In-House Decisions:
"Extrajudicial" Privilege Waiver Does Not Necessarily Result in Broad Subject Matter Waiver

By Stephen J. Siegel

When does a party's waiver of the attorney-client privilege *not* waive its privilege to other attorney-client communications on the same subject? When the waiver is "extrajudicial," says the United States Court of Appeals for the First Circuit. *XYZ Corp. v. United States (In re Keeper of the Records)*, 348 F.3d 16, 24 (1st Cir. 2003).

XYZ Corporation (XYZ) distributed a medical device (the Device), but soon learned that it sometimes worked improperly. XYZ investigated and made a preliminary decision to withdraw the Device from the market. As contractually required, XYZ consulted with its coventurer (Smallco). Two XYZ officers, outside counsel to XYZ (Counsel), Smallco's principals, and medical adviser conferred by telephone. Counsel advocated withdrawing the Device and in so doing, revealed certain advice he had previously given XYZ. Unknown to XYZ, Smallco recorded the call. Soon thereafter, XYZ withdrew the Device from the market. *Id.* at 19-20.

The United States Department of Justice began an investigation into the Device. A grand jury subpoenaed XYZ for records, some of which XYZ withheld on privilege grounds. The government asked XYZ to waive its privilege claims; XYZ refused. Subsequently, the government obtained a tape recording of XYZ's call with Smallco and asked XYZ for permission to audit the tape. XYZ agreed, on the condition that its permission would *not* waive any privilege applying to other communications. The government agreed—in writing. *Id.* at 20.

Subsequently, the government moved to compel XYZ to produce various documents, arguing that XYZ had waived the attorney-client privilege during the call with Smallco and otherwise. The district court agreed. *Id.* at 21.

The First Circuit reversed, finding no waiver of the privilege except as to the advice Counsel previously gave XYZ that was specifically revealed in the call to Smallco. The court rejected that this limited waiver had a "ripple effect" that waived XYZ's privilege against disclosing its other communications with Counsel on the same subject. *Id.* at 23.

The First Circuit found no express waiver and deemed the question one of implied waiver. The court held that the scope of an implied waiver is fundamentally a question of fairness—one party should not be allowed to place confidential information in issue for personal advantage and then limit the disclosure of other such communications on the same subject. *Id.* at 24.

With fairness as the touchstone, the First Circuit found that implied waivers typically resulted in a subject matter waiver only when the disclosure was made in judicial proceedings. As a matter of first impression in the First Circuit, the court held that, "the *extrajudicial* disclosure of attorney-client communications, not thereafter used by the client to gain adversarial advantage in judicial proceedings, cannot work an implied waiver of *all* confidential communications on the same subject matter." *Id.* (emphasis added). An attorney's participation in an extrajudicial meeting or negotiation "alone does not justify implying a broad subject matter waiver of the attorney-client privilege." *Id.* A limited waiver in such a setting poses no risk to the truth-seeking process, unlike attempts to limit privilege waivers in judicial proceedings. *Id.*

So perhaps you can disclose attorney-client communications in business negotiations without waiving the privilege you enjoy over all the other advice your attorney gave you on the same subject—so long as you don't mind litigating the scope of your waiver five years later before a trial court and an appellate court!

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tors as: (a) the burden and expense of the discovery, considering among other factors the total cost of production compared to the amount in controversy; (b) the need for the discovery, including the benefit to the requesting party and the availability of the information from other sources; (c) the complexity of the case and the importance of the issues; (d) the need to protect the attorney-client privilege or attorney work product; (e) the need to protect trade secrets, proprietary, or confidential information; (f) whether the information or the software needed to access it is proprietary or constitutes confidential business information; (g) the breadth of the discovery request; (h) whether efforts have been made to confine initial production to tranches or subsets of potentially responsive data; (i) whether the requesting party has offered to pay some or all of the discovery expenses; (j) the relative ability of each party to control costs and its incentive to do so; (k) the resources of each party as compared to the total cost of production; (l) whether responding to the request would impose the burden or expense of acquiring or creating software to retrieve potentially responsive electronic data or otherwise require the responding party to render inaccessible electronic information accessible, where the responding party would not do so in the ordinary course of its day-to-day use of the information; (m) whether the responding party stores electronic information in a way that makes it more costly or burdensome to access the information than is reasonably warranted by legitimate personal, business, or other non-litigation related reasons; and (n) whether the responding party has deleted, discarded or erased electronic information after litigation was commenced or after the responding party was aware that litigation was probable." Appendix I contains a comparison of the *Rowe*, *Zubulake* and *Proposed Standard 29* factors.