

129 F.3d 681, 80 A.F.T.R.2d 97-7981, 97-2 USTC P 50,955, 39 Fed.R.Serv.3d 4, 48 Fed. R. Evid. Serv. 66
(Cite as: 129 F.3d 681)



United States Court of Appeals,
First Circuit.
UNITED STATES of America, Petitioner-Appellee,
Cross-Appellant,
v.
MASSACHUSETTS INSTITUTE OF TECHNOLOGY, Respondent-Appellant, Cross-Appellee.
Nos. 97-1287, 97-1382.

Heard July 30, 1997
Decided Nov. 25, 1997.

Government sought enforcement of IRS summons during investigation into whether university still qualified for exempt status and was complying with obligations relating to employment taxes and reporting of unrelated business income. The United States District Court for the District of Massachusetts, [George A. O'Toole, Jr., J.](#), [957 F.Supp. 301](#), ordered production of some records. University appealed and government cross-appealed. The Court of Appeals, [Boudin](#), Circuit Judge, held that university forfeited attorney-client privilege and work-product protection by disclosing documents to Defense Contract Audit Agency.

Affirmed in part, vacated in part.

West Headnotes

[1] Federal Courts 170B ↪755

[170B](#) Federal Courts

[170BVIII](#) Courts of Appeals

[170BVIII\(K\)](#) Scope, Standards, and Extent

[170BVIII\(K\)1](#) In General

[170Bk754](#) Review Dependent on

Whether Questions Are of Law or of Fact

[170Bk755](#) k. Particular Cases. [Most](#)

[Cited Cases](#)

Whether disclosure of documents forfeited attorney-client privilege presented issue of law as to which review was plenary.

[2] Federal Courts 170B ↪416

[170B](#) Federal Courts

[170BVI](#) State Laws as Rules of Decision

[170BVI\(C\)](#) Application to Particular Matters

[170Bk416](#) k. Evidence Law. [Most Cited](#)

[Cases](#)

Whether contractor forfeited attorney-client privilege in disclosing documents to Defense Contract Audit Agency was governed by principles of federal common law. [Fed.Rules Evid.Rule 501, 28 U.S.C.A.](#)

[3] Privileged Communications and Confidentiality 311H ↪106

[311H](#) Privileged Communications and Confidentiality

[311HIII](#) Attorney-Client Privilege

[311Hk106](#) k. Purpose of Privilege. [Most Cited Cases](#)

(Formerly 410k198(1))

By safeguarding communications between lawyer and client, attorney-client privilege encourages disclosures by client to lawyer that better enable client to conform his conduct to requirements of the law and to present legitimate claims or defenses when litigation arises.

[4] Privileged Communications and Confidentiality 311H ↪168

[311H](#) Privileged Communications and Confidentiality

[311HIII](#) Attorney-Client Privilege

[311Hk168](#) k. Waiver of Privilege. [Most Cited Cases](#)

(Formerly 410k219(3))

Intent to maintain confidentiality is ordinarily necessary, but it is not alone sufficient, to preserve attorney-client privilege upon disclosure to third party, and where client chooses to share privileged communications outside "magic circle" of closely related persons who are appropriate for consultation, privilege is ordinarily forfeited despite client's intent.

[5] Privileged Communications and Confidentiality 311H ↪168

[311H](#) Privileged Communications and Confidentiality

[311HIII](#) Attorney-Client Privilege

[311Hk168](#) k. Waiver of Privilege. [Most Cited Cases](#)

(Formerly 410k219(3))

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Contractor's disclosure of documents to Defense Contract Audit Agency, during review of performance on defense contracts, forfeited any attorney-client privilege covering such documents, which were subject of IRS summons.

[6] Privileged Communications and Confidentiality 311H ↪26

311H Privileged Communications and Confidentiality

311HI In General

311Hk24 Evidence

311Hk26 k. Presumptions and Burden of

Proof. [Most Cited Cases](#)

(Formerly 410k222)

Where privilege is claimed and opponent alleges specific disclosure, burden of proof is upon claimant to show nondisclosure wherever that is material to disposition of claim.

[7] Federal Courts 170B ↪541

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(B) Appellate Jurisdiction and Procedure in General

170Bk541 k. In General. [Most Cited Cases](#)

Party may defend judgment in its favor on any legitimate ground without appealing from judgment on that issue.

[8] Federal Civil Procedure 170A ↪1604(2)

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(E) Discovery and Production of Documents and Other Tangible Things

170AX(E)3 Particular Subject Matters

170Ak1604 Work Product Privilege; Trial Preparation Materials

170Ak1604(2) k. Waiver. [Most Cited](#)

[Cases](#)

(Formerly 170Ak1600(5))

Contractor's disclosure of documents to Defense Contract Audit Agency was disclosure to potential adversary, forfeiting any work product protection for such documents, which were subject of IRS summons, where Audit Agency was reviewing contractor's expense submissions as part of its review of per-

formance on defense contracts. [Fed.Rules Civ.Proc.Rule 26\(b\)\(3\)](#), 28 U.S.C.A.

[9] Federal Civil Procedure 170A ↪1604(2)

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(E) Discovery and Production of Documents and Other Tangible Things

170AX(E)3 Particular Subject Matters

170Ak1604 Work Product Privilege; Trial Preparation Materials

170Ak1604(2) k. Waiver. [Most Cited](#)

[Cases](#)

(Formerly 170Ak1600(5))

Generally, disclosure to an adversary, real or potential, forfeits work product protection. [Fed.Rules Civ.Proc.Rule 26\(b\)\(3\)](#), 28 U.S.C.A.

***682** [Jeffrey Swope](#), Boston, MA, with whom Matthew P. Schaeffer and Palmer & Dodge LLP were on brief, for respondent.

Sara S. Holderness, Tax Division, Department of Justice, Washington, DC, with whom [Loretta C. Argrett](#), Assistant Attorney General, [Donald K. Stern](#), United States Attorney, and [Charles E. Brookhart](#), Tax Division, Department of Justice, were on brief, for petitioner.

Before [BOUDIN](#), Circuit Judge, HILL,^{FN*} Senior Circuit Judge, and POLLAK,^{FN**} Senior District Judge.

^{FN*} Of the Eleventh Circuit, sitting by designation.

^{FN**} Of the Eastern District of Pennsylvania, sitting by designation.

[BOUDIN](#), Circuit Judge.

This case concerns an attempt by the Massachusetts Institute of Technology to assert the attorney-client privilege and work-product doctrine in response to a document request by the Internal Revenue Service. The most important issue presented is whether MIT's disclosure of certain of the documents to another government agency caused it to lose the privilege. The background facts are essentially undisputed.

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MIT is a famous university with tax-exempt status under [26 U.S.C. § 501\(c\)\(3\)](#). In 1993, the IRS conducted an examination of MIT's records to determine whether MIT still qualified for exempt status and to determine whether it was complying with provisions relating to employment taxes and the reporting of unrelated business income. In aid of this examination, the IRS requested from MIT copies of the billing statements of law firms that had represented MIT and minutes of the MIT Corporation and its executive and auditing committees.

***683** In response, MIT supplied the documents requested but redacted information claimed to be covered by the attorney-client privilege or the work-product doctrine or both. In mid-1994 the IRS requested that the redacted information be supplied, and MIT declined. At this point the IRS sought to obtain the same documents in unredacted form from the Defense Contract Audit Agency ("the audit agency"), the auditing arm of the Department of Defense.

It appears that the same billing statements and possibly some or all of the minutes sought by the IRS had earlier been provided to the audit agency pursuant to contracts between MIT and components of the Department of Defense. The audit agency helps entities in the Department of Defense review contract performance to be sure that the government is not overcharged for services. Not surprisingly, the audit agency often reviews the private contractor's books and records.

In November 1994, the audit agency advised the IRS that it would not turn over the documents provided to it by MIT without the latter's consent, which MIT declines to give. The audit agency had made no unconditional promise to keep the documents secret, but its regulations and practices offered MIT some reason to think that indiscriminate disclosure was unlikely. The IRS then served an administrative summons on MIT in December 1994 seeking specific unredacted minutes of nine meetings of the MIT Corporation and auditing and executive committees in 1990 and 1991, and attorneys' billing statements for almost all legal expenses paid or incurred by MIT from July 1, 1990, through June 30, 1991. [26 U.S.C. §§ 7402\(b\), 7604\(a\)](#).

When MIT declined to comply, the IRS in early 1996

petitioned the district court to enforce the summons. The district court obtained briefs, heard arguments and considered the matter without an evidentiary hearing on the basis of the declaration filed by the IRS and an affidavit submitted by MIT. In January 1997, the district court issued a memorandum and order enforcing the IRS administrative summons as to the unredacted legal bills and the unredacted versions of most of the minutes sought by the IRS.

The district court held that the disclosure of the legal bills to the audit agency forfeited the attorney-client privilege. As to the minutes, the district court said that the privilege remained available because the government had not proved that the minutes had been disclosed to the audit agency. After reviewing the minutes *in camera*, the court found that three contained privileged material and ordered MIT to turn over the others as unprivileged or because MIT had lost the privilege by disclosing the substance of the minutes in its now unprivileged legal bills.

The district court followed a different path in resolving MIT's work product objection. The court held that neither the legal bills nor the minutes were "prepared in anticipation of litigation or for trial." [Fed.R.Civ.P. 26\(b\)\(3\)](#). It ruled that they were therefore discoverable as ordinary business records. Accordingly, the court did not discuss whether work product protection was waived by disclosure to the audit agency.

MIT now appeals, arguing that disclosure of the billing statements to the audit agency should not forfeit the privilege; MIT no longer claims work product protection for the billing statements. The government has cross-appealed from the district court's refusal to order production of the three remaining minutes; it says that the burden was on MIT to prove that the minutes had not been disclosed to the audit agency. MIT responds that the privilege was not waived even if the minutes were disclosed to the audit agency, and that the minutes remain protected by the work product doctrine.

[1] On an appeal respecting a privilege claim, the standard of review depends on the issue. Rulings by the district court on issues of law are reviewed *de novo*; fact findings are tested under a clear error standard; and discretionary judgments such as evidentiary rulings are reviewed for abuse of discretion. See [United States v. Wilson, 798 F.2d 509, 512 \(1st](#)

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[Cir.1986](#)). On the principal issue before us-forfeiture by disclosure-this case goes about as far as possible in posing an abstract issue of law and review is plenary.

*684 [\[2\]](#) The question whether MIT forfeited protection in disclosing documents to the audit agency is not governed by any federal constitutional provision, federal statute, or rule prescribed by the Supreme Court. Nor is the enforcement of an IRS summons a matter with respect to which state law supplies a rule of decision. Accordingly, the scope of the privilege is “governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.” [Fed.R.Evid. 501](#). See also [United States v. Zolin, 491 U.S. 554, 562, 109 S.Ct. 2619, 2625-26, 105 L.Ed.2d 469 \(1989\)](#).

MIT's Appeal. We begin with the attorney-client privilege. That privilege has been familiarly summed up by Wigmore in a formula that federal courts have often repeated:

- (1) Where legal advice of any kind is sought
- (2) from a professional legal adviser in his capacity as such,
- (3) the communications relating to that purpose,
- (4) made in confidence
- (5) by the client,
- (6) are at his instance permanently protected
- (7) from disclosure by himself or by the legal adviser,
- (8) except the protection be waived.

8 J. Wigmore, *Evidence* § 2292, at 554 (McNaughton rev.1961). The government argues, and the district court agreed, that by its disclosure to the audit agency, MIT waived the privilege to whatever extent that it might otherwise have protected the billing statements and various of the minutes.

[\[3\]](#) The attorney-client privilege is well-established and its present rationale straightforward: by safeguarding communications between lawyer and client, it encourages disclosures by client to lawyer that better enable the client to conform his conduct to the requirements of the law and to present legitimate claims or defenses when litigation arises. See [Upjohn Co. v. United States, 449 U.S. 383, 389-90, 101 S.Ct. 677, 682-83, 66 L.Ed.2d 584 \(1981\)](#). Waiver issues aside, the contours of the privilege are reasonably stable.

Quite a different scene presents itself when one turns to the problem of “waiver,” a loose and misleading label for what is in fact a collection of different rules addressed to different problems. Cases under this “waiver” heading include situations as divergent as an express and voluntary surrender of the privilege, partial disclosure of a privileged document, selective disclosure to some outsiders but not all, and inadvertent overhearings or disclosures. See [McCormick on Evidence § 93, at 341-48 \(J.W. Strong ed., 4th ed.1992\)](#).

Even where the cases are limited to those involving a deliberate and voluntary disclosure of a privileged communication to someone other than the attorney or client, the case law is far from settled. But decisions do tend to mark out, although not with perfect consistency, a small circle of “others” with whom information may be shared without loss of the privilege (*e.g.*, secretaries, interpreters, counsel for a cooperating co-defendant, a parent present when a child consults a lawyer).^{[FN1](#)}

[FN1](#). See, *e.g.*, [United States v. Bay State Ambulance & Hosp. Rental Serv., Inc., 874 F.2d 20, 28 \(1st Cir.1989\)](#); [Kevlik v. Goldstein, 724 F.2d 844, 849 \(1st Cir.1984\)](#); [Indian Law Resource Center v. Department of the Interior, 477 F.Supp. 144, 148 \(D.D.C.1979\)](#); J. Weinstein & M. Berger, *Weinstein's Federal Evidence* § 503.08[2], at 503-36 (J. McLaughlin ed., 2d ed.1997).

[\[4\]](#) Although the decisions often describe such situations as ones in which the client “intended” the disclosure to remain confidential, see, *e.g.*, [Kevlik v. Goldstein, 724 F.2d 844, 849 \(1st Cir.1984\)](#), the underlying concern is functional: that the lawyer be able to consult with others needed in the representation and that the client be allowed to bring closely related persons who are appropriate, even if not vital, to a consultation. Cf. [Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1424 \(3d Cir.1991\)](#). An intent to maintain confidentiality is ordinarily necessary to continued protection, but it is not sufficient.

On the contrary, where the client chooses to share communications outside this magic circle, the courts have usually refused to extend the privilege.^{[FN2](#)} The familiar platitude *685 is that the privilege is nar-

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rowly confined because it hinders the courts in the search for truth. See *Fisher v. United States*, 425 U.S. 391, 403, 96 S.Ct. 1569, 1577, 48 L.Ed.2d 39 (1976); 8 *Wigmore*, *supra*, § 2291, at 554. Fairness is also a concern where a client is permitted to choose to disclose materials to one outsider while withholding them from another. See, e.g., *Permian Corp. v. United States*, 665 F.2d 1214, 1221 (D.C.Cir.1981).

FN2. In addition to the cases cited in note 3 below, see *In re Grand Jury Proceedings*, 78 F.3d 251, 254 (6th Cir.1996); *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir.1982); *In re Sealed Case*, 676 F.2d 793, 818 (D.C.Cir.1982); *In re Horowitz*, 482 F.2d 72, 81 (2d Cir.), *cert. denied*, 414 U.S. 867, 94 S.Ct. 64, 38 L.Ed.2d 86 (1973); *McCormick on Evidence*, *supra*, § 93, at 347-48.

[5] Should this inclination not to protect a document disclosed outside the circle apply where, as here, the initial disclosure was to and at the request of a government agency? This problem has presented itself to six circuits. The most common cases have been disclosures of otherwise privileged attorney-client communications to the Securities and Exchange Commission by corporations during voluntary internal investigations or in response to SEC subpoenas. The Eighth Circuit, *en banc* but without more than a paragraph of analysis, treated this kind of disclosure as not comprising a total waiver of the privilege. See *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir.1978) (*en banc*). Subsequently, the Second, Third, Fourth, Federal and D.C. Circuits took the opposite view and ruled that such limited disclosures do destroy the privilege.^{FN3}

FN3. See *Genentech, Inc. v. United States Internat'l Trade Comm'n*, 122 F.3d 1409, 1417 (Fed.Cir.1997); *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 235 (2d Cir.1993); *Westinghouse*, 951 F.2d at 1424-26; *In re Martin Marietta Corp.*, 856 F.2d 619, 623-24 (4th Cir.1988), *cert. denied*, 490 U.S. 1011, 109 S.Ct. 1655, 104 L.Ed.2d 169 (1989); *Permian*, 665 F.2d at 1220-21.

The primary argument in favor of the Eighth Circuit position is that loss of the privilege may discourage the frank exchange between attorney and client in

future cases, wherever the client anticipates making a disclosure to at least one government agency. We put to one side the interest of the government agency in obtaining voluntary disclosures; such agencies usually have means to secure the information they need and, if not, can seek legislation from Congress. By contrast, the safeguarding of the attorney-client relationship has largely been left to the courts, which have a comparative advantage in assessing consequences in this sphere.

But MIT, like any client, continues to control both the nature of its communications with counsel and the ultimate decision whether to disclose such communications to third parties. The only constraint imposed by the traditional rule here invoked by the government—that disclosure to a third party waives the privilege—is to limit *selective* disclosure, that is, the provision of otherwise privileged communications to one outsider while withholding them from another. MIT has provided no evidence that respecting this constraint will prevent it or anyone else from getting adequate legal advice.

Admittedly, the arguments on the other side are far from overwhelming. The IRS' search for truth will not be much advanced if MIT simply limits or recasts its disclosures to the audit agency. But the general principle that disclosure normally negates the privilege is worth maintaining. To maintain it here makes the law more predictable and certainly eases its administration. Following the Eighth Circuit's approach would require, at the very least, a new set of difficult line-drawing exercises that would consume time and increase uncertainty.

MIT says that even if we are not prepared to follow the Eighth Circuit onto new ground, MIT's disclosure to the audit agency should be regarded as akin to the disclosure by a client's lawyer to another lawyer representing another client engaged in a common defense. Invoking the concept of "common interest," MIT seeks to compare its situation to cases where disclosure has been allowed, without forfeiting the privilege, among separate parties similarly aligned in a case or consultation (e.g., codefendants, insurer and insured, patentee and licensee).^{FN4}

FN4. Compare *In re Regents of Univ. of Cal.*, 101 F.3d 1386, 1390-91 (Fed.Cir.1996), *cert. denied*, 520 U.S. 1193,

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[117 S.Ct. 1484, 137 L.Ed.2d 695 \(1997\), and Hewlett-Packard Co. v. Bausch & Lomb, Inc., 115 F.R.D. 308, 310 \(N.D.Cal.1987\), and Roberts v. Carrier Corp., 107 F.R.D. 678, 687-88 \(N.D.Ind.1985\), with In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 922-23 \(8th Cir.\), cert. denied, 521 U.S. 1105, 117 S.Ct. 2482, 138 L.Ed.2d 991 \(1997\), and Linde Thomson Langworthy Kohn & Van Dyke, P.C., v. Resolution Trust Corp., 5 F.3d 1508, 1515 \(D.C.Cir.1993\).](#)

*686 In a rather abstract sense, MIT and the audit agency do have a “common interest” in the proper performance of MIT's defense contracts and the proper auditing and payment of MIT's bills. But this is not the kind of common interest to which the cases refer in recognizing that allied lawyers and clients—who are working together in prosecuting or defending a lawsuit or in certain other legal transactions—can exchange information among themselves without loss of the privilege. To extend the notion to MIT's relationship with the audit agency, which on another level is easily characterized as adversarial, would be to dissolve the boundary almost entirely.

MIT further argues that the disclosure to the audit agency was not “voluntary” because of the practical pressures and the legal constraints to which it was subject as a government contractor. The extent of those pressures and constraints is far from clear,^{FN5} but assuming *arguendo* that they existed, MIT chose to place itself in this position by becoming a government contractor. In short, MIT's disclosure to the audit agency resulted from its own voluntary choice, even if that choice was made at the time it became a defense contractor and subjected itself to the alleged obligation of disclosure. See [In re John Doe Corp., 675 F.2d 482, 489 \(2d Cir.1982\)](#).

^{FN5} MIT's main citation for its duty to disclose is not to a statute or regulation but to a procedures manual maintained by the audit agency. There is no actual evidence that MIT would have been denied payment if it had sought to negotiate some lesser disclosure.

Anyone who chooses to disclose a privileged document to a third party, or does so pursuant to a prior

agreement or understanding, has an incentive to do so, whether for gain or to avoid disadvantage. It would be perfectly possible to carve out some of those disclosures and say that, although the disclosure itself is not necessary to foster attorney-client communications, neither does it forfeit the privilege. With rare exceptions, courts have been unwilling to start down this path—which has no logical terminus—and we join in this reluctance.

We add, finally, a word about reliance and fair warning. MIT may have had some reason to think that the audit agency would not disclose the documents to the IRS (and the agency did not do so). But MIT had far less reason to think that it could disclose documents to the audit agency and still maintain the privilege when IRS then sought the same documents. See note 3, above. The choice to disclose may have been reasonable but it was still a foreseeable gamble.

The IRS Appeal. We turn now to the government's cross-appeal. Here, the IRS challenges the district court's refusal to require MIT to produce three specific minutes. The refusal reflected the district court's view that the documents contained privileged material, and that there was no waiver because MIT had not been shown to have disclosed those minutes to the audit agency. On the latter point, MIT effectively concedes error, and properly so.

[6] Where privilege is claimed and the opponent alleges a specific disclosure, the burden of proof is upon the claimant to show nondisclosure wherever that is material to the disposition of the claim. Cf. [United States v. Wilson, 798 F.2d 509, 512-13 \(1st Cir.1986\)](#). Here, MIT concedes that it cannot prove that the minutes in question were withheld from the audit agency. Instead, it proffers alternative grounds for sustaining the district court's judgment as to these minutes, namely, that the minutes were protected under the attorney-client privilege and the work product doctrine and that these protections were not waived even though the minutes were turned over to the audit agency.

[7] A party may defend a judgment in its favor on any legitimate ground without appealing from the judgment on that issue. [Martin v. Tango's Restaurant, Inc., 969 F.2d 1319, 1325 \(1st Cir.1992\)](#). Our discussion of the billing statements disposes of MIT's argument that the protection of the attorney-client

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privilege survived disclosure to the audit*687 agency. We therefore turn to the work product doctrine. In doing so, we reject the government's claim that MIT waived this work product argument by only raising it in its reply brief; MIT's "reply" brief was effectively its answering brief on the government's cross appeal, and the government filed its own "reply" in turn.

[8] The district court assumed that work product protection did not apply because the minutes were not prepared "in anticipation of litigation," as required by [Fed.R.Civ.P. 26\(b\)\(3\)](#). MIT argues that the minutes contained substantive information that did represent attorney work product even if the minutes had a more general function. There is little law in this area—partly, one suspects, because work product usually remains embodied in documents unquestionably prepared for litigation or, if given to the client, in documents independently protected by the attorney-client privilege.

The government has chosen in its brief to assume that, to the extent that the minutes contained "the mental impressions, conclusions, opinions, or legal theories" of MIT's attorneys, [Fed.R.Civ.P. 26\(b\)\(3\)](#), the district court erred in concluding that work product lost its protection when repeated in another confidential document not prepared in anticipation of litigation. A Third Circuit precedent supports this assumption, which MIT presses and the government does not resist. See [In re Ford Motor Co.](#), 110 F.3d 954, 967 (3d Cir.1997). In view of the government's concession, we will take the point as settled for this case.

Nevertheless, the government claims that any such protection was lost when the minutes were turned over to the audit agency, MIT having conceded that it cannot prove that the minutes were not so disclosed. One might wonder why the standard of waiver for the attorney-client privilege—that any voluntary disclosure outside the magic circle constitutes waiver—would not also apply to the work product doctrine. Equivalent waiver standards would make easier the resolution of evidentiary disputes where, as often happens, the two objections are raised together.

Nonetheless, the cases approach uniformity in implying that work-product protection is not as easily waived as the attorney-client privilege. The privilege,

it is said, is designed to protect confidentiality, so that any disclosure outside the magic circle is inconsistent with the privilege; by contrast, work product protection is provided against "adversaries," so only disclosing material in a way inconsistent with keeping it from an adversary waives work product protection. At least five circuits have adopted this rule in some form.^{FN6} See also 8 C. Wright, A. Miller & R. Marcus, [Federal Practice and Procedure § 2024, at 368-69 \(1994\)](#) (citing cases).

[FN6. See Westinghouse](#), 951 F.2d at 1428-29; [Steinhardt Partners](#), 9 F.3d at 234-35; [In re Subpoenas Duces Tecum](#), 738 F.2d 1367, 1371-75 (D.C.Cir.1984); [Martin Marietta Corp.](#), 856 F.2d at 625; [In re Chrysler Motors Corp. Overnight Evaluation Program Litig.](#), 860 F.2d 844, 846-47 (8th Cir.1988).

[9] Perhaps such formulations simply beg the question. If one wanted to explain the discrepant outcomes, it might be more persuasive to say that the privilege is strictly confined because it is absolute; on the other hand, work product protection (with certain qualifications) can be overcome by a sufficient showing of need. See [Fed.R.Civ.P. 26\(b\)\(3\)](#). In all events, it would take better reason than we have to depart from the prevailing rule that disclosure to an adversary, real or potential, forfeits work product protection.

MIT's disclosure to the audit agency was a disclosure to a potential adversary. The disclosures did not take place in the context of a joint litigation where the parties shared a common legal interest. The audit agency was reviewing MIT's expense submissions. MIT doubtless hoped that there would be no actual controversy between it and the Department of Defense, but the potential for dispute and even litigation was certainly there. The cases treat this situation as one in which the work product protection is deemed forfeit. See, e.g., [Steinhardt Partners](#), 9 F.3d at 234; [Westinghouse](#), 951 F.2d at 1428-31; [In re Subpoenas Duces Tecum](#), 738 F.2d at 1372 (D.C.Cir.1984).

*688 In closing, it may be helpful to stress that—with regard to both the attorney-client privilege and the work product doctrine—we are concerned only with loss of protection as to the very documents already disclosed to the audit agency. Nothing in this opinion is intended to be directed to the different and difficult

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question when disclosure of one document warrants forfeiture of protection for a different but related document. That issue was touched on in the district court but has not been pursued on appeal.

Similarly, even where work product can be discovered, the governing rule directs that “the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.” [Fed.R.Civ.P. 26\(b\)\(3\)](#). Conceivably, the strong policy underlying this reservation might serve to protect such materials, even if protection of ordinary work product materials were deemed waived because of selective disclosure. This possibility has not been briefed or argued to us; it may or may not be pertinent in this case; and we mention it only to stress that we are not deciding the issue.

Accordingly, on MIT's appeal, the judgment of the district court is *affirmed*. On the government's cross-appeal, the judgment of the district court refusing to order production of three specified minutes is *vacated*, and the matter is *remanded* to the district court for further proceedings consistent with this opinion.

It is so ordered.

C.A.1 (Mass.),1997.

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