

Proposed F.R.E. 502 and Selective Waiver: Would They Do More Harm Than Good?

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In June 2006, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (the "Standing Committee") approved the publication of proposed Federal Rule of Evidence 502 for public comment. Proposed Rule 502(b)(3) endorses the "selective waiver" doctrine by establishing that voluntary disclosure of privileged or protected information does not operate as a waiver if the disclosure is made to a federal, state or local governmental agency during an investigation by that agency, and is limited to persons involved in the investigation. If approved, Rule 502 will effectively reverse the rulings of a majority of the federal circuit courts, including the recent decision by the Tenth Circuit in *In re Qwest Comm. Intl. Inc.*,¹ that have rejected some form of the selective waiver doctrine. Indeed, with only the Eighth Circuit adopting selective waiver, the doctrine appeared dead. The enactment of Rule 502(b)(3) would revitalize selective waiver and codify it.

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