

LITIGATION

Selective Waiver

Changes in policy and the law alter the calculus in weighing a client's cooperation.

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COUNSEL REPRESENTING corporations facing parallel federal government investigation and civil litigation frequently face a difficult choice. On the one hand, to enhance the perception that the company is cooperating with the government, it can provide the government with privileged or potentially privileged or work-product information, thereby risking waiver of the protected nature of these materials in related civil litigation. On the other hand, the company can resist production to the government, thereby increasing the possibility that the government will charge the corporation or seek larger sanctions.

Until recently, government policy and judicial decisions have combined to make this dilemma especially difficult. Department of Justice policy and the policies of federal agencies were written to encourage such cooperation.¹ And judicial decisions generally held that such production waived the protected nature of these materials, although case law varied from circuit to circuit.²

Recently, however, there has been an effort by both the executive and the legislative branch to roll back the perceived "culture of waiver" that had evolved as a result of government policy and judicial decision. These efforts have resulted both in changes to executive branch policy in seeking waivers, and in the law of waiver itself in the form of Federal Rule of Evidence 502. And these changes in turn materially alter the calculus that

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counsel representing companies in these situations must go through in advising their clients.

Better but Not Perfect

Under pressure from both members of Congress and non-governmental actors, the Department of Justice and key agencies like the SEC have been softening their insistence that companies provide protected information so they may be deemed “cooperating” with the government.³

On Dec. 8, 2006, Senator Arlen Specter introduced the Attorney-Client Privilege Protection Act of 2006, which sought to “place on each agency clear and practical limits designed to preserve the attorney-client privilege and work product protections available to an organization.”⁴ Within days, the DOJ issued revised guidelines setting forth when the government would seek privileged materials.⁵ Many, including members of Congress, considered the DOJ’s revisions insufficient.⁶

This past August, amid further criticism,⁷ the Department of Justice announced further revisions to its guidelines.⁸ The U.S. Attorney’s Manual was revised accordingly.⁹ The revised Manual directs prosecutors not to ask corporations to waive the attorney-client privilege and notes that corporations will not be given credit for waiver, but only for disclosure of the underlying facts.¹⁰ In October, the SEC similarly revised its Enforcement Manual, commonly known as the “Red Book.”¹¹ The Red Book now provides that “[a] party’s decision to assert a legitimate privilege will not negatively affect their claim to credit for cooperation” and similarly focuses on disclosure of underlying facts as the key to cooperation credit.¹²

These changes significantly impact whether a company should provide privileged information to the government, though they clearly do not eliminate all incentives for a corporation under investigation to waive attorney-client privilege or work-product immunity.¹³ In practice, there may be little difference between receiving a “carrot” for waiving and suffering a “stick” for not waiving. Whether a corporation may selectively waive privilege thus remains a vital issue.

As a result, the recent adoption of Federal Rule of Evidence 502 should be considered in deciding how to advise companies in these circumstances.

FRE 502 Still Leaves Questions

The Rule “seeks to provide a predictable uniform set of standards under which parties can determine the consequences of a disclosure of [privileged information],” and thus aims to mitigate prohibitive and disproportional discovery costs.¹⁴ Although the final version of Rule 502 ultimately did not include language that was expressly aimed at the problem of “selective waiver,” it did include

other language that, at least on its face, could be relevant in a selective waiver context—specifically, the provisions of 502(d) and (e).

The language of these subsections presents counsel advising clients in these situations with at least three important questions.

1. Does Rule 502(d) permit selective waiver at all?

Rule 502(d) provides:

A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other Federal or State proceeding.

Nothing in this subsection precludes courts from ordering that privileged materials provided to the government will not be deemed waived as to third parties. So, on its face, Rule 502(d) could be read by a court to authorize selective waiver.

That, however, was clearly not the intent of its drafters. The Advisory Committee on Evidence Rules made plain that it did not intend to alter the law on selective waiver, concluding that “selective waiver raised empirical questions that the Committee was not in a position to determine.”¹⁵

Congress similarly signaled its understanding that Rule 502 was not designed to alter present

to revise the text of the proposed Rule. Similarly, the Advisory Committee received at least two public comments suggesting that it clarify that Rule 502(d) does not permit selective waiver,²⁰ after which it declined to alter the pertinent text of the Rule. A court otherwise inclined to allow selective waiver may accordingly conclude that resort to legislative history “only muddies the waters,”²¹ and that the Rule should be applied as written.

Even if courts are hesitant to interpret Rule 502(d) in a manner that allows a party to selectively waive plainly privileged materials, the line between selective waiver and a less controversial use of Rule 502(d) is unclear.

Suppose a corporation and the government disagree about whether the government has a sufficient need for fact work-product. In the interest of avoiding the time and expense of litigation, the parties might seek a court order providing that the corporation may disclose pertinent documents, such as interview memoranda created during an internal investigation, to the government without prejudice to the corporation resisting its disclosure in a future civil proceeding. One can easily imagine other scenarios in which the parties seek to settle a dispute through an order under Rule 502(d).

2. Is Rule 502(d) applicable to a government investigation?

Although Rule 502(d) provides that it pertains only to disclosures “connected with the litigation pending before the court,” it does not define what constitutes “litigation pending before the court.”

As an initial matter, it seems likely that Rule 502(d) has no application to situations in which the government has made only voluntary information

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law. The Senate Judiciary Committee Report noted that the Advisory Committee had decided not to include a selective waiver provision in Rule 502, and did not suggest altering the proposed Rule.¹⁶ In moving to pass the Senate bill in the House, Representative Sheila Jackson-Lee read into the Congressional Record an “agreed addendum” to the Advisory Committee Note to Rule 502 entitled “Statement of Congressional Intent,” which stated that Rule 502 “does not alter the law regarding waiver of privilege resulting from having acquiesced in the use of otherwise privileged information. Therefore, [it] does not provide a basis for a court to enable parties to agree to a selective waiver of the privilege....”¹⁷

But in an era when the Supreme Court has repeatedly instructed courts to focus on plain language,¹⁸ what the Rule says may be more important than what the Advisory Committee or members of Congress said about the Rule. And there is evidence, moreover, that Congress may have knowingly left ambiguity in Rule 502.

Before reading the Statement of Congressional Intent, Representative Jackson-Lee noted that “a number of questions [had arisen] regarding the scope and contours of the effect of the proposed rule on current law.”¹⁹ Yet Congress made no effort

requests.²² Such requests do not involve any process that brings the parties before a court,²³ and the Federal Rules of Evidence do not apply to agency proceedings.²⁴ While the SEC, for example, may issue a formal order of investigation, even a formal administrative subpoena does not automatically involve a court.²⁵ A corporation voluntarily responding to a formal administrative subpoena would thus not have the opportunity to come before a district court to request an order under Rule 502(d).

Nevertheless, because formal administrative subpoenas are not self-enforcing, agencies such as the SEC are given authority to seek district court enforcement.²⁶ Thus, if a corporation resists a formal administrative subpoena, and the agency persists, the dispute may end up in federal court. If “the litigation pending before the court” is read simply to mean formal process and two adverse parties, Rule 502(d) would be available in a proceeding brought to enforce a formal administrative subpoena. Once the proceeding has begun, the parties might seek to settle any dispute over the existence or scope of a privilege by entering into an agreement that disclosure to the government would not waive any applicable privilege as to third parties.

A more narrow reading of Rule 502(d) would limit “the litigation pending before the court” to cases between two parties subject to civil discovery rules.²⁷ Under this narrower view, Rule 502(d) could not be used in proceedings brought only to enforce an administrative subpoena, because such summary proceedings are meant to determine only the enforceability of the subpoena and no more.²⁸

A similar analysis would likely apply in the criminal context, where a corporation receives a grand jury subpoena. As in the civil context, the pertinent question would be whether a proceeding to either enforce or quash a grand jury subpoena could be considered to involve a disclosure “connected with the litigation pending before the court.”

3. Does Rule 502(e) overrule Eighth Circuit and Southern District case law?

In *Diversified Industries Inc. v. Meredith*,²⁹ the Eighth Circuit, sitting en banc, held that a corporation had not waived the attorney-client privilege by “voluntarily surrendering [covered material] to the SEC pursuant to an agency subpoena.”³⁰ The decision did not rest on the existence or non-existence of a court order governing disclosure of the privilege material.³¹

In *In re Steinhardt Partners, L.P.*,³² the Second Circuit suggested in dicta that disclosure of work-product to the government might not waive the immunity as to third parties if a confidentiality agreement covered the disclosure.³³ Following this decision, courts in the Southern District of New York have routinely held that disclosure to the government of privileged materials pursuant to a confidentiality agreement does not effect a waiver as to third parties, irrespective of whether the agreement has been so-ordered by a court.³⁴

Rule 502(e) provides: “An agreement on the effect of disclosure in a Federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order” (emphasis added). Rule 502(e) may thus overrule long-standing Eighth Circuit and Southern District case law.

Just as with Rule 502(d), there is some evidence that Congress may not have intended this result.³⁵ But also just as with Rule 502(d), an analysis of the plain language may lead to a different result. It remains to be seen whether courts agree.³⁶

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1. See Memorandum from Larry D. Thompson, Deputy Attorney Gen., U.S. Dep’t of Justice, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), available at http://www.usdoj.gov/dag/ctf/corporate_guidelines.htm. See generally *United States v. Stein*, 541 F.3d 130, 136 (2d Cir. 2008); Rebecca C.E. McFayden, “The Thompson Memo: Its Predecessors, Its Successor, and Its Effect on Corporate Attorney-Client Privilege,” 8 J. Bus. & Sec. L. 23 (2007).

2. For a history of “selective waiver” and a discussion of case law regarding the doctrine, see, e.g., Kenneth S. Broun & Daniel J. Capra, “Getting Control of Waiver of Privilege in the Federal Courts: A Proposal for Federal Rule of Evidence 502,” 58 S.C. L. Rev. 211, 229-40 (2006).

3. See, e.g., Michael L. Seigel, “Corporate America Fights Back: The Battle Over Waiver of the Attorney-

Client Privilege,” 49 B.C. L. Rev. 1, 5-7 (2008).

4. Attorney-Client Privilege Protection Act of 2006, S. 30, 109th Cong. (2006).

5. Memorandum from Paul J. McNulty, Deputy Attorney Gen., U.S. Dep’t of Justice, Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006), available at http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf.

6. See Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. (2007); 110 Cong. Rec. S182 (Jan. 4, 2007) (statement of Sen. Specter) (criticizing McNulty memorandum as insufficient). The legislation passed the House and is currently pending in the Senate. See H.R. 3013, 110th Cong. (2007); S. 3217, 110th Cong. (2008); S. 186, 110th Cong. (2007); see also Seigel, *supra* note 3, at 7.

7. See Letter from Mark Filip, Deputy Attorney Gen., to Chairman Patrick J. Leahy and Senator Arlen Specter (July 9, 2008), available at <http://www.aac.com/resource/v9892>; Letter from Senator Arlen Specter to Mark Filip, Deputy Attorney Gen. (July 10, 2008), available at http://specter.senate.gov/public/index.cfm?FuseAction=NewsRoom.NewsReleases&ContentRecord_id=09ee0cfc-978b-d2cb-c6e6-511bec8ea4ea.

8. Remarks Prepared for Delivery by Deputy Attorney General Mark R. Filip at Press Conference Announcing Revisions to Corporate Charging Guidelines, Aug. 28, 2008, available at <http://www.usdoj.gov/dag/speeches/2008/dag-speech-0808286.html>.

9. U.S. Dep’t of Justice, U.S. Attorney’s Manual, §§9-28.710, 9-28.720 (amended 2008) [hereinafter DOJ Manual], available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/title9.htm.

10. See *id.*

11. See U.S. Securities and Exchange Commission, Enforcement Manual 99 (Oct. 6, 2008), available at <http://www.sec.gov/divisions/enforce/enforcementmanual.pdf>.

12. See *id.*

13. See *id.*; DOJ Manual §§9-28.710, 9-28.720.

14. Advisory Committee on Evidence Rules, Explanatory Note on Evidence Rule 502, 110 Cong. Rec. S1317 (Feb. 27, 2008) (entering into the Congressional Record the Advisory Committee’s Explanatory Note on Evidence Rule 502); see also, e.g., Kevin N. Ainsworth, “Evidence Rule 502 Revamps Waiver-of-Privilege Analysis,” NYLJ, Oct. 6, 2008, at 4.

15. Advisory Committee on Evidence Rules, Minutes of the Meeting of April 12-13, 2007, at 15, available at <http://www.uscourts.gov/rules/Minutes/EV04-2007-min.pdf>.

16. S. Rep. No. 110-264, at 4 (2008), available at http://www.uscourts.gov/rules/S_Rep_110-264.pdf.

17. 110 Cong. Rec. H7818-19 (Sept. 8, 2008), available at http://www.uscourts.gov/rules/Congressional_Record_re_S2450.pdf.

18. See, e.g., *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (“We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: the judicial inquiry is complete.” (citations and internal quotation marks omitted)).

19. 110 Cong. Rec. H7818 (Sept. 8, 2008), available at http://www.uscourts.gov/rules/Congressional_Record_re_S2450.pdf.

20. See Letter from Michael R. Nelson, Esq., Comments on Proposed Federal Rule of Evidence 502, 06-EV-011, at 4 (Jan. 4, 2007) (“[T]he Committee Note to Rule 502(d) should specify that the provision does not authorize ‘selective waiver’ agreements.”), available at <http://www.uscourts.gov/rules/EV%20Comments%202006/06-EV-011.pdf>; Lawyers for Civil Justice, Comments to the Advisory Committee on Evidence Rules of the Judicial

Conference of the United States Re: Proposed Revisions to Rule 502, 06-EV-050, at 22 (Jan. 5, 2007) (The Advisory Committee should “make clear that the rule does not permit parties to enter into ‘selective waiver’ agreements.”), available at <http://www.uscourts.gov/rules/EV%20Comments%202006/06-EV-050.pdf>.

21. *United States v. Gonzales*, 520 U.S. 1, 6 (1997).

22. See 15 U.S.C. §§78u(a)(1), 80a-41(a), 80b-9(a).

23. See *id.*

24. See Fed. R. Evid. 1101; Colleen P. Mahoney et al., “The SEC Enforcement Process: Practice and Procedure in Handling an SEC Investigation After Sarbanes-Oxley,” 77-3rd C.P.S. (BNA) A-62 §XI (D)(3)(a) (2007).

25. See 15 U.S.C. §§78u(b), 80b-9(b), 80a-41(b).

26. See *id.* §§77v(b), 78u(c), 80b-9(c), 80a-41(c).

27. See 110 Cong. Rec. S15142 (Dec. 11, 2007) (statements of Senators Leahy and Specter) (discussing the increasing cost of civil discovery as major impetus for Rule 502).

28. See *SEC v. Lavin*, 111 F.3d 921, 926 (D.C. Cir. 1997) (subpoena enforcement proceedings are summary in nature and do not generally involve discovery); Gregory P. Joseph, “Privilege Waiver: Proposed Federal Rule of Evidence 502,” in “Trial Evidence in the Federal Courts: Problems and Solutions” 129, 142 (ALI Mar. 22-23, 2007) (The Rule was “limited to orders governing disclosures made in connection with litigation pending before the court. This will prevent parties from approaching the court for the purpose of obtaining an order....”).

29. 572 F.2d 596 (8th Cir. 1977) (en banc).

30. *Id.* at 611.

31. See *id.*

32. 9 F.3d 230 (2d Cir. 1993).

33. See *id.* at 236.

34. See, e.g., *In re Natural Gas Commodities Litig.*, 232 F.R.D. 208, 211 (S.D.N.Y. 2005). The Advisory Committee appears to have been aware of this case law. See Memorandum to Advisory Committee from Daniel Capra, Reporter, and Ken Broun, Consultant (March 22, 2006), at 15-16, available at <http://www.uscourts.gov/rules/Agenda%20Books/EV2006-04.pdf>. But there is no evidence that it considered altering the text of the proposed Rule in order to accommodate it.

35. See 110 Cong. Rec. H7818 (Sept. 8, 2008) (Rule 502 “does not alter the law regarding waiver of privilege resulting from having acquiesced in the use of otherwise privileged information”), available at http://www.uscourts.gov/rules/Congressional_Record_re_S2450.pdf.

36. It also remains to be seen whether courts will apply Rule 502(e) to disputes over the enforceability against third-parties of confidentiality agreements entered before the passage of Rule 502 that purport to permit selective waiver. Rule 502 is to apply “in all proceedings commenced after [Sept. 19, 2008] and, insofar as is just and practicable, in all proceedings pending on such date.” Pub. L. No. 110-322, 122 Stat. 3537, 3538 (2008).