The Strange History of Rule 502 and Selective Waivers: Part I

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In his January 14, 2015 “Privilege Points” release, Tom Spahn discusses Selective Waivers:

In nearly every situation, disclosing privileged communications to any third party renders the communications accessible to all other third parties. This general principle normally precludes what is called a "selective waiver" — disclosing privileged communications to a litigation adversary or some other third party while withholding it from everyone else. Despite some courts' and even occasional congressional efforts to allow corporations' selective waiver when disclosing privileged communications to the government or some other third party, all but a handful of courts have rejected that possibility.

After what some saw as the federal government's attempt to bully corporations into disclosing privileged communications, in 2008 the Federal Advisory Committee on Rules of Evidence proposed a new evidence rule (Rule 502) assuring that corporations disclosing protected communications to the federal government did not waive the protection "in favor of non-governmental persons or entities." See Minutes of Advisory Comm. On Evidence Rules Meeting (Apr. 12-13, 2007). But the Judicial Conference of the United States quickly abandoned that provision. The Congressional Record's legislative history makes it clear that the as-adopted Rule 502 "does not alter the law regarding waiver of privilege resulting from having acquiesced in the use of otherwise privileged information." 154 Cong. Rec. H7817, H7818 (daily ed. Sept. 8, 2008) (Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence). In an even more explicit statement, the rule's sponsor explained that Rule 502 "does not provide a basis for a court to enable parties to agree to a selective waiver of the privilege, such as to a federal agency conducting an investigation, while preserving the privilege as against other parties seeking information." Id. at H7818-19 (statement of Rep. Sheila Jackson-Lee).

However, the as-adopted Federal Rule of Evidence 502 indicates that federal courts "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." Fed. R. Evid. 502(d). The next two Privilege Points (Part II and Part III) will discuss what this provision means, and how some federal courts have relied on it in attempting to arrange selective waivers.