of law or to defend the corporation against any claim arising out of the alleged violation. Id.

12. Lauren C. Cohen, Note, In-House Counsel and the Attorney-Client Privilege: How Sarbanes-Oxley Misses the Point, 9 Stan. J. L. Bus. & Fin. 297, 313 (2004). "The SEC is essentially asking the corporate attorney to sniff out fraud and act as a government watchdog. This automatically breaks the trust between the client corporation and the attorney and thereby between the client's agents, corporate managers, and the attorney." Id. at 312-13.


14. Semple, supra note 6, at 427 (discussing the SEC's proposed § 205.3(e)(3) providing that an issuer would not waive any applicable privileges by sharing confidential information with the SEC about misconduct by the issuer's employees or officers, pursuant to a confidentiality agreement); see also Beth Dorris, Note, The Limited Waiver Rule: Creation of an SEC-Corporation Privilege, 36 Stan. L. Rev. 789, 794 (1984) (noting that after the Watergate scandal, the SEC created a program of voluntary disclosure to cut enforcement costs resulting from increased investigations).

15. See generally Sue Reisinger, Waiving Privilege Good-Bye, 3 Corp. Couns. 117 (2003); see also Dorris, supra note 14, at 789 (discussing the SEC's limited waiver rule allowing corporations that disclose attorney-client information to the SEC to maintain the privileged status of those communications after such disclosure).
pursue or dismiss its investigation. They also encourage the corporate attorneys to comply with the government’s pressure to disclose.

Courts disagree, however, as to the enforceability of these confidentiality agreements. The circuit courts are deeply split on whether disclosure of privileged information to the government made in the course of an investigation, whether pursuant to a confidentiality agreement or not, waives the privilege as to all other parties. On one hand, the Sixth Circuit Court of Appeals follows the traditional waiver rule holding that a waiver of privilege as to one opponent waives the privilege for all parties. While, on the other hand, the Eighth Circuit Court of Appeals applies the selective waiver doctrine and protects attorney-client and work product disclosures made to the SEC so long as the disclosures are made pursuant to a confidentiality agreement.

This Comment supports upholding confidentiality agreements and allowing selective waiver of the attorney-client privilege to further the goals of the Act while minimizing the effect to attorney-client communications. Part II explores the background of the rules and legislation controlling attorney conduct and discusses a history of the attorney-client privilege. This section also provides a brief background to recent cases exposing the circuit split on the applicability of confidentiality agreements. Part III discusses the courts’ reasoning and professional commentaries behind upholding or striking down confidentiality agreements. Further, this section suggests that up-

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17. Id. at *6.
18. See In re Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 307 (6th Cir. 2002) (Boggs, J., dissenting). "It is true that only one circuit court of appeals has implemented a government investigation exception to the third party waiver rule. Yet, it is equally true that one other circuit court of appeals has expressly contemplated a government investigation exception where, as here, the holder of the privilege [sic] information executes a confidentiality agreement with the government before disclosure." Id. (citation omitted).
19. Id. at 307 (Boggs, J., dissenting).
20. Id. at 289.
21. Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1978); see also Semple, supra note 6, at 427; see also Saito v. McKesson HBOC, Inc., No. CIV.A.18553, 2002 WL 31657622 (upholding selective waiver rule for disclosure made to SEC pursuant to a confidentiality agreement).
22. See infra notes 202–247 and accompanying text; see also Semple, supra note 6, at 423 (quoting Chancellor Chandler in Saito v. McKesson HBOC, Inc., No. CIV.A.18553, 2002 WL 31657622, that such a rule "encourages cooperation with law enforcement agencies without any negative cost to society or to private plaintiffs").
23. See infra notes 28–124 and accompanying text.
24. See infra notes 125–185 and accompanying text.
25. See infra notes 186–199 and accompanying text.
holding confidentiality agreements between a corporate client and the
government protects the attorney-client privilege from further dimi-
nution and also advances the purpose of legislation governing corpo-
rate disclosure. Proposed in Part IV is a legislative solution to the
circuit split outlining a new federal statute specifically upholding con-
fidentiality agreements and Part V provides conclusions.

II. BACKGROUND

This section first discusses the Act and the legislative intent. Sec-
ond, this section examines the requirements of the current and pro-
posed version of SEC Rule 205. Third, it explores the corporate
attorney-client privilege. Fourth, this section considers the SEC's pro-
cess for investigating corporations suspected of violations and the
SEC's use of confidentiality agreements to access privileged corporate
communications. Finally, this section dissects cases addressing the se-
lective waiver doctrine via confidentiality agreements.

A. The Sarbanes-Oxley Act of 2002

In the wake of the financial disasters of 2001 and 2002, small in-
vestors and middle-class workers witnessed the death of their 401Ks
and consequently, looked to Congress to restore confidence in the
market and in corporate America. The Act is one of the most signif-
icant pieces of legislation governing the United States securities mar-
kets since the 1930s and was designed to "crack down on all of the
Enron-WorldCom-Global Crossing chicanery." Most significantly,
the Act seeks to regulate the accounting and business professions and
provides for tough criminal penalties for violations of the Act.

At the urging of forty lawyers who wrote to Congress, the Act in-
cluded a provision regarding attorney conduct. Accordingly, in its
first effort to regulate attorney conduct, Congress outlined in § 307 of
the Act the "Rules of Professional Responsibility for Attorneys."
Section 307 has two primary purposes. First, § 307 grants the SEC power to promulgate minimum standards of professional conduct for attorneys practicing before it. Second, the Act outlines two elements that the SEC should include in its rules: (1) attorneys who become aware of fraudulent activity must report it to the corporation’s management and (2) if an appropriate response is not given, the attorney must report to an audit committee or the board of directors.

Senators John Edwards, D-NC, Michael Enzi, R-WY, and Jon Corzine, D-NJ supported Section 307 and articulated that the amendment’s purpose was to address failures by bar associations to adequately police corporate lawyers. Noting that the bill’s requirements for attorneys were less onerous than those for accountants, the Senators repeatedly expressed the collective view that the recent corporate scandals had occurred with the participation of attorneys. Further, Senator Edwards stated that the lawyer would not be required to report any wrongdoing outside of the company, and Senator Enzi specified that the amendment would not require lawyers to report to the SEC violations of the law by their corporate clients. Thus, the Act created a “reporting-up” requirement for attorneys to bring evidence of a material violation to the attention of the company’s CLO, CEO, and/or board of directors. Congress believed that while it sought to create professional responsibility standards for corporate attorneys, it also understood that it needed to protect the attorney-client relationship because of corporate counsel’s essential role in corporate compliance.

B. SEC Rule 205

Counsel practicing before the SEC has traditionally been bound by a number of securities regulations, particularly § 10(b) of the Securities Exchange Act of 1934 which forbids insider trading, and §§ 11(a), 12(a)2, and 17(a) of the Securities Exchange Act of

34. Id.
35. Lucci, supra note 7, at 365-66; see also Cohen, supra note 12, at 308 (noting that the most contentious aspect of the act is the empowerment of the SEC in promulgating these requirement and setting forth their own minimum standards of conduct).
36. Cohen, supra note 12, at 308.
37. Lucci, supra note 7, at 376.
38. Id. at 379 (noting that accountants are required to report material violations to the SEC).
39. Id.
40. Id.
41. Cohen, supra note 12, at 309.
1933, which provide principal responsibilities for preparing securities-related documents.46 Further, under the 1933 and 1934 Acts, attorneys are obligated to carefully scrutinize securities filings, corporation's financial reports, disclosure documents, registration statements, forward-looking statements, and the Management Discussion and Analysis Section of the annual report.47

The SEC enacted Rule 205 as required by § 307 of the Act.48 Rule 205 outlines the minimum standards of professional conduct for attorneys practicing before the SEC in the representation of issuers.49 Rule 205's main objective is its "up-the-ladder" reporting requirement for attorneys representing a corporation.50 Further, the SEC has suggested, but has not yet implemented, regulations that go beyond the mandates of § 307 of the Act and require attorneys to withdraw from representing a corporate client in certain circumstances.51

46. Zeineddine, supra note 6, at 135.
47. Id. at 136.
48. See Litt, supra note 2, at C-3.
49. Semple, supra note 6, at 423; see Litt, supra note 2, at C-3 (noting that the SEC rule applies broadly with an expansive definition of attorneys appearing and practicing before the commission). The rule is limited to attorneys “appearing and practicing” before the SEC. Id. However, this term is broader than it appears. It includes:

(i) transacting any business with the Commission, including communications in any form;
(ii) representing an issuer in a commission administrative proceeding or in connection with any Commission investigation, inquiry, information request or subpoena;
(iii) providing advice in respect of the United States securities laws or the Commission's rules or regulations thereunder regarding any document that the attorney has notice will be filed with or submitted to, or incorporated into any document that will be filed with or submitted to, the Commission; or
(iv) advising an issuer as to whether information or a statement, opinion, or other writing is required under the United States securities laws or the Commission's rules or regulations thereunder to be filed with or submitted to, or incorporated into any document that will be filed with or submitted to the Commission.


50. Lucci, supra note 7, at 380. The rule also incorporates several provisions that are not explicitly required by § 307 of the Act, but which the SEC believes are important components of an effective “up-the-ladder” reporting system. Lucci, supra note 7, at 381.

51. Id. at 382.
1. Up-the-Ladder Reporting

Rule 205.3(b) outlines up-the-ladder reporting which requires attorneys to report evidence of a material violation to certain corporate officers and/or directors. Evidence of a material violation is defined in Rule 205.2(e) as "credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur."

If there is a material violation, the attorney is directed to report to the issuer's CLO, or to both the CLO and the CEO. If the CLO reasonably concludes that there was no material violation, he or she must notify the reporting attorney of this conclusion. If the CLO concludes that a material violation had occurred, was occurring, or was about to occur, the CLO must take reasonable steps to ensure that the corporation adopts an appropriate response and must also advise the reporting attorney of this conclusion. The new rule further requires that the reporting attorney report evidence of a material violation to the issuer's audit committee, another committee of independent directors, or the full board of directors if the attorney did not receive an appropriate response from the CLO within a reasonable time. Further, if the attorney reasonably believed that it would be futile to report evidence of a material violation to the CLO and/or CEO, the attorney may report the evidence of a material violation directly to the corporation's audit committee or board of directors.

52. 17 C.F.R. § 205.2 (2004). Material violation is defined in §205.2(i) as a "material violation of an applicable United States federal or state securities law, a material breach of a fiduciary duty arising under United States federal or state law, or a similar material violation of any United States federal state law." Id.

53. Id. § 205.3.

54. Id. § 205.2.

55. Id. § 205.3(b)(1); but cf. Semple, supra note 6, at 424 (discussing the proposed rule which would have required the reporting attorney to retain documentation of his report to the CLO).

56. 17 C.F.R. § 205.3 (b)(2).

57. Id. The rule also allows the chief legal officer to refer a report of evidence of a material violation to a qualified legal compliance committee if one has been duly established by the corporation prior to the report of the material violation. Id.

58. 17 C.F.R. § 205.3(b)(3) (2004); Semple, supra note 6, at 425 (explaining the application of the rule).

59. 17 C.F.R. § 205.3(b)(4); Jenny E. Cieplak & Michael K Hibey, The Sarbanes-Oxley Regulations and Model Rule 1.13: Redundant Complementary?, 17 GEO. J. LEGAL ETHICS 715, 718 (2004) (noting that Rule 205.3 has a report-out option similar to ABA Model Rule 1.13 which allows the attorney to reveal confidential information related to the attorney's representation if the attorney reasonably believes that such revelations are necessary to prevent a material violation that will injure the company or stockholders, to prevent perjury, or to rectify the consequences of a material violation).
2. Noisy Withdrawal

Currently, an attorney is not required to report evidence of a material violation to the SEC. Section 205(d)(2) of the SEC rules states that an attorney may reveal confidential information to the SEC in three circumstances. First, the attorney may release confidential information if he reasonably believes it is necessary to prevent the issuer from committing a material violation which would result in injury to the financial interest of the issuer or investors. Second, the attorney may release confidential information to prevent the issuer from committing perjury or an act of fraud upon the SEC when the issuer is being investigated. Third, the attorney may release confidential information if he reasonably believes that in doing so he may rectify the effects of a past material violation.

A noisy withdrawal requirement would oblige outside attorneys to "report-out" evidence of a material violation. Under such a rule, if the attorney did not receive a favorable response from the CLO and/or CEO and the attorney reasonably believed that a material violation is ongoing or is about to occur, the attorney must withdraw, notify the SEC, and disaffirm submissions that are tainted by the violation. The proposed SEC "noisy withdrawal" requirement was strongly opposed by the legal community arguing that noisy withdrawal surpassed the mandate given to the SEC in the Act. Further, critics fear that noisy withdrawal would deter clients from seeking legal advice, make

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60. Lucci, supra note 7, at 406-07. On January 23, 2003, the SEC issued a media release summarizing Rule 205 which included the up-the-ladder requirement, but did not implement the noisy withdrawal provision. Id. at 407-08.
61. 17 C.F.R. § 205.3 (d)(2) (emphasis added).
62. Id. § 205.3 (d)(2)(i) (emphasis added).
63. Id. § 205.3 (d)(2)(ii) (emphasis added). This provision of the Rule also requires that the attorney "reasonably believe." Id.
64. Id. § 205.3 (d)(2)(iii) (emphasis added).
65. Lucci, supra note 7, at 383-84. The proposed rule distinguishes between in-house counsel and outside counsel. Id. at 384. Outside attorneys are required to report the evidence of a material violation to the SEC, while in-house attorneys are required to disaffirm any documents they have participated in drafting that are tainted by the violation. Id.
66. Id. at 386-87 (noting that more than seventy of the nation's law firms asked the SEC to reconsider its controversial proposal that would force lawyers to disclose evidence of client wrongdoing); see also id. at 389-92 (discussing that Senator Enzi, one of § 307's sponsors, specifically stated that 307 was drafted to confine disclosure entirely within the corporation); see also Comments of Skadden, Arps, Slate, Meagher & Flom LLP, SEC Release Nos. 33-8150; 34-46868; IC- 25829; File No. S7-45-02 (Dec. 16, 2002), http://www.sec.gov/rules/proposed/s74502/skaddenarps1.htm.

We respectfully submit that the Commission has gone well beyond the specified requirements and intended purpose of § 307. The Proposed Rules (noisy withdrawal) will so fundamentally alter the relationship between issuers and their attorneys that the level of consultation – and thereby the vital flow of information – between issuers'
lawyers agents of the SEC,67 force lawyers to focus on protecting themselves from the wrath of the SEC rather than on the client’s needs,68 and deter lawyers from learning as much as possible about their corporate clients’ activities.69 As a result of this criticism, the SEC did not include the “noisy withdrawal” in the current version of Rule 205, but is still considering implementing a similar requirement in the future.70 However, even without a noisy withdrawal requirement, Rule 205 is a departure from conventional corporate law practice.

C. The American Bar Association’s Model Rules of Professional Conduct

Traditionally, the ABA has been the primary mechanism in addressing attorneys’ roles in relation to client confidentiality.71 This section discusses attorney responsibility under ABA Model Rules 1.6 and 1.13. Further, this section compares the duties imposed by SEC Rule 205 with the responsibilities outlined in the 2003 version of Model Rules 1.6 and 1.13. Rules 1.6 and 1.13 governing client confidentiality are given effect by the attorney-client privilege.72 However, rules 1.6 and 1.13 encompass the entire attorney-client relationship, while the attorney-client privilege applies only in proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning the client.73

1. Model Rules

The ABA creates the Model Rules and each state may independently choose to adopt all or part of the Model Rules.74 The Model

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67. Lucci, supra note 7, at 391.
68. Id. at 392.
69. Id. Moreover, some critics noted that while Rule 205 was designed to restore investor confidence, the rule may harm investors by increasing the number of SEC investigations. Id. at 393.
70. Litt, supra note 2, at C-6.
71. See Model R. Prof’l Conduct, Introduction (2003) (noting that the Model Rules are designed to be a basis for lawyer discipline); see also Gillers & Simon, supra note 6, at 4 (discussing the history of various rules, codes and canons promulgated by the ABA outlining attorney responsibility).
72. Model R. Prof’l Conduct R. 1.6 cmt. (3). “The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics.” Id.
73. Id.
74. Id. at Preface.
Rules provide an outline of the role of the attorney as not only an advocate, but also a negotiator, intermediary, and evaluator. Rule 1.6 is the general rule addressing client confidentiality, and Rule 1.13 governs the organizational client. In August 2003, the ABA adopted a “reporting up” rule for corporate clients. Whether the ABA’s purpose was to prevent the SEC from taking further steps to regulate attorneys or a valid concern over corporate scandals, the revised ABA rules broaden the circumstances in which a lawyer may disclose privileged information. The new Rule 1.6 also permits disclosure not just to prevent reasonably certain death or substantial bodily harm, but also where the lawyer reasonably believes it is necessary to prevent, mitigate, or rectify the client from committing a crime in

75. Zeineddine, supra note 6, at 136.

76. Litt, supra note 2, at C-6—C-7. Rule 1.6 addresses client confidences. However, the attorney-client privilege is an evidentiary privilege and is not specifically governed by the Model Rules. Rules 1.6 and 1.13 are critical to understanding the protections and obligations implicating the attorney-client privilege. See also Model R. Prof’l Conduct R. 1.6, cmt. 5 (2001). The old version of Rule 1.6 stated that the lawyer shall not reveal information relating to representation of a client with only a few limited exceptions outlined in section (b) of Rule 1.6. Litt, supra note 2, at C-6—C-7. Rule 1.6 (b) (1-4) stated:

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

1. To prevent reasonably certain death or substantial bodily harm;
2. To secure legal advice about the lawyer’s compliance with these rules;
3. To establish a claim of defense on behalf of the lawyer in controversy between the lawyer and the client, to establish a defense to criminal charge or civil claim against the lawyer based upon conduct which the client was involved, or to respond to allegation in any proceeding concerning the lawyer’s representation of the client;
4. To comply with other law or court order.

77. MODEL R. PROF’L CONDUCT R. 1.6 and 1.13 (2003); see Litt, supra note 2, at C-3. The revisions to Model Rules 1.6 and 1.13 were made at the ABA annual meeting just days after SEC Rule 205 went into effect. Litt, supra note 2, at C-7. At the urging of the Cheek Commission, a task force addressing corporate responsibility, the ABA House of Delegates narrowly approved the changes. Id.

78. Cohen, supra note 12, at 309.

79. Id. at 308. The ABA expressed that the corporate scandals have held to a need for lawyers to play a significant and heightened role in preventing future corporate misconduct. Id.

80. Litt, supra note 2, at C-7.
which the client has used the lawyer's services and that is reasonably
certain to result in substantial financial injury to another.\footnote{81}

Further, the ABA amended Rule 1.13 to sharpen the "bedrock
principle of the Model Rules" that the lawyer for an organizational
client represents the organization and must act in the best interest of
that organization.\footnote{82} There are two significant changes in revised
Model Rule 1.13.\footnote{83} First, in the old version of Model Rule 1.13 "re-
porting up" was an option a lawyer could consider when confronted
with fraudulent corporate activity.\footnote{84} Now under the revised rule, "re-
porting up" is mandatory unless the lawyer "reasonably believes that
it is not necessary in the best interest of the organization to do so."\footnote{85}
Second, the new rule permits the lawyer to disclose confidences and
secrets to third parties if the lawyer "reasonably believes disclosure is
necessary to prevent substantial injury to the corporation."\footnote{86} Model
Rule 1.13 limits this disclosure to circumstances where the attorney
has first revealed the information to the highest governing authority
within the organization and such authority refuses to respond in an
appropriate manner and where the organization may be detrimentally
affected by the violation before the attorney reports outside of the
organization.\footnote{87}

\footnote{81. MODEL R. PROF'L CONDUCT R 1.6 (2003) (emphasis added); see also Litt, supra note 2, at
C-7—C-8 (analyzing the changes in Model Rule 1.6).}
\footnote{82. A.B.A., REPORT OF THE AMERICAN BAR ASSOCIATION TASK FORCE ON CORPORATE
final_report.pdf; see also id. at 41. "[T]his obligation is a mandate, the Rule cannot and does not
prescribe precisely what action is appropriate; the lawyer is obligated to exercise informed profes-
sional judgment in determining what steps are 'reasonably necessary in the best interest of the
organization.' That can be determined, in specific detail, only in the context of the circumstances
in which the problem arises." Id; see also Cieplak & Hibley, supra note 59, at 717. Model Rule
1.13 imposes substantially similar requirements upon all attorneys that SEC Rule 205 imposes on
attorneys practicing before the SEC. Cieplak & Hibley, supra note 59, at 717.}
\footnote{83. Litt, supra note 2, at C-7—C-8.}
\footnote{84. MODEL R. PROF'L CONDUCT R 1.13 (2001); cf. MODEL R. PROF'L CONDUCT R 1.13
(2003). "Reporting up" became mandatory in the latter version of the Model Rules. See also
Litt, supra note 2, at C-8—C-9.}
\footnote{85. MODEL R. PROF'L CONDUCT R 1.13 (2003). However, is it unlikely that many lawyers
will argue that he or she reasonably believed that reporting to the executive committee was
unnecessary. See Litt, supra note 2, at C-8. "It would be a brave lawyer indeed who would avail
herself of that exception." Id; see also A.B.A., supra note 82, at 43 (stating that the Rule should
more actively encourage such action, by requiring that the lawyer refer the matter to higher
authority in the organization — including, if warranted, the organization's highest authority —
unless the lawyer reasonably believes that it is not necessary to do so). Unlike the relatively
rigid reporting requirements in the Part 205 SEC Rules, proposed Rule 1.13 would continue to
allow the lawyer to exercise professional judgment in determining the appropriate way to pro-
cede in the best interest of the organization. A.B.A., supra note 82, at 44 n.78.}
\footnote{86. MODEL R. PROF'L CONDUCT R 1.13 (2003); Litt, supra note 2, at C-8—C-9.}
\footnote{87. MODEL R. PROF'L CONDUCT R 1.13(c)(1-2) (2003). The rule requires that the attorney
first try to report within the organization and if such attempt fails and the lawyer "reasonably
2. Differences between SEC Rule 205 and ABA Model Rules 1.6 and 1.13

While the revised Model Rules 1.6 and 1.13 certainly reflect the same focus on attorney responsibility in corporate governance as SEC Rule 205, the SEC rule is broader in several aspects. First, SEC Rule 205 requires the attorney to report any "evidence of material violations of which the attorney becomes aware in the course of representing the issuer." On the other hand, the ABA Model Rules limit disclosure to violations relating to the particular attorney's representation or if the violation involved use of the attorney's services. Second, the Model Rules appear to apply only when a lawyer has actual knowledge of a violation or potential violation. The SEC's standard is objective and applies when it would be reasonable for a lawyer to conclude that a violation occurred or was about to occur. Third, the Rule 205 mandates up-the-ladder reporting, whereas the Model Rules permit a lawyer to choose not to report up-the-ladder if it is not in the best interest of the corporation to do so. Finally, the SEC rules are mandatory and carry sanctions while the Model Rules are simply guidelines for the states to adopt. Once a state adopts all or part of the rules, they are the binding code of conduct for attorneys in that state.

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88. Id.
89. 17 C.F.R. § 205.3(b)(1) (2004); see also Litt, supra note 2, at C-9. This is somewhat in opposition to Model Rule 1.6 which does not require that the attorney first report within the organization and the attorney may disclose information to prevent or rectify substantial injury to the financial interests or property of a third party. Id. at C-9.
91. Litt, supra note 2, at C-3.
92. 17 C.F.R. § 205.2(m); see also Litt, supra note 2, at C-9 (discussing the difference between the Model Rules and SEC Rule 205).
93. 17 C.F.R. § 205.3(b)(1); Litt, supra note 2, at C-9.
94. 17 C.F.R. § 205.6(a-d) (outlining sanctions).
D. The Attorney-Client Privilege

The attorney-client privilege protects communications shared between a client and an attorney and has been considered the bedrock of a lawyer's professional obligations. It is essential both for effective client representation and smooth functioning of the legal system as a whole. Subject only to narrow exceptions where a lawyer's services are being misused by the client to perpetrate a crime or fraud or where the client has waived the privilege by work or deed, it has been zealously guarded. The United States Supreme Court has upheld the attorney-client privilege on numerous occasions. In *Upjohn Co. v. United States*, the Court recognized that the attorney-client privilege applied to the corporate client. The Court noted that the attorney-client privilege is the oldest of the privileges for confidential communications known to common law and that the purpose of the attorney-client privilege is to "encourage full and frank communication between attorneys and their clients and thereby to promote broader

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95. In discussing the attorney-client privilege, the work product doctrine is often involved. The work product doctrine is explicitly protected by Federal Rule Civ. P. 26(b)(3), unlike the attorney-client privilege. In *re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 314 (6th Cir. 2002) (Boggs, J., dissenting). The work product doctrine has generally been recognized as distinct from and broader than the attorney-client privilege. *Id.* at 294. "The doctrine is designed to allow an attorney to 'assemble information, sift what he considers to be relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference ....'" *Id.* This comment will only address the attorney-client privilege, however many cases and articles referenced in this comment also address the work product doctrine.


97. Litt, *supra* note 2, at C-1; *Re statement (Third) of the Law Governing Lawyers* §§ 68–72 (2000). The Restatement states that the attorney-client privilege protects: (1) a communication; (2) made between privileged persons; (3) in confidence; (4) for the purpose of obtaining or providing legal assistance to the client." *Id.* "Communication" is "any expression through which a privileged person ... undertakes to convey information to another privileged person and any document or other record revealing such an expression." *Id.* § 69. A privileged person is the client or prospective client, the client's lawyer, agents of either who facilitate communications between them, and agents of the lawyer who facilitate representation. *Id.* § 70. A communication is in confidence if "at the time and in the circumstances of the communication, the communicating person reasonably believes that no one will learn the contents of the communication except a privileged person." *Id.* § 71. Obtaining or providing legal assistance for the client includes any communication made to or to assist a person, "(1) who is a lawyer or who the client or prospective client reasonably believes to be a lawyer; and (2) whom the client or prospective client consults for the purpose of obtaining legal assistance." *Id.* § 72.

98. Litt, *supra* note 2, at C-1.


101. *Id.* at 389 (citing FED. R. EVID. 501).
public interests in observance of law and administration of justice.\textsuperscript{102} While the Court recognized that complications in the application of the privilege arise when the client is a corporation, the Court found that the privilege was necessary for the corporate attorney to formulate sound legal advice.\textsuperscript{103}

Because some courts fear that the attorney-client privilege inhibits the truth-seeking process and results in the loss of testimony, the privilege is narrowly construed.\textsuperscript{104} Courts have recognized several mechanisms for waiver of the attorney-client privilege including: (1) client voluntarily reveals information to a third party;\textsuperscript{105} (2) the attorney voluntarily reveals information to a third party;\textsuperscript{106} and (3) implied waiver when the client attacks his attorney's conduct by calling into question substance of communications.\textsuperscript{107} Accordingly, while the legal profession highly values the confidentiality of information provided as part of the attorney-client communication,\textsuperscript{108} it is not without limitations.\textsuperscript{109} While the ABA has historically guarded the attorney-client privilege with fervor, it has recently limited the privilege's application to the corporate client.\textsuperscript{110}

It is important to note that the attorney-client privilege is more limited in its application than the duty of confidentiality under Model Rules 1.6 and 1.13. The attorney-client privilege governs the use of information only in the context of an adversarial proceeding and applies only to the lawyer-client communication made for the purposes of securing legal advice or assistance.\textsuperscript{111} While the "up-the-ladder reporting" of Rule 205 and Model Rules 1.6 and 1.13 do not per se implicate violations of the attorney-client privilege because the reporting

\textsuperscript{102. Id. (holding that communications by Upjohn employees to counsel are covered by the attorney-client privilege where company's attorneys sent questionnaire to and interviewed employees regarding questionable payments of foreign government officials); see also id. at 389 (noting that the privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyers being fully informed by the client).}

\textsuperscript{103. Id. at 390 (citing United States v. Louisville & Nashville R. Co., 236 U.S. 318 (1915).}

\textsuperscript{104. Todd A. Ellinwood, "In Light of Reason and Experience": The Case for a Strong Government Attorney-Client Privilege, 2001 Wis. L. Rev. 1291, 1301 (2001).}

\textsuperscript{105. United States v. Bump, 605 F.2d 548, 551 (10th Cir. 1979).}

\textsuperscript{106. Id.}

\textsuperscript{107. In re French Bankr., 162 B.R. 541 (Bankr. D. S.D. 1994) (finding waiver when the client testifies as to attorney's advice).}

\textsuperscript{108. Semple, supra note 6, at 423.}

\textsuperscript{109. Shareholders suing their corporation may discover communications otherwise protected by the attorney-client privilege upon a showing of good cause. Garner v. Wolfinbarger, 430 F.2d 1093, 1103-04 (5th Cir. 1970). However, the complete removal of the attorney-client privilege from the grasp of the corporate client would expose corporations to harassment suits by minority stockholders and may inhibit candid attorney-client communication. See id. at 1104.}

\textsuperscript{110. See supra notes 77–80 and accompanying text.}

\textsuperscript{111. MODEL R. PROF'L CONDUCT R 1.6 (2003).}
is done within the organization, the privilege may be affected by a diminution of the free flow of information between corporate attorney and management due to worries about confidentiality. The corporate client may be less than honest with the attorney where the client is aware of the attorney's duty to report potential violations "up-the-ladder."  

E. Corporate Cooperation in SEC Proceedings

In January 2003, the Deputy Attorney General, Larry Thompson, issued a Department of Justice ("DOJ") memo ("Thompson Memo") discussing the factors considered in determining whether to seek federal prosecution of corporations. One of the factors the DOJ considers is the cooperation and voluntary disclosure of information by the corporation.

The DOJ's controversial definition of cooperation includes, as a gauge of cooperation, the company's willingness not to invoke the attorney-client privilege and attorney work product doctrine. United States Attorney for the Southern District of New York, James Comey, stated in an interview that prosecutors will consider whether the cor-

112. Cieplak & Hibley, supra 59, at 722 (noting that some concerns have been raised that conflicts between the corporation's officer and lawyers where management fears that the attorney may blow the whistle at any time and thus are more reluctant to communicate with the lawyers). But see id. at 726 (stating that concerns over communication issues resulting from the disclosure requirements of Rule 205 and the 2003 Model Rules are unfounded).

113. Id. (noting that some commentators suggest that the independence of the bar may be compromised if lawyers are required to assist the government in the investigation of crimes).


115. Id. The factors outlined in the memo are the following: (1) nature and seriousness of the offense; (2) persuasiveness of the wrongdoing within the corporation; (3) corporation's past history; (4) cooperation and voluntary disclosure; (5) corporate compliance programs; (6) offers of restitution and remediation; (7) collateral consequences; (8) adequacy of prosecuting responsible individuals; and (9) non-criminal alternatives. Id.; see also Dale Oesterle, Early Observations on the Prosecutions of the Business Scandals of 2002-2003: On Sideshow Prosecutions, Spitzer's Class with Donaldson Over Turf, the Choice of Civil or Criminal Actions, and the Tough Tactic of Coerced Cooperation, 1 Ohio St. J. Crim. L. 443, 476-77 (discussing the factors considered by the DOJ).

116. See Hochberg, supra note 13, at L-13. In an interview, United States Attorney James Comey stated that one factor for prosecutors to consider is whether and to what extent the corporation cooperated with the government's investigation. Id.

117. Thompson Memo, supra note 114. "In gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to identify the culprits within the corporation, including senior executives; to make witnesses available; to disclose the complete results of its internal investigation; and to waive attorney-client and work product protection." Id.; see also Oesterle, supra note 115, at 476-477. "The Justice Department includes as a gauge of cooperation the company's willingness not to invoke the attorney-client privilege and attorney work-product protection." Oesterle, supra note 115, at 477.
poration turned over documentation of any internal investigations that the corporation conducted and whether the corporation waived privileges.\textsuperscript{118} Further, Comey specifically stated that while waiver is not required as a measure of cooperation, prosecutors will sometimes ask the corporation to provide information that is generally considered privileged.\textsuperscript{119} The DOJ's measure of cooperation extends to the corporation's cooperation with other government agencies, specifically the SEC.\textsuperscript{120}

Moreover, in October of 2003, the SEC issued its own "Statement on the Relationship of Cooperation to Agency Enforcement Decisions" discussing the waiver of privileges and setting forth a number of criteria it considers when determining whether to give credit for self-reporting.\textsuperscript{121} Among the criteria that the SEC considers are: (1) nature of the misconduct; (2) source of the misconduct; (3) length of misconduct; (4) extent of the harm caused; (5) detection of the misconduct; and (6) internal corporate remedy for the misconduct.\textsuperscript{122} The SEC noted that it does not view a company's waiver of privilege as an end in itself but only as a means to provide relevant, and sometimes critical, information as to the corporation's internal remedy and detection of the misconduct.\textsuperscript{123} While both the SEC and DOJ insist that waiver of privilege is not required for cooperation, corporate attorneys are aware of the well-known incentives to cooperate with a government investigation and fear that the corporation will be treated harshly if their cooperation is deemed inadequate.\textsuperscript{124}

F. Courts Differ in Treatment of Confidentiality Agreements and Selective Waiver

In order to conform to the cooperation requirements outlined by the SEC and other government agencies, a corporation will often re-

\textsuperscript{118} Hochberg, \textit{supra} note 13, at L-13.

\textsuperscript{119} \textit{Id.} In response to the question, "Don't you sometimes ask the corporation to provide information that is classic attorney-client privilege, i.e. counsel's advice to the corporation?" Comey stated, "Yes, but rarely." \textit{Id.} at L-14. Comey suggested that the Department of Justice may ask for privileged information in situations where the corporation is claiming that it engaged in a good faith reliance on counsel. \textit{Id.}

\textsuperscript{120} Thompson Memo, \textit{supra} note 114.


\textsuperscript{122} \textit{Id.} at 2. The SEC qualified the stated criteria by stating that these were just factors and not necessarily determinative of whether the SEC will give credence to self-reporting and waiver of privileges. \textit{Id.}

\textsuperscript{123} \textit{Id.} at n.3; see also Litt, \textit{supra} note 2, at C-2.

\textsuperscript{124} Litt, \textit{supra} note 2, at C-2.
lease privileged information pursuant to a confidentiality agreement.\textsuperscript{125} These agreements generally state that the release of attorney-client information or work product to the SEC does not constitute a waiver of the privilege.\textsuperscript{126} Thus, the SEC is barred from releasing the information to other parties. While the SEC has indicated its support of such a practice,\textsuperscript{127} some courts have declined to uphold confidentiality agreements stating that once a client waives the privilege as to one party, the privilege is waived as to all parties.\textsuperscript{128}

Courts have long been addressing the issue of whether clients waiving the attorney-client privilege as to the government should be allowed to maintain the privilege as to everyone else.\textsuperscript{129} However, with the introduction of the Act and SEC Rule 205, courts have a new perspective in addressing whether to uphold confidentiality agreements because of the increased emphasis on attorney responsibility in identifying, addressing, and remediying corporate wrongdoing. Both sides of the debate support their respective opinions by citing policy,

\textsuperscript{125} See supra notes 117–120 and accompanying text.

\textsuperscript{126} See Dorris, supra note 14, at 797 (discussing the limited waiver rule which allows corporations to share their confidential attorney-client communications with the SEC without having to waive the privileged status of these communications against other parties). Dorris uses the term "limited" waiver to mean what this comment terms as "selective" waiver. The confidentiality agreement also often encompasses the work product protected materials.

\textsuperscript{127} SEC Release No. 44969, supra note 121, at n.3. The SEC filed an amicus brief, Brief of SEC as Amicus Curiae, McKesson HBOC, Inc., No. 99-C-7980-3 (Ga. Ct. App. filed May 13, 2001), arguing that the provision of privileged information to the commission pursuant to a confidentiality agreement did not necessarily waive the privilege as to third parties. Id.; see generally Dorris, supra note 14 (discussing cases from the 1980's where the SEC utilized confidentiality agreements).

\textsuperscript{128} See In re Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 294 (6th Cir. 2002). "As a general rule, the 'attorney-client privilege is waived by voluntary disclosure of private communications by an individual or corporation to third parties.'" Id. (quoting In re Grand Jury Proceedings, October 12, 1995, 78 F.3d 251, 254 (6th Cir. 1996)); see also Westinghouse Electric Corp. v. Republic of the Philippines, 951 F.2d 1414, 1423 n.7 (3d. Cir. 1991). Some courts have distinguished between waivers which permit the client who has disclosed privileged communications to one party to continue asserting the privilege against other parties and waivers which allow the client who has disclosed a portion of privileged communication to continue asserting the privilege as to the remaining portions of the same communications. Id.; see also In re Columbia/HCA, 293 F.3d at 295 (finding that corporation could not selectively waive attorney-client privilege by releasing otherwise privileged documents to government agencies during investigation, but continue to assert privilege as to other parties); see also Saito v. McKesson HBOC, Inc., No. CIV.A.18553, 2002 WL 31657622 (Del. Ch. Oct. 25, 2002), aff'd, CIV.A. 18554, 2005 WL 583742 (Del. Mar. 8, 2005) (noting that Delaware Supreme Court has already determined that it is unfair to allow for partial waivers, but finding that disclosures made to the SEC pursuant to a confidentiality agreement should remain privileged as to other parties). This comment will only address "selective waivers," which allow a party the client who has disclosed privileged communications to one party to continue asserting the privilege against other parties.

\textsuperscript{129} See Dorris, supra note 14, at 797–798 n.41 (1984) (citing cases from the middle 1970's and early 1980's addressing the applicability of confidentiality agreements with the government).
Supreme Court precedent, and the purpose of the attorney-client privilege.

1. Courts Declining to Adopt a Selective Waiver Theory

The Third and Sixth Circuits have declined to adopt a theory of selective waiver where a corporation releases information to the government, but wishes to retain the privilege as to other parties. The circuits strictly interpret the traditional waiver doctrine to find that once the privilege is waived, it is always waived. The courts bolster this argument by asserting that the reasoning behind confidentiality agreements does not further the purpose of the attorney-client privilege. Finally, the courts see confidentiality agreements as disadvantaging private plaintiffs.

Courts declining to uphold confidentiality agreements often cite the Third Circuit's 1991 decision in Westinghouse Electric Corp. v. Republic of the Philippines. The Westinghouse court found that voluntary disclosure to a third party of privileged information was inconsistent with an assertion of the privilege and that by disclosing documents to the SEC containing privileged communication, Westinghouse waived the attorney-client privilege. In Westinghouse, the SEC investigated the company for illegal payments made to obtain a contract in connec-

130. The Circuit Court for the District of Columbia refused to allow selective waiver of privileged information to the SEC. Permian Corp. v. United States, 665 F.2d 1214 (D.C. Cir. 1981). The company exchanged letters with the SEC where the SEC stated that it would not deliver the documents to any person other than a member of the SEC, another governmental body or Congress without first giving notice to Occidental of its intentions to deliver the documents to a person other than the SEC, government or Congress. Id. at 1217. However, there was no confidentiality agreement negotiated between the parties. Id.; see also Westinghouse Elec. Corp., 951 F.2d at 1425 (stating that selective waiver does not serve the purpose of encouraging full disclosure to one's attorney in order to obtain informed legal assistance and extends the privilege beyond its intended purpose). In Westinghouse, there was no formal confidentiality agreement entered into between Westinghouse and the SEC. Id. at 1418. However, at the time, the SEC regulations stated that "information or documents obtained by the SEC in the course of an investigation examination, unless made a matter of public record, shall be deemed non-public," and would not be disclosed without authorization. Id. at 1418 n.4; see also In re Columbia/HCA, 293 F.3d at 302 (declining to adopt selective waiver).

131. Westinghouse Electric Corp., 951 F.2d at 1423 (stating that voluntary disclosure to a third party of privileged communications is inconsistent with the assertion of the privilege).

132. In re Columbia/HCA, 293 F.3d at 302 (quoting Permian Corp. v. United States, 665 F.2d 1214 (D.C. Cir. 1981) that the "client cannot be permitted to pick and choose among his opponents, waive the privilege for some and resurrecting the claim of confidentiality as to others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit.").

133. Westinghouse Electric Corp., 951 F.2d at 1418.

134. Id. at 1423. The court also found that Westinghouse had waived the work product protection. Id.
tion with a Philippine nuclear plant. Westinghouse's attorneys released privileged information to the SEC relying upon the SEC's confidentiality regulations providing that information or documents obtained by the SEC in the course of any investigation or examination, unless made a matter of public record, are deemed non-public. The Republic of the Philippines subsequently brought suit against Westinghouse in 1988 and requested privileged documents that Westinghouse had made available to the SEC.

In reaching its decision, the court looked to the purpose behind the attorney-client privilege. The court held that encouraging full and frank communication, the traditionally purported purpose of the attorney-client privilege, was merely a means to achieve the ultimate purpose, which the court stated is the promotion of a broader public interest in the observance of law and administration of justice. Further, the court stated that because the attorney-client privilege obstructs the truth-finding process, it should apply only to those disclosures necessary to obtain informed legal advice. Specifically, the Westinghouse court stated that selective waiver does not encourage full and frank disclosure to one's attorney in order to obtain informed legal assistance. Rather, it furthers voluntary disclosure to the government which is not the purpose of the attorney-client privilege. Accordingly, the court found that Westinghouse's voluntary

135. Id. at 1418.
136. Id. In March 1978, Westinghouse retained the law firm Kirkland & Ellis to conduct an internal investigation into whether company official had made improper payments. Id. In the course of the internal investigation, Kirkland & Ellis produced two letters reporting its findings. Id. These letters include communications between the attorneys and officers and employees of the corporation. Id.

137. Concurrently, the Department of Justice (DOJ) also began an investigation and Westinghouse also released privileged information to the DOJ. Westinghouse Electric Corp., 951 F.2d at 1414, 1419. In 1986, the DOJ reactivated its 1978 investigation after deposing Ferdinand Marco, the president of the Philippines at the time. Id. Westinghouse entered into a confidentiality agreement with the DOJ to preserve the attorney-client privilege and work product doctrine, and subsequently released privileged information to the government. Id.

138. Id. at 1418 n.4. The court quoted the provision in 17 C.F.R. §203.2 (1978), which stated that, "information or documents obtained by the Commission in the course of any investigation or examination, unless made a matter of public record, shall be deemed non-public." Id. While this provision is still good law, it is not often invoked without a corresponding confidentiality agreement. Further, it does not specifically address the issue of waiver of privileged information.

139. Id. at 1420.
140. Id. at 1423.
141. Westinghouse Electric Corp., 951 F.2d at 1423 (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)).
142. Id. at 1423.
143. Id. at 1424.
144. Id. The court quoted the D.C. Circuit court in Permian Corp. v. United States and stated that "selective waiver 'has little to do with' the privilege's purpose - protecting the confidential-
disclosures to the SEC were inconsistent with an assertion of the attorney-client privilege and allowed the Republic of the Philippines access to the information.\textsuperscript{145}

In \textit{In re Columbia/HCA Healthcare Corp. Billing Practices Litig.},\textsuperscript{146} the Sixth Circuit followed the Third Circuit’s approach in \textit{Westinghouse} and rejected the idea of selective waiver of attorney-client privileged information.\textsuperscript{147} The DOJ began investigating Columbia/HCA in the mid 1990s for possible Medicare fraud.\textsuperscript{148} The company conducted several internal audits of its Medicare patient records which it agreed to produce to the Government.\textsuperscript{149} In exchange for this cooperation, the DOJ agreed that certain stringent confidentiality provisions would govern its obtainment of the documents.\textsuperscript{150} However, numerous lawsuits were filed throughout the country by private litigants who wanted Columbia to produce the audits.\textsuperscript{151}

In declining to uphold the confidentiality agreement, the court reasoned that the attorney-client privilege is a matter of common law right and is not a creature of contract.\textsuperscript{152} The Third Circuit’s reasoning was similar to the Sixth Circuit’s reasoning stating that a selective waiver rule has “little, if any, relation to fostering frank communication between a client and his or her attorney.”\textsuperscript{153} The court felt that any form of selective waiver, even that which stems from 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.\textsuperscript{154} While the \textit{Westinghouse} court declined to base their finding on the "fairness" issue,\textsuperscript{155} the Sixth Circuit specifically articulated that a private litigant stands in nearly the same stead as the government and should be allowed the same access to the information.\textsuperscript{156}

2. Courts Adopting Selective Waiver

The Eighth Circuit, the Northern District of California,\textsuperscript{157} and Delaware state courts have found that the public policy of encouraging disclosure, the purpose of the attorney-client privilege, and the lack of a threat of harm to individual plaintiffs support upholding selective waiver of the attorney-client privilege and/or attorney work product doctrine pursuant to confidentiality agreements with the government.\textsuperscript{158} Further, there is clearly an economic benefit associated with upholding selective waiver in the reduced costs of investigations by the government.\textsuperscript{159}

\textsuperscript{154} Id. \\
\textsuperscript{155} See \textit{Westinghouse Electric Corp. v. Republic of the Philippines}, 951 F.2d 1414, 1425 (3d. Cir. 1991). The court referred to \textit{Permian v. United States}, 665 F.2d 1214,1221 (D.C. Cir. 1981), decision stating, "that the client cannot be permitted to pick and choose among his opponents waiving the privilege for some ad resurrecting the claim of confidentiality to obstruct others . . . ." \textit{Id.}

\textsuperscript{156} \textit{In re Columbia/HCA}, 293 F.3d at 303.

\textsuperscript{157} \textit{In re McKesson HBOC, Inc.}, No. 99-CV-20743. 2005 WL934331, at *1 (N.D. Cal. Mar. 31, 2005). \textit{In re McKesson's} holding specifically adopted a selective waiver rule for attorney work-product information. \textit{Id.} at *10. However, the Court found that the attorney-client privilege did not apply to the communications sought to be protected and thus, the waiver rule could not be applied. \textit{Id.} at *8-*9. Much of the analysis supporting selective waiver as to work-product information is applicable to attorney-client information.

\textsuperscript{158} \textit{Diversified Indus., Inc. v. Meredith}, 572 F.2d 596, 611 (8th Cir. 1978) (holding that the company only waived the privilege as to the SEC because holding otherwise would "have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them"). There was not an expressed confidentiality agreement between the SEC and the company. \textit{See generally Saito v. McKesson HBOC, Inc}, No. CIV.A.18553, 2002 WL 31657622, at *11 (Del. Ch. Oct. 25, 2002), aff'd, CIV.A. 18554, 2005 WL 583742 (Del. Mar. 8, 2005) (finding that it is in the best interest of the shareholders to encourage corporate compliance and therefore adopting a selective waiver rule for disclosures made to the government pursuant to a confidentiality agreement). \textit{In Saito}, McKesson did enter into a confidentiality agreement with the SEC. \textit{Id.} at *1. The court discussed the communications, information, and documents in question under the work product doctrine, but expressed that the communications which would fall under the attorney-client privilege also were protected under the same rationales expressed under the work product doctrine. \textit{Id.} at *12; \textit{see also In re McKesson HBOC, Inc.}, No. 99-CV-20743. 2005 WL934331, at *10 (N.D. Cal. Mar. 31, 2005) (upholding selective waiver agreement as to attorney work product but finding that the attorney-client privilege did not apply to the material because McKesson had not communicated the information to its attorneys in confidence because McKesson had already agreed to release the information to the SEC).

\textsuperscript{159} \textit{See Janet L. Hall, "Limited Waiver" of Protection Afforded by the Attorney-Client Privilege and the Work Product Doctrine}, 1993 U. ILL. L. REV. 981, 996 (discussing how a selective
As early as 1978, some courts have recognized the benefits of upholding a selective waiver rule. In *Diversified Industries, Inc. v. Meredith*, the Eight Circuit found that since the company voluntarily surrendered certain material protected by the attorney-client privilege to the SEC in a non-public investigation, the company only gave a selective waiver.\(^{160}\) There, Diversified sought to protect from the Weatherhead Corporation a memorandum prepared by its law firm.\(^{161}\)

In 1975, the SEC conducted an official investigation of Diversified regarding a "slush fund" which was allegedly used to bribe the purchasing agent of other business entities including Weatherhead.\(^{162}\) Diversified hired a law firm to make a detailed investigation of the corporation's business practices and report to the board of directors.\(^{163}\) Diversified released information from the attorney's investigation pursuant to an SEC subpoena.\(^{164}\) The court found that Diversified expressed an expectation of privacy in protecting the privileged material in that it only released the information to the SEC in a nonpublic investigation.\(^{165}\) The court was not concerned with fairness to private litigants and noted that private litigants were not foreclosed from obtaining the same information from non-privileged sources by examining business documents, deposing corporate employees, interviewing nonemployees, and obtaining preexisting documents and financial records prepared by Diversified for a purpose other than communicating with the law firm.\(^{166}\) Thus, the court found that Diversified had authorized only a selective waiver of the attorney-client privilege by releasing information to the SEC in a non-public investigation.\(^{167}\)

In *Saito v. McKesson HBOC, Inc.*, the Delaware Chancery Court upheld selective waiver rule relating to attorney-client privileged information.\(^{168}\) The court stated that such a rule benefitted law enforce-
ment agencies and encouraged corporate compliance. Saito, a McKesson shareholder, sought access to documents over which McKesson had asserted attorney-client privilege. The SEC conducted an informal inquiry into whether McKesson HBOC had filed materially false or misleading financial statements. McKesson’s attorneys disclosed information as to their internal investigation to the SEC pursuant to confidentiality agreements. Saito filed a derivative suit and requested access to the information that McKesson released to the SEC.

In finding that communications released pursuant to the confidentiality agreement were privileged as to Saito, the court noted that the disclosing party’s expectations of privacy are heightened when the party secures a confidentiality agreement before agreeing to disclose the information. Further, the court stated that from a policy perspective, private plaintiffs are not disadvantaged, but rather benefit because the SEC may more efficiently protect the integrity of capital markets. Litigating shareholders cannot “have their cake and eat it too.” The court noted that shareholders want disclosing parties to continue disclosing to the SEC so that they are better protected, but at the same time they want access to these disclosures for their own tactical advantage.

169. Id. at *8. A selective waive rule is such a rule that benefits law enforcement agencies such as the SEC. Id. It encourages corporations to disclose their internal infestation confidentially allowing the SEC to resolve the investigations expeditiously. Id. Thus, the SEC benefits from a substantial savings in time and resources, and can resolve a higher volume of investigations. Id. The court also found that the selective waiver rule applied to work product protected information. Id.

170. Id. at *1. Saito also wish to gain access to documents which McKesson felt were covered by the work product doctrine. Id.

171. Id. McKesson hired Skadden, Arps, Slate, Meagher & Flom, LLP and Price-waterhouseCoopers LLP to conduct an internal investigation of the alleged wrongdoing. Id. Shortly after McKesson merged with HBOC, McKesson HBOC announced the first of three downward revisions of revenues, earnings, net income and other financial information for 1996-1998. Id.

172. Id.


174. Id. at *6 (citing Westinghouse Elec. Corp. v. Philippines, 951 F.2d 1414 (3d Cir. 1992)).

175. Id. at *9. “Because of the SEC’s savings and efficiency, greater protection is afforded to the beneficiaries that it was designed to protect—investing shareholders such as plaintiff Saito.” Id. The court also references the SEC’s amicus brief which stated that it saved several hundred hours, used half the number of staff to investigate, and complete the investigation of McKesson much earlier than it would have done without the confidential disclosure in this case. Id. at *8 n.55.

176. Id. at *9.

closure had been made and even hinted that the plaintiff may have already received the benefit of the disclosure.\textsuperscript{178}

In the recent and related case, \textit{In re McKesson HBOC, Inc.}, the District Court for the Northern District of California followed the Delaware Chancery Court in \textit{Saito}, and upheld a selective waiver agreement between McKesson and the SEC as to attorney work product.\textsuperscript{179} In its discussion, the court found persuasive Judge Boggs's dissent in \textit{In re Columbia/HCA} which recognized a distinction between disclosure to a private entity (resulting in waiver) and disclosure to a government entity pursuant to a confidentiality agreement (maintaining work product protection).\textsuperscript{180} \textit{In re McKesson} involved the same communications and information to which Saito sought access to a report compiled by Skadden, Arps, Slate, Meagher & Flom ("Skadden"), the law firm hired by McKesson to review its accounting policies, circumstances and procedures involved in McKesson's merger with HBOC for which it was under investigation by the SEC.\textsuperscript{181} Prior to producing its report, Skadden and McKesson agreed to release the report to the SEC upon its completion pursuant to a confidentiality agreement with the SEC.\textsuperscript{182} Because McKesson agreed to release the information prior to the communications having been made to the Skadden attorneys, the court found that the communications were not made in confidence and that the attorney-client privilege did not apply to protect the information.\textsuperscript{183} However, the court did find that the Skadden report was protected by the work product doctrine which had been only selectively waived as to the SEC.\textsuperscript{184} While the district court clearly limited its holding to the work product doctrine, it cited with support Judge Boggs's dissent in \textit{In re Columbia/HCA} which addressed the attorney-client privilege.\textsuperscript{185} Accordingly, the case is helpful in analyzing the reasons supporting the selective waiver doctrine.

\textsuperscript{178} Id.
\textsuperscript{180} Id. at *9.
\textsuperscript{181} Id. at *1.
\textsuperscript{182} Id. at *3.
\textsuperscript{183} Id. at *3.
\textsuperscript{184} Id. at *10. "This court's determination that McKesson did not waive its work product protection as to all adversaries when it disclosed the Skadden Report and Back-up Materials to the government under the terms of the letter agreement is in accord with the conclusions reached by the Court of Chancery in Delaware in \textit{Saito v. McKesson HBOC, Inc.}" Id.
\textsuperscript{185} Id. at *4-*10. Most of the cases that have dealt with the selective waiver issue have considered both the attorney-client privilege and work product protection.
This section analyzes the reasoning of the courts in either adopting or refusing to adopt a selective waiver theory. Second, this section discusses why the position of the Eighth Circuit, California federal district court, and Delaware state courts is the better approach by addressing the concerns raised by the Third and Sixth Circuits. Finally, this section supports resolving the circuit split in favor of adopting a selective waiver theory by upholding confidentiality agreements between corporations and the SEC. Public policy, precedent, the purpose behind the attorney-client privilege, and the legislative intent of the Act and SEC Rule 205 all support such a decision.

A. Reasoning of the Circuits

In considering whether to allow a selective waiver of the attorney-client privilege via a confidentiality agreement with the government, the circuits have relied on very similar reasoning. The courts have based their opinions on the purpose of the attorney-client privilege and the search for truth, but have reached conflicting conclusions. The Third and Sixth Circuits found that allowing corporations to selectively waive the attorney-client privilege as to the government hindered the search for truth, while the Eighth Circuit, California federal district court, and the Delaware state court found that a selective waiver of the attorney-client privilege as to the government pursuant to a confidentiality agreement ensured full and frank communications between the corporate client and attorney.

Many of the cases addressing selective waiver analyze both the attorney-client privilege and work-product doctrine. This Comment focuses primarily on the attorney-client privilege, but as articulated by Judge Boggs's dissent in In re Columbia/HCA many of the reasons for supporting selective waiver of the attorney-client privilege apply when considering selective waiver of the attorney work product doctrine.

1. Third and Sixth Circuits' Analyses

The decisions of the Third and Sixth Circuits rest firmly on the traditional waiver doctrine without regard to the unique relationship

186. See infra notes 190–197 and accompanying text.
188. See infra note 197 and accompanying text.
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among a corporate attorney, the corporation and the government. Both circuits articulated that releasing privileged information to any party is inconsistent with the assertion of the attorney-client privilege. Among the reasons courts present for refusing to allow a selective waiver of the attorney-client privilege are the search for truth, privacy, and fairness. Without considering the corporate attorney's role as counselor and advisor of corporate compliance, the courts found that the purpose of the attorney-client privilege, to encourage full and frank communication between attorney and client, was not furthered by adopting a selective waiver rule where the client could waive the privilege only as to the government. Further, the Sixth Circuit expressed a fairness concern stating that allowing the corporation to waive the privilege as to the government, but not as to others, disadvantaged private litigants. Thus, the courts felt that the traditional waiver rule best protected the attorney-client privilege and ensured that information was not selectively disclosed to the government at the expense of private litigants.

2. The Eighth Circuit, Northern District of California, and Delaware State Courts' Analyses

Although concluding differently, the Eighth Circuit, the Northern District of California, and the Delaware state court also based their decisions on the purpose of the attorney-client privilege and policy referencing the search for truth, fairness, privacy, and government efficiency. The courts concluded that the "all-or-nothing" approach

190. See Westinghouse Electric Corp., 951 F.2d at 1420; In re Columbia/HCA, 293 F.3d at 303 (quoting 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, waiving the privilege for some and resurrecting the claim of confidentiality as to others . . . ."); see also In re Columbia/HCA, 293 F.3d at 303 (noting that privacy is gone once the client has consented to release of information).
191. See Okreszik, supra note 96, at 147–56 (discussing justifications for courts refusal to allow selective waiver).
192. Westinghouse Electric Corp., 951 F.2d at 1418; In re Columbia/HCA, 293 F.3d at 303 (noting that a disclosure to a governmental agency may further the truth-seeking process, but should not do so at the expense of private litigants). But see Okreszik, supra note 96, at 147. The courts limited the attorney-client privilege for fear that the privilege restrained the search for truth and that disclosure of information was contrary to the privacy protection afforded by the privilege. Id.
193. In re Columbia/HCA, 293 F.3d at 302.
194. Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1978) (holding that the company’s waiver of the attorney-client privilege as to the SEC did not waive the privilege as to private litigants.); Saito v. McKesson HBOC, Inc, No. CIV.A.18553, 2002 WL 31657622, at *8 (Del. Ch. Oct. 25, 2002), aff'd, CIV.A. 18554, 2005 WL 583742 (Del. Mar. 8, 2005) (stating that
to selective waiver hindered the corporate attorney's role as advisor. Rather, these courts found that the purpose of the attorney-client privilege is furthered by ensuring corporations that information discussed with attorneys would not be released to the public if disclosed to a government agency. Contrary to the Third and Sixth Circuits, the Eighth Circuit and Delaware state courts noted that the search for truth is unhindered by the attorney-client privilege because information may not be revealed whatsoever without the protection of the privilege and a corresponding confidentiality agreement for information released to the government. Moreover, private litigants are not disadvantaged by upholding confidentiality agreements protecting attorney-client privileged communication because, except in special circumstances, no party has access to privileged communications. Finally, the courts held that government investigations would be more efficient and effective by upholding selective waiver of the confidentiality agreement.

both the shareholders and the capital markets benefit from a selective disclosure rule allowing information to be disclosed to the SEC and not to private litigants; In re McKesson HBOC, Inc., No. 99-CV-20743, 2005 WL934331, at *9 (N.D. Cal. Mar. 31, 2005) (stating that permitting disclosure to the work product doctrine).

195. See Saito, 2002 WL 31657622, at *8. "When courts amplify the risk of disclosure to include future private plaintiffs, the scales begin to tip further in favor of corporate non compliance with investigative agencies. A rigid rule leading to such an unwholesome trend seems unwise." Id.; see also Diversified Indus., 572 F.2d at 611. "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." Diversified Indus., 572 F.2d at 611.

196. See Saito, 2002 WL 31657622, at *8 (stating that encouraging corporation to disclose information confidentially to the SEC allows the SEC to resolve its investigations expeditiously and efficiently); see In re McKesson HBOC, 2005 WL934331, at *9 (citing with approval Judge Boggs's dissent in In re Columbia/HCA noting that the choice between disclosure to the government under a confidentiality agreement or otherwise no access supports a selective waiver doctrine where the public is benefited); see In re Columbia/HCA Healthcare Corp., Billing Practices Litig., 293 F.3d 289, 314 (6th Cir. 2002) (Boggs, J., dissenting). Judge Boggs specifically states in his dissent that many of the reasons for supporting selective waiver of the attorney-client privilege apply when considering selective waiver of the attorney work product doctrine despite other courts finding to the contrary. Id.


198. See Saito, 2002 WL 31657622 at *11. "The selective waiver rule encourages cooperation with law enforcement agencies without any negative cost to society or to private plaintiffs." Id.

199. See id. at *8. "When the SEC more efficiently protects the integrity of the capital markets, shareholders benefit." Id.; see also In re McKesson HBOC, 2005 WL934331, at *10 (noting that the government benefited from the disclosure because it could focus its investigation on the primary wrongdoers and deploy fewer employees to investigate McKesson).
B. Circuit Split Should Be Resolved in Favor of Selective Waiver Pursuant to a Confidentiality Agreement

The circuit split should be resolved by following the Eighth Circuit and Delaware state courts’ approaches to selective waiver and confidentiality agreements. The Third and Sixth Circuits’ reasoning is flawed in that both courts: (1) misapply the purpose behind the attorney-client privilege in their interpretation of the traditional waiver doctrine; (2) rely too heavily on the fairness to private litigants argument; and (3) fail to consider the changing environment in which corporate attorneys practice and businesses operate. Accordingly, in light of the established purpose behind the attorney-client privilege and policy, courts should uphold confidentiality agreements which waive the attorney-client privilege (or attorney work product doctrine) only as to the government in order to effectuate the appropriate balance between the protection of shareholder’s interest and protection of client confidences under Rule 205 and the Act.200

1. Selective Waiver through Confidentiality Agreements Furthers the Purpose of the Attorney-Client Privilege

The Supreme Court articulated that the purpose of the attorney-client privilege is to “encourage full and frank communication between attorneys and their clients and thereby to promote broader public interests in observance of law and administration of justice.”201 However, the Third and Sixth Circuits have focused primarily on the “full and frank communication between attorneys and their clients” portion finding that allowing selective waiver of the attorney-client privilege is effectively creating a “client-government” exception.202 This approach is far too limited. There is no client-government excep-

200. Giovanni P. Prezioso, Speech by SEC Staff: Remarks before the A.B.A. Section of Bus. Law (April 3, 2004) (stating that the debate surrounding Rule 205 has exposed the tensions between the duty to serve shareholder interests and the duty to protect client confidences; between federal authority to regulate attorneys appearing and practicing before the SEC and traditional state regulation of attorneys).

201. Upjohn Co. v. United States, 449 U.S. 383, 388 (1980) (holding that communications by Upjohn employees to counsel are covered by the attorney-client privilege where company’s attorneys sent questionnaire to and interviewed employees regarding questionable payments of foreign government officials); see also supra notes 100-103 and accompanying text.

202. See In re Columbia/HCA, 293 F.3d at 302. “The attorney-client privilege was never designed to protect conversations between a client and the government. . . rather, it pertains only to conversations between the client and his or her attorney.” Id.; see also Dorris, supra note 14, at 789. Dorris argues that the limited waiver rule does not concern the privilege between attorney and client; rather, it implicitly creates a new privilege between corporations and the SEC. Dorris, supra note 14, at 789. Dorris relies on the Permian Corp. v. United States, 665 F.2d 1214 (D.C. Cir. 1981), decision where the DC Circuit found a limited waiver rule to be inconsistent with the assertion of the attorney-client privilege. Id. at 802–803.
tion to the attorney-client privilege because the client is not communicating with the government, but rather, the client and/or attorney is releasing attorney-client privileged information to the government pursuant to a confidentiality agreement. This exception to the waiver rule allows a selective release of information to the government while still retaining the privilege as to other parties.

Further, the Third and Sixth Circuits ignore the loss of information which endangers the truth-seeking process. Judge Boggs of the Sixth Circuit articulated in his dissent in In re Columbia/HCA that “[w]ithout the [selective waiver] exception, much otherwise disclosed material would stay completely in the dark, under the absolute cover of privilege.” The Third and Sixth Circuits fail to recognize that without the exception, the corporation is less likely to reveal information to the government and thus, would not disclose the information whatsoever because it is privileged.

The Sixth Circuit also argued that a selective waiver rule was unfair to private litigants who would be barred from the information. However, this argument is unfounded. Because the communications sought are privileged, they would never be required to be released. Thus, the private plaintiff is in no worse position than if no disclosure had been made. Moreover, the underlying facts of the privileged communication may be available through other sources which are not privileged such as business documents. Even if the information is

203. See In re Columbia/HCA, 293 F.3d at 302; see also Saito v. McKesson HBOC, Inc, No. CIV.A.18553, 2002 WL 31657622, at *4 (Del. Ch. Oct. 25, 2002), aff'd, CIV.A. 18554, 2005 WL 583742 (Del. Mar. 8, 2005) (stating that a party has a reasonable expectation of privacy in the information when it is released only pursuant to a confidentiality agreement).
204. See In re Columbia/HCA, 293 F.3d at 312 (Boggs, J., dissenting) (discussing a government exception to the waiver rule).
205. See id. at 313 (Boggs, J., dissenting) (stating that either the government gets the disclosure made because of the exception or neither the government nor any other party becomes privy to the privileged material).
206. Id. (Boggs, J., dissenting) (noting also that the exception aids the government in bringing violations of the law to light).
207. Id. at 309 (Boggs, J., dissenting).
208. Id. at 303 (quoting Permian Corp. v. United States, 665 F.2d 1214, 122 (D.C. Cir. 1981) “[t]he client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality as to others.”); see also Okrzesik, supra note 96, at 167 (stating that the Sixth Circuit in In re Columbia/HCA, discussed “other” means for the government to obtain documents, but other means cannot reach privileged information).
209. In re Columbia/HCA, 293 F.3d at 312 (Boggs, J., dissenting).
211. See Hall, supra note 159, at 984 (stating that the attorney-client privilege protects all legal communications between attorneys and their clients, but does not protect disclosure of the underlying facts of a given situation).
privileged, private shareholder litigants may be able to gain access to the information pursuant to the Garner Doctrine. In Garner v. Wolfinbarger, the Fifth Circuit held that where the corporation is in a suit against its stockholders on charges of acting against shareholder interests, the stockholders must show "good cause" as to why the attorney-client privilege should not be invoked for communications between the corporation and its attorneys. Thus, upon a showing of good cause by the private shareholder plaintiff, the Garner Doctrine may allow for the release of attorney-client privileged information. Finally, the private litigant arguably has already benefited from the release of the information to the government and the remedy of the unlawful conduct by the corporation.

2. Policy Reasons Support Selective Waiver through Confidentiality Agreements

Perhaps the strongest support for adopting the approach of the Third Circuit Court of Appeals and the Delaware state courts is policy. Federal courts regularly consider public policy when analyzing rules. Here, policy reasons in support of upholding confidentiality agreements span the spectrum including the drastic change in corporate law as a result of the Act and SEC Rule 205, promoting the spirit of disclosure mandated by these rules, economic concerns, and protecting the attorney-client privilege and the private investor.


213. Id. See American Steamship, 232 F.R.D. at 201 (noting that while Garner v. Wolfinbarger was a derivative action, the doctrine has been applied to non-derivative claims).

214. Id. at 1104. Garner factors for showing "good cause" are: (1) number of shares owned by the shareholder and the percentage of stock they represent; (2) the assertion of a colorable claim; (3) the necessity of the information and its unavailability from other sources; (4) whether the stockholder has identified the information sought and is not merely fishing for information; and (5) whether the communication is advice concerning the litigation itself. Id.

215. See Saito, 2002 WL 31657622, at *8 (stating that the plaintiff who was contesting the confidentiality of the disclosure had already benefited from the confidential disclosures because the integrity of the capital markets is preserved).

a. Changing Corporate Landscape

Both In re Columbia/HCA and Westinghouse Electric Corp., were decided before the enactment of the Act in late 2002 and the implementation of SEC Rule 205, and thus do not consider the regulatory environment in which corporations operate today. These disclosure rules have weakened the protections of the attorney-client privilege. SEC Rule 205 requires that attorneys report up-the-ladder of the corporation any material violation of securities laws and attorneys are presumably expected to assist in remediying any wrongdoing. While not required to report violations to the SEC, a corporate attorney's role is to provide corporate clients with sound legal advice which may include a recommendation to disclose material violations of securities laws to the SEC contemporaneously or prior to an investigation. Further, while Rule 205 only requires "up-the-ladder" reporting within the corporation and thus does not diminish the attorney-client privilege per se, the nature of the attorney-client privilege is sacrificed because the lawyer is placed in a position of having to police the corporation. It is entirely contradictory to the spirit of disclosure advocated by Congress in the Act and the SEC in Rule 205, to not uphold confidentiality agreements as to the government.

Simply put, attorneys are caught between a "rock and a hard place." On one hand, attorneys are bound by the attorney-client privilege, which protects the conversations between the attorney and the client

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217. See supra notes 32–39 and accompanying text.
218. See Cohen, supra note 12, at 309 (discussing criticism of the Act by the American Corporate Counsel Association and the ABA finding that clients, and not attorneys, are ultimately vested with the power to choose to accept or reject their lawyer's advice); see also id. at 311 (stating that the Act will lead to a complete deterioration of the attorney-client privilege in ten years).
219. See Semple, supra note 6, at 423. Section 205 of the SEC rule includes "up-the-ladder" reporting. Id.
220. See Gregory Massing, Note, The Fifth Amendment, the Attorney-Client Privilege, and the Prosecution of White Collar Crime, 75 V.A. L. REV. 1179, 1198 (1989) (noting that the attorney-client privilege may create a "zone of silence" surrounding corporate affairs, but noting that the attorney-client privilege is necessary for attorneys to give sound legal advice).
221. 2 THOMAS LEE HAZEN, LAW OF SECURITIES REGULATION § 9.8 (5th ed. 2006).
222. See Semple, supra note 6, at 428 (quoting Saito v. McKesson HBOC, Inc., No. CIV.A.18553, 2002 WL 31657622 (Del. Ch. Oct. 25, 2002), aff'd, CIV.A. 18554, 2005 WL 583742 (Del. Mar. 8, 2005), "[t]he Delaware Court of Chancery— no stranger to business disputes—adopted a selective waiver rule for disclosures made to law enforcement agencies pursuant to a confidentiality agreement because such a rule 'encourages cooperation with law enforcement agencies without any negative cost to society or to private plaintiffs ... '); see also Senate Consideration of Public Company Accounting Reform and Investor Protection Act of 2002, 107th Cong. S6524, S6524 (2002) (explaining that the purpose of the Act was "to improve quality and transparency in financial reporting and independent audits. To increase corporate responsibility and the usefulness of corporate financial disclosure . . . ").
and is the foundation of good legal representation. Lawyers are most effective when clients completely confide in their attorneys, and thus, the search for truth must sometimes yield to the protections of the attorney-client privilege.

On the other hand, corporate attorneys practicing in any way before the SEC are also subject to SEC Rule 205 and the Act which promote disclosure of information. As evidenced by the SEC's processes for investigating corporations, the government considers "cooperation" in determining whether to bring charges against a corporation. While not required, it is often necessary for the corporation to release attorney-client privileged information in order to "cooperate" with the investigation. Moreover, it is also often in the best interest of the corporation to release the information on a selective basis to the government to obtain leniency or to remedy any wrongdoing. However, if the corporation is not able to rely on the confidentiality agreement promised by the government, the corporation risks the release of the privileged information to the public. Further, with this known risk, the corporation may only provide the attorney with "selective information" thus hindering the attorney's advice, counsel, or strategy.

223. Zeineddine, supra note 6, at 148 (noting that the ABA considers the attorney-client relationship and the legal advice rendered to the client as indispensable elements to the attorney's role as a counselor).

224. See id. (noting that the ABA considers the attorney-client relationship and the legal advice rendered to the client as indispensable elements to the attorney's role as a counselor); see also Okrzesik, supra note 96, at 148. "The consensus, however, is that the need for truth-finding is offset by the more imperative need to preserve the client's sense of confidentiality with her attorney. Specifically, the client must feel free to divulge all information so that the attorney can filter the important from the trivial." Id.

225. Litt, supra note 2, at C-3 (discussing Section 307 of the Act's mandate on the SEC to create a mandatory requirement for attorneys practicing before the SEC in response to the erosion of corporate integrity and ethics).

226. Hochberg, supra note 13, at L-13—L-14. "Waiver is not required as a measure of cooperation." Id. See also Hazen, supra note 221, at § 9.8 (stating that "cooperation in criminal, SEC and other regulatory investigations will reflect positively in the settlement process and in selecting appropriate sanctions. It is the position of the Department of Justice and SEC that waiver of the attorney-client privilege in the course of the investigation will be a positive factor in selecting sanctions."). But see Hochberg, supra note 13, at L-13 (stating that "[i]n evaluating cooperation, the Principles [of Federal Prosecution of Business Organizations] tell prosecutors that they can consider whether the corporation turned over any internal investigation it may have conducted, and waived privileges." (emphasis added)).

227. Hochberg, supra note 13, at L-13. "Sometimes, in order to fully cooperate and disclose all the facts, a corporation will have to make some waiver because it has gathered the facts through privileged interviews and the protected work product of counsel." Id.

228. Hochberg, supra note 13, at L-13—L-14 (noting that a wide range of factors are considered when charging a corporation, cooperation being one of them).
With the protection of the confidentiality agreement, the attorney and the corporation benefit. The corporation is more likely to fully disclose information to the attorney, which better equips the attorney to represent the client. The corporation and attorney are complying with SEC Rule 205 and the Act's spirit of disclosure and are thus more likely to be proactive in preventing and remedying potential corporate wrongdoing.

b. Economic Benefits

By upholding confidentiality agreements, corporations and the public benefit economically. Corporations benefit in two ways. First, by upholding confidentiality agreements, corporations do not risk exposure to massive liability by cooperating with a government investigation or complying with disclosure requirements which might ultimately lead to a government investigation. Second, by complying with government investigation cooperation requirements, the corporation may receive a lessened monetary punishment for any violations. The government specifically considers cooperation with investigation and particularly, disclosure of information, in determining whether to prosecute or punish a corporation. Accordingly, by fully cooperating with any government investigation, the corporation may reduce its risk to financial loss.

The public also benefits economically from the use of confidentiality agreements because it helps to preserve the integrity of the capital.

229. See Zeineddine, supra note 6, at 153 (stating that considering the complexity and amount of regulatory legislation challenging the modern corporate governance, corporations must frequently go to lawyers to find out how to obey the law).

230. See Lucci, supra note 7, at 366 (noting that a goal of the Act was to prevent lawyers from ignoring or assisting in corporate wrongdoing). See also Hazen, supra note 221, at §9.8 (noting that an attorney's appearance before an administrative agency reflects two concerns: (1) the proper role of the attorney in light of their interest in representing their clients properly; and (2) the public interest in documents filed with the SEC because the public relies on that information in making financial decisions). Id.

231. See Zeineddine, supra note 6, at 153. Zeineddine is discussing the noisy withdrawal proposal to SEC Rule 205; however, her argument is persuasive as to confidentiality agreements as well. “[Noisy withdrawal] would remove an incentive for clients involved in misconduct to reveal corporate secrets to their attorneys, leaving those attorneys in the dark.” Zeineddine, supra note 6, at 153. “Conversely, if attorneys were not required to blow the whistle to a third party, clients would be encouraged to completely confide in their attorneys and seek frank legal advice without fear of exposure.” Id.

232. See In re Columbia/HCA Healthcare Corp., Billing Practices Litig., 293 F.3d 289, 311 (6th Cir. 2002) (Boggs, J., dissenting) (stating that relatively narrow cooperation with the government in the form of a disclosure of privileged information can expose an individual or firm to massive liability and reveal privileged document far greater than the disclosure itself).

233. See supra notes 114–120 and accompanying text.
markets at a lower cost to society. The SEC is the "agency principally responsible for the administration and enforcement of federal securities laws, which are designed to protect investors and the integrity of the capital markets." Government investigations are more likely to be of public interest than are suits by private plaintiffs. Thus, because privileged information may not be released to private plaintiffs whatsoever, the use of confidentiality agreements allows the government to bring suits with information only available pursuant to the confidentiality agreement and saves the public from the economic loss resulting from corporate wrongdoing. Accordingly, shareholders benefit when the SEC more efficiently protects the integrity of the capital markets.

c. Public Policy

From a public policy perspective, upholding confidentiality agreements best protects the public investor from corporate fraud while still preserving the attorney-client privilege. The disclosure requirements the SEC instituted, the Act introduced, and the ABA Model Rules suggested have forced corporate attorneys to shift focus from the client to the public, which is an aberration of the attorney-client privilege. At the same time, the SEC has a pervasive interest in maintaining confidence in capital markets as demonstrated by Congress's enactment of the Act and even attorney support of the Act. Accordingly, allowing corporations to release privileged information to the government, particularly the SEC, pursuant to a confidentiality agreement strikes the most effective balance between the two legitimate concerns of preserving the attorney-client privilege and protecting the investing public. The corporation is furthering the spirit of disclosure, but not sacrificing their privilege as to the entire litigating world.


236. See In re Columbia/HCA, 293 F.3d at 312 (Boggs, J., dissenting). Government investigations are more likely to be in the public interest. Id.

237. Id.


239. Zeineddine, supra note 6, at 152-53.

240. Id. at 152.

241. Id. at 153.
Private litigants are not disadvantaged by allowing privileged information to be disclosed only to government agencies.\textsuperscript{242} The Supreme Court in \textit{Upjohn Co. v. United States}, supported this idea by stating that because, presumably, the client would not reveal the confidential information without the privilege, denying third parties access to the confidential information puts third parties in no worse a position that if the privileged communication had never taken place. And because the privilege only protects the disclosure of privileged communications, it does not protect disclosure of the underlying facts by those who communicate with the attorney.\textsuperscript{243} Private litigants are not barred from bringing suits even where the government conducts an investigation. Further, private litigants may seek the underlying facts of the privileged communication from other non-privileged sources.\textsuperscript{244}

In addition to economic savings, the SEC investigation benefits the public from a policy perspective. Confidentiality agreements with the SEC increase the information available in government investigations and further the truth-seeking process.\textsuperscript{245} With the ever-increasing veracity of regulations placed on corporations, a selective waiver of the attorney-client privilege as to the government promotes heightened observance of law and regulations.\textsuperscript{246} Corporations should be encouraged to increase conversations with counsel, rather than be discouraged by the threat of the release of privileged communications. Accordingly, a selective waiver rule increases corporate compliance with regulations designed to protect the investing public because the disclosing party is more likely to understand and comply with applicable laws and regulations.\textsuperscript{247} Investors are naturally benefited by an increased confidence in corporate governance and a corresponding confidence in the capital market.

\section*{IV. Impact}

This section considers the effects of not resolving the circuit split in favor of upholding confidentiality agreements and the problems associated with continuing the status quo. Additionally, this section suggests a legislative solution to the circuit split and the likely impact of such legislation.

\textsuperscript{242} \textit{In re Columbia/HCA}, 293 F.3d at 312 (Boggs, J., dissenting).
\textsuperscript{244} \textit{In re Columbia/HCA}, 293 F.3d at 311 (Boggs, J., dissenting).
\textsuperscript{245} Id. at 307.
\textsuperscript{246} See Hall, supra note 159, at 996 (stating that a primary reason that a corporation may cooperate with an investigation is to comply with the law as soon as possible).
\textsuperscript{247} Id. at 996.
A. Effects of Not Upholding Confidentiality Agreements

If confidentiality agreements are not upheld, corporations will be exposed to massive liability, the purpose of recent legislation regarding corporate disclosure will be sabotaged, the attorney-client privilege will be further diminished, and corporate clients will be less likely to cooperate with a government investigation.

As the dissent in In re Columbia/HCA stated, "relatively narrow cooperation with the government in the form of a disclosure of privileged information can expose . . . a firm to massive liability." If confidentiality agreements are not honored, privileged client information would be available to any private litigant despite the SEC's promise that the attorney-client privilege would be retained as to other parties. In exchange for cooperating with the SEC, the corporation would face a multitude of private lawsuits fueled with privileged information. In essence, the corporation would be doubly punished and the private investor doubly benefited. The corporation would face the SEC's punishment, as well as any damages as a result of shareholder suits. However, the shareholder would benefit both from the SEC investigation's protection of the economy as a whole, and from a private cause of action for damages supported by privileged information gathered from the SEC's investigation.

Additionally, by not upholding confidentiality agreements, courts would discourage the disclosure purpose behind the Act. Corporations would be less likely to cooperate with the SEC and less likely to consult with attorneys for fear of massive litigation. Decreased cooperation with the SEC increases costs to shareholders, the government and the economy. The SEC has publicly supported upholding confidentiality agreements by suggesting a provision to SEC Rule 205 which would provide that confidentiality agreements with the SEC were not a waiver of privilege. The SEC's position was that such a rule would encourage cooperative issuers and attorneys to produce internal reports under a confidentiality agreement; thus expediting the SEC investigation. However, despite this initial support, the SEC's...
proposed rule was withdrawn.\textsuperscript{252} Without a clear legislative position, courts are in disarray on how to handle the issue.\textsuperscript{253}

B. Effects of Continuing the Status Quo

If the status quo is maintained and courts continue to disagree on the applicability of confidentiality agreements, corporations and corporate attorneys will be confused and forum shopping will be encouraged. Further, the same concerns associated with not upholding selective waivers pursuant to a confidentiality agreement will also be relevant if the status quo continues.\textsuperscript{254}

Many corporations subject to SEC regulation are international organizations with jurisdiction in many courts. If no action is taken, the circuit split will extend to other circuits which have not taken a position on confidentiality agreements and the inconsistencies will be perpetuated. This will only hinder the purposes behind the attorney-client privilege and SEC Rule 205. "The attorney-client privilege exists to enable a person to consult freely and openly with an attorney without any fear of compelled disclosure of the information communicated."\textsuperscript{255} Certainly, today's corporations do stand in fear that disclosures to counsel will be reported, at minimum, within the corporation.\textsuperscript{256} Upholding confidentiality agreements where the corporation becomes the subject of an SEC investigation, helps belie some of those fears, at least as to external parties.\textsuperscript{257} However, courts infuse fear and uncertainty into the lawyer-client relationship by differing on the applicability of selective waiver of the attorney-client privilege pursuant to a confidentiality agreement. Uncertainty in the relationship between corporate client and attorney will not "foster full and frank communications," but rather jeopardize this sacred foundation of the attorney-client relationship.\textsuperscript{258}

Further, the status quo will encourage both corporate defendants and private litigants to engage in forum shopping. On the one hand, plaintiffs will seek to file private causes of action in jurisdictions de-

\textsuperscript{252} Id. at 429.
\textsuperscript{253} See id. at 428 (noting that even the SEC has admitted that federal case law on selective or limited waiver is in hopeless confusion).
\textsuperscript{254} See supra notes 248–253 and accompanying text.
\textsuperscript{255} People v. Adam, 51 Ill.2d 46, 48 (1972).
\textsuperscript{256} See supra notes 28–70 and accompanying text.
\textsuperscript{257} See supra notes 200–231 and accompanying text.
\textsuperscript{258} See supra notes 95–113 and accompanying text (discussing the purpose behind the attorney-client privilege); see also supra notes 201–215 and accompanying text (discussing how the truth-seeking process would be hindered if clients do not feel comfortable disclosing information to their attorneys).
clining to uphold confidentiality agreements in hopes of obtaining information released to the SEC during the investigation. On the other hand, defendant corporations will avidly seek to remove the private litigation to jurisdictions favorable to confidentiality agreements. While forum shopping is not necessarily reprehensible, such a policy may prolong litigation and may favor some private litigants. Further, forum shopping does not encourage the truth-seeking process behind the attorney-client privilege, does not further the spirit of disclosure behind the Act and SEC Rule 205, and does not better protect the public from corporate wrongdoing.

C. Solutions to Resolve the Circuit Split

In order to clarify the SEC's support of confidentiality agreements and assist courts in solving the circuit split regarding confidentiality agreements, Congress should adopt legislation specifically upholding selective waivers as to the government. Such legislation must provide clear provisions which allow the party to cooperate with the government without the practical administrative complications anticipated by the Sixth Circuit in *In re Columbia/HCA*. In doing so, the legal profession will simultaneously preserve its core values and adjust to current policy goals articulated in the Act.

Legislation adopted by Congress should specifically articulate that the selective waiver rule applies only to disclosures made in cooperation with a government investigation. While under the Act and SEC Rule 205, the SEC is the obvious government agency likely to be a party to the agreement, logistically the waiver would be most effective as to the government as a whole. Limiting the disclosure only to the SEC would be problematic when, for example, the SEC and DOJ are both conducting investigations of a corporation. The government can

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259. See AXA Corporate Solutions v. Underwriters Reinsurance Group, 347 F.3d 272 (7th. Cir. 2003). The court in discussing forum shopping stated, "We are not so naive as to believe that lawyers will not try to exploit whatever differences they may perceive among the federal circuits at any given time. Nevertheless, those differences are ultimately subject to reconciliation by the Supreme Court, if they are not cured by the transfer devices that exist or through the rule-making process." *Id.* at 277. The court was not addressing the selective waiver rule, but the court's statement is analogous to selective waiver and confidentiality agreements.

260. *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 312 (6th Cir. 2002) (Boggs, J., dissenting) (noting that the majority suggests that enforcing a selective waiver rule would be cumbersome and expensive).

be distinguished from private parties because the government functions both to interpret and enforce the laws.

The legislation should specify that the disclosures made to the government preserve the attorney-client privilege and work product doctrine as to third parties even if the government agency brings suit. Some courts have distinguished between releasing communications to a non-adversarial party and an adversarial party finding that disclosures to non-adversarial parties retain the privilege. If legislation distinguished between investigations and suits, the effect of the waiver would be sharply diminished. Corporations would be fearful to release privileged communications because of the uncertainty of whether the investigation will lead to a later suit.

Further, the legislation should require that a disclosing party enter into a signed confidentiality agreement in order for communications to be protected. The confidentiality agreement is not a per se selective waiver, but should be a prerequisite to finding selective waiver as to the government. The confidentiality agreement cannot "manufacture a privilege," but rather, it is important to record the intent of the parties to preserve the agreement. Accordingly, an interpreting court will clearly understand the parties' intentions and effective date which will eliminate the fear that disclosing parties should not "have their cake and eat it too." This legislative solution effectively creates a compromise between the corporation and corporate attorney, who are placed in a particularly tenuous position in light of the Act and SEC Rule 205.

A legislative solution is preferable to a judicial ruling upholding selective waiver pursuant to confidentiality agreements because it would better articulate the purposes behind the Act and allow for streamlined implementation. While the legislative process is often long and arduous, the Act was implemented rather quickly as was the SEC's

262. Hall, supra note 159, at 1003. See also Okrzesik, supra note 96, at 168. Further, the government can be distinguished because private parties will personally benefit from the results of the lawsuit. Id.

263. See Okrzesik, supra note 96, at 133-34 (discussing two scenarios where the Westinghouse court might have reached a different conclusion: when the disclosure is inadvertent or made to a non-adversary, and when there is conscious disregard for the confidentiality of the material).

264. See Hall, supra note 159, at 1004 (stating that a disclosing party should be required to sign a confidentiality agreement).

265. Okrzesik, supra note 96, at 169.

266. See Hall, supra note 159, at 1004 (noting that the confidentiality agreement should protect only the communications disclosed after the agreement so that it alleviates some of the fear that disclosing parties may simply disclose without agreeing to terms of a confidentiality agreement).
response manifested in Rule 205.\textsuperscript{267} Thus, perhaps the legislative energy behind the goal of corporate disclosure would expedite this legislation. In addition, a legislative solution would offer the SEC\textsuperscript{268} the opportunity to actively demonstrate its support of confidentiality agreements. Finally, unlike a judicial decision, a legislative solution would outline concrete criteria for confidentiality agreements so as to limit further litigation.

V. Conclusion

In light of the recent implementation of legislation governing attorney-conduct and consequently diminishing the protections of the attorney-client privilege, Congress would greatly enhance confidence in the capital markets by creating legislation to require courts to uphold confidentiality agreements as to the government. Such a move would also salvage some respect for the confidentiality of the attorney-client relationship and promote economic and public policy which in turn, protects the capital markets and individual investors from corporate fraud. Further, the circuit split would be resolved, uniformity would prevail in federal courts, and corporate attorneys would be better able to assist their clients in compliance with the vast regulatory laws governing corporations. Alternatively, because the legislative process may be lengthy, the Supreme Court could adopt the Eighth Circuit, Northern District of California and Delaware state court approach to selective waiver via confidentiality agreements. Regardless of the method, corporations and the public would be benefited significantly by adoption of a selective waiver rule.


\textsuperscript{268} In addition to the SEC, support from the DOJ would be important.