DISCOVERABILTY OF WELLS SUBMISSIONS: WHAT THEY ARE AND HOW TO GET THEM

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I. INTRODUCTION

In the last several years, defective securities product cases have invited increased regulatory scrutiny by the U.S. Securities and Exchange Commission (SEC) and other regulatory agencies, such as the Financial Industry Regulatory Authority (FINRA). Consequently, civil litigants seek discovery of documents broker-dealers produce to regulators.

While there is no "SEC privilege" that can be asserted by the party that produced transcripts and related documents to the regulator,[1] the corollary question has arisen as to whether a Wells submission is subject to civil discovery by subsequent third-party litigants. While a majority of courts have permitted discovery of Wells submissions, overruling objections based on attorney-client privilege and work product doctrine, a minority of courts has, under certain circumstances, upheld claims of attorney-client and work product privilege based on the theory of selective waiver.

This article will explain what a Wells submission is, the advantages and disadvantages of making a Wells submission, and the theories articulated by the courts, both majority and minority, in deciding when they are discoverable by subsequent third party litigants.

II. A WELLS SUBMISSION IS A VOLUNTARY RESPONSE TO NOTICE OF AN SEC INVESTIGATION

A Wells submission is a responsive statement provided to the SEC by those under investigation for alleged violation of federal securities laws, submitted in an effort to dissuade the SEC from bringing charges or, in the alternative, to reduce or eliminate charges or remedies pursued.[2] As a

1. *See infra* Section III(A).

2. *See* KENNETH B. WINER & SAMUEL J. WINER, SECURITIES ENFORCEMENT: COUNSELING AND DEFENSE 16-3 (2005). "In a Wells Submission, [a] prospective defendant can make factual, legal, and policy arguments as to why it would be inappropriate for the Commission to bring the contemplated enforcement action. *Id.*

voluntary process, the SEC is under no obligation to inform the accused of his ability to submit a written statement[3] and the accused is under no obligation to respond.[4] Nevertheless, notice has become standard practice by the SEC, except in cases involving emergency relief or where notice would interfere with a criminal investigation.[5] Though sounding complex, the process is straightforward, as the court in *In re Initial Public Offering Securities Litigation* explained:

> The Wells process is relatively straightforward. Targets of SEC investigations are notified whenever the Enforcement Division staff decides, even preliminarily, to recommend charges. The staff typically identifies the provisions of the federal securities law[(s)]…it intends to charge, the forum in which… enforcement…will proceed (e.g. district court or administrative action), and the relief it intends to seek. Defense counsel [may] then…request a "Wells meeting," at which the staff presents a more detailed account of its case[, including] their view of the relevant facts, the applicable law, and their theory of…violations. The Wells meeting is less a forum for defense counsel to obtain discovery of the

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Even if defense counsel cannot persuade…the Staff or the Commission that… enforcement…should [not] be authorized, [they] may persuade the Staff to narrow the charges or seek less severe remedies." *Id.*; *see also SEC v. Cuban*, 798 F. Supp. 2d 783, 786 (N.D. Tex. 2012).

3. *See SEC v. Zahareas*, 374 F.3d 624, 629 (8th Cir. 2004); *SEC v. Forman*, No. 07-11151RWZ, 2010 U.S. Dist. LEXIS 56802, at *6 (D. Mass. June 9, 2010).

4. *See* 17 C.F.R. § 202.5(c) (2011), which states

> Persons who become involved in preliminary or formal investigations may, on their own initiative, submit a written statement to the Commission setting forth their interests and position in regard to the subject matter of the investigation. Upon request, the staff, in its discretion, may advise such persons of the general nature of the investigation, including the…violations [they intend to charge] and the amount of time that may be available for preparing and submitting a [Wells submission] prior to the … staff['s] recommendation to the Commission for the commencement of an administrative or injunction proceeding.

5. *See* WINER & WINER, *supra* note 2, at 16-4; *In re Initial Pub. Offering Secs. Litig.*, No. 21 MC 92 (SAS), 2003 U.S. Dist. LEXIS 23102, at *6 (E.D.N.Y. Dec. 24, 2003).

> Commission's case than it is a dialogue in which…counsel can appreciate whether there are any issues – factual, legal or otherwise – that may affect the Commission's deliberative process. The target may then file [a] Wells submission[, through which they attempt to talk the SEC out of bringing charges, into bringing reduced or amended charges, or into reducing or eliminating the remedies sought through enforcement].[6]

In a Wells submission, "[a] prospective defendant can make factual, legal, and policy arguments as to why it would be inappropriate for the Commission to bring the contemplated enforcement action."[7] Where a prospective defendant submits a Wells submission, it is attached to the staff's recommendation and forwarded to the Commission for review, assuming the recommendation for enforcement is maintained.[8] Responding with a Wells submission is valuable because of the access it affords to ultimate decision makers, by allowing a prospective defendant to bypass the Division of

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6. *In re Initial Pub. Offering Secs. Litig.*, 2003 U.S. Dist. LEXIS 23102, at *6; *see also* WINER & WINER, *supra* note 2, at 16-4, 16-5, 16-6 (stating that "In the initial Wells Call and letter, the Staff will typically provide a cursory outline of the charge[(s)] the Staff has tentatively decided to recommend. For example, the letter might do little more than identify the statutory provisions allegedly violated and the nature of the relief the Staff has tentatively decided to seek (e.g., an injunction, civil penalties, a cease-and-desist order, a bar from association with a broker-dealer)" (internal citations omitted)); *SEC v. Sears*, No. 05-728-JE, 2005 U.S. Dist. LEXIS 44854, at *4 (D. Or. July 28, 2005).

7. WINER & WINER, *supra* note 2, at 16-4.

8. *See In re Initial Pub. Offering Secs. Litig.*, 2003 U.S. Dist. LEXIS 23102, at *3.

> Persons who become involved in preliminary or formal investigations may, on their own initiative, submit a written statement to the commission setting forth their interests and position in regard to the subject matter of the investigation.…. In the event a recommendation for the commencement of an enforcement proceeding is presented by the staff, any submissions by interested persons will be forwarded to the Commission in conjunction with the staff memorandum.

In re Initial Pub. Offering Secs. Litig., 2003 U.S. Dist. LEXIS 23102, at *3; *see SEC v. Berlacher*, No. 07-3800, 2012 U.S. Dist. LEXIS 19011, at *10 (E.D. Pa. Feb. 14, 2012).

Enforcement and communicate directly with Commissioners and their senior staff outside the Division of Enforcement.[9]

A. Advantages of a Wells Submission

With the SEC staff limited in its ability to initiate charges,[10] it is the Commissioners, not the Division of Enforcement staff, who determine whether enforcement will proceed, what charges will be brought, and what remedies will be sought.[11] By making a Wells submission, a prospective defendant presents a case for why enforcement should not proceed, by offering arguments, for example, on mistakes of fact and law and matters of public policy.[12] In effect, a Wells submission allows a prospective defendant to bypass the Division of Enforcement, removing the potential for filtering and misunderstanding by Enforcement staff that might otherwise influence the Commissioners' decision to bring charges.[13] Additionally, since a Wells submission follows a defense counsel's attendance at a Wells meeting, use of a Wells submission allows a prospective defendant to offer arguments that cut to the heart of the recommended charges.[14] As such, the process is in keeping with the purpose for which Wells submissions were created: to provide a means through which the Commission can hear a prospective defendant's arguments before determining whether to bring charges.[15]

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9. *See* Mark J. Astarita, *The Wells Notice and NASD Investigations*, SEC LAW.COM (2010), http://www.seclaw.com/docs/wellsnotice.htm (last visited Sept. 6, 2012); WINER & WINER, *supra* note 2, at 16-4.

10. *See* Astarita, *supra* note 9.

11. *See* John J. Carney & Francesca M. Harker, *Benefits and Dangers of an SEC Wells Submission*, BAKERHOSTETLER 2 (Dec. 17, 2009), http://www.bakerlaw.com/files/Uploads/Documents/News/Articles/LITIGATION/Law360_Carney_Harker_December_2009.pdf.

12. *See* Astarita, *supra* note 9; Carney & Harker, *supra* note 11, at 2. "Wells submissions are usually not the appropriate vehicle to address heated factual disputes but, rather, are best suited to address legal and policy questions the commission might not have fully considered." *Id.*; *see also SEC v. Berlacher*, 2012 U.S. Dist. LEXIS 19011, at *10.

13. *See* Astarita, *supra* note 9.

14. *See In re Initial Pub. Offering Secs. Litig.*, 2003 U.S. Dist. LEXIS 23102, at *6.

15. *See* SEC DIVISION OF ENFORCEMENT, ENFORCEMENT MANUAL 22 (2012), *available at* http://www.sec.gov/divisions/enforce/enforcementmanual.pdf. "The

Another significant advantage of a Wells submission is to influence the staff to amend its recommendation or influence the Commissioners to reduce or amend charges to be brought in the event the submission fails to dissuade them from bringing charges at all.[16] Additionally, it may influence the Commissioners to reduce or modify the remedies sought through enforcement.[17] Providing opportunity for advocacy *before* charges are brought – an avenue not typically available for charges brought by regulatory agencies[18] - the use of a Wells submission may pave the way to a settlement or to reduced charges.[19]

B. Disadvantages of a Wells Submission

In light of the benefits of submission, the decision to respond with a Wells submission should not be made lightly.[20] "Tempted with the possibility of halting litigation before it…begins, many practitioners might not stop to consider the very real dangers a Wells submission presents[,]" including:

> (1) the reality that submissions are not protected from use by the Commission against the offering party;
> (2) that submissions commit the offering party to positions taken before charges have been brought and discovery has been conducted;
> (3) that submissions open the offering party to prosecution for false statements in the event they are false or wrong;
> (4) that statements in the submission are generally admissible despite the prohibition on hearsay evidence;
> (5) that submissions are not protected from disclosure by the Commission to other regulatory and enforcement agencies – namely the Department of Justice; and

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objective of the Wells notice is…not only to [inform the Commission] of the findings [of Division of Enforcement staff], but also, where practicable and appropriate, to have before it the position of persons under investigation at the time it is asked to consider [the] enforcement action." *Id.*

16. *See* WINER & WINER, *supra* note 2, at 16-3.

17. *See id.*

18. *See* Carney & Harker, *supra* note 11, at 3.

19. *See* WINER & WINER, *supra* note 2, at 16-8.

20. *See* Carney & Harker, *supra* note 11, at 5.

> (6) that submissions are generally not privileged, confidential, or otherwise protected from third party discovery.[21]

In fact, the risks associated with Wells submissions are so great that most practitioners forgo opportunity to provide them at all, advising prospective defendants to make the Commission prove its case at trial rather than proving it for them with a submission.[22] There are at least six such risks.

The first risk of providing a Wells submission is that, by making a Wells submission, the offering party is providing the Commission with evidence it may use to prosecute him.[23] Unlike other evidence the Commission will use, it may not have evidence contained in a Wells submission, had it not been provided by the accused. Since the Commission "…routinely seeks to introduce submissions made pursuant to Rule 5(c) as evidence in… enforcement proceedings, when the staff deems appropriate,…[counsel] drafting the Wells submission must be extraordinarily careful in making any factual statements that could later be used as admissions against the prospective defendant."[24]

The second risk of providing a Wells submission is that it commits the offering party to positions before charges have been filed and discovery has been conducted.[25] This makes the prospective defendant vulnerable to exploitation by the SEC and to impeachment by the SEC, the DOJ, and third-party civil litigants.[26] Since a Wells submission predates the filing of charges by the SEC,

> [c]ounsel should be aware that the…Staff might respond to the submission by conducting additional discovery to obtain the evidence that was otherwise missing from the record or by modifying the theory of the case in a manner that will make it harder for the [offering party] to prevail in litigation.[27]

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21. *Id.* at 1.

22. *See* Astarita, *supra* note 9.

23. *See* WINER & WINER, *supra* note 2, at 16-8.

24. Carney & Harker, *supra* note 11, at 3.

25. *See id.*

26. *See id.*

27. WINER & WINER, *supra* note 2, at 16-10.

Allowing the Staff to use statements provided as a roadmap to solidify its case[28] compounds the risk with the possibility of disclosing inaccuracies that may subject the offering party to impeachment in enforcement proceedings, parallel criminal proceedings, and subsequent civil proceedings.[29] With the Commission having completed its investigation by the time it issues the Wells notice, a Wells submission places the offering party in the unique position of responding to allegations provided in broad detail, without access to third party documents, sworn statements, and other evidence in support of his position.[30]

> There is a very real concern that as more information comes to light, legal theories and defenses might need to change. Once [a Wells statement] is submitted, [however], the [offering party is] wedded to a single theory of the case. Worse yet, a statement that [counsel] and the defendant honestly believe to be fully accurate and true may turn out to be mistaken.[31]

When this happens, the offering party is vulnerable to impeachment for false or inconsistent statements in an enforcement action by the SEC, in parallel criminal proceedings by the DOJ, and in subsequent litigation by third-party litigants.[32]

The third risk of providing a Wells submission is that it may open the offering party to the possibility of prosecution for false statements, adding

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28. *See* Astaria, *supra* note 9*,* which states*:*

> Prospective respondents must keep this in mind in deciding whether to make such a submission, and must keep in mind that the SEC or NASD has conducted an investigation and made a determination to commence proceedings. It is therefore extremely difficult to argue factual matters in a Wells Submission. If you do, you are simply pointing out that there are disputed fact, and underscoring the fact that the Staff's position is correct, if its facts are correct. The end result of a 'factual' Wells Submission is a hearing, where the SEC Staff has been given advance notice of a respondent's factual defenses, which they might not have obtained.

29. *See* Carney & Harker, *supra* note 11, at 3.

30. *See id.* at 4.

31. *See id.*

32. *See id.*

the threat of expanded prosecution into the mix.[33] While prosecution for false statements is rare, providing statements that are knowingly false not only creates a basis for impeachment, but opens the door to prosecution for knowingly submitting false statements to a federal agency in performance of its duties.[34] As such, it is a risk to consider when providing a Wells submission.

The fourth risk of providing a Wells submission is that statements provided are generally admissible despite the prohibition on hearsay, making their use at trial for purposes other than impeachment important to consider.[35] While statements made in a Wells submission are hearsay when offered to prove the truth of the matter asserted, counsel should be mindful that the SEC, the DOJ, and subsequent civil litigants will generally shape them as admissions under Federal Rule of Evidence 801, making them statutorily defined as not hearsay, despite meeting the elements.[36] Thus, when a Wells submission is provided to the SEC, statements contained in the submission will generally be admitted to prove the truth of the matter asserted, as well as for impeachment purposes.[37]

The fifth risk of providing a Wells submission is that they are not protected from disclosure by the Commission to other regulatory and enforcement agencies. Therefore, by making a Wells submission, the offering party is, in essence, providing it to the Justice Department for prosecution in a parallel criminal proceeding.[38] With the Commission cooperating with the Justice Department through investigations and information sharing now more than ever before, the reality that "…Wells submissions can and have been used against [the offering party] in collateral

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33. *See id.*

34. *See id.*

35. *See* Carney & Harker, *supra* note 11, at 1.

36. *See id.* "Before submitting a Wells submission, practitioners need to be aware of the commission's position that the submission could be used against their client in a future proceeding by the commission as an admission against interest under Federal Rule of Evidence 801(d)(2)…." *Id.*; *see also* WINER & WINER, *supra* note 2, at 16-15. "[T]he SEC Staff routinely informs defense counsel in the Wells Call that the Staff may use the Wells Submission as an admission in [an] enforcement proceeding." *Id.*

37. *See* Carney & Harker, *supra* note 11, at 1.

38. *See* WINER & WINER, *supra* note 2, at 16-8.

criminal proceedings…" makes them dangerous to a party that may also face criminal prosecution by the DOJ.[39]

Finally, the sixth risk of providing a Wells submission is that they are generally not privileged, confidential, or otherwise protected from third party civil discovery.[40] Therefore, by providing a Wells submission, the offering party opens the floodgates to use of the submission by third parties in a subsequent civil action against the party providing the submission.[41]

The discoverability of Wells submissions, specifically whether Wells submissions are protected from discovery by attorney-client or work-product privilege, is the focus of the next section. Case law generally provides that, because attorney-client and work-product protections do not apply based on voluntary waiver of privileges, Wells submissions are generally discoverable,[42] whether admissible or not, as long as they are reasonably calculated to lead to the discovery of admissible evidence.[43] However, minority positions hold that they may not be discoverable based on the theory of selective waiver of privileges.[44] While providing a submission will not make it discoverable by third parties from the SEC,[45] it may make it discoverable from the offering party.[46]

With the benefits and risks of Wells submissions exposed, the fact is that the danger of offering them may substantially outweigh the benefits provided to the prospective defendant.[47]

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39. Carney & Harker, *supra* note 11, at 3.

40. *See* WINER & WINER, *supra* note 2, at 16-8.

41. *See* Carney & Harker, *supra* note 11, at 3.

42. *See infra* Sections III(A)(1)(a) and III(A)(2)(a).

43. *See Bennett v. La Pere*, 112 F.R.D. 136, 138 (D.R.I. 1986). "If one thing is certain, it is this: by its terms, Rule 26(b) does not condition the availability of discovery upon the likely admissibility of the information sought." *Id.*

44. *See infra* Sections III(A)(1)(b)&(c) and III(A)(2)(b)&(c).

45. *See* Philip M. Aidikoff et al., *Discovery of Regulatory Documents: Debunking the Myth of an "SEC Privilege" in Securities Arbitration*, 18 PIABA B.J. 187, 187 (2011). "[C]ase law supports the conclusion that SEC regulations deeming nonpublic certain disclosures to the agency, are for the benefit of the SEC and not for the party responding to the inquiry." *Id.* at 207.

46. *See* Astaria, *supra* note 9. "[A] well-placed subpoena can obtain a copy of the submission, to be used in later civil litigation by private citizens." *Id.*

47. *See id.*

> Therefore, a Wells submission should be carefully considered and should not be automatic. More often than not, a prospective respondent should…declin[e] to make a submission. However, there are instances where the submission is a valuable tool for the defense, and can be used to limit the…charges that are filed…and[,] in some instances, [to] avoid the [threat of prosecution] altogether.[48]

III. DISCOVERABILITY OF RELEVANT WELLS SUBMISIONS

Before statements in a Wells submission can be used by third-party litigants against the providing party in a separate action, the evidence must be discovered by the party seeking to use it. As the Federal Rules of Civil Procedure make clear, the question of whether evidence is discoverable is separate from the question of whether it can be admitted at trial.[49] With the requirements for discovery being substantially broader than the requirements for admissibility, Rule 26 provides in relevant part that evidence need not be admissible in order to be discoverable in a subsequent action.[50] Specifically, it provides:

> Parties may obtain discovery regarding *any matter*, *not privileged*, *that is relevant to the claim or defense of any party*, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. *Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the*

48. Astaria, *supra* note 9.

49. *See Bottaro v. Hatton Assocs.*, 96 F.R.D. 158, 159 (E.D.N.Y. 1982); *First Nat'l Bank of Oklahoma v. Bank of America, N.A.*, No. CIV-09-172-M, 2009 U.S. Dist. LEXIS 84301, at *4-5 (W.D. Okla. Sept. 15, 2009).

50. *See id.*; *Bennett v. La Pere*, 112 F.R.D. at 138. "If one thing is certain, it is this: by its terms, *Rule 26(b)* does not condition the availability of discovery upon the likely admissibility of the information sought." *Id.*

> *discovery of admissible evidence*. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).[51]

With the rule allowing discovery of *any* matter: (1) that is not privileged; (2) that is relevant to a claim or defense; and, (3) that is reasonably calculated to lead to the discovery of admissible evidence, the ability to discover Wells submissions and statements they contain requires consideration of each of these issues.[52] Because questions of whether evidence is relevant to a claim or defense and whether that evidence is reasonably calculated to lead to the discovery of admissible evidence are case-specific concerns, this article assumes relevancy. The question of whether privilege applies to protect relevant submissions from discovery is discussed below.

A. Wells Submissions Are Generally Not Protected From Discovery

While discovery of Wells submissions is hotly contested by the offering party as being protected by privilege in civil litigation,[53] case law makes clear that such submissions are generally not protected by attorney-client and work-product privilege based on the theory of voluntary waiver by the providing party.[54] However, a minority of courts provide that they may be protected based on the theory of selective waiver.[55] Additionally, submissions are not protected by an alleged regulatory or "SEC privilege."[56]

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51. Fed. R. Civ. P. 26(b)(1) (emphasis added).

52. *See id.*; *Bennett*, 112 F.R.D. at 138; *see also SEC v. Nacchio*, No. 05-cv-00480-MSK-CBS, 2007 U.S. Dist. LEXIS 5435, at *13 (D. Colo. Jan. 25, 2007).

53. *See Holtsinger v. Voros*, No. CIV S-03-0732-MCE-CMK-P, 2009 U.S. Dist. LEXIS 57889, at *12 (E.D. Cal. June 23, 2009); *Nacchio*, 2007 U.S. Dist. LEXIS 5435, at *15.

54. *See infra* Section III(A)(1)(a) and III(A)(2)(a).

55. *See infra* Sections III(A)(1)(b)&(c) and III(A)(2)(b)&(c).

56. *See* Aidikoff, *supra* note 52, at 187, which states:

> Companies under investigation by the SEC often object to producing regulatory correspondence and documents submitted to the SEC and other regulatory agencies based on an alleged 'SEC privilege.' In short, there is no such privilege. Specifically, there is no support for the proposition that relevant otherwise nonprivileged documents, submitted by a party in a civil action to any regulatory agency are not discoverable from the producing party by the other litigant in a civil action.

As a result, relevant Wells submissions are generally discoverable by third party litigants.[57]

1. A Majority of Courts Hold That Wells Submissions Are Not Protected By Attorney-Client Privilege

A common privilege invoked by offering parties to protect Wells submissions from discovery by third-party litigants is the attorney-client privilege, which operates to protect confidential communications between attorneys and their clients. Created "…to encourage [']full and frank communications between attorneys and their clients[,']"[58] it is grounded in necessity, based on the reality that "assistance can only be safely and readily availed when free from the consequences…or apprehension of disclosure."[59] Because it could obstruct the truth-seeking process, the attorney-client privilege is construed narrowly; courts have limited its protection to "*only* those disclosures---necessary to obtain legal advice—which might not have been made absent the privilege."[60] "Accordingly, voluntary disclosure of purportedly privileged communications has long been considered inconsistent with the assertion of the privilege. As the court in *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation* explained:

> As a general rule, the []attorney-client privilege is waived by voluntary disclosure of private communications by an individual or corporation to third parties. In addition, a client may waive the privilege by conduct which implies a waiver of the privilege or…consent to disclosure.[61]

The ability to shield submissions from discovery turns on the meaning of voluntary disclosure and whether or not submissions to regulators are included as such. Courts have fashioned three approaches to whether disclosure to regulators in a Wells submission operates as a waiver of

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Id. (citations omitted).

57. *See Westinghouse Elec. Corp. v. Republic of Phil.*, 951 F.2d 1414, 1418 (3d Cir. 1991).

58. *Id.* at 1423 (citing *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

59. *Id.*

60. *Id.*

61. *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 294 (6th Cir. 2002). (internal citations omitted).

attorney-client protections: (1) disclosure as a complete waiver of attorney-client privilege in the submission; (2) disclosure as a selective waiver of attorney-client privilege in the submission; and (3) disclosure as a selective waiver of attorney-client privilege in the submission, but only to the government when the government agrees to a confidentiality order.[62]

a. Disclosure of Wells Submissions as a Complete Waiver of Attorney-Client Privilege

In the first approach, the D.C. Circuit in *Permian Corp. v. United States* held that voluntary disclosure of attorney-client privileged information to anyone other than the attorney or client operates as a complete waiver of attorney-client privilege against third-parties.[63] In *Permian*, Occidental Petroleum proposed an acquisition by an exchange offer for outstanding shares of Mead.[64] Mead's management resisted the takeover and sued to enjoin the transaction.[65] In the course of litigation with Mead, Occidental produced millions of pages of discovery, which it sought to preserve claims of privilege and confidentiality in by careful screening, by stipulating that privileges were retained in the event privileged information was inadvertently produced and by protective order issued by the court.[66]

As a result of problems raised by Mead, the SEC opened an investigation into Occidental's involvement in possible violations of petroleum pricing regulations through its subsidiary Permian.[67] In response, the SEC was

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62. *See id.* at 295.

> A review of the positions presented by the various courts reveals three general opinions on the issue – selective waiver is permissible,; selective waiver is not permissible under any situations,; and selective waiver is permissible in situations where the Government agrees to a confidentiality order,– and the Court will examine each.

Id. (internal citations omitted).

63. *See Permian Corp. v. United States*, 665 F.2d 1214, 1215 (D.C. Cir. 1981).

64. *See id.*

65. *See id.*

66. *See id.* at 1215-16.

67. *See Permian Corp.,* 665 F.2d. at 1216.

provided with 1.2 million pages of documents in discovery from Occidental.[68] In an attempt to speed the investigation and not hold up the acquisition of Mead, the SEC negotiated an agreement with Occidental that allowed it to obtain confidential Occidental information from Mead which had it organized around issues and claims for use at trial.[69] As part of the agreement, the SEC agreed that all documents produced pursuant to the agreement would be stamped with a restrictive endorsement precluding disclosure to third parties by the SEC.[70]

In a subsequent action, "…the Department of Energy sought documents from the SEC for use in an investigation of" Occidental's involvement through Permian in violations of petroleum pricing regulations.[71] Pursuant to its agreement with Occidental, the SEC notified Occidental of its intent to supply documents to the Department of Energy and Occidental sued to enjoin the discovery of documents from the SEC, claiming attorney-client, work product protections, and limited waiver of privilege against the SEC, but not against subsequent parties.[72] On the issue of attorney-client privilege and work product protection, the district court agreed that the documents were not discoverable.[73] On appeal, however, the D.C. Circuit Court reversed, rejecting the Eighth Circuit's selective waiver of the attorney-client privilege theory in favor of a strict approach that waived attorney-client privilege once disclosed to *any* third party – government or not.[74] Finding that Occidental should not be able to pick and choose among its opponents - by waiving attorney-client protections against some and asserting it against others - the Court held that "[w]e believe … the attorney-client privilege should be available only at the traditional price: a litigant who wishes to assert confidentiality must maintain genuine confidentiality."[75]

The D.C. Circuit's rejection of selective waiver in *Permian* was joined by the First Circuit in *United States v. Massachusetts Institute of*

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68. *See id.*

69. *Permian Corp.*, 665 F.2d at 1216.

70. *See id.*

71. *Id.* at 1217.

72. *See id.*

73. *See id.* at 1215.

74. *Permian Corp.*, 665 F.2d at 1215.

75. *Id.* at 1222.

Technology;[76] by the Second Circuit in *In re John Doe Corp.*;[77] by the Third Circuit in *Westinghouse Electric Corp. v. Republic of the Philippines*;[78] by the Fourth Circuit in *In re Martin Marietta Corp.*;[79] by the Sixth Circuit in *In re Columbia/HCA Healthcare Corporation Billing Practices Litigation*;[80] and by the Federal Circuit in *Genentech v. United States International Trade Commission*,[81] making complete waiver the majority approach to voluntary disclosure of attorney-client privileged communications in a submission to the SEC.[82]

b. Disclosure of Wells Submissions as a Selective Waiver of Attorney-Client Privilege

In the second approach, the Eighth Circuit held in *Diversified Industries, Inc. v. Meredith*, that voluntary disclosure of attorney-client privileged information to the SEC operates as a selective waiver of attorney-client privilege to the SEC, but not against subsequent parties.[83] Diversified Industries, a Delaware manufacturer operating in Missouri, conducted an internal investigation of bribes paid to domestic officials and submitted an internal report to the board, which acted accordingly.[84] The report was obtained by the SEC through an administrative subpoena. A civil action was also brought against Diversified by one of the customers it purportedly bribed for conspiracy, tortious interference, and violations of the Clayton

76. *See United States v. Mass. Institute of Tech.*, 129 F.3d 681, 686 (1st Cir. 1997).

77. *See In re John Doe Corp.*, 675 F.2d 482, 489 (2d Cir. 1982).

78. *See Westinghouse Elec. Corp. v. Republic of Phil.*, 951 F.2d at 1418.

79. *See In re Martin Marietta Corp.*, 856 F.2d 619, 623 (4th Cir. 1988).

80. *See In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d at 294.

81. *See Genentech v. U.S. Int'l Trade Commn.*, 122 F.3d 1409, 1417 (Fed. Cir. 1997).

82. *See In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d at 294. "The prevailing view is that once a client waives the privilege to one party, the privilege is waived en toto." *Id.*

83. *See Diversified Indus. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977).

84. *See id.* at 599-600.

Antitrust Act.[85] The customer sought to obtain the audit report provided to the SEC, as well as the board minutes for the meeting where outside counsel presented the findings of the internal audit to the board.[86] The district court ordered production of documents sought, finding they were not protected by attorney-client privilege, which had been voluntarily waived by providing the documents to the SEC.[87] On appeal, the Eighth Circuit reversed, finding that documents were protected from disclosure to the third party customer based on the theory of selective waiver.[88] Finding that Diversified provided documents pursuant to an administrative subpoena "…in a separate and nonpublic SEC investigation…" the court found any waiver that occurred was limited (i.e. "selective"), in that it waived attorney-client protections against the SEC but not against third parties in unrelated proceedings.[89]

The approach, which is good law in the Eighth Circuit and has been favorably cited by the Northern District of Texas in *In re LTV Securities Litigation*[90] and the Southern District of New York in *Byrnes v. IDS Realty Trust*,[91] but has been rejected by the First Circuit in *United States v. Massachusetts Institute of Technology*;[92] the Second Circuit in *In re John*

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85. *See id.* at 600.

86. *See id.* at 599.

87. *See id.*

88. *See id.* at 611.

89. *Diversified Indus.*, 572 F.2d at 611.

> We finally address the issue of whether Diversified waived its attorney-client privilege with respect to the privileged material by voluntarily surrendering it to the SEC pursuant to an agency subpoena. As Diversified disclosed these documents in a separate and nonpublic SEC investigation, we conclude that only a limited waiver of the privilege occurred. To hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders, and customers.

Id.

90. *See In re LTV Secs. Litig.*, 89 F.R.D. 595, 605 (N.D. Tex. 1981).

91. *See Byrnes v. IDS Realty Trust*, 85 F.R.D. 879, 689 (S.D.N.Y. 1980).

92. *See United States v. Massachusetts Institute of Tech.*, 129 F.3d at 686.

Doe Corp.;[93] the Third Circuit in *Westinghouse Electric Corp. v. Republic of the Philippines*;[94] the Fourth Circuit in *In re Martin Marietta Corp.*;[95] the Sixth Circuit in *In re Columbia/HCA Healthcare Corporation Billing Practices Litigation*;[96] and the Federal Circuit in *Genentech v. United States International Trade Commission*;[97] making it a minority approach to the issue of waiver of attorney-client privilege.[98]

c. Disclosure of Wells Submissions as a Selective Waiver of Attorney-Client Privilege When the Government Agrees To Confidentiality

In the third approach, the Southern District of New York held in *Teachers Insurance & Annuity Association of America v. Shamrock Broadcasting Co.*, that voluntary disclosure of attorney-client privileged information to the SEC operates as a complete waiver of attorney client privilege against all parties, "…*unless* the right to assert the privilege in subsequent proceedings is specifically reserved at the time the disclosure is made."[99] In *Teachers*, Shamrock was investigated for alleged improper dealings by a corporation in connection with a "…series of questionable loans and other debentures by Shamrock."[100] The SEC subpoenaed numerous documents in connection with its investigation of Shamrock, which Shamrock provided.[101] The SEC subpoena did not limit the use of documents to the SEC and Shamrock did not attempt to quash or otherwise evade the

93. *See In re John Doe Corp.*, 675 F.2d at 489.

94. *See Westinghouse Elec. Corp. v. Republic of Phil.*, 951 F.2d at 1418.

95. *See In re Martin Marietta Corp.*, 856 F.2d at 623.

96. *See In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d at 294.

97. *See Genentech v. U.S. Int'l Trade Commn.*, 122 F.3d at 1417.

98. *See In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d at 294. "The prevailing view is that once a client waives the privilege to one party, the privilege is waived en toto." *Id.*

99. *Teachers Ins. & Annuity Assn. of America v. Shamrock Broadcasting Co.*, 521 F. Supp. 638, 644-45 (S.D.N.Y. 1981).

100. *See id.* at 640.

101. *See id.*

subpoena on basis of privilege.[102] Documents were then subpoenaed by Teachers Insurance in a shareholder action against Shamrock.[103] Shamrock objected on the basis of attorney-client privilege.[104] At trial, the district court concluded "I am of the opinion that disclosure to the SEC should be deemed a complete waiver of the attorney-client privilege *unless* the right to assert the privilege in subsequent proceedings is specifically reserved at the time the disclosure is made."[105] Finding no basis to deny Shamrock's production under a protective order, stipulation, or other express reservation of attorney-client privilege in the documents disclosed, the court held privilege had been waived by Shamrock as against subsequent parties.[106] The court's finding in *Shamrock* is supported by the District of Colorado's finding concerning a Wells-type submission in *In re M&L Business Machine Co., Inc.*,[107] creating a second minority approach to the waiver of attorney-client privilege.[108]

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102. *See In re Columbia/HCA Healthcare Corp. Billing Practices Litig.,* 293 F.3d at 294.

103. *See id.*

104. *See Teachers Ins. & Annuity Assn. of America*, 521 F. Supp. at 644.

105. *Id.*

106. *See id.* at 646; *see also In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d at 300 ("The court noted that '[i]t does not appear that such a reservation would be difficult to assert, nor that it would substantially curtail the investigatory ability of the SEC…. *'* Such a stipulation would also 'make clear that…the disclosing party had made some effort to preserve the privacy of the privileged communication, rather than having engaged in abuse of the privilege by first making a knowing decision to waive the rule's protection and then seeking to retract that decision in subsequent litigation'" (quoting *Teachers Ins. & Annuity Assn. of America*, 521 F.Supp. at 646)) (alterations in original).

107. *See In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d at 301 (citing *In re M&L Business Mach. Co.*, 161 B.R. 689, 696 (D. Colo. 1993)). Steps taken to preserve confidentiality, the existence of an explicit agreement between the offering party and the United States Attorney not to disclose the material provided, and the fact that disclosure was not made for the benefit of the disclosing party distinguished this case from others where documents were produced in hopes of obtaining favorable treatment from the SEC. *See id.*

108. *See In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d at 294.

2. A Majority of Courts Hold That Wells Submissions Are Not Protected By Work Product

Another common privilege invoked to protect Wells submissions from discovery by third-party litigants is work-product protection, which operates to shield the mental processes of an attorney from discovery by opponents[109] by protecting "any document prepared in anticipation of litigation by or for an attorney."[110] "The logic behind the work product doctrine is that opposing counsel should not enjoy free access to an attorney's thought processes[,]" including development of legal theories, development of trial tactics and legal strategies, and presentation and review of information.[111] By protecting the thought process of counsel, "… the doctrine grants counsel an opportunity to think or prepare a client's case without fear of intrusion by an adversary."[112] While protection is necessary to preparing a client's case, the limits of protection are guided by common sense and the practicalities of litigation and are not determinative in the event of disclosure to third parties.[113] As the court in *In re Steinhardt Partners, L.P.* explains:

> Once a party allows an adversary to share the otherwise privileged thought processes of counsel, the need for the privilege disappears. Courts therefore accept the waiver doctrine as a limitation on work product protection. The waiver doctrine provides that voluntary disclosure of work product to an adversary waives the privilege as to other parties.[114]

Unlike protection afforded by attorney-client privilege, where protection is waived by voluntary disclosure of communication to third parties, the issue of whether work product privilege is waived turns on whether work product was disclosed to an adversary or not.[115] As the court in *Westinghouse Electric Corp. v. Republic of the Philippines* explains:

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109. *See id.*

110. *Id.* at 304 (citing *In re Antitrust Grand Jury*, 805 F.2d 155, 163 (6th Cir. 1986)).

111. *See In re Steinhardt Partners, L.P.*, 9 F.3d at 234; *see also Westinghouse Elec. Corp. v. Republic of Phil.*, 951 F.2d at 1427.

112. *In re Steinhardt Partners, L.P.*, 9 F.3d at 234.

113. *See id.* at 235.

114. *In re Steinhardt Partners, L.P.*, 9 F.3d at 235..

115. *See id.*; *see also Westinghouse Elec. Corp. v. Republic of Phil.*, 951 F.2d at 1428.

> A disclosure to a third party waives the attorney-client privilege unless the disclosure is necessary to further the goal of enabling the client to seek informed legal assistance. Because the work-product doctrine serves instead to protect an attorney's work product from falling into the hands of an adversary, a disclosure to a third party does not necessarily waive the protection of the work-product doctrine. Most courts hold that to waive the protection of the work-product doctrine, the disclosure must enable an adversary to gain access to the information.[116]

Therefore, unlike attorney-client privilege, in determining whether work product protections apply, the ability to shield submissions from discovery turns on the identity of the third party to whom work product was exposed and the circumstances surrounding disclosure.[117] There are at least three approaches to consider: (1) the Eighth Circuit's voluntary disclosure to an adversary as a complete waiver of work product protections;[118] (2) the D.C. Circuit's voluntary disclosure to an adversary as a selective waiver of work product protections when confidentiality is promised prior to disclosure;[119] and (3) the Third Circuit's voluntary disclosure to an adversary as a selective waiver of work product protections based on the underlying goal of the work product doctrine.[120]

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116. 951 F.2d at 1428.

117. *See id.* "Even though the courts generally agree that disclosure to an adversary waives the work-product doctrine, they disagree over the reasons behind this principle and thus, over its application to specific circumstances." *Id.*

118. *See In re Chrysler Motors Corp. Overnight Evaluation Prog.*, 860 F.2d 844, 846 (8th Cir. 1988).

119. *See In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d at 304 (citing *Permian Corp. v. United States*, 665 F.2d at 1215). "Indeed, in *Permian*, which so roundly rejected selective waiver as to attorney client privilege, the D.C. Circuit upheld a finding by the district court that the agreement between Occidental and the SEC preserved the work product protection." *Id.*; *see also id.* (citing *In re Subpoena Duces Tecum*, 738 F.2d 1367, 1375 (D.C. Cir. 1984)). A party waives work product protection unless it demands "…on a promise of confidentiality before disclosure to the SEC." *Id.*

120. *See Westinghouse Elec. Corp. v. Republic of Phil.*, 951 F. 2d at 1429. "In other words, a party who discloses documents protected by the work-product doctrine may continue to assert the doctrine's protection only when the disclosure furthers the doctrine's underlying goal." *Id.*

a. Disclosure of Wells-Type Submissions to an Adversary as a Complete Waiver of Work Product

In the first approach, the Eighth Circuit, which upheld selective waiver of attorney-client privilege in *Diversified*, held in *In re Chrysler Motors Corp. Overnight Evaluation Program*, that voluntary disclosure of work product protected material to an adversary operates as a complete waiver of work product protection against subsequent parties.[121] In *Chrysler*, "Chrysler established a ['']quality control['] program whereby workers disconnected the odometers on new cars and then took the cars home overnight for a ['']test drive['']."[122] When the truth came out, plaintiffs and the government launched suits against Chrysler sounding in mail and odometer fraud.[123] To determine the extent of the fraud, Chrysler conducted an internal investigation and prepared a report of how many cars were involved in the program.[124] Chrysler released findings as a computer tape to counsel for the plaintiff's class on the condition that counsel for the class agree that the tape was qualified work product and that release did not constitute a waiver of work product protection.[125] Chrysler subsequently refused to produce the tape to the government, claiming work product protection based on preparation in

121. *See In re Chrysler Motors Corp.*, 860 F.2d at 846.

122. *In re Columbia/HCA Healthcare Corp.*, 293 F.3d at 305.

123. *See In re Chrysler Motors Corp..*, 860 F.2d at 844. "[C]lass actions had been prompted by a 1986 federal indictment charging Chrysler with sixteen counts of mail fraud and odometer fraud. The government alleged that during 1985 and 1986 as many as 60,000 new vehicles had been driven with disconnected odometers as part of Chrysler's Overnight Evaluation Program." *Id.*

124. *See id.*

125. *See id.*

> Chrysler agreed to provide co-liaison counsel for the class action plaintiffs with access to the computer tape for the limited purpose of expediting the due diligence review. Chrysler agreed to provide the computer tape on the condition that co-liaison counsel for the class action plaintiffs agreed that the computer tape was attorney work product and that Chrysler's making the computer tape available to co-liaison counsel for the class action plaintiffs did not constitute a waiver of work product privilege.

Id.

anticipation of the criminal case and related class actions.[126] In considering whether Chrysler's voluntary disclosure to the plaintiff's class constituted a waiver of work product protections against subsequent parties, the Eighth Circuit found that it did and was not persuaded by use of a confidentiality agreement restricting the material from subsequent disclosure.[127] Holding that confidentiality alone is the dispositive factor in determining whether work product provided to an adversary is privileged, the court found work product protections were not only waived with regard to the plaintiff's class, but against subsequent third parties.[128]

In its holding that voluntary disclosure of work product protected material operated as a complete waiver of protection against subsequent parties, the Eighth Circuit in *Chrysler* was joined by the First Circuit in *United States v. Massachusetts Institute of Technology*,[129] the Sixth Circuit in *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*,[130] and the Northern District of California in *In re Worlds of Wonder Securities*

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126. *See* 860 F.2d at 844.

127. *See id.* at 847. "Nor does the agreement between Chrysler and co-liaison counsel for the class action plaintiffs not to disclose the computer tape to third-parties change the fact that the computer tape has not been kept confidential. [']Confidentiality is the dispositive factor in deciding whether [material] is privileged.[']" *Id.* (citing *Chubb Integrated Sys., Ltd. v. Nat'l Bank of Washington*, 103 F.R.D. 52, 67 (D.D.C. 1984)).

128. *See id.*

129. *See In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d at 306 (citing *United States v. Massachusetts Inst. of Tech.*, 129 F.3d at 687). "The First Circuit upheld the [']prevailing rule that disclosure to an adversary, real or potential, forfeits work product protection.[']" *Id.*

130. *See In re Columbia/HCA Healthcare Corp.*, 293 F.3d at 306, which further states:

> Even more than attorney-client privilege waiver, waiver of the protections afforded by the work product doctrine is a tactical litigation decision. Attorney and client both know the material in question was prepared in anticipation of litigation; the subsequent decision on whether or not to [']show your hand['] is a quintessential litigation strategy. Like attorney-client privilege, there is no reason to transform the work product doctrine into another [']brush on the attorney's palette'['] used as a sword rather than a shield.

Id. at 307 (citing *In re Steinhardt Partners, L.P.*, 9 F.3d at 235).

Litigation,[131] making complete waiver the dominant approach to voluntary disclosure of work product to an adversary.

b. Disclosure of Wells Submissions to an Adversary as a Selective Waiver of Work Product When Confidentiality Is Promised By the SEC Prior to Disclosure

In the second approach, the D.C. Circuit held in *Permian Corp. v. United States*, *In re Sealed Case*, and *In re Subpoenas Deuces Tecum* that voluntary disclosure of work product to an adversary can operate as a selective waiver of work product protections when disclosure is made in response to a promise of confidentiality by the SEC.[132] In *Permian*, Occidental also objected to the Department of Energy's discovery of materials from the SEC on grounds of work product protection and selective waiver.[133] Specifically, it argued that, pursuant to its agreement that allowed the SEC to secure Occidental documents from Mead on the condition that documents were stamped with a restrictive endorsement precluding disclosure by the SEC to subsequent parties, work product protections were waived by agreement against the SEC but not against subsequent parties like the DOE.[134] The district court agreed on the issue of work product and limited waiver.[135] On appeal, the D.C. circuit affirmed, holding that, while selective waiver did not apply to attorney-client privilege, the district court's finding of selective waiver by agreement with the SEC was not erroneous.[136]

The court's decision was joined by subsequent decisions in *In re Sealed Case*[137] and *In re Subpoenas Deuces Tecum*,[138] and in part by the Second

131. *See In re Worlds of Wonder Secs. Litig.*, 147 F.R.D. 208, 211 (N.D. Cal. 1992). "[W]aiver of work product to the SEC also waives work product to others." *Id.*

132. *See Permian Corp. v. United States*, 665 F.2d at 1215; *In re Sealed Case*, 676 F.2d 793, 823 (D.C. Cir. 1982); *In re Subpoenas Duces Tecum*, 738 F.2d at 1375.

133. *See Permian Corp*., 665 F.2d at 1220.

134. *See id.*

135. *See id.* at 1215.

136. *See id.*

137. *See In re Sealed Case*, 676 F.2d at 823.

138. *See In re Subpoenas Duces Tecum*, 738 F.2d at 1372-75. The court considered the following factors in its determination that selective waiver did not apply in fact

Circuit in *In re Steinhardt Partners, L.P.*, providing the first minority approach to voluntary disclosure of work product to an adversary when confidentiality is promised by the government.[139]

c. Disclosure of Wells Submissions to an Adversary as a Selective Waiver of Work Product Based On the Underlying Goal of the Work Product Doctrine

In the third approach, the Third Circuit held in *Westinghouse Electric Corp. v. Republic of the Philippines*,[140] that voluntary disclosure of protected material to an adversary operates as a selective wavier of work product protections when disclosure is in furtherance of the underlying goal of the work product doctrine.[141] In *Westinghouse*, the SEC launched an investigation into contracts procured by Westinghouse through illegal payments to foreign officials.[142] In response, Westinghouse conducted an internal investigation and disclosed materials created to the SEC and DOJ, but not to the Republic of the Philippines, claiming work product protections and selective waiver as a basis for refusal.[143] In considering whether Westinghouse's voluntary disclosure to the SEC and the DOJ constituted a

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under the facts of the case: (1) the party attempting to use work product privilege sought to use it in a way that was not consistent with the purpose of the work product doctrine; (2) the party attempting to use work product privilege had no reasonable basis for believing materials disclosed to the SEC would remain confidential; and (3) waiver of work product under the circumstances "…would not trench on any policy elements not inherent in…" the work product privilege. *Id.* at 1372. The court noted the outcome may have been different had the party attempting to use the privilege either maintained pure confidentiality by not disclosing work product or by insisting on a promise of confidentiality by the SEC before disclosing work product to it. *See id.* at 1375.

139. *See In re Steinhardt Partners, L.P.*, 9 F.3d at 236. "In denying the petition, we decline to adopt a *per se* rule that all voluntary disclosures to the government waive work product protection. Crafting rules relating to privilege in matters of governmental investigations must be done on a case-by-case basis." *Id.* (citation omitted).

140. 951 F.2d 1414 (3rd Cir. 1991).

141. *See Westinghouse Electric Corp. v. Republic of Phil.*, 951 F. 2d at 1429.

142. *See id.* at 1418.

143. *See id.* at 1418-19.

selective waiver as to the SEC and DOJ, but not against subsequent parties, the Third Circuit considered the goal of the work product doctrine and the reasons behind Westinghouse's disclosures to the SEC and DOJ.[144] Finding that the goal of the doctrine was to protect the adversarial system by allowing attorneys to prepare their cases without fear of work product created being used against their clients, it attributed Westinghouse's disclosures to an effort to forestall charges and to secure lenient treatment in the event charges had merit.[145] Holding that its reasons for disclosure were inapposite to the goal of the work product doctrine, since Westinghouse was free to prepare its case without fear of work product being used against it – at least until it waived protections by disclosing documents to the government - the court denied its claim of selective waiver and ordered the production of documents sought.[146] Thus, the use of selective waiver to protect work product voluntarily disclosed when disclosure furthers the purpose of the work product doctrine is the second minority approach to voluntary disclosure of work product to an adversary.

IV. CONCLUSION

In deciding whether to make a Wells submission, a potential target of the SEC must consider the possibility that a Wells submission will likely be discovered by subsequent third party civil litigants. While it is true that Wells submissions generally deny the anticipated claims, it is still useful for a

144. *See id.* at 1429-30.

145. *See id.*

146. *See id.* at 1429.

> We hold that Westinghouse's disclosure of work product to the SEC and to the DOJ waived the work product doctrine as against all other adversaries.. . . [P]arties who have disclosed materials protected by the attorney-client privilege may preserve the privilege when the disclosure was necessary to further the goal underlying the privilege. We require the same showing of relationship to the underlying goal when a party discloses documents protected by the work-product doctrine. In other words, a party who discloses documents protected by the work-product doctrine may continue to assert the doctrine's protection only when the disclosure furthers the doctrine's underlying goal.

951 F. 2d at 1429.

subsequent civil litigant to know that the target has taken a fixed written position, which may or may not be supported later by discovery of all relevant documents. On the other hand, a successful Wells submission that results in no claims being filed by the SEC will reduce the likelihood of any successful subsequent litigation. Accordingly, one should weigh carefully the pros and cons of making a Wells submission.