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.

The benefit of Rule 502(b)(3) to the government is clear. As the Committee Note to proposed Rule 502 observes, a rule "protecting selective waiver to investigating government agencies furthers the important policy of cooperation with government agencies, and maximizes the effectiveness and efficiency of government investigations."[2] Likewise, the proposed rule would seem at first blush to be a welcome development for companies in the midst of an investigation. No more would disclosure to the government result in a waiver of privilege as to third parties; no longer would cooperation with regulators risk exposure of attorney work-product to the full view of plaintiffs' counsel in separate litigation against the company.

For all of these apparent advantages, however, the proposed rule suffers from two flaws that may seriously undermine its value to companies seeking to cooperate with investigators. The first, long recognized by opponents of selective waiver, is inherent in the doctrine itself: its very existence will encourage the government to demand waiver, thereby further eroding the attorney-client privilege and work-product protection. The second flaw arises from the specific language of the proposed rule. Its terms are vague and its scope unclear, making the rule difficult to apply predictably or uniformly. As a result, the proposed rule raises at least as many potential problems as it is intended to resolve.

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The *Diversified* Case and the Rise of Judicially Created Selective Waiver

Selective waiver has followed a tortuous path to proposed Rule 502. At the core of the doctrine are two long-established protections: the attorney-client privilege and the work-product doctrine. The attorney-client privilege is designed to encourage full and frank communication between a lawyer and a client so that the client can obtain informed legal advice.[3] The work-product doctrine protects the mental processes of the lawyer so that she can prepare and analyze her client's case.[4] Generally, attorney-client privilege is waived if the privileged information is voluntarily disclosed to a third party, while work-product protection is waived if the protected information is disclosed to an adversary. A corporation therefore waives both attorney-client privilege and work-product protection when it discloses protected information to an adversary, such as the plaintiff in a civil suit or a governmental agency investigating alleged misconduct.

The Eighth Circuit carved out an exception to this well-settled principle by adopting the selective waiver doctrine. In *Diversified Industries, Inc. v. Meredith*,[5] a third-party plaintiff sought to obtain privileged documents that the corporate defendant, Diversified, had voluntarily produced to the SEC pursuant to an agency subpoena. The Eighth Circuit held that *Diversified's* production of the privileged documents to the SEC constituted only a limited waiver. As such, *Diversified's* voluntary disclosure to the government did not waive attorney-client privilege with regard to third-party requests for the subpoenaed documents. The Eighth Circuit reasoned that selective waiver served the public interest by encouraging corporations to undertake internal investigations to thwart corporate misconduct and protect shareholders.[6]

The *Qwest* Case and the Demise of Judicially Created Selective Waiver

Following *Diversified*, however, the selective waiver doctrine failed to gain support among other circuit courts. Several circuit courts addressing the issue of selective waiver found that the voluntary disclosure of privileged or protected information to a government agency constituted a complete waiver of the privilege. In reaching this conclusion, some courts reasoned that that the justification for adopting selective waiver was inconsistent with the purpose of both the attorney-client privilege and

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the work-product doctrine.[7] These courts found that selective waiver "merely encourages voluntary disclosure to government agencies," and that this goal, however laudable, did nothing to improve either attorney-client communication or an attorney's ability to prepare his client's case.[8] Other courts reasoned that selective waiver was unfair to third parties because it allowed a party to pick and choose among his opponents, manipulating the doctrine for tactical advantage.[9]

In June, the Tenth Circuit became the latest circuit to reject the selective waiver doctrine. In *In re. Qwest*, the Tenth Circuit held that the corporate defendant, Qwest, had completely waived both attorney-client privilege and work-product protection for 220,000 documents produced to the SEC and DOJ pursuant to an agency subpoena – even though the parties had entered into confidentiality agreements with respect to the documents at issue.[10] Consequently, Qwest could not prevent third-party plaintiffs in separate litigation from obtaining the privileged documents turned over to the government.

In reaching this conclusion, the Tenth Circuit reviewed the federal circuit case law addressing selective waiver and found an overwhelming rejection of the doctrine. Following the reasoning of its fellow circuits, the *Qwest* court held that selective waiver was unnecessary "to assure cooperation with law enforcement, to further the purposes of the attorney-client privilege or work-product doctrine, or to avoid unfairness to the disclosing party."[11] The parties' confidentiality agreements were of no moment to the court's analysis, largely because they vested the government with "broad discretion to use the Waiver Documents as they saw fit, and any restrictions on their use were loose in practice."[12] More fundamentally, in the court's view, adopting selective waiver would effectively introduce "the substantial equivalent of an entirely new privilege, i.e., a government-investigation privilege."[13] The court refused to take this leap in the common law development of privileges and protections, leaving it to Congress and the Standing Committee to consider the adoption of a new privilege.

Proposed Rule of Evidence 502(b)(3)

The Standing Committee did exactly that at its June 2006 meeting, when it approved Rule 502 for publication and public comment. Rule 502 provides, in relevant part, that a voluntary disclosure of information covered by the attorney-client privilege or work-product protection "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."[14] The Committee Note following the proposed rule explains that the rule's central purpose is to resolve the longstanding conflict in the courts regarding selective waiver. The Note also makes clear that selective waiver would not depend on the existence of a confidentiality order, ultimately because "the obtaining of a confidentiality agreement has little to do with the underlying policy of furthering cooperation with government agencies that animates the rule." It was sufficient, the Committee added, "to condition selective waiver on a finding that the disclosure is limited to persons involved in the investigation."[15]

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Demand for Waiver

The first and most fundamental problem with proposed Rule 502(b)(3) is that it would likely encourage government agencies to demand waiver of the attorney-client privilege and work-product protection even more vigorously than they do now, and make it even more difficult for corporations under investigation to resist. That would not be a salutary development. The defense bar has strenuously objected to the Department of Justice's policy, articulated in the 1999 "Holder Memorandum" and the 2004 "Thompson Memorandum," of including waiver as a condition for receiving cooperation credit during investigations.[16] The ABA has weighed in on the issue as well, and, like other critics, observed that the government's waiver policies "discourage entities both from consulting with their lawyers – thereby impeding the lawyers' ability to effectively counsel compliance with the law – and conducting internal investigations designed to quickly detect and remedy misconduct." As the ABA noted, the government can obtain the information it seeks from cooperating corporations without eroding the attorney-client privilege or work-product protection.[17]

This is not to diminish the importance of cooperating with regulators and government agencies. Given the many headline-grabbing cases of the moment, both corporations and their directors, officers, and counsel understand the necessity of such cooperation. The point is simply that counsel can provide vital benefits when they have the opportunity to gather information and discuss its significance with their corporate clients, in absolute candor, under the protection of the attorney-client privilege and work-product doctrine. To be sure, there may be situations in which waiver is appropriate; but to insist upon waiver as a general rule overlooks the benefits that counsel can bring to the company and ultimately to the government itself.

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Practical Problems

The other problem with Rule 502(b)(3) is one of nuts-and-bolts application. The rule does not, for instance, explain whether the agency receiving privileged information ("Agency 1") may share it with another agency ("Agency 2") without causing a waiver. If the answer is no, the rule would presumably forbid Agency 1 from making the disclosure to Agency 2. But then a corporation could do precisely what the courts have found most unacceptable about selective waiver, that is, strategically "picking and choosing" which agency to make disclosure to and thereby prioritizing one governmental agency over another. On the other hand, if Agency 1 may disclose privileged information to Agency 2 without waiving the privilege, a corporation would face the prospect of waiver far beyond what it originally contemplated or desired. One need only imagine a corporation disclosing privileged materials to a municipal regulator, only to stand by helplessly as the regulator shares those materials with the local U.S. Attorney's Office. Rule 502(b)(3) offers no guidance on this critical issue.

The proposed rule leaves many other questions unanswered as well. A few examples illustrate the point:

- Assume that an investigation of ABC Corporation leads to criminal charges and a criminal trial in federal court against the CEO of ABC. The CEO would be entitled under federal law to obtain exculpatory materials in the government's possession for use at trial, and the government would almost certainly be required to turn them over – even if some of those materials were privileged documents produced by ABC to the government. What would happen to the privilege in that scenario? Could private litigants make use of any information publicly disclosed at the trial in a separate civil lawsuit? Would there be subject matter waiver as to all issues disclosed?

- The rule protects disclosures made "during an investigation by that agency." What constitutes an "investigation" under the rule? Would an annual audit of school records by the Department of Education fit the bill? What about an informal SEC inquiry? The rule does not say. Neither does it say whether information provided voluntarily to a regulator (and not in response to a subpoena) would be protected; or whether unsolicited disclosures would be covered; or when an "investigation" begins or ends for purposes of the rule.

In short, as presently drafted, proposed Rule 502(b)(3) may create more problems than it solves. It would surely benefit from greater detail and clarity. With appropriate changes to the rule, corporations forced to make the choice of waiving privilege or being viewed as uncooperative would certainly be better off with the rule in effect. But they would be better off still if Rule 502(b)(3) and the selective waiver doctrine were rendered unnecessary in the first place. That day will not come until the government no longer makes credit for cooperation dependent upon the waiver of attorney-client privilege and work-product protection.

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