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Breckinridge L. Willcox

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MARTIN MARIETTA AND THE EROSION OF THE ATTORNEY-
CLIENT PRIVILEGE AND WORK-PRODUCT
PROTECTION

BRECKINRIDGE L. WILLCOX*

I. INTRODUCTION

The Court of Appeals for the Fourth Circuit in *In re Martin Marietta Corp.*¹ has significantly rewritten the law of attorney-client privilege and work-product protection. The decision greatly expands the doctrine of implied waivers and applies it to a new context—the settlement conference. By expanding the potential for waiver of the protection afforded by the two doctrines, the court has opened most, if not all, of a lawyer’s litigation file to hostile parties under many circumstances. Despite the opinion’s broad new interpretations of the privilege and protection, it has gone relatively unnoticed by the legal community.² This article discusses flaws in the court’s reasoning and explores the decision’s ramifications.

In addition, a federal judge in the Southern District of New York recently held that a standard audit letter disclosure of potential litigation waives the attorney-client privilege and work-product protection as to underlying data from an outside counsel’s investigation.³ Other changes have eroded the security of information trial lawyers have long believed to be confidential. The federal government’s aggressive pursuit of client fee information and the possibility of the restraint and forfeiture of legal fees from some criminal defendants have raised serious concern within the defense bar.⁴

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³ See infra notes 130-136 and accompanying text.
⁴ See infra notes 156-161 and accompanying text.
This Article analyzes these trends and predicts assaults on the attorney-client relationship will continue and expand.

**II. **In Re Martin Marietta

In Martin Marietta, the Court of Appeals for the Fourth Circuit cleared the way for courts to compel the production of attorney interview notes and memoranda in fairly common circumstances. The decision significantly expands the potential scope for waiver of the attorney-client privilege and the work-product doctrine and narrows the concept of opinion work-product.

In November 1984, federal grand jury subpoenas were served on Martin Marietta. The company retained outside counsel and commenced an internal investigation. Investigators interviewed employees, generating written materials including handwritten attorney notes of the interviews, attorneys' memoranda about the interviews, and transcripts of tape-recorded interviews of witnesses. Certain internal audits were conducted and audit workpapers were generated. Subsequently the Department of Justice advised Martin Marietta that the company and William Pollard, the head of one of its subsidiaries, were targets of a federal criminal investigation into improper billing for government contracts.

Martin Marietta, through outside counsel, met with the prosecutors on several occasions in an effort to avoid prosecution. During those meetings, the company's attorneys in essence asserted that Pollard had defrauded and victimized the company. The United States Attorney invited the company to submit its position in writing and agreed that any submission would not waive claims of attorney-client privilege or work-product protection.

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5. See infra notes 29-87 and accompanying text.
6. See infra notes 88-120 and accompanying text.
8. Id.
9. See id. at 4.
10. See In re Martin Marietta Corp., 856 F.2d 619, 621 (4th Cir. 1988) (implying that the meetings were held to avoid prosecution by noting that "portions of some documents it sought to withhold had been earlier quoted in disclosures made by it to the Government, either or both the United States Attorney and the Defense Logistics Agency, part of the Department of Defense").
11. See id. at 622.
12. Petition for Writ of Certiorari, supra note 7, at 3.
13. See Letter from George Beall to author (Sept. 17, 1986) (cover letter submitted with position paper stating understanding that "government will not use information..."
In September 1986, the company submitted a position paper that by its own terms was based on the results of the internal investigation. The position paper quoted employee interviews, although in most instances without attribution. Perhaps most important were certain assertions in the position paper. For example, at one point it stated that “[o]f those consulted within the Company, all will testify that any qualms they had about the arrangement had nothing to do with worries about fraud.” The negotiations were mostly unsuccessful. In February 1987, the company pleaded guilty to a three-count criminal information.

Two months later, Pollard was indicted. Awaiting trial, he subpoenaed Martin Marietta under Federal Rule of Criminal Procedure 17(c) for various documents connected with the internal investigation, including the attorneys' notes, memoranda, transcripts of the employee interviews, and the internal audit workpapers. The company moved to quash the subpoenas on the basis of attorney-client privilege and the work-product doctrine. Martin Marietta was willing to, and subsequently did, provide to Pollard much of the information it had provided to the government. The com-

15. Id.
16. Id.; see also In re Martin Marietta Corp., 856 F.2d 619, 623 (4th Cir. 1988) (using same quotation).
17. Petition for Writ of Certiorari, supra note 7, at 4.
18. Martin Marietta, 856 F.2d at 620.
19. Id. Rule 17(c) provides as follows:
(c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.
FED. R. CRIM. P. 17(c).
20. Martin Marietta, 856 F.2d at 621.
21. Id. at 620.
pany resisted additional discovery, however, on a limited waiver theory: waiver had only been made as to the information actually disclosed, and not by implication as to all underlying materials on the same subject. Martin Marietta refused to comply with the district court's order enforcing the subpoena and was held in contempt.

On appeal, the Fourth Circuit held that the attorney-client privilege and work-product protection had been effectively waived as a result of the position paper disclosures to the United States Attorney. The court did make an exception for "pure expressions of legal theory or mental impressions" such as margin notes reflecting an attorney's assessment of witness credibility. The court drew a distinction between opinion and nonopinion work-product, and remanded the case with instructions that pure opinion work-product retained protection despite the waiver and its production could not be compelled.

The result is extraordinary for two reasons. First, the Fourth Circuit interprets an attorney proffer as an appropriate context for a waiver of privilege. Second, it dramatically redraws the parameters of work-product while either misapprehending or ignoring relevant Supreme Court precedent.

A. The Purposes for the Protections

The attorney-client privilege and the work-product doctrine have evolved separately and each has a distinct purpose. The attorney-client privilege is intended to promote full and frank communication between those in need of legal advice and attorneys by protecting the confidentiality of both discussions and correspondence. The work-product doctrine, on the other hand, protects

24. Id. at 621.
25. Id. at 623-26.
26. Id. at 626.
27. Id. at 626 n.2.
28. Id. at 626.
papers prepared by or on behalf of an attorney so that work performed in anticipation of litigation may be done "with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." The distinction was aptly drawn by the Court of Appeals for the District of Columbia Circuit: "[T]he work-product privilege does not exist to protect a confidential relationship, but rather to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of an opponent." These distinctive purposes were first recognized by the Supreme Court in Hickman v. Taylor, where an attorney preparing for potential litigation interviewed several witnesses and subsequently sought to avoid complying with an opponent's discovery request, claiming the interview materials were protected by the attorney-client privilege. The Supreme Court initially determined that the privilege did not apply because the communications at issue were made by witnesses, not by the client. The Court then established the doctrine that work-product materials are entitled to qualified protection. The reason for the protection was not to promote full and frank communication between attorney and client or even between attorney and witness; rather, it was to promote the adversary system of justice by forcing attorneys to prepare their own cases instead of allowing them to obtain the fruits of their opponents' preparation.

These underlying purposes are critical in an evaluation of the

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33. 329 U.S. 495 (1947).
34. Id. at 499.
35. Id. at 508.
36. Id. at 509-12.
37. Id. at 511. The Court stated that:

Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Id.
conduct that will constitute a waiver of privilege or protection. Because the attorney-client privilege protects confidentiality, any disclosure to a third person destroys the protection. In contrast, work-product might be disclosed to a nonopponent third person without undermining the integrity of the adversarial process. Consequently, at least where work-product is concerned the context of the disclosure can be critical to a determination of a waiver.

B. The Context of the Disclosure

Martin Marietta's disclosures in its position paper involved both attorney-client communications and attorney work-product. The company urged the Fourth Circuit to adopt the concept of limited waiver to shield the material.

There are two distinct types of limited waiver: partial and selective. Partial waiver is the strategic disclosure of a subset of a larger class of privileged or protected material. Selective waiver is a purposeful disclosure to a third person by a party who continues to assert privilege or protection as to all others. Both types were implicated in Martin Marietta because the position paper disclosed the results of the investigation without disclosing the underlying data, and because the position paper was disclosed to the government under an agreement that no one else would see it.

The Fourth Circuit conducted its entire analysis under the rubric of partial waiver. The court ignored the fact that the disclosure

38. See J. Gergacz, supra note 29, ¶ 7.02[3][c], at 7-38. Because Hickman recognizes that work-product is not privileged material but is still entitled to protection, the term "privilege" is used throughout this article for clarity to refer only to the attorney-client privilege. Work-product material, often erroneously labeled as "privileged" by commentators or courts, will be identified in this article as material subject to "work-product protection" or the "work-product doctrine." See Cohn, supra note 29, at 922-24 (defining work-product).

39. MCCORMICK ON EVIDENCE § 93, at 226-27 (E. Cleary 3d ed. 1984). Because no privilege attaches to communications knowingly made in the presence of a third person, the disclosure of privileged material is analogous. Id.


41. Waiver can be express or implied. Because an express waiver by the person entitled to protection will rarely be at issue, the term "waiver" throughout this Article refers to an implied waiver.

42. See Petition for Writ of Certiorari, supra note 7, at 5-6.


45. Id.

46. Id.
was made selectively to the government and not to Pollard, and that many courts recognize selective waivers of work-product. By doing so, the court treated the attorney-client privilege and the work-product doctrine as if their purposes were identical, and reached an impractical result far broader than the case required.

1. Partial Disclosure.—A disclosure of any information covered by the attorney-client privilege results in what is commonly called a "subject matter waiver." Under this doctrine, a partial disclosure waives the privilege not only with respect to the material disclosed but also with respect to related information that was withheld. The basis for the extended waiver is one of fairness; because the disclosed information in isolation will normally be favorable to the privileged party, it would be unfair to deprive an opponent of the opportunity to undermine the limits of the waiver by exploring the context of the disclosure.

This rationale of fairness applies equally to work-product materials. In *United States v. Nobles*, the Supreme Court held that, although an investigative report was protected by the work-product doctrine, once the investigator testified the protection was waived with respect to the subject of the investigator's testimony. The Supreme Court limited the application of its holding in a critical footnote:

47. See infra notes 68-76 and accompanying text.

48. *Martin Marietta*'s expansion of the waiver doctrine joins the pattern of court decisions that is neither consistent nor easily summarized. Some courts have properly focused on the purposes to be served by the attorney-client privilege and work-product doctrine, while others focus solely on the fairness of the limited disclosure to achieve a desired result. One line of cases holds that disclosure of some material results in the loss of the privilege with respect to related, undisclosed documents and information. *In re John Doe Corp.*, 675 F.2d 482, 488-89 (2d Cir. 1982); *Permian Corp. v. United States*, 665 F.2d 1214, 1219-21 (D.C. Cir. 1981) (any voluntary breach of attorney-client privileged information waives the privilege as to all communications on the same subject). Another line of cases limits the waiver to the actual documents or information disclosed, unless palpable unfairness results. See *In re Von Bulow*, 828 F.2d 94, 102-03 (2d Cir. 1987) (disclosure of privileged attorney-client communications does not extend to other conversations on the same subject); United States v. Aronoff, 466 F. Supp. 855, 862 (S.D.N.Y. 1979) (waiver limited to the information disclosed during a settlement discussion; where the party attacking the privilege was not prejudiced, and there were no grounds for a finding of waiver, there is no reason to find a waiver by implication).

49. Comment, supra note 44, at 1633.

50. *In re Martin Marietta Corp.*, 856 F.2d 619, 623 (4th Cir. 1988), cert. denied, 109 S. Ct. 1655 (1989); J. GERGACZ, supra note 29, ¶ 5.02(2)[a][2], at 5-15 to 5-16 & n.50; Comment, supra note 44, at 1633.

51. See Comment, supra note 44, at 1633-34.

52. 422 U.S. 225 (1975).

53. Id. at 239.
What constitutes a waiver with respect to work-product materials depends, of course, upon the circumstances. Counsel necessarily makes use throughout trial of the notes, documents, and other internal materials prepared to present adequately his client's case, and often relies on them in examining witnesses. When so used, there normally is no waiver. But where, as here, counsel attempts to make a testimonial use of these materials the normal rules of evidence come into play with respect to cross-examination and production of documents. 54

"The circumstances" were central to the Nobles decision. An investigator for the defendant had interviewed two witnesses called by the government at trial. 55 On cross-examination, both witnesses acknowledged being interviewed but each denied making statements that defense counsel knew were described in his investigator's report. 56 The government requested that the report be disclosed, but the trial court initially declined to order its production. 57 When the defense called the investigator as its witness for the purpose of impeaching the testimony of the two government witnesses, the court conditioned permitting such testimony on the production of the report. 58 The Supreme Court held that the trial court's action was permissible. 59 The crucial aspect of Nobles was the testimonial use at trial of the otherwise protected work-product material and the resulting unfairness of a one-sided presentation of evidence to a fact-finder.

Relying on Nobles, the Fourth Circuit found that Martin Marietta's submission of the position paper to the United States Attorney during pre-indictment settlement discussions constituted "testimonial use." 60 After characterizing the pre-indictment negotiations as "proceedings," 61 the court grounded its conclusion on three factors: (1) the adversarial nature of the negotiations; (2) Martin Marietta's express assurance of the completeness of the disclosures; and (3) Martin Marietta's intent to settle the controversy. 62 The court did not mention that settlement disclosures are not testi-

54. Id. at 239 n.14.
55. Id. at 227.
56. Id. at 227-28.
57. Id. at 228.
58. Id. at 229.
59. Id. at 239-41.
61. Id.
62. Id. The third factor appears to be inherent in the other two.
monial in any evidentiary sense. It also ignored the fact that the position paper was inadmissible as proof for a variety of reasons, including the government's express agreement that it would not be used as evidence against Martin Marietta or Pollard, and the fact that it would be inadmissible as hearsay.

Regardless of whether the Martin Marietta disclosure constituted testimonial use, it clearly did not invoke the fairness problems of Nobles. In Nobles the Supreme Court made it clear that it was recognizing a waiver of work-product protection solely on the basis of fairness implicated by a one-sided presentation of evidence to a fact-finder. The settlement context does not invoke such fairness concerns because the government can reject the target's proffer regardless of the amount of information disclosed, and it can pursue charges of obstruction of justice if the target intentionally provides misleading information. More to the point, the government can demand complete disclosure before drawing any conclusions from a proffer, but a jury can make no such demands during a trial. In the settlement context there is no danger of unfairly misleading the ultimate fact-finder. In short, the unique considerations that underlie judicially created waivers do not exist outside the courtroom. The differences in context between a partial disclosure in a settlement negotiation and one made at trial render Nobles inapposite for the purpose of finding a subject-matter waiver in the Martin Marietta context.

2. Selective Disclosure.—The Martin Marietta court did not discuss the fact that the position paper was disclosed to the government and not to Pollard, despite the fact that it was Pollard who was seeking information. As is mentioned above, most courts con-

63. See Letter from George Beall, supra note 13.
64. Nobles, 422 U.S. at 239-40. In Nobles, the Court acknowledged its previous recognition of the power of a court to require the prosecution to produce previously recorded statements by government trial witnesses in order to facilitate truth-finding. Id. at 231; see Jencks v. United States, 353 U.S. 657 (1957). This power is now authorized by statute. See 18 U.S.C. § 3500 (1988). There is no concomitant statutory requirement regarding previously recorded statements by defense witnesses. However, Nobles suggests that such statements are subject to production. 422 U.S. at 241. Cf. Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613, 616 (S.D.N.Y. 1977) (reaching the same conclusion without reference to Nobles).
65. See 18 U.S.C. § 1505 (1988) (providing for fine of up to $5000 or imprisonment up to 5 years, or both, for anyone who "corruptly . . . influences, obstructs or impedes . . . the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States").
66. Disclosure was also made to Pollard, see supra note 22 and accompanying text; this fact, however, was not considered by the court.
clude that a selective disclosure of confidential communications to one person results in a waiver of attorney-client privilege as to all other persons because the underlying purpose of confidentiality is destroyed.\textsuperscript{67} On the other hand, many courts, including the Fourth Circuit, recognize a limited waiver for selective disclosure of work-product.\textsuperscript{68}

In \textit{In re Doe},\textsuperscript{69} the Fourth Circuit recognized that the purpose of the work-product doctrine is to shield an attorney’s work from adverse parties.\textsuperscript{70} It also recognized that some disclosures which do not reach an adversary do not contravene the purpose of the doctrine.\textsuperscript{71} For example, disclosures between joint defendants have been recognized as appropriate limited waivers.\textsuperscript{72} Consequently, the \textit{Doe} Court adopted the generally accepted test that “to effect a forfeiture of work product protection by waiver, disclosure must occur in circumstances in which the attorney cannot reasonably expect to limit the future use of the otherwise protected material.”\textsuperscript{73} The court also clearly implicated the purpose behind the protection by stating that the waiver is effective when the disclosure circumstances

\begin{footnotes}
\footnote{67. \textit{See supra} note 50 and accompanying text. At least one commentator has argued against such a blanket rule based on the same rationale by which courts permit a selective disclosure of work-product. Comment, \textit{supra} note 44, at 1648.}
\footnote{68. \textit{E.g.}, \textit{In re Doe}, 662 F.2d 1073, 1081 (4th Cir. 1981) ("Disclosure to a person with an interest common to that of the attorney or the client normally is not inconsistent with an intent to invoke the work product doctrine’s protection and would not amount to such a waiver."); \textit{cert. denied}, 455 U.S. 1000 (1982); \textit{United States v. American Tel. & Tel. Co.}, 642 F.2d 1285, 1298-99 (D.C. Cir. 1980) (purpose of work-product is to protect material from an opposing party in litigation, not necessarily from the rest of the world generally); \textit{GAF Corp. v. Eastman Kodak Co.}, 85 F.R.D. 46, 51-52 (S.D.N.Y. 1979) (waiver exists only if disclosure substantially increases the possibility that the opposing party could obtain the information disclosed). \textit{See generally} E. \textsc{Epstein} & M. \textsc{Martin}, \textit{supra} note 30, at 164; J. \textsc{Gergacz}, \textit{supra} note 29, ¶ 7.02[3][c][iii] (cases are split on the issue); \textsc{8 C. Wright \& A. Miller, Federal Practice and Procedure} § 2024, at 209-10 (1970 & Supp. 1990).}
\footnote{69. 662 F.2d 1073 (4th Cir. 1981), \textit{cert. denied}, 455 U.S. 1000 (1982).}
\footnote{70. \textit{Id.} at 1077.}
\footnote{71. \textit{Id.} at 1081.}
\footnote{72. \textit{E.g.}, \textit{United States v. McPartlin}, 595 F.2d 1321, 1336 (7th Cir.) (recognizing attorney-client privilege for statements made in confidence to attorney for codefendant for common purpose); \textit{cert. denied}, 444 U.S. 833 (1979); Hunydee v. \textit{United States}, 355 F.2d 183, 185 (9th Cir. 1965) (same). This exception to the general waiver theory is recognized because joint defendants have a common interest in concealing the work-product from their common opponent and because the limited sharing of privileged information does not discourage full and frank client communication to the attorney. \textit{See In re LTV Sec. Litig.}, 89 F.R.D. 595, 604 (N.D. Tex. 1981) (recognizing joint defendant exception because communication between codefendants was confidential, concerned common issues, and was intended to facilitate representation in SEC investigation).}
\footnote{73. \textit{Doe}, 662 F.2d at 1081.}
\end{footnotes}
increase the possibility that an opponent will obtain and use the material. 74

Applied to the *Martin Marietta* facts, this test yields a new result. *Martin Marietta* disclosed its position paper to the government, not to Pollard. 75 Although the company did disclose to an opponent, its position at the time was that Pollard was the only culpable party. Therefore, to *Martin Marietta* Pollard was in theory an opponent also. In this context, the company took the extraordinary step of exacting from the government an agreement that the information would remain protected from disclosure to Pollard. Consequently, following the *Doe* test, the circumstances of the disclosure did not increase the possibility that Pollard would obtain the material. 76

In sum, it was critical that the selectiveness of the disclosure be considered. Although it would have had no effect on the outcome concerning the attorney-client privilege, it would certainly have affected the Fourth Circuit’s conclusion on work-product under its own precedent as well as under the policy that supports the doctrine.

3. *The Context of the Request.*—The preceding two sections focused on the context of the disclosure—that is, how much was disclosed and to whom the disclosures were made. Equally important is the context of the request. In *Martin Marietta*, Pollard employed a subpoena in advance of trial. While it is not required that the objects of such a subpoena actually be used in evidence, the subpoena must reflect a good-faith effort to obtain evidence. 77 It is not to be used in a “fishing expedition to see what may turn up.” 78

Pollard’s justification for seeking attorney work-product was, in essence, that the attorneys’ material might show “a company-wide

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74. *Id.* See 8 C. Wright & A. Miller, *supra* note 68, § 2024, at 209-10.
76. Note that this mechanistic approach raises additional questions of fairness. Here, the disclosure tended to deflect blame from the company and onto Pollard, who claimed that fairness required that he be fully informed as to the disclosures and underlying data in order that he might raise a proper defense. While this clearly made an impression on the Fourth Circuit in *Martin Marietta*, *see* 856 F.2d at 622, it is in essence a circular argument. If selective disclosure of work-product is permissible, *see* *Doe*, 662 F.2d at 1081, it might have been fair to deprive Pollard of information that he could not have obtained if no disclosure had been made. Furthermore, even if the government had relied upon *Martin Marietta’s* representations concerning Pollard, it still had to present evidence of Pollard’s guilt in order to obtain a conviction. At trial, Pollard would have to respond to this proof rather than to the company’s representations.
78. *Id.*
conspiracy to defraud the Defense Department, as well as identify the members of such conspiracy.'" In short, it was a fishing expedition: if there was a company-wide conspiracy that included Pollard, it would hardly exonerate him.

Much of what Pollard sought could have been obtained without looking to privileged or protected information. For example, the data underlying the internal audit and the facts contained in the witness statements were not protected or privileged. Pollard could have conducted his own audit of the data and could have interviewed the same witnesses. Although it would be inconvenient to do such work, "considerations of convenience do not overcome the policies served by the attorney-client privilege" or by the work-product doctrine. Pollard had an opportunity to obtain the substantial equivalent of most of the material described in the subpoena, and that opportunity was not altered by Martin Marietta's disclosures to the government. Thus, a balancing of the character of the disclosure against the policies underlying the protections does not necessarily support a rule of absolute waiver.

In addition, the timing of Pollard's request and the procedural device used must be scrutinized. Pollard sought the source material for the position paper through a pretrial subpoena. In order to be discoverable under rule 17(c), the requested materials must meet the three-pronged United States v. Nixon test: they must be specific,
relevant, and admissible. The Fourth Circuit did not pause long in finding that Pollard’s subpoena met the Nixon standard. Although the material sought was of doubtful admissibility, the court found that only a “good faith” effort need be made to obtain evidence, and that the subpoenaed materials were “of evidentiary value” and hence were properly sought under a rule 17(c) subpoena.

In sum, the context of a request for information is important to a proper evaluation of a waiver analysis. Material sought pursuant to rule 17(c) must be admissible and relevant—work-product such as attorney notes and memoranda are generally neither.

C. The Content of the Requested Material

The second striking aspect of the Martin Marietta opinion is that it significantly alters the definition of work-product, seemingly in derogation of Hickman v. Taylor, the Supreme Court’s seminal opinion on the subject.

In Hickman, the Supreme Court established a work-product doctrine that shields from discovery “all written materials obtained or prepared by an adversary’s counsel with an eye toward litigation.” Among the materials sought in Hickman were written statements signed by witnesses and the essence of other witness interviews as memorialized by counsel. Both of these classes of materials were afforded protection because “[p]roper preparation of a client’s case demands that [the attorney] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. This work is reflected, of course, in interviews, statements, [and] memoranda . . . .”

Both classes, however, were not given equal protection. Written statements either drafted or adopted by witnesses were viewed as deserving of less protection because they might be admissible in evidence under certain circumstances or they might be useful to the adversary for impeachment or corroboration. Consequently, the Supreme Court suggested that a trial court should order such writ-

86. See id. at 699-700.
89. Id. at 511.
90. Id.
91. Id.
ten statements produced upon a showing of necessity. Because an attorney's memorandum that merely captures the essence of the statements made in an interview has no direct impeachment or corroborative value, and because such attorney writings reveal an attorney's mental processes, they are afforded significantly greater protection. This difference between written statements and attorneys' memoranda is commonly recognized, and materials that the attorney obtains, such as signed or adopted written statements, are known as nonopinion work-product; materials the lawyer prepares, such as notes and memoranda, are categorized as opinion work-product.

The line between the two became blurred by the Fourth Circuit in Duplan Corp. v. Deering Milliken, Inc. At issue were several documents prepared by the defendant's former attorneys in connection with prior litigation. One such document had apparently been disclosed and the plaintiffs sought all such earlier work-product on a broad theory of subject-matter waiver. In affirming the district court's rejection of this theory, the Fourth Circuit quoted Nobles, but went on to state: "Thus, it is true that Nobles, which dealt solely with Hickman-type witness statements as opposed to opinion work product, held that the privilege derived from the work product doctrine

92. Id. at 511-12.
93. Id. at 511-13.
95. 540 F.2d 1215 (4th Cir. 1976). The district court, in a pre-Nobles opinion, went as far as to state: "There are obviously degrees of mental impression." Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1199 (D.S.C. 1974) (emphasis in original). The district court described a continuum of recorded opinion work-product, with creative legal thought at the more-protected end and observed fact at the less-protected end. Id. at 1199-1200. Such a discrimination defies the reasoning in Hickman and ignores the reality that even the selection and manner of recording observed facts reveals creative legal thought:

It seems clear that [a lawyer's notebooks] are indeed "work product" in an essential sense of the term. They are counsel's ordering of the "facts," referring to the prospective proofs, organizing, aligning, and marshaling empirical data with the view to combative employment that is the hallmark of the adversary enterprise.

96. 540 F.2d at 1218-19. Most of the documents actually were prepared by a French conseil en brevets, whom the court described as "not a lawyer" but a patent agent. Id. at 1218-19 & n.3; see also infra note 102 (significance of lawyer-investigator distinction). For the prior litigation, see Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 509 F.2d 730 (4th Cir. 1974), cert. denied, 420 U.S. 997 (1975).
97. See Duplan, 540 F.2d at 1222.
is not in all cases absolute." 98

The basic problem with the reference to "Hickman-type witness statements" is that it misclassifies the document at issue in Nobles as nonopinion work-product. Hickman involved two types of witness statements: Adopted written statements and memorialized oral statements. The latter are classified as opinion work-product. 99

The document at issue in Nobles was an investigator's report containing witness interviews that "preserved the essence of those conversations in a written report." 100 There is no indication that the report contained verbatim witness statements or that the contents of the report had been adopted by the witnesses. 101 Consequently, according to Hickman such a memorandum containing only the essence of an interview reveals mental processes and impressions and it should be classified as opinion work-product. 102

This misclassification is carried forward into Martin Marietta, where the Fourth Circuit relied upon its earlier Duplan decision for the proposition that "Nobles dealt with non-opinion work-product." 103 The Martin Marietta court added, "We realize that nonopinion work product necessarily will be reflective of a counsel's approach . . . ." 104 The court apparently ignored the language in Hickman that drew an opinion work-product distinction for attorneys' memoranda because such memoranda reveal more about the attorney's views of the case than what the witness actually said. 105 Indeed, a good pretrial interview of a witness will reflect a litigator's inferences, hypotheticals, theory of the case, and strategy for cross-examination. In other words, material is opinion work-product be-

98. Id. at 1223.
99. See supra notes 89-94 and accompanying text.
101. See id. (investigator merely preserved the essence of the conversation in a report).
102. The Duplan court apparently did not mean to classify the Nobles report as nonopinion work-product because it was written by an investigator rather than an attorney. In fact, the court acknowledged that opinion work-product immunity could apply equally to nonlawyers. Duplan, 540 F.2d at 1219. Clearly, this lawyer-nonlawyer distinction was rejected by the Supreme Court as a basis for denying protection.

One of [the realities of litigation] is that attorneys often must rely on the assistance of investigators and the agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect materials prepared by agents for the attorney as well as those prepared by the attorney himself.

Nobles, 422 U.S. at 238-39.
104. Id.
105. See supra notes 89-94 and accompanying text.
cause it is "reflective of a counsel's approach." The Supreme Court reaffirmed the Hickman distinction in Upjohn Co. v. United States: "Forcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes."

In its discussion of the enhanced protection afforded to materials that reflect an attorney's theories, Upjohn relied upon Nobles. Inexplicably, the Fourth Circuit failed to mention Upjohn in the Martin Marietta decision. It is difficult to understand how the Fourth Circuit could have ignored the Supreme Court's most recent pronouncement on both the attorney-client privilege and the work-product doctrine, especially given the similarity of facts in the two cases.

The Upjohn Company, like Martin Marietta, retained outside counsel to conduct an internal investigation that included sending a questionnaire to certain employees. Outside counsel conducted interviews of these and other employees, which generated notes and memoranda. As a result of the investigation, Upjohn submitted a report to the Securities and Exchange Commission disclosing its conclusion that the legality of certain payments made to foreign government officials was questionable. The district court concluded that a subsequent government subpoena for materials, including the interview notes and memoranda, should be enforced because any applicable protection had been waived. The Sixth Circuit disagreed.

Although the Supreme Court did not reach the issue of waiver, it clearly considered internal investigation materials, such as those the Fourth Circuit classified as nonopinion work-product, to be opinion work-product "entitled to special protection."

In Upjohn, the Supreme Court also rejected the "control-group test" for determining the application of attorney-client privilege,

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106. Martin Marietta, 856 F.2d at 625.
108. Id. at 399.
109. Id. at 398-99.
110. Id. at 386-87.
111. See id. at 387-88, 397.
112. Id. at 387-88.
113. See id. at 388.
115. Upjohn, 449 U.S. at 401.
116. A federal district judge in Pennsylvania first outlined the control-group test:
   [I]f the employee making the communication, of whatever rank he may be, is in
and held that relevant communications from any employee are privileged.\textsuperscript{117} Applying this rule to the \textit{Martin Marietta} facts yields the conclusion that no nonopinion work-product was involved. Because only employees were interviewed during the internal investigation, any document that revealed communications implicated the attorney-client privilege. The remainder of the material constituted opinion work-product. As the Court in \textit{Upjohn} stated:

The notes and memoranda sought by the Government here, however, are work product based on oral statements. If they reveal communications, they are, in this case, protected by the attorney-client privilege. To the extent they do not reveal communications, they reveal the attorneys' mental processes in evaluating the communications.\textsuperscript{118}

Thus, to the extent that \textit{Martin Marietta} classifies notes and memoranda as nonopinion work-product, it is in conflict with \textit{Upjohn}. It seems beyond dispute that Martin Marietta's position paper disclosed only attorney-client communications and opinion work-product.

In sum, the Fourth Circuit's reliance on its earlier misreading of \textit{Nobles} and its apparent disregard of \textit{Upjohn} resulted in a unique and questionable definition of nonopinion work-product. This new definition permitted the court to classify improperly documents reflecting attorney mental processes as nonopinion work-product, and to hold that this less-protected class should be disclosed. Under proper analysis, the documents should have been classified as opinion work-product entitled to the same heightened protection that the Fourth Circuit afforded to other materials in this class.\textsuperscript{119} At the same time, it is critical to understand that the opinion-nonopinion


\textsuperscript{118} Id. at 401.

distinction was drawn in *Hickman* en route to the conclusion that a
court could order disclosure of the less-protected nonopinion
materials upon a showing of necessity;\(^{120}\) the distinction had noth-
ing to do with waiver.

D. *A Synthesis of Errors*

The key issue in *Martin Marietta* was whether and to what extent
protections were waived. The Fourth Circuit incorrectly distin-
guished between classes of work-product when the only relevant
distinction was between materials covered by attorney-client privi-
lege and those covered by the work-product protection. As dis-
cussed above, waiver analysis must focus on the purpose behind
these protections. A waiver of the attorney-client privilege includes
the communication disclosed and all other communications relating
to the same subject matter.\(^ {121}\) Furthermore, disclosure to one
waives as to all others.\(^ {122}\) Consequently, since confidentiality was
breached by Martin Marietta's disclosure of the position paper, Pol-
lard should have been granted access to any verbatim employee
statement within this description.

With regard to work-product, the Fourth Circuit held on the
facts of *Martin Marietta* that subject-matter waiver should apply to
nonopinion work-product but not to opinion work-product.\(^ {123}\) This
holding, however, was premised on a misapprehension that the
Supreme Court in *Nobles* permitted access only to nonopinion work-
product.\(^ {124}\) In fact, *Nobles* stands for the proposition that even opin-
ion work-product is not exempt from subject-matter waiver when
concerns of fairness outweigh the purpose for protecting the materi-
als.\(^ {125}\) In *Nobles*, the balance tipped in favor of fairness because the
defense proffered a limited, potentially inaccurate version of certain
facts at trial. It would have been equally unfair if the selective dis-
closure had come from an adopted witness statement or from an
attorney's notes.

In *Martin Marietta*, the disclosure was not before a fact-finder; it

\(^{120}\) See *Hickman v. Taylor*, 329 U.S. 495, 511 (1947) ("Where relevant and non-privi-
leged facts remain hidden in an attorney's file and where production of those facts is
essential to the preparation of one's case, discovery may properly be had.").

\(^{121}\) United States v. Jones, 696 F.2d 1069, 1072 (4th Cir. 1982). See generally Com-
ment, supra note 44, at 1633.

\(^{122}\) See supra notes 50 & 67 and accompanying text.

\(^{123}\) 856 F.2d at 625-26.

\(^{124}\) See supra notes 99-104 and accompanying text.

\(^{125}\) See United States v. Nobles, 422 U.S. 225, 239-40 (1975); J. Gergacz, supra note
29, ¶ 7.02[2][a][i], at 7-27 & n.120.
was an attorney proffer made in confidential settlement negotiations. Nor could the position paper qualify as evidence that the government could use in a trial of Pollard. Consequently, it is not clear that fairness, under the principles in Nobles and Upjohn, should result in a subject-matter waiver and required production of notes and memoranda.

Martin Marietta sought certiorari, and the American Bar Association (ABA) joined as amicus. In its amicus brief, the ABA stated: "The Fourth Circuit’s decision creates substantial uncertainty concerning both the existence and the scope of the implied waivers of the attorney-client and work-product privileges. This uncertainty in the law significantly impairs the ability of lawyers to provide responsible, effective legal representation..." The Supreme Court denied certiorari on April 3, 1989.

Given this dramatic change in the rules concerning disclosure of the details of internal corporate investigations, uncertainty now pervades the domain of outside corporate counsel. It has been suggested that the government itself now will be seeking to invoke the Martin Marietta waiver rule in an effort to obtain underlying documentation from internal investigations, and it will have little incentive to accept a written submission from defense counsel on terms that will allow continued invocation of attorney-client or work-product protection.

III. The Drexel Burnham Problem

At the same time the appellate courts were considering Martin Marietta, a similar drama was unfolding in Manhattan. In anticipation of extensive litigation surrounding allegations of securities fraud, Drexel Burnham Lambert hired outside counsel to conduct an internal investigation. The information generated was used by Drexel’s attorneys to outline the status and merits of the investigation in response to the standard audit inquiry letter submitted to the company’s auditors.

127. Motion for Leave to File a Brief and Brief of the American Bar Association as Amicus Curiae in Support of Petition at 2, Martin Marietta Corp. v. Pollard, cert. denied, 109 S. Ct. 1655 (No. 88-1157).
131. Id.
Federal prosecutors issued a grand jury subpoena to Drexel’s outside counsel for the results of the internal investigation, including the lawyer’s interview notes. In a sealed opinion, Senior United States District Judge Edmund L. Palmieri held two prominent Wall Street lawyers in contempt and ordered that some of the materials be produced, apparently on the theory that the company had waived protections by disclosing the results of the investigation to the outside auditors. This is believed to be the first time a court imputed a subject-matter waiver from the submission of a standard audit inquiry letter.

Although the opinion remains sealed, it has generated enormous concern among members of the corporate defense bar. The concern springs from the recognition that a candid assessment of potential liability included in a response to an auditor’s request may waive protection of most, if not all, of the results of an internal investigation. The defense bar’s concern also stems from Judge Palmieri’s revisitation of an issue presumed settled.

In 1976, the American Bar Association issued a statement of policy regarding the appropriate scope of a lawyer’s response to a potential-liability request by a corporate client’s outside auditors. The policy recommends a limited response that covers only items that are “material to the presentation of the client’s financial statements,” but it also suggests that the response carry a disclaimer that it is intentionally being limited pursuant to the ABA guidelines. It is apparent that such a disclosure still would serve as a waiver as to the statements actually disclosed and, under the Fourth Circuit’s expansive interpretation of the subject-matter waiver theory, as to all client communications related to the areas classified as material.

The ABA policy also recommends that the lawyer obtain ex-

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132. Id.
133. Id.
134. Id.
135. Id.; Strasser, Corporate Probe Use Expanding, Nat’l L.J., Jan. 9, 1989, at 1, col. 3.
136. A failure to respond completely to an auditor’s request will likely result in a qualified opinion of the company’s financial condition, which has a detrimental effect on the value of public stock.
138. Id. at 1712.
139. Id.
140. See supra text accompanying notes 25-28, 64-65.
press consent from the client before responding,¹⁴¹ and the most recent auditing interpretation by the American Institute of Certified Public Accountants suggests that the consent letter contain a clear statement of intent to retain attorney-client privilege and work-product protection despite the pending disclosure to outside auditors.¹⁴² This manual also suggests that the response to the auditors say that disclosure should not be construed as a waiver.¹⁴³

In light of recent case law, it is doubtful that any court would value such a disclaimer. Courts apparently find a lack of intent to waive protection only upon a showing that the disclosure was inadvertent¹⁴⁴ or compelled by a court.¹⁴⁵ One court has recognized a waiver of attorney-client privilege based upon such a specific reservation made at the point of disclosure; however, a key to the court’s conclusion was the fact that the disclosure was made in the context of a Securities and Exchange Commission investigation that had not advanced to the point of public proceedings.¹⁴⁶ Because a disclosure to an outside auditor concerning potential or pending litigation is made for the purpose of completing financial statements to be used in the credit market and in reports to shareholders, there can be no expectation that the information will remain confidential with the auditor. But it is equally certain that none of the participants in this process has any expectation that the underlying material—most especially lawyer’s notes—will be subject to an implied waiver of privilege and expected protection.

A corporation is thus placed in a dilemma. It must conduct the internal investigation if litigation is anticipated and it must also disclose its potential for liability to the credit market. But to do both vitiates any claim of privilege with regard to the heart, if not all, of the results of the investigation. The dilemma should not cause cor-

¹⁴¹. ABA Policy, supra note 137, at 1716.
¹⁴². 1 American Institute of Certified Public Accountants, AICPA Professional Standards (CCH) AU §§ 9337.28-.30 (May 1990).
¹⁴³. Id. § 9337.30.
¹⁴⁵. See, e.g., Ward v. Succession of Freeman, 854 F.2d 780, 788-89 (5th Cir. 1988) (where a district court compels disclosure of privileged communications that plaintiffs use at trial, defendants do not automatically waive their privilege by attempting to use some communications to demonstrate good faith reliance on counsel’s advice), cert. denied, 109 S. Ct. 2064 (1989); Transamerica Computer, 573 F.2d at 650-51 (parties agreed that “a party does not waive the attorney-client privilege for documents which he is compelled to produce” (emphasis in original)).
porations to avoid internal investigations for the obvious reasons that litigation cannot be avoided or won without them. On the other hand, as the ABA policy statement acknowledges: "It is also recognized that our legal, political and economic systems depend to an important extent on public confidence in published financial statements. To meet this need the accounting profession must adopt and adhere to standards and procedures that will command confidence in the auditing process." Consequently, corporations can neither forgo an investigation nor conceal the results from outside auditors without incurring some loss. Because they cannot do both without potentially waiving the privilege, corporations must weigh the value of confidentiality in litigation against the negative fallout that can be expected from a qualified opinion of financial status in an auditor's statement.

The benefits to the economic and political systems of public confidence in published financial statements could provide a basis for changing the analysis of waiver. The recognition and waiver of the attorney-client privilege and work-product protection occur on a case-by-case basis, and the analysis must take into account the purposes underlying the protections. Courts should evaluate each case involving disclosure to an outside auditor to determine if the company claiming the privilege seeks to use it in a way that is inconsistent with its purpose. Because the purpose of the attorney-client privilege is to foster candor by maintaining the confidentiality of communications, waivers should be implied only after analysis of the context of the communication. Disclosure for the purpose of a financial statement is clearly inconsistent with maintaining confidentiality and does not foster candor when public disclosure is a near certainty.

The purpose of work-product protection, on the other hand, is to advance the adversary system by protecting the attorney's work in order to promote thorough preparation and presentation of each

147. ABA Policy, supra note 137, at 1710.
149. See supra notes 29-41 and accompanying text.
150. See In re Sealed Case, 676 F.2d 793, 818 (D.C. Cir. 1982) (when the corporation disclosed information to the SEC, it impliedly waived its claim of work-product protection as to documents clearly noted as material to the investigation).
151. See supra note 30.
152. See, e.g., Himmelfarb v. United States, 175 F.2d 924, 939 (9th Cir.) (IRS agent's testimony was admissible although the taxpayer claimed he only submitted information out of fear and with the understanding that it would remain confidential), cert. denied, 338 U.S. 860 (1949).
Because the information conveyed in audit inquiry letters invariably becomes public, the issue of an opponent's preparation is irrelevant, at least to the extent of the published information. But a subject-matter waiver is not necessarily demanded in this context because subject-matter waiver is driven by concerns of fairness. As is illustrated by Nobles, shielding undisclosed results of an internal investigation involving the same subject matter as is disclosed is not unfair to an opponent unless the partial disclosure is used as evidence in a formal proceeding. Wholly different concerns apply in the nonadversarial context of audit inquiry letter disclosures. Consequently, the disclosure to an outside auditor should not result in subject-matter waiver as to work-product.

IV. THE FISCHETTI AND GOLDBERGER CASE

In recent months the Department of Justice has fueled the debate over access to once-sacrosanct information by aggressively seeking the identity of cash-paying clients of lawyers. The general rule is that fee information is a nonconfidential communication and thus unprivileged. Several courts, however, have labored to establish narrow exceptions to the rule—for example, when such disclosure would supply the "last link" in an existing chain of incriminating evidence; when disclosure would implicate the client in the very matter for which legal advice was sought initially;
and when disclosure would be tantamount to disclosing an otherwise protected confidential communication.\textsuperscript{159} But a sudden and recent surge of interest by the government in pursuing client fee information, driven by the greatly increased attention being devoted to the forfeiture and money-laundering aspects of narcotics trafficking, has greatly troubled the criminal defense bar.\textsuperscript{160} The resentment is due more to the criminal combatants' common understanding that such information was confidential rather than the defense bar's unilateral view that it was privileged. The end of the informal truce is manifested by the government's greatly increased use of compulsion to obtain client fee information from attorneys.\textsuperscript{161}

The compulsion process has used both the vehicles of grand jury subpoenas and Internal Revenue Service (IRS) administrative subpoenas. Before issuing a grand jury subpoena to an attorney for client information, a federal prosecutor must obtain written approval from the Assistant Attorney General of the Criminal Division.\textsuperscript{162} The information sought must be unprivileged, necessary, and not obtainable from any other source.\textsuperscript{163} But requests for authority to issue grand jury subpoenas to lawyers are routinely granted—640 such subpoenas were issued in 1989, and the number is rising.\textsuperscript{164}

The IRS recently has entered this arena. The 1984 Deficit Reduction Act added section 6050I to the Internal Revenue Code.\textsuperscript{165} Under its provisions, any person engaged in a trade or business who receives more than $10,000 in cash in one transaction\textsuperscript{166} is required

\begin{thebibliography}{99}
\bibitem{159}NLRB v. Harvey, 349 F.2d 900, 905 (4th Cir. 1965); see also Stern & Hoffman, \textit{supra} note 156, at 1798-99 (discussing rationales behind the exceptions); Comment, \textit{supra} note 156, at 69 & nn.5-7 (additional cases).
\bibitem{161}See \textit{ABA Takes Positions on Lawyer Subpoenas, Rights of Death Row Inmates, Abortion}, 46 Crim. L. Rep. (BNA) 1436, 1437 (Feb. 21, 1990) [hereinafter \textit{ABA Position}].
\bibitem{162}See \textit{UNITED STATES ATTORNEYS' MANUAL} § 9-2.161(a)D (1988).
\bibitem{163}\textit{Id.} § 9-2.161(a)E. For criticism of an earlier version of these rules, see Note, \textit{A Critical Appraisal of the Justice Department Guidelines for Grand Jury Subpoenas Issued to Defense Attorneys}, 1986 \textit{DUKE L.J.} 145.
\bibitem{164}\textit{ABA Position}, \textit{supra} note 161, at 1437 (reporting on speech by the President of the National Association of Criminal Defense Lawyers).
\bibitem{166}See also Temp. Treas. Reg. § 1.6050I-1T (requiring the reporting of cash transac-
to provide to the IRS certain information about the transaction, including the identity of the payor. Since November 1988, willful failure to file the form is a felony punishable by imprisonment for up to 5 years and a fine of $25,000, or in the case of a corporation, $100,000. There is also a civil penalty for intentional failure to file: ten percent of the amount which should have been reported, or ten percent of the taxable income derived from the transaction.

Law firms clearly come within the coverage of section 6050I. Designed to root out drug dealers' money-laundering activities, this reporting requirement was immediately resisted by criminal defense lawyers, who argued that such disclosure might incriminate their clients.

A number of defense attorneys who received such fees in cash adopted the stratagem of reporting the transactions on the required form by describing the amount of cash, and the date and nature of the transactions, but declining to provide the names, addresses, and taxpayer identification numbers of the payors as required by the statute. In October 1989, after the Justice Department and several criminal defense bar groups failed to negotiate a compromise to the dispute, the IRS sent letters seeking client identity information to 956 lawyers who did not provide it on the reporting form. In addition, the IRS issued administrative subpoenas to several law

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167. 26 U.S.C. § 6050I (1988). Two or more related transactions are treated as one for reporting purposes. See also supra note 166.


170. Lawyers who represent certain types of criminals also have a much more mundane concern. The government can restrain and obtain forfeiture of legal fees paid by drug dealers to their lawyers if the fees can be traced to the proceeds of drug trafficking. 21 U.S.C. §§ 853, 881(a)(6) (1988); United States v. Monsanto, 109 S. Ct. 2657, 2665 (1989) (holding that this statute authorized the district court to freeze defendant's assets even if they were to be used to pay attorney); Caplin & Drysdale v. United States, 109 S. Ct. 2646, 2652 (1989) (forfeiture statute's preventing payment of attorneys' fees did not unduly burden defendant's sixth amendment rights). Legal fees can also be restrained and forfeited if shown to be proceeds of a pattern of racketeering activity under the RICO statute, and the restraining of such potentially forfeitable sums can be effectuated before trial, prior to any forfeiture order. 18 U.S.C. § 1963(d)(1)(A) (1988); United States v. Regan, 858 F.2d 115, 119 (2d Cir. 1988). See also Mansnerus, For Lawyers, Crime May Not Pay, N.Y. Times, Dec. 17, 1989, § 4, at 5, col. 1 (suggesting that fee-forfeiture provisions drove at least one prominent criminal defense attorney away from drug cases).

171. Brodsky, supra note 160.


firms. In November 1989, the United States Attorney for the Southern District of New York moved to enforce the subpoenas against two Manhattan law firms, Fischetti Pomerantz & Russo and Goldberger & Dubin. The firms argued that the identities of the clients were protected by the attorney-client privilege.

The argument, in essence, followed the lines of the purpose behind the privilege: if the client is connected with large amounts of cash, the government will focus on the client's activities, and such a possibility, initiated by the attorney's report to the government, will chill the attorney-client relationship. The attorneys argued that this harm outweighed the governmental interest in the information, which they characterized as nothing more than a fishing expedition. There is substantial case authority for the proposition that lawyers can be compelled under grand jury subpoena to divulge information about client identity and fees. But the lawyers for Fischetti and Goldberger argued that those cases involved identified defendants already under investigation, while the new IRS initiative would force lawyers to divulge information about potential criminal targets who have not yet aroused the government's suspicion.

In a bench opinion issued on March 13, 1990, United States District Judge Vincent Broderick granted the government's subpoena enforcement action. The court agreed with the government's position that what was involved was a requirement of neutral application and that attorneys were not singled out by the statute. Judge Broderick found no privilege attached to the clients at issue in the subpoena—they had already been indicted or brought to trial—but did recognize the need for judicial review of individual circumstances and found that specific exceptions could be warranted upon a proper showing of special circumstances.

The court was bound by Second Circuit law holding that, "absent special circumstances, client identity and fee information are

174. See id.
175. Id.
177. See id. at 16-17, 19, 35.
178. Id. at 18-19.
179. See supra note 156.
180. Stille, supra note 173.
181. Transcript, supra note 176, at 51.
182. Id. at 52.
183. Id. at 53.
not privileged." The rationale is that the client's identity and fee information are not confidential and are not essential to obtain legal advice. The "special circumstances" caveat apparently springs from Baird v. Koerner, where the Ninth Circuit reversed an order directing an attorney who had communicated with the IRS to disclose the clients' identities on the rationale that "the identification . . . conveys information which ordinarily would be conceded to be part of the usual privileged communication."

One commentator has traced three variations of the Baird exception and found the most widely accepted to be where the disclosure of client identity or fee information would connect the client to already-disclosed, independently privileged information. Clearly section 6050I does not implicate such an exception because it only requires the reporting of the client's name and the portion of the fee information that constitutes the cash payment. It also requires a description of the transaction, but a description such as "fee for legal advice" does not reveal the content of the advice, which is independently privileged. Furthermore, a reportable cash transaction is not of itself evidence of criminal conduct, much less of guilt.

At bottom, the information should not be privileged because in isolation it communicates nothing that necessarily is considered confidential. The statute reflects the policy concern that large cash transactions often are related to potentially harmful activity, and, like weapons purchases, ought to be reported. The concerns of the legal profession, voiced in the Fischetti-Goldberg case, could be addressed just as the Rules of Professional Conduct suggest for dealing with other types of potential conflict. Lawyers should inform clients who propose to pay a fee in cash that the transaction must be reported. This will provide the clients with the opportunity to make some other arrangement.

185. Id. (citing Fisher v. United States, 425 U.S. 391, 403 (1976)).
186. 279 F.2d 623 (9th Cir. 1960).
187. Id. at 632-33.
188. Comment, supra note 44, at 1519-20.
189. 26 U.S.C. § 6050I(b) (1988). The Secretary of the Treasury is authorized to require other information. Id. § 6050I(b)(2)(D); see, e.g., supra note 166.
190. Id. § 6050I(b)(2)(C).
191. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1989).
192. There are limitations on alternate arrangements contained in the same statute, which makes it illegal to structure a transaction in order to evade the reporting requirement. 26 U.S.C. § 6050I(f) (1988).
V. Conclusion

Strong currents are reshaping trial lawyers' relationships with their clients, and there is no indication that the waters are calming. *Martin Marietta* is only the latest manifestation of a steady erosion of the attorney-client privilege and work-product protection, but it has accelerated the process dramatically.

The Fourth Circuit's opinion in *Martin Marietta* rests on an unstable foundation, and serious questions challenge the legitimacy of several premises central to the decision—namely, whether facts proffered in a settlement context should constitute disclosures such that fairness dictates an implied waiver of the protection afforded all undisclosed facts, and whether attorney notes and memoranda of witness interviews can be viewed as nonopinion work-product. At issue in the case was not the information actually revealed to opposing counsel, but rather undisclosed information. The arguments that support the rule that a privilege cannot attach to disclosed documents and information do not support the corollary that protection should be lost for undisclosed, privileged documents and information. Fairness concerns which suggest that a partial disclosure might prove misleading in an adversarial setting can have little application to a third party. But the opinion stands, and it can be expected to raise havoc for trial lawyers: no longer can settlement discussions be undertaken with no risk; no longer can counsel conducting internal corporate investigations ensure that they can protect the results of their efforts, for any factual admissions made to an adversary—even if accepted with an express no-waiver understanding—may trigger a *Martin Marietta*-type waiver.

Equally astonishing, courts also seem willing to find implied waivers in the context of the routine annual disclosure letter from outside counsel to a corporation's accountants. If the attorney-client relationship is to have any meaningful protection at all, it seems axiomatic that required public disclosures cannot be deemed to waive privileges and protections attaching to information in the lawyer's file.

The government is appearing more frequently in this arena, not only as an interested third-party observer but also as an aggressor. The government probably will claim upon the slightest pretext a waiver of the protection of underlying information in internal corporate investigations, and it is certain that the government now has little incentive to receive proffered information on any basis that al-

193. See supra notes 130-155 and accompanying text.
lows undisclosed underlying material to remain privileged or protected. Moreover, a sudden interest in the identity of lawyers' cash-paying clients and the stark possibility of restrained or forfeited\textsuperscript{194} legal fees have caused the defense bar to view the Department of Justice even more skeptically. Although client identity and fee information traditionally has not been viewed as privileged, the government's interest in such information is only very recent.\textsuperscript{195}

The rules that historically have governed the trial lawyer have changed dramatically, although perhaps not as much as Martin Marietta claimed in its petition for rehearing: that no meaningful settlement discussions in any civil or criminal case can occur without loss of work-product protection, and that routine civil discovery has been expanded to include counsel's notes and memoranda of interviews.\textsuperscript{196} Nevertheless, at a minimum, the trial lawyer's choices are more uncertain. In the course of litigation, lawyers customarily engage in settlement discussions or plea negotiations, which the law encourages.\textsuperscript{197} Do disclosures of privileged information in such negotiations result in the loss of attorney-client privilege or work-product protection for undisclosed underlying information or documents? If there is such a risk, should counsel conducting internal corporate investigations do things differently: make written memoranda as cryptic as possible, or not identify the witness by name, or not reduce witness interviews to writing at all?

Perhaps this erosion of the protections covering a lawyer's litigation file will precipitate a return to the days before electronic copiers or even typewriters, when lawyers did their business orally and kept their files in their heads. After all, these new rules of discovery cover only documents and tangible items, and constitute an obvious reason to forgo documentation and the recording of discussions with clients. Ironically, concern for precisely this result was among the reasons the Supreme Court reaffirmed the work-product privilege in \textit{Hickman v. Taylor}:\textsuperscript{198} "much of what is now put down in writing would remain unwritten."\textsuperscript{199} We have not yet reached the point where lawyers can be compelled to disclose their unrecorded

\begin{itemize}
\item \textsuperscript{194} See \textit{supra} note 170.
\item \textsuperscript{195} See \textit{supra} notes 160-161 and accompanying text.
\item \textsuperscript{196} Appellant's Petition for Rehearing and Rehearing In Banc at 3, \textit{In re Martin Marietta Corp.}, 856 F.2d 619 (4th Cir. 1988) (No. 87-3648), \textit{cert. denied}, 109 S. Ct. 1655 (1989).
\item \textsuperscript{197} \textit{See}, e.g., \textit{Fed. R. Evid.} 408, 410.
\item \textsuperscript{198} 329 U.S. 495 (1947).
\item \textsuperscript{199} \textit{Id.} at 511.
\end{itemize}
thoughts and information, and we likely never will, but there appears to be little left of the traditional sanctity of the litigation file.