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The Debate over the Permissibility of Selective Privilege Waiver Orders Under Federal Rule of Evidence 502(d): The Crucial Scope Issues

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ABSTRACT

In the past, most common-law courts developed an intense antipathy to privileges because they perceived privileges as obstructing the search for truth. To begin with, the courts made it difficult for claimants to assert privileges by prescribing rigorous foundational requirements for privilege claims. Moreover, the courts made it easy to find a waiver. As some commentators observed, many courts took an absolutist approach and demanded that holders guard their privileges like crown jewels. For example, the courts announced that even inadvertent production of privileged material could effect a waiver, a waiver as to any privileged communication automatically extends to any other privileged communication on the same subject matter, and holder may not make a selective waiver as to some third parties but not others.

The rub was that in the era of the pretrial discovery of electronically stored information, these waiver rules imposed inordinate economic costs. Modernly, pretrial discovery can entail millions of pages of documents. Given these waiver rules, the only way to avoid waiver was to conduct a time-consuming, comprehensive preproduction privilege review. In some cases, the cost of the review could easily exceed the monetary stakes in the litigation. The problem became so acute that Congress intervened, enacting Federal Rule of Evidence 502. Rule 502(b) repudiates the rule that inadvertent production necessarily results in a waiver, and Rule 502(a) similarly rejects the automatic subject matter waiver rule.

One of the early drafts of Rule 502 contained a provision authorizing selective waivers, but that provision was withdrawn from the final draft that Congress voted on and approved. That legislative history has led many courts and commentators to conclude that a court may not authorize a selective waiver under Rule 502. On closer examination, though, that con-

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clusion is only partially true. In any given case, the key is paying attention to the scope issues: the scope of Rule 502 and the scope of the selective waiver agreement between the parties.

On the one hand, assume that the parties ask the court to approve a narrow selective waiver agreement providing only that the holder's disclosure of privileged information to the other party in the proceeding will not effect a waiver. Rule 502 governs only one type of waiver, namely, waivers effected by disclosure. On this assumption, though, the scope of the agreement coincides with the scope of Rule 502; a court order under Rule 502(d) would validate the agreement. If the parties reached a settlement after the disclosure and during the proceeding the holder performed no other act that would effect a waiver, by the terms of Rule 502(d), the holder would still be able to assert the privilege in subsequent litigation against third parties.

On the other hand, assume alternatively that the parties enter into a broader selective waiver agreement that purports to provide that without waiving, the holder may not only disclose but also allow the other party to the agreement to introduce evidence of the privileged communication at an adversary hearing in this proceeding. This agreement exceeds the scope of Rule 502; Rule 502 does not apply to waivers effected by the failure to object to the introduction of testimony about privileged communications. If the holder failed to object to the use of the evidence in the prior proceeding, Rule 502 would not preclude finding a waiver in subsequent litigation with third parties. Indeed, there is a grave risk that merely by consenting to that use of the privileged communication in the broader selective waiver agreement, the holder has lost the privilege.

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I. INTRODUCTION

PRIVILEGE law differs fundamentally from the typical doctrines governing the admissibility of evidence. Most evidentiary doctrines rest on the judicial system's institutional concerns about the accuracy of factfinding, such as whether the trier of fact will use the item of evidence only as proof of the fact that the item is admitted to establish and whether the trier will assign the item appropriate probative weight.[1] In contrast, privilege rules are based on considerations of extrinsic social policy. As former Supreme Court Justice Arthur J. Goldberg remarked during the 1973 Congressional hearings on the then-proposed Federal Rules of Evidence, privilege law "is the concern of the public at large."[2] In the final House report on the Rules, Representative Elizabeth Holtzman asserted that "unlike most evidentiary rules, privileges protect interpersonal relationships outside of the courtroom."[3]

However, precisely because privileges do not reflect the judicial system's institutional concerns, there is a tension between those concerns and privilege doctrine. In the microcosm of a given case, the invocation of a privilege such as the attorney-client privilege to exclude relevant evidence can frustrate the objective of accurate factfinding and cause a wrongful verdict. For that reason, the great English utilitarian philosopher Jeremy Bentham sharply attacked most privileges. Bentham believed that the first and foremost objective of the judicial system was to accurately ascertain the truth.[4] While he supported a Crown Secrets doctrine and felt that the principle of religious tolerance required the recog-

1. FED. R. EVID. 105, 403.

2. *Proposed Rules of Evidence: Hearings Before the Spec. Subcomm. on Reform of Fed. Crim. Laws of the H. Comm. on the Judiciary*, 93d Cong. 143 (1973) (statement of Hon. Arthur J. Goldberg).

3. H.R. REP. NO. 93-650, at 28 (1973).

4. *See* 1 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, SPECIALLY APPLIED TO ENGLISH PRACTICE 1 (1827) (stating his theory that "merely with a view to rectitude of decision, to the avoidance of the mischiefs attached to undue decision, no species of evidence whatsoever . . . ought to be excluded").

nition of a privilege for required confessions,[5] he was adamantly opposed to other privileges. For instance, he vigorously attacked the attorney-client privilege. He reasoned that if the attorney's client was innocent "by the supposition there is nothing to betray: let the law adviser say every thing he has heard from his client, the client cannot have any thing to fear."[6] Bentham's powerful rhetorical attacks, though, had little impact in the legislature or the courts. Parliament did not curtail privileges, and the English courts continued to recognize privileges such as the one protecting the attorney-client relationship.[7] Like Bentham, Dean Henry Wigmore, a giant in American law, believed that the judicial system should assign the highest priority to rectitude of decision. Again, like Bentham, he was skeptical of the value of privileges. In his mind, privileges were often obstructions in the search for truth. He wrote forcefully that "[t]he investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion, of . . . privileges. They should be recognized only within the narrowest limits . . . . Every step beyond these limits helps to provide . . . an obstacle to the administration of justice."[8]

In order to confine privileges to "the narrowest limits," Wigmore proposed a strict set of criteria for recognizing privileges—his famous four instrumental criteria.[9] One criterion was that "confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties."[10] The third criterion was, in effect, Wigmore's means of reconciling the recognition of a privilege with the priority of rectitude of decision.[11] For example, if confidentiality is truly essential to maintaining an attorney-client relationship, without an assurance of confidentiality, the client would be unwilling to consult and confide in the attorney.[12] In *Jaffee v. Redmond*,[13] the landmark Supreme Court decision recognizing a psychotherapist privilege, Justice Stevens voiced that view about the need for confidentiality in the psychotherapist-patient relationship: "[t]his unspoken 'evidence' [would] . . . serve no greater truth-seeking function than if it had been spoken and privileged."[14] In *Swidler & Berlin v. United States*, Chief Justice Rehnquist expressed a similar belief about the

5. 5 BENTHAM, *supra* note 4, at 346.

6. *Id.* at 304.

7. COMM. ON RULES OF PRAC. & PRO., U.S. JUD. CONF., RULES OF EVIDENCE: A PRELIMINARY REPORT ON THE ADVISABILITY AND FEASIBILITY OF DEVELOPING UNIFORM RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS 43 (Comm. Print 1962), *reprinted in* 30 F.R.D. 73 (1962).

8. 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2192, at 73 (John T. McNaughton rev. ed. 1961).

9. *Id.* § 2285, at 527.

10. *See id.* (emphasis omitted).

11. *Id.*

12. Melanie B. Leslie, *The Costs of Confidentiality and the Purpose of Privilege*, 2000 WIS. L. REV. 31, 31 (2000) ("In a perfect [Wigmorean] world, however, the privilege would shield no evidence. Privilege generates the communication that the privilege protects. Eliminate the privilege, and the communication disappears . . . . [T]he privilege would protect only . . . statements that would not otherwise have been made.").

13. 518 U.S. 1 (1996).

14. *Id.* at 12.

invocation of the attorney-client privilege to exclude relevant communications, stating: "[T]he loss of evidence is more apparent than real."[15]

The rub is that in many, if not most, cases the loss is indeed real; the behavioral assumptions underlying "the establishment line" lack empirical support.[16] There have been numerous studies of both the attorney-client and psychotherapist-patient privileges.[17] For the most part, the studies undercut the facile generalization that the typical layperson consulting an attorney or therapist is so fearful of subsequent, judicially compelled disclosure of his or her statements that they would not consult with or confide in the professional without the assurance of confidentiality furnished by a formal privilege.[18] To be sure, in some cases the layperson would balk at disclosure. Moreover, in many cases the layperson would undoubtedly be more circumspect in written communication with the professional. However, when a troubled layperson seeks out an attorney, therapist, or doctor, the layperson is frequently more focused on the "here and now," the current problem demanding immediate attention, rather than the long-term risk of disclosure in a lawsuit that may be filed in the distant future or that might never be filed.[19]

Given the priority on accurate factfinding and the justifiable fear that enforcing a privilege often results in the suppression of valuable evidence, it was predictable that many courts would adopt a hostile attitude toward privileges—an attitude reflecting Bentham and Wigmore's own antipathy. The cases are legion proclaiming that privileges are not favored and that they must be narrowly, strictly construed.[20] That hostile attitude manifests itself in several ways. To begin with, the courts tend to demand that a privilege claimant meet a high standard of proof to establish a prima facie case for a privilege claim. If the claimant's foundational proof is ambiguous, the courts resolve the ambiguity against the claimant and deny the privilege claim.[21] Moreover, even when the claimant has a solid prima facie case for privilege, the courts recognize a large number of acts that can result in a waiver of the privilege.[22] These courts have adopted

15. 524 U.S. 399, 408 (1998).

16. Richard Lempert, Comment, *The Economic Analysis of Evidence Law: Common Sense on Stilts*, 87 VA. L. REV. 1619, 1688 (2001); *see also* Edward J. Imwinkelried, *Questioning the Behavioral Assumption Underlying Wigmorean Absolutism in the Law of Evidentiary Privileges*, 65 U. PITT. L. REV. 145 (2004).

17. *See* 1 EDWARD J. IMWINKELRIED, THE NEW WIGMORE: EVIDENTIARY PRIVILEGES § 5.2.2, at 369 (Richard D. Friedman ed., 3d ed. 2016).

18. *Id.* § 5.2.2(d), at 391.

19. Edward J. Imwinkelried, *Court Ducks Larger Privilege Issues Yet Again*, NAT'L L.J., July 20, 1998, at A22.

20. *See* Taylor Lohmeyer L. Firm P.L.L.C. v. United States, 957 F.3d 505, 510 (5th Cir. 2020); Advanced Physicians, S.C. v. Conn. Gen. Life Ins. Co., 431 F. Supp. 3d 857, 861 (N.D. Tex. 2020); United States v. Carter, 429 F. Supp. 3d 788, 881 (D. Kan. 2019), *vacated in part on other grounds*, No. 16-20032-02-JAR, 2020 WL 430739 (D. Kan. Jan. 28, 2020); 1 IMWINKELRIED, *supra* note 17, § 4.2.4(c), at 317 n.593 (collecting cases).

21. *Taylor Lohmeyer L. Firm P.L.L.C.*, 957 F.3d at 510.

22. *See* 1 IMWINKELRIED, *supra* note 17, § 6.12.4(a)(2).

an absolutist,[23] "all-or-nothing"[24] approach to privilege waiver. The holder must guard his or her privilege like a crown jewel, and if for virtually any reason they disclose some of the privileged information to anyone outside the original circle of confidence, the holder permanently forfeits the privilege as against all third parties. A case in point is the current controversy over the question of whether under Federal Rule of Evidence 502(d), a court may permit the holder to make a selective waiver of the attorney-client privilege in a federal proceeding.[25] Prior to Congress's enactment of Rule 502 in 2008, the federal and state courts were badly divided over the question of selective waiver.[26] Of course, a selective waiver agreement could involve only private parties, but the issue often arose in this context: In a government investigation into corporate misconduct, in order to dissuade the government from prosecuting, the corporation would share the results of a privileged internal investigation into the misconduct with the government, and later private litigants suing the corporation would seek to discover the same material on the theory that the holder's disclosure to the government waived the privilege. In this setting, a minority of courts refused to find a waiver, at least if the government and corporation had entered into an agreement in which the corporation expressly reserved the privilege. However, the clear majority of courts rejected the notion of a selective waiver.[27] They reasoned that once the corporation had disclosed the privileged material

23. Liesa L. Richter, *Corporation Salvation or Damnation? Proposed New Federal Rule Legislation on Selective Waiver*, 76 FORDHAM L. REV. 129, 129–30 (2007) ("[J]udicial rejection of selective waiver ignores the evolution of privilege doctrine from a paradigm of rigid absolutism to one of fairness and flexible party autonomy over protected information.").

24. United States v. Billmyer, 57 F.3d 31, 37 (1st Cir. 1995).

25. To be sure, there are other controversies related to Rule 502(d). One question is whether a Rule 502(d) order can completely relieve a party of the obligation to take reasonable steps to prevent the inadvertent disclosure of privileged information. *See* Michael Correll, *The Troubling Ambition of Federal Rule of Evidence 502(d)*, 77 MO. L. REV. 1031, 1058–67 (2012) (explaining the various approaches courts have taken to interpret Rule 502(d)); FED. R. EVID. 502(d) advisory committee's note ("[T]he court order may provide for return of documents without waiver irrespective of the care taken by the disclosing party."). Another controversy is whether the judge must find "good cause" before entering a Rule 502(d) order over a party's objection. Liesa L. Richter, *Making Horses Drink: Conceptual Change Theory and Federal Rule of Evidence 502*, 81 FORDHAM L. REV. 1669, 1687 (2013) (citing Rajala v. McGuire Woods, LLP, No. 08-2638-CM-DJW, 2010 WL 2949582 (D. Kan. July 22, 2010)). As Professor Richter points out, the Federal Rules of Civil Procedure ordinarily require that the judge find good cause before entering a protective order. Richter, *supra*, at 1687. However, the selective waiver controversy provides the most fundamental insight into the courts' attitude toward the waiver doctrine. *Id.*

26. *See* 1 IMWINKELRIED, *supra* note 17, § 6.12.4(a)(2), at 1187–1201.

27. *See, e.g.*, Patrick v. City of Chicago, 154 F. Supp. 3d 705, 711 (N.D. Ill. 2015) ("'[S]elective disclosure is not an option.' 'The client cannot be permitted to pick and choose among his opponents. . . .'" (first quoting Burden-Meeks v. Welch, 319 F.3d 897, 899 (7th Cir. 2003); then quoting *In re* Columbia/HCA Healthcare Corp. Billing Pracs. Litig., 293 F.3d 289, 302–03 (6th Cir. 2002))); Amy Conway-Hatcher, Kyle Clark & Andrew George, *Protecting the Privilege in Corporate Investigations When It Counts—From the Beginning*, 86 U.S.L.W. (BL) 937 (Jan. 11, 2018) ("Many courts have rejected the doctrine of 'selective waiver.'").

to any third party outside the original circle of confidence, the privilege was lost forever.

In 2008, Congress enacted Federal Rule 502. In pertinent part, Rule 502 reads:

> The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.
>
> **(a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver.** When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:
>
> (1) the waiver is intentional;
>
> (2) the disclosed and undisclosed communications or information concern the same subject matter; and
>
> (3) they ought in fairness to be considered together.
>
> **(b) Inadvertent Disclosure.** When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:
>
> (1) the disclosure is inadvertent;
>
> (2) the holder of the privilege . . . took reasonable steps to prevent disclosure; and
>
> (3) the holder promptly took reasonable steps to rectify the error . . . .
>
> . . . .
>
> **(d) Controlling Effect of a Court Order.** 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.[28]

Admittedly, Congress did not intervene to enact Rule 502 for the stated purpose of resolving the controversy over selective waivers. Rather, Congress intervened primarily to address the spiraling cost of pretrial discovery, driven in part by numerous judicial holdings that even an inadvertent production of a single privileged document during discovery resulted in a subject matter waiver, extending to every other privileged document relevant to the same subject. In these holdings, the courts manifested their hostility to privileges by visiting harsh consequences on any privilege holder who inadvertently produced even a solitary privileged document in a case involving millions of pages of electronically stored information. In order to avoid such waivers, litigants felt compelled to conduct extensive, expensive preproduction privilege reviews of material requested by the opposition. At a public hearing on the subject, "[r]epresentatives from Verizon testified . . . that the company had spent $13.5 million on one privilege review relating to a U.S. Department of

28. FED. R. EVID. 502(a)–(b), (d).

Justice antitrust merger investigation."[29] In one survey, federal litigants indicated that the cost of preproduction privilege reviews had skyrocketed and often accounted for 30%–50% of the total cost of litigation.[30] The stark reality was that litigants' fear that an inadvertent production would effect a subject matter waiver had become so acute that the cost of a preproduction privilege review could exceed the monetary stakes in the litigation.[31] New Rules 502(a) and (b) directly addressed this problem. Rule 502(b) rejected the categorical rule that an inadvertent disclosure of privileged material is a waiver, and for its part, Rule 502(a) added that even if there was a waiver, an inadvertent disclosure does not trigger a broad, subject matter waiver.[32] However, the controversy over selective waiver also surfaced during the deliberations over Rule 502. As we shall see in Part III of this Article, an early draft of the Rule included a provision authorizing selective waiver.[33] However, that language was deleted before Congress's final approval of the Rule.[34] On its face, the wording of Rule 502(d) is arguably expansive enough to allow a judge to enter an order authorizing a selective waiver, and the language does not explicitly prohibit a judge from doing so. However, in the House report on the Rule, one representative stated that Rule 502(d) "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 the information."[35] Nevertheless, some commentators insist that the courts should respect the plain meaning of Rule 502(d)'s text and give effect to court orders allowing selective waivers, at least when the holder is interacting with a government enforcement or regulatory agency.[36]

The thesis of this short Article is that the continuing controversy over the validity of Rule 502(d) selective waiver orders is a product of two scope problems: the first a failure to define the scope of selective waiver and the second a failure to pay attention to the limited scope of Rule 502. Part II of this Article describes the pre-Rule 502 split of authority over

29. Alvin F. Lindsay, *New Rule 502 to Protect Against Privilege Waiver*, NAT'L L.J., Aug. 25, 2008, at S2.

30. Thomas Brom, *e-Discovery Options*, CAL. LAW., Jan. 2009, at 14.

31. Hopson v. Mayor of Baltimore, 232 F.R.D. 228, 244 (D. Md. 2005) ("[E]lectronic document discovery may encompass . . . millions[ ] of [documents, and] . . . to insist in every case upon . . . record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation."), *aff'd*, 598 F. App'x 860 (4th Cir. 2015).

32. FED. R. EVID. 502(a), (b).

33. *See* 1 IMWINKELRIED, *supra* note 17, § 6.12.4(a)(2), at 1193 ("[T]he [original] draft read that there is no 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.'").

34. *Id.*

35. 154 CONG. REC. H7817, 7818–19 (daily ed. Sept. 8, 2008) (statement of Rep. Jackson-Lee).

36. *See* Keyawna Griffith, Note, *From Compulsion to Compensation: How Selective Waiver Compensates Corporations for Involuntary Disclosures*, 13 VA. L. & BUS. REV. 41 (2019).

the validity of selective waivers. Part III is also descriptive. Section III.A chronicles the general history of Rule 502. Section III.B focuses on the specific dispute over the propriety of selective waiver orders under Rule 502(d). In contrast, Part IV is evaluative, reaching the merits of the dispute described in Section III.B. Part IV demonstrates that the keys to resolving the controversy are precisely defining the scope of the selective waiver in question and respecting Rule 502's limited scope, governing only waivers effected by disclosure—as opposed to other conduct—by the holder. Once those two scopes are defined and understood, the resolution of the dispute becomes a relatively straightforward matter. The ultimate denouement is that, depending on the scope of the proposed selective waiver, in some cases a Rule 502(d) order may certainly authorize a selective waiver while in other cases such an order would be patently invalid. Implicit antipathy to privileges, which strains waiver doctrines to defeat privilege claims, might prompt a court to rule that all such orders are invalid, but a principled analysis of the issue leads to a very different conclusion.

II. A DESCRIPTION OF THE CONTROVERSY OVER SELECTIVE WAIVER

Courts and commentators often—if not usually—refer to selective waiver in the singular as if there were only one type of selective waiver agreement. However, on closer scrutiny, as we shall soon see, it becomes evident that there are several conceivable types of selective waivers. Nevertheless, there is a core concept of selective waiver. At its core, the concept of selective waiver has two foci: one on a privilege holder's current dealings with another party, such as the government, in a dispute or investigation and a second on the holder's intent to otherwise retain the privilege and therefore the ability to later assert the privilege against third parties. The first focus is on the holder's present discussion with a party, such as law enforcement agents or government regulators conducting an investigation. The most essential entitlement in a holder's bundle of rights is the right to refuse to disclose the information to anyone outside the original circle of confidentiality.[37] For instance, if in the course of a lawful investigation a government agency served the holder with a subpoena calling for the disclosure of material covered by the attorney-client privilege, the holder may invoke the privilege as a basis for refusing to comply with the subpoena. However, in order to obtain favorable treatment from the government agency, the holder might enter into a deferred prosecution agreement (DPA).[38] Pursuant to the agree-

37. *See* 1 IMWINKELRIED, *supra* note 17, § 6.6.1(a). For example, California Evidence Code § 954 defines the attorney-client privilege as the right "to refuse to disclose." CAL. EVID. CODE § 953 (West 2020).

38. *See* Andrea Amulic, Note, *Humanizing the Corporation While Dehumanizing the Individual: The Misuse of Deferred-Prosecution Agreements in the United States*, 116 MICH. L. REV. 123, 124–25 (2017); *see also* Daniel Richman, *Decisions About Coercion: The Corporate Attorney-Client Privilege Waiver Problem*, 57 DEPAUL L. REV. 295, 323 (2008).

ment, the holder could consent to disclose the privileged information to the agents or regulators in the current discussions. Under the terms of the agreement, the holder might voluntarily disclose the information to the government—an act that would ordinarily result in a waiver of the privilege. However, at the time of that disclosure in its dealings with the government, the holder has a second focus in mind; despite the disclosure to the government, the holder intends to retain the right to later assert the privilege to refuse to disclose to third parties. Thus, the DPA might expressly provide that the holder does not intend to waive the privilege against any private litigants who might subsequently sue the holder.[39]

The question arose whether the courts should respect the holder's intent and allow the holder to later invoke the privilege against third parties. There is extensive scholarly support for the notion of selective waiver.[40] The scholarly articles outline an especially plausible policy case for recognizing the concept, at least when the initial focus is an interaction between the holder and a government agency investigating a corporate holder's potential misconduct. Government enforcement and regulatory agencies have limited financial and time resources.[41] One of the primary challenges facing the criminal justice system is the limited funding of white collar enforcement units.[42] Although it is often a useful fiction to treat an entity as a person, section 9.28.210 of the United States Attorney's Manual points out that the government's real world priority is the prosecution and deterrence of the natural persons who actually perpetrate the misconduct. As that section declares, "imposition of individual criminal liability may provide the strongest deterrent against future corporate wrongdoing."[43] If the government can "piggy-back"[44] on a corporation's internal investigation of corporate wrongdoing, the government can conserve resources that can then be devoted to the investigation of other serious crimes. However, a corporation's fear that the revelation of the privileged material could expose it to substantial monetary liability in subsequent litigation can be a major disincentive to the corporation's cooperation with the government. In the long term, by removing that disincentive, the recognition of selective waiver can promote the administra-

39. Thomas Brom, *Read My Lips*, CAL. LAW., Apr. 2006, at 17 ("[T]he Delaware state court recognized selective waiver if there is a confidentiality agreement with the government.").

40. *See* Richter, *supra* note 23; Sean L. Finan, Comment, Vardon Golf Co. v. Karsten Manufacturing Corp.*: Is Waiver an All-or-Nothing Proposition or Does Policy Favor a More Limited Approach?*, 27 AM. J. TRIAL ADVOC. 589, 604 (2004).

41. *See* Earl J. Silbert & Demme Doufekias Joannou, *Under Pressure to Catch the Crooks: The Impact of Corporate Privilege Waivers on the Adversarial System*, 43 AM. CRIM. L. REV. 1125, 1228 (2006) ("Corporations conduct internal investigations that cost millions of dollars, investigations that '[f]ederal prosecutors don't have funds for . . . and would be unable to replicate . . . .'" (alterations in original)).

42. *See* Richman, *supra* note 38, at 320; *see also* Andrew Gilman, Note, *The Attorney-Client Privilege Protection Act: The Prospect of Congressional Intervention into the Department of Justice's Corporate Charging Policy*, 35 FORDHAM URB. L.J. 1075, 1136 (2008).

43. U.S. Dep't of Just., U.S. Att'ys' Manual § 9.28.210 (2018).

44. Silbert & Joannou, *supra* note 41, at 1228.

tion of the laws that the government agents are tasked with enforcing. In other words, by protecting the holder's private interest in retaining its privilege, a selective waiver can advance the public interest. The social utility of selective waiver agreements between private parties may be debatable, but when the holder and a government agency contemplate entering into such an agreement, the agreement implicates and serves a special public interest.[45]

Given that policy argument, a number of legislatures and courts have embraced the concept of selective waiver. In 2006, Congress amended the Federal Deposit Insurance Act and the Federal Credit Union Act to expressly authorize waiver under those regulatory schemes.[46] For instance, the Federal Deposit Insurance Act now provides:

> The submission by any person of any information to . . . any Federal banking agency, State bank supervisor, or foreign banking authority for any purpose in the course of any supervisory or regulatory process of such . . . agency, supervisor, or authority, shall not be construed as waiving, destroying, or otherwise affecting any privilege such person may claim with respect to such information under Federal or State law as to any person or entity other than such . . . agency, supervisor, or authority.[47]

Likewise, the Oklahoma Rules of Evidence provide:

> Disclosure of a communication or information meeting the requirements of an attorney-client privilege . . . to a governmental office, agency or political subdivision in the exercise of its regulatory, investigative, or enforcement authority does not operate as a waiver of the privilege . . . in favor of nongovernmental persons or entities.[48]

Moreover, the concept of selective waiver has garnered the support of the United States Court of Appeals for the Eighth Circuit and several district courts.[49] The leading precedent is the Eighth Circuit's 1977 decision in *Diversified Industries v. Meredith*.[50] For that matter, in Bentham's

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45. Enron Corp. v. Borget, No. 88 Civ. 2828, 1990 WL 144879, at *2 (S.D.N.Y. Sept. 22, 1990) ("[T]he public policy concern of encouraging cooperation with law enforcement militates in favor of a no waiver finding.").

46. Financial Services Regulatory Relief Act of 2006, Pub. L. No. 109-351, § 607(a), (b), 120 Stat. 1982 (2006) (codified at 12 U.S.C. §§ 1785(j), 1828(x)(1)).

47. 12 U.S.C. § 1828(x)(1); *see also* Audrey Strauss, *White Collar Crime; Selective Privilege Waiver for the Banking Industry; Corporate Update*, 237 N.Y. L.J. 29 (2007).

48. OKLA. STAT. tit. 12 § 2502(F) (West, Westlaw through 57th Leg., 2d Leg. Sess. (2020)).

49. Gilman, *supra* note 42, at 1088.

50. 572 F.2d 596 (8th Cir. 1977). Some have suggested that the United States Supreme Court implicitly approved of the concept of selective waiver in *Upjohn Co. v. United States*, 449 U.S. 383 (1981). Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 DUKE L.J. 853, 884 (1998). However, later Professor Rice emphasized that the Court did not explicitly endorse the concept. He noted that the Court clearly wanted to reach the "hot button" question of whether corporate employees personify the corporation for purposes of communicating with corporate counsel. Professor Rice elaborated: "An equally plausible interpretation . . . is that the court felt it more important to resolve the question of who personifies the corporate client than to address the concept of limited waiver which, if rejected, would have made the personification dis-

home country, the English courts have moved beyond his fierce hostility to privileges and validated the concept of selective waiver.[51]

Although the concept of selective waiver enjoys respectable legislative and judicial support and rests on a plausible policy argument, the vast majority of American courts have repudiated the concept.[52] In some cases, these courts have challenged the policy argument underlying the concept and have asserted that the recognition of the concept is unnecessary to assure a corporate holder's cooperation with the government.[53] That generalization may be true in many cases, but the assertion is certainly dubious when, under the substantive criminal law, the corporation faces a modest fine but its civil liability exposure in subsequent private litigation is potentially massive. In many cases, though, rather than attacking the policy argument favoring selective waivers, the courts are content to voice the traditional antipathy towards privileges; in effect, courts rely on the proposition that if the holder makes any disclosure of privileged information "outside [the] magic circle," the privilege is permanently lost.[54] In one oft-cited case, *Permian Corp. v. United States*, the court declared that privilege law cannot allow holders "to pick and choose among . . . opponents."[55] Some courts stop short of altogether rejecting the concept but insist that there should be "a strong presumption against a finding of selective waiver."[56] The bottom line is that in rejecting selective waiver, numerous courts fall back on a relatively inflexible all-or-nothing stance on waiver issues.[57]

In the above cases, and far more often than not, the courts address only the validity of the general notion of selective waiver—as if there is only one type of selective waiver. However, as stated at the outset of Part II, there are several conceivable varieties of selective waiver agreements. In

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cuss unnecessary." PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 9:88, at 9-565 to -566 (2d ed. 2010).

51. Belhaj v. Dir. Pub. Prosecutions [2018] EWHC (Admin) 513 [2] (Eng.) ("[The producing party] provides these papers for the sole purpose of assisting with this [government] investigation and do not consider to have waived legal privilege for any other purpose, including any future prosecution or civil claim."); Citic Pac. Ltd. v. Sec'y for Just., [2012] 4 H.K.C. 1, 15; Berezovsky v. Hine [2011] EWHC (Civ) 1089, [28]–[29] (Eng.).

52. *See In re* Lupron Mktg. & Sales Pracs. Litig., 313 F. Supp. 2d 8, 12 (D. Mass. 2004) ("[E]very Circuit but the Eighth that has addressed the issue has ruled that voluntary disclosures to the government in an enforcement context destroy the attorney-client privilege."); JOHN WILLIAM GERGACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE 5-47 to -48 (2d ed. 1990) (citing decisions from the District of Columbia, Fourth, and Sixth Circuits); Conway-Hatcher et al., *supra* note 27, at 4 ("Many courts have rejected the doctrine of 'selective waiver.'"); Jason Somensatto, *What Companies Should Consider Before Waiving Attorney-Client Privilege During a Government Investigation*, 83 U.S.L.W. (BL) (March 31, 2015) ("[T]he doctrine is universally applied in only one circuit . . . ."); Rice, *supra* note 50 ("[M]ost lower courts have rejected the . . . concept . . . ."); David M. Zornow & Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 AM. CRIM. L. REV. 147, 153 n.31 (2000) ("[T]he case law in most circuits provides little comfort that such selective waivers will be upheld.").

53. *See, e.g.*, *In re* Qwest Commc'ns Int'l Inc., 450 F.3d 1179, 1192–93 (10th Cir. 2006).

54. United States v. Mass. Inst. of Tech., 129 F.3d 681, 684 (1st Cir. 1997).

55. Permian Corp. v. United States, 665 F.2d 1214, 1221 (D.C. Cir. 1981).

56. *In re* Initial Pub. Offering Sec. Litig., 249 F.R.D. 457, 465 (S.D.N.Y. 2008).

57. Richter, *supra* note 23.

the simplest, most common scenario, in its dealings with a party such as a government agency, the holder consents to disclose privileged information while simultaneously intending to retain the right to later refuse to disclose to other third parties. However, on a moment's reflection it becomes clear that in its initial dealings with a party such as a government agency, it is theoretically possible for the holder to assert its autonomy by agreeing to other conduct that would otherwise effect a waiver of the privilege—conduct such as allowing the other party to publicly disclose some of the information[58] or even using the information as trial evidence.[59] Concededly, it would be unrealistic for a holder to agree to the use of the information as trial evidence in a situation in which the holder is facing a solitary charge in a single proceeding. However, if the holder were involved in multiple proceedings or several charges, in exchange for government concessions, the holder could plausibly consent to the use of the information with respect to a certain charge or in a particular proceeding. Differentiating among these possible variations of selective waiver agreements will become critical in Part IV because, again, by its terms Rule 502 deals only with waivers effected by disclosure.

III. A DESCRIPTION OF THE HISTORY OF FEDERAL RULE OF EVIDENCE 502, INCLUDING THE CONTROVERSY OVER THE PERMISSIBILITY OF RULE 502(d) SELECTIVE WAIVER ORDERS

A. Federal Rule of Evidence 502 in General

1. Congress's Initial Consideration of the Draft Federal Rules

The Introduction noted that privilege law differs from the other areas of evidence law, which is principally inspired by the judicial system's institutional concerns about the accuracy of factfinding and the rectitude of decision. The history of the Federal Rules of Evidence, including Rule 502, demonstrates that Congress shares the perception that privilege law is special. In 1973, after the Judicial Conference had prepared a draft of the Federal Rules, the Supreme Court transmitted the draft to Congress.[60] The draft included Article V, devoted to privileges. Article V contained thirteen provisions: several general provisions, including one on waiver (draft Rule 511), and a number of provisions devoted to specific privileges such as the psychotherapist privilege (draft Rule 504), husband-wife privilege (draft Rule 505), and government information privilege (draft Rule 509).[61]

When the Court had previously submitted the draft Federal Rules of Civil and Criminal Procedure to Congress, Congress allowed the Rules to

58. *See* 2 Imwinkelried, *supra* note 17, § 6.12.4(a)(4)–(5).
59. *See id.* § 6.12.4(c)(4).
60. H.R. Doc. No. 93-46 (1973).
61. *Id.* at 9–19.

take effect without making so much as a single change.[62] However, Congress reacted very differently when it received the draft Federal Rules of Evidence. This time Congress's response "was both swift and violent."[63] Congress immediately passed legislation blocking the promulgation of the draft Evidence Rules.[64] The submission of the draft Rules created a furor[65] and precipitated a "crisis" in the rulemaking process.[66]

The lightning rod for Congress was draft Article V on privileges. Congress's initial negative reaction to Article V almost doomed the entire Federal Rules of Evidence project.[67] The House report, justifying the legislation blocking the promulgation of the draft Rules, stated that the House Judiciary Committee had received numerous complaints about "the formulation of the rules relating to doctor-patient and husband-wife privileges, . . . and official information, . . . among others."[68] Draft Rule 504 set out a psychotherapist privilege but not a general medical privilege.[69] Draft Rule 505 purported to abolish the spousal communications privilege while continuing to recognize an accused's right to prevent his or her spouse from testifying against the accused.[70] Draft Rule 509 described a broad privilege for government information.[71] Representative Bertram Podell was sharply critical of draft Article V for curtailing the medical and spousal privileges.[72] Draft Rule 509, expansively describing government privilege, became a special target. The timing was terrible because the Court submitted the draft to the same Congress that had recently battled President Nixon in federal court over claims of government privilege.[73]

After blocking the promulgation of the draft Rules, Congress spent two years deliberating over the Rules.[74] Much of the time was devoted to a detailed critique of draft Article V. The Rules ultimately took the form of statutes enacted by Congress rather than mere court rules promulgated

62. 1 IMWINKELRIED, *supra* note 17, § 4.2.2(a), at 244.

63. *Id.*

64. *Id.*

65. 5 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 501 App.101[1][a] (Mark S. Brodin ed., Matthew Bender 2d ed. 2020); Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 IND. L.J. 845, 881 (1990) (describing the rulemaking process as a "firestorm").

66. Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673, 675 (1975).

67. Kenneth S. Broun, *Giving Codification a Second Chance—Testimonial Privileges and the Federal Rules of Evidence*, 53 HASTINGS L.J. 769, 769 (2002).

68. H.R. REP. NO. 93-52, at 4 (1973).

69. H.R. DOC. NO. 93-46, at 12–13 (1973).

70. *Id.* at 13–14.

71. *Id.* at 15–16.

72. *Proposed Rules of Evidence: Hearings Before the Spec. Subcomm. on Reform of Fed. Crim. Laws of the H. Comm. on the Judiciary*, 93d Cong. 7 (1973) (statement of Hon. Bertram L. Podell).

73. 1 IMWINKELRIED, *supra* note 17, § 4.2.2(a), at 247–48.

74. *See id.* at 244–45 ("[I]n February 1973, the Senate . . . block[ed] the implementation of the draft."); *Id.* § 4.2.2(f), at 262 ("Public Law 93-595, establishing the Federal Rules of Evidence, was approved by both houses on January 2, 1975.").

by the Supreme Court.[75] When the dust settled at the end of the process, although Congress only amended other draft Articles, Congress completely jettisoned every provision in the original Article V[76] and substituted a version of the current Rule 501. In pertinent part, Rule 501 reads:

> The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise:
> - the United States Constitution;
> - a federal statute; or
> - rules prescribed by the Supreme Court.[77]

In turn, Rule 101(b)(5) defines "a rule prescribed by the Supreme Court [as] a rule adopted by the Supreme Court under statutory authority,"[78] that is, the Rules Enabling Act, 28 U.S.C. § 2074. Congress treated Article V not only in a different substantive fashion than all of the other Articles but also in a different procedural manner. The final legislation reserves a limited congressional veto power over most proposed amendments to the Federal Rules; for most articles, an amendment proposed by the Court will take effect unless Congress takes affirmative action to block the amendment within 180 days.[79] However, Congress prescribed that privilege amendments may take effect only with Congress's affirmative approval; the Act flatly states that privilege amendments "shall have no force or effect unless approved by Act of Congress."[80] Thus, Congress retained more control over privilege rules than other evidentiary doctrines.

Congress chose to exercise that extensive control in 2008 when it enacted Rule 502. By 2008, American litigation was well into the era of "documents cases." Pretrial discovery had eclipsed trial as the most important phase of the litigation process; in the new era of "the vanishing trial" there were relatively few trials,[81] and the vast majority of cases were disposed of without trial on the basis of the developments during pretrial discovery. In *United States v. IBM*, the attorneys produced over

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75. 5 WEINSTEIN & BERGER, *supra* note 65, § 501 app.101[2].

76. Daniel J. Capra & Liesa L. Richter, *Poetry in Motion: The Federal Rules of Evidence and Forward Progress as an Imperative*, 99 B.U. L. REV. 1873, 1894 (2019) ("Congress famously torpedoed the detailed proposed rules of privilege in favor of Rule 501, leaving privilege to common law development.").

77. FED. R. EVID. 501.

78. FED. R. EVID. 101(b)(5).

79. *See* 1 IMWINKELRIED, *supra* note 17, § 4.2.2(e).

80. *See id.*; 28 U.S.C. § 2074(b); FED. R. EVID. 502 advisory committee's note ("Unlike all other federal rules of procedure prescribed under the Rules Enabling Act, those rules governing evidentiary privilege must be approved by an Act of Congress, 28 U.S.C. § 2074(b).").

81. Capra & Richter, *supra* note 76, at 1877 (citing Ad Hoc Comm. on the Future of the Civ. Trial of the Am. Coll. of Trial Lawyers, *The "Vanishing Trial": The College, the Profession, the Civil Justice System*, 226 F.R.D. 414, 414 (2005) (the "trial implosion"); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459 (2004) ("The portion of federal civil cases resolved by trial fell from 11.5 percent in 1962 to 1.8 percent in 2002 . . . ."). In some states, the figure is as low as 0.6%. Galanter, *supra*, at 506–08.

sixty-four million pages of documents in the first five years of pretrial discovery.[82] In another federal case, the *Washington Public Power Supply System Litigation*[83] (the WPPSS case), involving a default on the bonds sold to finance a nuclear power plant project, "more than 200 million pages of documents were produced."[84] Businesses' reliance on electronically stored information increased the problem exponentially:

> Perhaps no case could be a more monumental example of the reality of modern e-discovery than the . . . copyright infringement lawsuit against YouTube filed . . . in 2008. In that dispute, the judge ordered that 12 terabytes of data be turned over, according to Matthew Knouff.
>
> "People often say that one terabyte equals 50,000 trees, and 10 terabytes would be the equivalent of all the printed collections in the Library of Congress," says Knouff, . . . general counsel of Complete Discovery Source, a New York City-based . . . discovery services provider. For the Viacom/YouTube case then, the demand was for the printed equivalent of the entire Library of Congress. And then some.[85]

When the magnitude of pretrial production events becomes so massive, it is virtually inevitable that a producing party will mistakenly disclose some privileged information. The "time constraints"[86] imposed by tight discovery deadlines and the staggering number of documents make it virtually impossible for the producing party to avoid such inadvertent disclosures—no matter how careful the manual or technology-assisted review (TAR)[87] of the documents being produced. The problem was magnified because, in the event of inadvertent production, many courts applied two unreasonably strict waiver rules.

One rule was that no matter how thorough and painstaking the party's preproduction privilege review had been, even an inadvertent production resulted in an automatic waiver of any privilege attaching to the material.[88] As the Introduction indicated, these courts required the holder to treat privileges "like jewels—if not crown jewels."[89] The courts applied a "strict"[90] standard, which mandated treating any "uncoerced disclo-

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82. Michael A. Pope, *Rule 34: Controlling the Paper Avalanche*, LITIG., Spring 1981, at 28, 28.

83. *In re* Wash. Pub. Power Supply Sys. Sec. Litig., MDL No. 551, 1988 WL 158947 (W.D. Wash. July 28, 1988).

84. Irwin J. Sugarman, *Coordinating Complex Discovery*, LITIG., Fall 1988, at 41, 41.

85. Joe Dysart, *The Trouble with Terabytes: As Bulging Client Data Heads for the Cloud, Law Firms Ready for a Storm*, A.B.A. J., Apr. 2011, at 32, 32; *see also* Capra & Richter, *supra* note 76, at 1895 ("Eyes-on review of every single electronically stored terabyte became prohibitively expensive, if not impossible.").

86. FED. R. EVID. 502(b) advisory committee's note.

87. *Id.* (referring to "advanced analytical software applications").

88. *See* 2 IMWINKELRIED, *supra* note 17, § 6.12.4(a)(4), at 1251.

89. Leonard H. Becker, *When Advocacy Trumps Confidentiality*, LEGAL TIMES, July 17, 2000, at 19 (quoting *In re* Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989)).

90. Jacob P. Hart & Anna Marie Plum, *Litigating the Production of Electronic Media*, PRAC. LITIGATOR, July 2001, at 31, 39–40.

sure"[91] as a waiver even when the disclosure was indisputably inadvertent.[92]

To make matters worse, many courts then applied a second, unreasonably severe waiver rule, namely that a waiver with respect to one privileged item automatically extends to all other privileged items relevant to the same subject matter.[93] The courts broadly defined the scope of the waiver.[94] The courts found extensive subject matter waivers even when the relationship between the disclosed information and the other information was "tangential"[95] or "tenuous."[96] The combined effect of these two waiver doctrines was that if a holder allowed even a single privileged document to slip through the preproduction privilege review, there was a waiver applied to every other privileged document relevant to the same topic. The predictable result of the concurrent operation of these two waiver rules was that, before production, litigants felt compelled to spend ridiculous sums of money on preproduction privilege reviews. As the Introduction noted, in one antitrust case Verizon spent almost $14 million on such a review.[97] The potentially enormous cost of such a preproduction privilege review could easily exceed the monetary stakes in a case.[98] In order to avoid incurring that cost, even a litigant with a completely meritorious claim or defense might conclude that it had no alternative but to settle.[99] Businesses complained to Congress about the problem and Congress became convinced that unsound, draconian waiver rules were the root cause.[100] The pertinent Senate Judiciary Committee Report states:

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91. Jasmine Networks, Inc. v. Marvell Semiconductor, Inc.,12 Cal. Rptr. 3d 123, 128 (Cal. Ct. App. 2004), *review granted and opinion superseded*, 94 P.3d 475 (Cal. 2004).

92. *In re* Grand Jury, 475 F.3d 1299, 1305 (D.C. Cir. 2007).

93. 2 IMWINKELRIED, *supra* note 17, § 6.12.7(a), at 1327–30. Federal Rule of Evidence 401 codifies a liberal definition of "relevant" evidence. United States v. Causey, 748 F.3d 310, 316 (7th Cir. 2014) (stating that the item must merely "in some degree advance the inquiry" to be relevant (quoting Thompson v. City of Chicago, 472 F.3d 444, 453 (7th Cir. 2006))), *cert. denied*, 139 S. Ct. 295 (2018); United States v. Nason, 9 F.3d 155, 162 (1st Cir. 1993) ("The threshold for relevance is very low under Federal Rule of Evidence 401."); United States v. Harry, 20 F. Supp. 3d 1196, 1221 (D.N.M. 2014) ("The standard for relevance is liberal."); *see* 1 MCCORMICK ON EVIDENCE §§ 184–85 (Robert P. Mosteller ed., 8th ed. 2020).

94. Jennifer A. Hardgrove, Note, *Scope of Waiver of Attorney-Client Privilege: Articulating a Standard That Will Afford Guidance to Courts*, 1998 U. ILL. L. REV. 643, 664–67; *see* Meds. Co. v. Mylan Inc., 936 F. Supp. 2d 894, 906 (N.D. Ill. 2013) ("Waiver is broad in scope . . . ."); VLT, Inc. v. Artesyn Techs., Inc., 198 F. Supp. 2d 56, 57 (D. Mass. 2002) ("[Plaintiff's actions] operate[d] as a subject matter waiver . . . as to all communications on the same subject matter.").

95. Hardgrove, *supra* note 94, at 667.

96. *Id.* at 664.

97. Lindsay, *supra* note 29.

98. Capra & Richter, *supra* note 76, at 1895 ("The costs of pre-trial discovery threatened to eclipse the value of a case in some circumstances.").

99. FED. R. EVID. 502(d) advisory committee's note (describing the costs as "prohibitive").

100. *See* S. REP. NO. 110-264, at 1–2 (2008), *as reprinted in* 2008 U.S.C.C.A.N. 1305, 1305–06.

> The costs of discovery have increased dramatically in recent years as the proliferation of email and other forms of electronic record-keeping have multiplied the number of documents litigants must review to protect privileged material. Outdated law affecting inadvertent disclosure coupled with the stark increase in discovery materials has led to dramatic litigation cost increases.
>
> Currently, the inadvertent production of even a single privileged document puts the producing party at significant risk. If a privileged document is disclosed, a court may find that the waiver applies not only to that specific document and case but to all other documents and cases concerning the same subject matter. Furthermore, the privilege can be waived even if the party took reasonable steps to avoid disclosing it.
>
> The increased use of email and other electronic media in today's business environment have exacerbated the problems with the current doctrine on waiver. Electronic information is even more voluminous and dispersed than traditional record-keeping methods, greatly increasing the time needed to review and separate privileged from non-privileged material. As the time spent reviewing documents has increased, so too has the amount of money litigants on all sides must spend to protect against the potential waiver of privilege.[101]

As in the case of the original enactment of the Federal Rules, including Rule 501, Rule 502 took the form of a statute enacted by Congress. Rules 502(a) and (b) are the antidotes to the two unreasonably strict waiver doctrines that Congress perceived to be the cause of the problem. Again, one waiver rule was the doctrine that even the most inadvertent production of a privileged document automatically forfeited all the privileges attaching to the document. Rule 502(b) abolishes that rule. It is true that under Rule 502(b) inadvertent production can sometimes result in a waiver, but according to the Rule, the inadvertent production of a privileged document does not affect a waiver if: "(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error . . . ."[102]

For its part, Rule 502(a) flatly repudiates the second harsh waiver rule that even an inadvertent act of production automatically results in a subject matter waiver. Quite to the contrary, according to Rule 502(a)(1) only an "intentional" waiver can trigger a subject matter waiver.[103] As the Advisory Committee Note to Rule 502(a)(1) explains, "[A]n inadvertent disclosure of protected information can never result in a subject matter waiver."[104] The end result is that Rules 502(a) and(b) reject the strict waiver rules and replace them with more sensible, practical standards.

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101. *Id.*
102. FED. R. EVID. 502(b)(2)–(3).
103. *Id.* at 502(a)(1).
104. *Id.* at 502(a) advisory committee's note.

B. The Specific Controversy over Rule 502(d) Selective Waiver Orders

As we have seen, the legislative purpose of Rules 502(a) and (b) included the reform of two strict waiver rules. The remaining question is whether Rule 502(d) should similarly be construed as permitting the reform of a third restrictive waiver doctrine, namely the rule forbidding selective waivers.

At first blush, there seems to be a strong case that the answer to the question is yes. As parts of the same statute, Rule 502(d) ought to be construed in the context of Rules 502(a) and (b).[105] If both Rules 502(a) and (b) move the law in the direction of making it harder to find waivers and easier to uphold prima facie privilege claims, it would certainly be consistent to interpret Rule 502(d) in the same spirit. For that matter, construing Rule 502(d) as authorizing selective waiver orders is a less drastic step than the changes effected by Rule 502(a) and (b); while in some instances Rule 502(a) and (b) forbid courts from finding a waiver, upholding Rule 502(d) selective waiver orders has the less dramatic effect of merely limiting the extent of a waiver.[106] Moreover, the text of 502(d) can bear the interpretation that it allows selective waiver orders; affirmatively, the wording is expansive enough to support that interpretation,[107] and negatively, 502(d) does not contain any language explicitly prohibiting courts from issuing such orders.

However, when we turn to the legislative history of Rule 502, the picture becomes muddier. An original draft of Rule 502 included language expressly authorizing selective waivers.[108] The provision would have stated that there is no 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."[109] However, attorneys' groups voiced opposition to the provision. According to Professor Daniel Capra, the Reporter for the Federal Rules of Evidence Advisory Committee, strange bedfellows joined ranks to oppose the provision: "[D]efense attorneys [did] not like the section on selective waiver because it eliminate[d] a common excuse for not cooperating with government investigators. . . . [T]he plaintiffs' bar [was] also unhappy with the provision because it [would] reduce the evidence available for civil litigation following a government investigation."[110]

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105. *See generally* Edward J. Imwinkelried, *"Importing" Restrictions from One Federal Rule of Evidence Provision to Another: The Limits of Legitimate Contextual Interpretation in the Age of Statutes*, 72 Okla. L. Rev. 231 (2020).

106. *See* Fed. R. Evid. 502(d).

107. Griffith, *supra* note 36, at 53–54.

108. Kenneth S. Broun & Daniel J. Capra, *Getting Control of Waiver of Privilege in the Federal Courts: A Proposal for a Federal Rule of Evidence 502*, 58 S.C. L. Rev. 211, 247–48, 251 (2006).

109. *Id.* at 248 (citing Fed. R. Evid. 502 (Proposed Draft 2006)).

110. J.P. Finet, *Selective Waiver of Privilege Provision Likely to Be Pulled from Proposed Rule of Evidence*, Laws. Man. on Prof. Conduct, Current Reports (ABA/BLAW) (Feb. 7, 2007).

In a statement about the proposed Rule, Representative Jackson-Lee asserted that Rule 502(d) "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 the information."[111]

Although several elements of the legislative history of Rule 502 seem at odds with the expansive text of Rule 502(d), the final analysis of the text of Rule 502 and two passages in the legislative history will prove to be key, as we shall see in Part IV. It is critical to remember that by its terms, Rule 502 deals only with waivers effected by the holder's "disclosure" of privileged information. One passage in the Senate Judiciary Committee report contains the following description of what a judge is affirmatively authorized to do under Rule 502(d); for example, "[i]f a federal court enters an order finding that an inadvertent disclosure of privileged information does not constitute a waiver, that order will be enforceable against [other] persons in federal or state proceedings."[112]

Just as significantly, in the second passage Representative Jackson-Lee's statement elaborates negatively on what Rule 502(d) does not empower the judge to do:

> [Rule 502(d)] does not alter the law regarding waiver of privilege resulting from having acquiesced in the use of otherwise privileged information. . . .
>
> . . . [A]cquiescence by the disclosing party in use by the federal agency of information disclosed pursuant to such an order would still be treated as under current law for purposes of determining whether the acquiescence in use of the information, as opposed to its mere disclosure, effects a waiver of the privilege. The same applies to acquiescence in use by another private party.[113]

Part IV demonstrates that, perhaps somewhat surprisingly, the text of Rule 502(d) and those two passages can cohere in a satisfactory resolution of the controversy over the validity of Rule 502(d) selective waiver orders.

IV. A CRITICAL EVALUATION OF THE QUESTION OF THE VALIDITY OF SELECTIVE WAIVER ORDERS UNDER FEDERAL RULE OF EVIDENCE 502(d)

As the Introduction pointed out, the key to resolving the controversy over the validity of Rule 502(d) selective waiver orders is grasping two scopes—the limited scope of Rule 502 and the varying scope of the conceivable types of selective waiver agreements.

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111. 154 CONG. REC. H7817, 7818–19 (daily ed. Sept. 8, 2008) (statement of Rep. Jackson-Lee).

112. *See* S. REP. NO. 110-264, at 3 (2008), *as reprinted in* 2008 U.S.C.C.A.N. 1305, at 1307.

113. 154 CONG. REC. H7817, 7818–19.

We have repeatedly noted that Rule 502 addresses only waivers effected by the holder's disclosure. The Advisory Committee Note to Rule 502 explicitly states that "the rule does not purport to supplant applicable waiver doctrine generally. The rule governs only certain waivers by disclosure."[114] Conduct other than disclosure can result in a waiver. For example, even if the holder does not make any disclosure, the holder can waive under the "at issue" doctrine.[115] If a plaintiff sues a defendant for fraud, in his or her answer the defendant might allege that they had an innocent state of mind because they justifiably relied on "advice of counsel." At that point, the defendant has not yet disclosed the substantive content of any of their communications with counsel, but the allegation in the pleading makes the communications so highly relevant that, as a matter of fairness, the defendant has waived the privilege.[116] Likewise, it is well-settled that the holder waives the privilege if he or she expressly consents to the public disclosure of the privileged communication by a third party.[117] The holder need not personally make the disclosure; the holder's consent suffices to effect the waiver. Furthermore, there is certainly a waiver if, although having an opportunity to object, the holder does not object when a third party attempts to introduce the privileged information into evidence.[118] Here, too, it is irrelevant that the holder does not personally make any disclosure; the holder implicitly consents to a third party's use of the information that would destroy its confidentiality. As previously stated, the legislative history of Rule 502 indicates that it does not govern situations in which, although the holder has not disclosed the information, the holder has acquiesced in someone else's use of the information in a way that would be at odds with preserving its confidentiality.[119] The solitary type of waiver controlled by Rule 502 is waiver effected by the holder's disclosure.[120]

The other scope to keep in mind is the varying scope of the conceivable types of selective waiver agreements. As previously stated, the parties could reach a bare-bones agreement that the holder will disclose to the other party while simultaneously reserving the right to later assert the privilege against other parties. In the context of a DPA with the govern-

114. FED. R. EVID. 502 advisory committee's note.

115. 2 IMWINKELRIED, *supra* note 17, § 6.12.4(b)(2), at 1214–15.

116. *See* Xcentric Ventures, L.L.C. v. Borodkin, 934 F. Supp. 2d 1125, 1146 (D. Ariz. 2013), *aff'd*, 798 F.3d 1201 (9th Cir. 2015); *see also* FED. R. EVID. 502 advisory committee's note ("Other common-law waiver doctrines may result in a finding of waiver even where there is no disclosure of privileged information . . . . *Nguyen v. Excel Corp*., 197 F.3d 200, 206 (5th Cir. 1999) (reliance on an advice of counsel defense waives the privilege with respect to attorney-client communications pertinent to that the defense); *[B]yers v. Burleson*, 100 F.R.D. 436, 438 (D.D.C. 1983) (allegation of lawyer malpractice constituted a waiver of confidential communications under the circumstances). The rule is not intended to displace or modify federal common law concerning waiver of privilege or work product where no disclosure has been made.").

117. 2 IMWINKELRIED, *supra* note 17, § 6.12.4(a)(5), at 1209–10.

118. Certain Underwriters at Lloyd's v. Nat'l R.R. Passenger Corp., 218 F. Supp. 3d 197, 202 (E.D.N.Y. 2016).

119. *See* FED. R. EVID. 502 advisory committee's note.

120. *See id.*

ment, the holder might hope that having considered the disclosed information, the government will either dismiss charges or support a lenient sentence.

However, the agreement incorporated in the Rule 502(d) order could have a larger scope. For instance, the agreement might be to the effect that although the holder intends to retain the privilege as against third parties, the holder not only agrees to disclose to the government but also consents to certain public disclosures of the information. The government might want to publicly disclose the information in order to publicize the precise type of misconduct it considers illegal and discourage other parties from engaging in such conduct. Finally, theoretically, while purporting to reserve the holder's privilege rights against other parties, the agreement might call for the holder to both disclose and consent to the use of the disclosed information as evidence in a proceeding between the holder and the government. Again, if the holder were faced with multiple charges or proceedings, to obtain lenient treatment on other charges or in other proceedings the holder might plausibly assent to the use of the information as evidence on a particular charge or in a certain proceeding. What would be the consequences if a judge incorporated one of these broader agreements in a Rule 502(d) order? Consider the two types of selective waiver agreements that could be incorporated into a 502(d) order and, for each type of agreement, two fact situations in which the holder might rely on the order in later litigation involving third parties.

A. A Rule 502(d) Order Incorporating a Narrow Selective Waiver Agreement in Which the Holder Merely Promised to Disclose Privileged Information

1. Variation #1

As we have seen, one passage in the legislative history of Rule 502(d) asserts that 502(d) "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 the information."[121] That assertion is false when it is applied to a case in which the incorporated selective waiver agreement contemplates only that the holder will disclose the information to the government—and then hope that the disclosed information will persuade the government to treat the holder favorably. Here the scope of the agreement and the scope of Rule 502 coincide—disclosure simpliciter. Again, Rule 502(d) reads: "A federal court may order that the privilege . . . 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."[122]

121. 154 Cong. Rec. H7817, 7818–19 (daily ed. Sept. 8, 2008).
122. Fed. R. Evid. 502(d).

The passage from the Senate Judiciary Committee report, quoted at the end of Part III, confirms that that language was intended to mean what it plainly says.[123] In the words of Rule 502(d), the privilege would not be waived by "disclosure" pursuant to the agreement, and in this variation of the facts, the holder has not performed or consented to any other act that could trigger a waiver. If so, the last clause in 502(d) dictates that disclosure pursuant to this limited selective waiver agreement would not affect "a waiver in any other federal or state proceeding."[124] That language would certainly apply to a subsequent federal or state lawsuit in which a third party sought to discover the disclosed information. As the Advisory Committee Note states, "[T]hat order is enforceable against all [other] persons . . . in any federal or state proceeding."[125] There is nothing in the text of the Rule or its legislative history to suggest that the expression, "any other federal or state proceeding," is restricted to cases involving the identical parties as the proceeding in which the Rule 502(d) order was entered. In this variation of the fact situation, an appellate court could not invalidate a lower court's Rule 502(d) selective waiver order without torturing the language of Rule 502(d). Thus, if the holder and the government resolve their dispute based on the government's review of the disclosed information, that dispute terminates, and the 502(d) order will preserve the holder's privilege in subsequent litigation filed by third parties.

2. Variation #2

However, suppose that the holder's initial disclosure does not lead to a mutually satisfactory resolution of their dispute. The government then takes the dispute to a trial or enforcement hearing and offers the privileged information as evidence at the trial or hearing. In this variation, by their terms, neither the agreement between the holder and the government nor the order incorporating the agreement applies to the introduction of the evidence. Both the agreement and the order are limited to the holder's disclosure to the government. If at the time of the proffer of the evidence the holder did not object, the failure to object would affect a waiver;[126] as a party to the trial or hearing, the holder would have the opportunity to object, and the holder's neglect to object results in a waiver. If a waiver occurred at that point, in a later lawsuit against the holder by private parties, the holder could no longer claim the privilege.

123. *See* 154 CONG. REC. H7817, 7818–19.
124. FED. R. EVID. 502(d).
125. FED. R. EVID. 502 advisory committee's note.
126. *See* 2 IMWINKELRIED, *supra* note 17, § 6.12.4(c)(6), at 1286.

B. A Rule 502(d) Incorporating a Broader Selective Waiver Agreement in Which the Holder Both Promised to Disclose Privileged Information and to Perform or Consent to Other Acts That Would Effect a Waiver

Now, suppose that the parties are bolder and draft a broader selective waiver agreement, which the judge agrees to incorporate into a Rule 502(d) order. In this scenario, the government exacts more than the holder's mere promise to disclose privileged information to the government. Rather, either because the holder wants to impress the government with its bona fides or because the government simply has more leverage, the holder agrees to some public disclosure of the disclosed information, possibly even the use of the information as trial evidence. Would a Rule 502(d) incorporating that agreement withstand scrutiny and protect the holder? As in the case of Section IV.A, consider two variations of the fact situation.

1. Variation #1

Assume that after the parties' entry into the agreement and a court's incorporation of the agreement into a purported 502(d) order, the holder makes the initial disclosure. However, even after the disclosure, the holder and government cannot reach a mutually satisfactory outcome. The government takes the case to trial. At the trial, the government offers some of the privileged information into evidence, and relying on the terms of the 502(d) order, the holder fails to object—thinking that the order will enable the holder to assert the privilege in subsequent litigation filed against the holder by private parties. Will the holder be able to claim the privilege in the subsequent litigation?

On the one hand, the part of the agreement dealing with only disclosure would be valid. The scope of that part of the agreement and the scope of Rule 502 again coincide. If the agreement stopped there, the analysis would be exactly the same as in Variation #1 in Section III.A.

On the other hand, the agreement does not stop there; the terms go further and include a provision in which the holder consents to some public disclosure of the information or, in an extreme variation of the agreement, even the use of the information as evidence. What should be the analysis in this scenario?

The first step in the analysis is resolving the question of whether, given its limited scope, Rule 502 can be invoked to uphold the part of the agreement dealing with acts other than mere production if the agreement is included in a Rule 502(d) order. The answer is no. That part of the order is ultra vires and nugatory; Rule 502 deals only with waiver effected by disclosure. It would be indefensible to strain the text to extend to other types of waiver; the wording of Rule 502(d) cannot reasonably bear that construction, and there is nothing in the legislative history of Rule 502 to warrant going so far beyond the text. Rule 502 does not empower

the judge to validate the portion of the Rule 502(d) order dealing with acts other than disclosure. Simply stated, that part of the order is invalid because the court lacks the power to issue the order. Consequently, the order does not cover the holder's failure to object to the government's use of the information as evidence, and the holder's failure to object would again result in a waiver.[127] Having neglected to object to the government's introduction of the evidence, the holder could not later claim the privilege against private parties in a subsequent lawsuit—the same result that was obtained in Variation #2 in Section III.A.

2. Variation #2

Alternatively, suppose that after the holder's disclosure, the holder and the government reach a mutually satisfactory disposition and that the government never has occasion to make any public disclosure of the information. More specifically, suppose that the government never attempts to introduce any of the privileged information into evidence at any public hearing. At first blush, the holder would seem to have a stronger case for asserting the privilege in the subsequent lawsuit in this variation than in the first variation where the government proffered the evidence at a trial or hearing. Yet, the private litigant who wants to discover the disclosed information in a subsequent lawsuit has an intriguing argument.[128] When the holder enters into such a broad agreement, there

127. *See id.*

128. Technically, there is another issue that turns on whether the two parts of the order can be severed. Suppose that although the order referred to post-disclosure, public use of the information, the case was disposed of after the disclosure. Having reviewed the disclosed information, the government not only gave the holder favorable treatment but also decided against making any public use of the privileged information. In a subsequent lawsuit by private parties, those parties might contend that because the non-disclosure part of the agreement was invalid, the entire order was invalid, and that, therefore, even the disclosure otherwise covered by Rule 502 effected a waiver. In the analogous situation in which a court finds that part of a statute is invalid, perhaps as being unconstitutional, the court engages in a severability analysis. SD Voice v. Noem, 432 F. Supp. 3d 991, 1002 (D.S.D. 2020), *appeal docketed*, No. 20-1262 (8th Cir. Feb. 10, 2020). The court usually begins the severability analysis by inquiring whether the valid part could stand by itself. *Id.* Here the answer is yes; the disclosure provision could stand separately, just as it could if it were the entire scope of a narrow selective waiver agreement. If the valid provision of the statute could stand on its own two feet, the court then inquires whether the legislature would have intended the valid portion to take effect without the invalid portion. *Id.* There is an unavoidable element of speculation in this phase of the analysis even if the statute contains a general severability clause. However, in many contexts the courts rely on the scholastic philosophy concept of interpretative intent: the intent that a person would have had if he or she had foreseen the problem that materialized. *See* Edward J. Imwinkelried, *A More Modest Proposal Than a Common Law for the Age of Statutes: Greater Reliance in Statutory Interpretation on the Concept of Interpretative Intention*, 68 ALB. L. REV. 949, 953 (2005). For example, when an unforeseen contingency prevents the performance of a contract, the courts invoke interpretative intent to decide whether to discharge, without any liability, the party who could not perform his or her duty. In this hypothetical, the court would probably conclude that the valid disclosure provision is severable from the invalid provisions dealing with acts other than disclosure. In entering the Rule 502(d) order, the judge's basic intent is to facilitate the holder's dispute with the government. In this hypothetical, after the holder's disclosure, the parties were able to resolve the dispute. The fact that the government did not deem it necessary to put the disclosed information to any use

is a pitfall that to date has gone unidentified. The thrust of the private litigant's argument would be that in the agreement, the holder waived the privilege by merely consenting that the government could use the information to make a public disclosure or offer the information into evidence—even if the government never put the information to either of those uses. This argument well might carry the day. Draft Federal Rule of Evidence 511 dealt with waiver: "A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses *or consents to disclosure* of any significant part of the matter on communication."[129]

The draft Rule refers in the alternative to two ways in which the holder can waive, that is, either disclosing or consenting to disclosure. California Evidence Code § 912(a) does likewise:

> Except as otherwise provided in this section, the right of any person to claim a privilege . . . is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication *or has consented disclosure made by anyone.*[130]

It is easiest for the courts to find consent when the holder grants express consent,[131] as the holder would in the case of a broad selective waiver agreement incorporated in a Rule 502(d) order. Moreover, it is critical to bear in mind the lingering judicial hostility to privileges and their obstructive effect on the search for truth; the courts have gone quite far in both finding implied consent and declaring waiver even when in fact there was no subsequent disclosure to someone outside the circle of confidence. Professors Wright and Graham give the example of a client depositing privileged communications in a public library; in their view, "the privilege would be waived, even though no one ever read them."[132] In one case, the court ruled that leaving a notepad containing privileged information in a prominent place in a public court was inconsistent with a claim of confidentiality.[133] The upshot is that consent to public disclosure can affect a waiver even before and without actual disclosure. Hence, in the subsequent lawsuit in Variation #2 the private litigant has an excellent chance of defeating the holder's privilege objection on the ground that

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that would destroy its confidentiality does not detract from the fact that the intended result was achieved.

129. 2 IMWINKELRIED, *supra* note 17, app. A, at 2112 (emphasis added).

130. CAL. EVID. CODE § 912(a) (West 2015) (emphasis added).

131. *See, e.g.*, Bolin v. State, 650 So. 2d 19 (Fla. 1995). The accused gave the police detectives consent to speak to his wife about her knowledge of his involvement in a murder. *Id.* at 21.

132. Goldstein v. Colborne Acquisition Co., 873 F. Supp. 2d 932, 938 (N.D. Ill. 2012) (quoting CHARLES A. WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE & PROCEDURE § 5507, at 580 n.126 (1986)).

133. United States v. Waller, 581 F.2d 585, 586–87 (6th Cir. 1978); *see also* KENNETH S. BROUN, EVIDENTIARY PRIVILEGES IN FEDERAL COURTS: SURVEY RULES 13 (2014) (discussing *Waller*).

the terms of the broad selective waiver agreement manifested consent to public disclosure of the information and thereby destroyed the privilege. A 502(d) order, incorporating a broad agreement, is invalid because Rule 502 is limited to waivers by disclosure. Paradoxically, by seeking more extensive protection in a broader selective waiver agreement, the holder could lose even the basic protection that would be afforded by a narrower 502(d) order limited to disclosure.

V. CONCLUSION

As Part II noted, the English philosopher Jeremy Bentham and the American Evidence scholar John Henry Wigmore have had a profound influence on the Anglo-American law of privilege. The former campaigned to abolish most privileges as obstructions to the search for truth, and the latter urged confining privileges to the narrowest limits possible. As Professor Liesa Richter, the Academic Consultant to the Federal Rules of Evidence Advisory Committee, has observed, their influence has led many American courts to adopt restrictive, absolutist positions on privilege waivers.[134] This Article has touched on a trilogy of such positions: even an inadvertent production of privileged information results in a waiver as to that information, a waiver as to any privileged material automatically effects a subject matter waiver extending to all privileged information relevant to the same topic, and a holder may not make a selective waiver. These positions pressure the holder to treat his or her privilege as a crown jewel[135]—the protection of the precious jewel requires the holder to refrain from any conduct the least bit inconsistent with the maintenance of the confidentiality of the information on pain of waiver.

Federal Rules 502(a) and (b) put an end to the first two restrictive rules in federal practice. Rules 502(a) and (b) abolished those rigid categorical rules and replaced them with more flexible standards. Under Rule 502(b), inadvertent production does not have the drastic consequence of an automatic waiver. If a holder takes reasonable steps to prevent the production of privileged material and acts promptly to rectify the problem when the holder subsequently later discovers that there has been an unintentional production,[136] there is no waiver at all. Even if there has been a waiver as to some privileged information, Rule 502(a) abandons the harsh view that the waiver automatically applies to every other item of privileged information relevant to the same subject. There can be a subject matter waiver but only in exceptional circumstances—situations in which the production was intentional and the disclosed and undis-

134. Richter, *supra* note 23, at 129–30.

135. *See* Becker, *supra* note 89 and accompanying text.

136. FED. R. EVID. 502(b) advisory committee's note ("The rule does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake. But the rule does require the producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently.").

closed information "ought in fairness to be considered together."[137]

The remaining question is the third strict waiver rule: the majority view prohibiting selective waiver. Just as many courts found waivers based on inadvertent production and expanded those waivers to the entire subject matter, most courts have refused to embrace the notion of selective waiver. Unlike their English counterparts,[138] the majority of American courts still treat the issue as an all-or-nothing proposition: either the holder asserts the privilege against all persons and entities outside the magic circle, or the holder waives the privilege in its entirety as to all strangers to the privileged relationship. Putting aside selective waiver agreements between private parties, the proponents of selective waiver contend that, at least in the context of government investigations into corporate misconduct, selective waiver agreements can serve a useful public purpose. If the agreement incorporated into a Rule 502(d) order removes the corporation's fear that disclosure to the government will expose the corporation to extensive monetary liability in subsequent private litigation, the agreement can encourage corporate cooperation with government investigators, conserve the investigators' limited resources, and increase the probability that the real malefactors—the natural persons who acted on behalf of the corporation—will be punished. When the corporation is facing modest criminal punishment but the misconduct could potentially expose the entity to substantial civil liability in later litigation, absent a Rule 502(d) order the corporation might very well refuse to cooperate with the government. As we have seen, the original draft would have expressly authorized Rule 502 orders incorporating selective waiver agreements, but attorney groups successfully lobbied to have that language deleted from the final version of Rule 502. Today, some opponents of selective waiver point to the passage in the extrinsic legislative history material avowing an intention that Rule 502(d) orders may not incorporate a selective waiver agreement.

As this brief Article has hopefully demonstrated, the weakness of the opponents' argument is that the argument overlooks two crucial scope issues: the scope of Rule 502 and the varying scope of the different conceivable types of selective waiver agreements. Rule 502 regulates waivers effected by disclosure. If a 502(d) order incorporates a narrow selective waiver agreement limited to disclosure, the enforcement of the agreement is entirely consistent with the text of the Rule. The holder, though, can overreach by asking the court to incorporate a broad selective waiver agreement purportedly protecting the holder against waivers effected by

137. Thus, it is not enough that the disclosed and undisclosed information relate to the same topic. Under Rule 502(a)(1), the disclosure must be intentional, and Rule 502(a)(3) imposes the further limitation that "they ought in fairness to be considered together." FED. R. EVID. 502(a)(1), (3). As the Advisory Committee Note points out, the wording of Rule 502(a)(3) echoes the fairness standard codified in the federal version of the rule of completeness, Federal Rule 106. 1 MCCORMICK ON EVIDENCE, *supra* note 93, § 32.

138. *See* Belhaj v. Dir. Pub. Prosecutions [2018] EWHC (Admin) 513 [2] (Eng.); Citic Pac. Ltd. v. Sec'y for Just., [2012] 4 H.K.C. 1, 15; Berezovsky v. Hine [2011] EWHC (Civ) 1089, [28]–[29] (Eng.); *see also supra* text accompanying note 51.

other conduct such as publication of the privileged information or even the use of the information as trial evidence. Courts cannot look to Rule 502 as a source of authority to uphold orders of that breadth; those orders exceed Rule 502's modest scope, applying only to waivers effected by disclosure. Part IV demonstrated that if the holder overreaches by asking a court to enforce such an agreement, the holder's efforts may be worse than ineffective; the efforts may prove to be counterproductive in the sense that they waive the privilege for even the disclosed information by manifesting consent to acts other than production, which triggers waiver.

Rules 502(a) and (b) go a long way toward meaningful reform of the federal law of privilege waiver. They repudiate the first two rules in the trilogy of restrictive waiver doctrines and replace them with practical, sensible standards. Rule 502(d) should be construed as modifying the third rule in the trilogy and permitting the holder to assert the privilege against third parties only in a circumscribed fact situation: the order incorporates a narrow selective waiver agreement limited to the holder's initial disclosure, and the holder neither performs nor consents to any other act that could affect a waiver. Even in that situation a judge surely should not feel compelled to routinely incorporate selective waiver agreements between private parties in Rule 502(d) orders, but the judge ought to have discretion to do so when the holder's agreement with a government enforcement or regulatory agency will serve the important public policy of facilitating an investigation into serious misconduct by an entity's natural person agents.[139] The upshot is that, in some respects, the third restrictive doctrine in the trilogy will survive.

The bottom line is that Rules 502(a), (b), and (d) all represent noteworthy, sound reforms. As previously stated, pretrial discovery has become the "center of gravity" in modern litigation.[140] These three provisions embody reforms that directly impact the pretrial discovery stage. Professor Richter has referred to the gradual "evolution of privilege doctrine from a paradigm of rigid absolutism to one of fairness and flexible party autonomy over protected information."[141] These provisions are significant steps in that evolutionary process. As a result of the reforms they have wrought, in federal practice, holders no longer have to treat their privileges like delicate crown jewels; a minor, innocent misstep will no longer be fatal to the holder's privilege rights. Nevertheless, holders must exercise their privilege rights in a careful, discriminating manner. In particular, in the case of Rule 502(d), the holder must pay special attention to the dangerous pitfall that can arise when Rule 502(d)'s nar-

139. Enron Corp. v. Borget, No. 88 CIV. 2828, 1990 WL 144879, at *2 (S.D.N.Y. Sept. 22, 1990) ("[T]he public policy concern of encouraging cooperation with law enforcement militates in favor of a no waiver finding.").

140. John W. Cooley, *Puncturing Three Myths about Litigation*, A.B.A. J., Dec. 1984, at 75, 76. *See generally* Edward J. Imwinkelried, *The Need for Truly Systemic Analysis of Proposals for the Reform of Both Pretrial Practice and Evidentiary Rules: The Role of the Law of Unintended Consequences in "Litigation" Reform*, 32 REV. LITIG. 201, 235–36 (2013).

141. Richter, *supra* note 23, at 129–30.

row scope, limited to disclosure, is applied to a selective waiver agreement with broader scope. The consequences of an overreaching Rule 502(d) could be catastrophic.