STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE

IN THE MATTER OF:	)	
Local Government Center, Inc.; Government Center Real Estate, Inc.; Local Government Center Health Trust, LLC; Local Government Center Property-Liability Trust, LLC; Health Trust, Inc.; New Hampshire Municipal Association Property-Liability Trust, Inc.; LGC – HT, LLC; Local Government Center Workers' Compensation Trust, LLC; And the following individuals: Maura Carroll; Keith R. Burke; Paul G. Beecher; Peter J. Curro; April D. Whittaker; Timothy J. Ruehr; Julia A. Griffin; and John Andrews	)	Case No: C2011000036
RESPONDENTS	)	

MOTION REQUESTING HEARING OFFICER TO FIND WAIVER OF THE ATTORNEY CLIENT PRIVILEGE THROUGH THE ASSERTION OF "ADVICE OF COUNSEL" DEFENSE AND FOR RELATED RELIEF AGAINST ALL LGC RESPONDENTS AND RESPONDENTS CARROLL AND ANDREWS

Now comes the Secretary of State, Bureau of Securities Regulation (the "Bureau) and moves the Hearing Officer to find that the Respondents who have filed answers in this matter relying on an "advice of counsel" defense have waived their attorney client privilege with respect to those counsel upon whose advice the Respondents claim to have relied and to issue orders accordingly with respect to discovery and trial testimony.

In support of this motion, the Bureau states as follows.

1. The Respondents at issue in this motion filed their answers on or about January 6, 2012. Respondents are all represented by senior, experienced counsel in this matter. Although

Ms. Carroll now has independent counsel, she previously filed her answer jointly with the LGC entities. Mr. Andrews' answer was filed on his own behalf.

2. In their answers, these Respondents rely on an "advice of counsel" defense and otherwise exposed legal opinions on which Respondents claimed they relied. An advice of counsel defense is designed to protect a defendant or respondent from penalty because, although the respondent admits to the challenged action, he or she claims he did so in good faith with clear conscience reliant upon the advice given to him or her by legal counsel.

3. After reviewing their Answers, the Bureau raised the issue of a waiver of the attorney client privilege with Messrs. Ramsdell, Quirk and Saturley and asked for access to the underlying legal files in correspondence dated January 16, 2012 to Mr. Ramsdell and January 11, 2012 to Messrs. Quirk and Saturley. The Bureau explained that it understood that experienced counsel would understand the clear implications of asserting advice of counsel defenses and asked for a quick reply from the Respondents with logistics to be later agreed upon. These letters are appended to this pleading.

4. In response, Mr. Ramsdell has explained that his client essentially is dependent upon the LGC's decision to release or withhold the legal files. Mr. Quirk has twice requested extensions of time in order to respond and has not agreed to produce the legal files during the 13 days since the letter request was emailed to him. Ms. Carroll now has separate counsel.

Respondents have asserted "Advice of Counsel" defenses.

5. That the Respondents have placed the legal advice provided to them squarely in issue cannot be doubted. Once this advice is placed in issue, the Bureau is entitled to review the underlying files.

6. Mr. Andrews' Answer provides at ¶ F:

At all times, Mr. Andrews acted in good faith upon the advice of counsel and other professionals retained by the employer.

Andrews Answer at 9. Emphasis supplied.

7. The Answer filed by LGC and Ms. Carroll is rife with references to "advice of counsel" and discloses specific legal opinions. The LGC and Carroll have specifically listed advice of counsel as a defense. The Answer makes clear that it is "a summary of the defenses and affirmative defenses [LGC and Carrol] intend[] to mount in advance of and during the merits hearing." LGC/Carroll Answer at 2. The references to reliance upon the advice of counsel in the LGC/Carroll Answer are as follows:

a. Upon the advice of legal counsel, the boards voted to restructure the existing entities into single-member, member-managed limited liability companies, with a common parent corporation. [LGC/Carroll Answer at 8. Emphasis supplied.]

b. The return of the surplus through rate reduction was addressed in an opinion letter from LGC's attorney on April 20, 2007, which concluded as follows:

A reduction in rating resulting from the consideration of these additional funds which reduction results in lower contributions by Members, achieves the same economic result as the divided return to Members who then in turn must pay proportionately higher contributions. In essence, a return of additional funds to the Members has been achieved. In the absence of contrary legislative or judicial clarity on the meaning of "return" of surplus and the lack of an express legal mandate that a "return" be accompanied by only a declaration of a dividend, this method should constitute a return of additional funds to the Members within the meaning of RSA 5-B. [LGC/Carroll Answer at 17. Emphasis supplied.]

c. In that same opinion, the LGC's legal counsel concluded that the return of additional funds to Members through an adjustment in the ratings process, spread over a number of years to address additional unexpected contingencies, and to seek to achieve rate stabilization, was legal. [LGC/Carroll Answer at 18. Emphasis supplied.]

d. **Strategic support of the workers' compensation pool was a business judgment of the LGC board.** Following the 2003 reorganization, LGC's Board decided to fund certain strategic priorities. The decision reflects the Board's determination how to best offer several lines of coverage, and to coordinate activities related to these coverages in a cost-efficient manner, to better

serve LGC's members. The activities funded as a part of the strategy include training; wellness; loss prevention across all lines of coverage; as well as assisting the workers' compensation program's competitive position in the marketplace. The decision to do so was made following extensive due diligence and deliberation, with the advice of counsel. [LGC/Carroll Answer at 18. Emphasis supplied. (Use of **bolding** in original.)]

e. **VIII. Affirmative and Other Defenses**

L. Deference to the judgment of the Respondents is warranted, as the actions taken by LGC and its pools were taken pursuant to the best business judgment exercised by its Boards, at the time, given the available information, and with the advice of consultants and legal counsel, and were similar to those taken by other pools, both within and without New Hampshire. [LGC/Carroll Answer at 29. Emphasis supplied. (Use of **bolding** in original.)]

The assertion of Advice of Counsel waives the attorney client privilege.

8. The finding that a party who asserts an advice of counsel defense waives its attorney client privilege is premised upon considerations of fairness. Litigants do not hold monopolies either on truth or the availability of evidence. A party that intentionally seeks to minimize its misconduct by claiming reliance on legal advice knows that that reliance must be carefully reviewed and subjected to challenge by the opposing party. This is not a novel concept and court decisions are replete with descriptions of this analysis premised upon fairness. The First Circuit's almost ten year old decision in *In re Keeper of Records (Grand Jury Subpoena Addressed to XYZ Corp.)* 348 F.3d 16 (1st Cir. 2003) provides but one example:

> It is well accepted that waivers by implication can sometimes extend beyond the matter *24 actually revealed. *See, e.g., In re Grand Jury Proceedings,* 219 F.3d at 182-83; *Sedco Int'l, S.A. v. Cory,* 683 F.2d 1201, 1206 (8th Cir.1982). Such waivers are almost invariably premised on fairness concerns. *See von Bulow,* 828 F.2d at 101-03. As one respected treatise explains, "[t]he courts have identified a common denominator in waiver by implication: in each case, the party asserting the privilege placed protected information in issue for personal benefit through some affirmative act, and the court found that to allow the privilege to protect against disclosure of that information" would have been unfair to the opposing party. 3 Weinstein, *supra* § 503.41[1]. *See also Sedco,* 683 F.2d at 1206 (noting that courts have found waiver by implication when a client (i) testifies concerning portions of an attorney-client communication, (ii) places the

attorney-client relationship itself at issue, or (iii) asserts reliance on an attorney's advice as an element of a claim or defense).

A paradigmatic example of this phenomenon is a case involving an advice of counsel defense. When such a defense is raised, the pleader puts the nature of its lawyer's advice squarely in issue, and, thus, communications embodying the subject matter of the advice typically lose protection. *See, e.g., United States v. Bilzerian,* 926 F.2d 1285, 1292 (2d Cir.1991). Implying a subject matter waiver in such a case ensures fairness because it disables litigants from using the attorney-client privilege as both a sword and a shield. Were the law otherwise, the client could selectively disclose fragments helpful to its cause, entomb other (unhelpful) fragments, and in that way kidnap the truth-seeking process.

In re Keeper of Records (Grand Jury Subpoena Addressed to XYZ Corp.) 348 F.3d at 23 - 24 (emphasis supplied). A copy of this decision is attached.

9. Judge McNamara of the Business Court has also commented upon the finding of waiver of the attorney client privilege occasioned by the assertion of an advice of counsel defense.

"It is well settled law that 'in certain circumstances a party's assertion of factual claims can, out of consideration of fairness to a party's adversary, result in the involuntary forfeiture of privileges for matters pertinent to the claims asserted.' " *Lugosh v. Congel,* 2006 WL 931687, at *22 (N.D.N.Y. 2006) (quoting *John Doe Co. v. United States,* 350 F.3d 299, 302 (2d Cir. 2003)); *see Rhone-Poulenc Rorer. Inc. v. Home Indem. Co.,* 32 F.3d 851, 863 (3d Cir. 1994). "For example, a client may waive the [attorney-client] privilege as to certain communications with a lawyer by filing a malpractice action against the lawyer." *Rhone-Poulenc Rorer. Inc.,* 32 F.3d at 863. "A defendant may also waive the [attorney-client] privilege by asserting reliance on the advice of counsel as an affirmative defense." *Id.; see Chevron Corp. v. Pennzoil Co.,* 974 F.2d 1156 (9th Cir. 1992) (finding party's claim that its tax position was reasonable because it was based on the advice of counsel puts advice in issue and waives privilege); *see also Hunt v. Blackburn,* 128 U.S. 464, 470 (1888) (finding client waives attorney-client privilege when she alleges as a defense that she was mislead by counsel). As the Third Circuit has noted:

"In these cases, the client has made the decision and taken the affirmative step in the litigation to place the advice of the attorney in issue. Courts have found that by placing the advice in issue, the client has opened to examination facts relating

> to that advice. Advice is not in issue merely because it is relevant, and does not necessarily become in issue merely because the attorney's advice might affect the client's state of mind in a relevant manner. The advice of counsel is placed in issue where the client asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney-client communication." *Rhone Poulenc Rorer. Inc.*, 32 F.3d at 863.

IHEARSAFE, LLC v. INGEMI, et al. 2010 WL 5559094 (N.H.Super., September 1, 2010) (emphasis supplied). A copy of this decision is attached.

10. The waiver of the attorney client privilege that results from the Respondents' assertion of advice of counsel defenses has a number of implications. First, the parties are attempting to schedule the depositions of the LGC's former lawyers and individual respondents. The Bureau requires access to the underlying legal files to prepare for these depositions. The Bureau also plans to question deponents about the legal advice at issue and this will necessarily also involve questioning about the factual predicates upon which prior counsel based their advice.

11. The Hearing Officer recently issued an Order on Parties Motions to Compel Production dated January 19, 2012. This Order must now be reconsidered based upon the waivers occasioned by the advice of counsel defense. In the Order, the Hearing Officer acknowledged that "the [attorney client] privilege can be pierced under certain conditions and can be waived if the communications relate to a matter that has been put into issue by the party asserting the privilege." Order at 14. The waiver the Hearing Officer contemplated has now occurred.

12. The Hearing Officer permitted the LGC to withhold or redact documents to protect its privileged information. In light of the assertion of the advice of counsel defense by Carroll, Andrews and the LGC, these limitations on discovery are no longer appropriate and should be modified. *See* Order at 11, 15 and 16.

13. To the extent that the Hearing Officer finds that LGC controls the disclosure of legal files and the LGC decides not to produce same, the Bureau requests the Hearing Officer strike all answers reliant upon the advice of counsel defense.

WHEREFORE, FOR THE FOREGOING REASONS, the Bureau requests the Hearing Officer find that the LGC Respondents and Respondents Carroll and Andrews have waived their attorney client privileges and that the parties should act accordingly during discovery and at the merits hearing.

Respectfully submitted,

Bureau of Securities Regulation
By and Through Their Attorneys,
Bernstein, Shur, Sawyer & Nelson, PA

January 24, 2012

By: */s/ Andru H. Volinsky*
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CERTIFICATION OF SERVICE

I, Andru H. Volinsky, hereby certify that a copy of the above pleading was this date, forwarded to Jeffrey D. Spill, Esq., Earle F. Wingate, III, Esq., Kevin B. Moquin, Esq., Eric Forcier, Esq., Adrian S. Larochelle, Esq., William C. Saturley, Esq., Brian M. Quirk, Esq., David I. Frydman, Esq., Michael D. Ramsdell, Esq., Joshua M. Pantesco, Esq., Mark E. Howard, Esq., Jaye L. Rancourt, Esq., and Steven M. Gordon.

/s/ Andru H. Volinsky
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January 16, 2012

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VIA US MAIL AND PDF
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Re: BSR v. LGC *et al*

Dear Michael,

After reading the Andrews' Answer to the September 2, 2011 Staff Petition (the Petition), it is clear that Mr. Andrews is asserting an "advice of counsel" defense and "advice of consultant" defense to many of the allegations outlined in the Petition. *See e.g.,* Answer at Defense F, page 9. As such, the Bureau respectfully requests that Mr. Andrews produce all legal files pertaining to the allegations to which this defense has been asserted. The Bureau also requests that Mr. Andrews identify and produce the files of all professionals or consultants that he had in mind in the Defense F reference.

The Bureau's request for legal and professional files related to defenses includes, but is not limited to, the following issues:

1. All legal and professional files pertaining to any and all advice regarding the 2003 merger and all subsequent corporate or company reorganizational activities;
2. All legal and professional files pertaining to any and all advice regarding the retaining of Pool member money for use in "rate stabilization" or the reduction in the future rates of Pool members or the maintenance of surpluses in excess of expenses and reserves;
3. All legal and professional files pertaining to any and all advice regarding spending of Pool money, including but not limited to, the use of Pool monies for "strategic support" of the workers' compensation pool; and

4. All legal and professional files pertaining to any and all advice regarding spending of Pool money on executive compensation, including deferred compensation received by Mr. Andrews and others.

By using the term, "legal and professional files," the Bureau intends to request the entire contents of files, in whatever form they exist, maintained by Hinckley, Allen and Snyder, LLP, its lawyers or any other lawyers that analyzed or provided suggestions or advice to any of the Respondents in this matter or to the staffs, consultants or employees of the Respondents that are or were entities. The Bureau also intends this request to apply separately to Mr. Lloyd if he practiced in another entity, whether alone or as a part of another firm (e.g., Cleveland, Waters and Bass). The same is true for David Law. Finally, the same requests apply to any other professional or consultant upon which Mr. Andrews relied such that the reliance forms a basis for a so-called advice of consultant defense.[1]

The legal and professional files should include, but not be limited to, notes, drafts, correspondence, minutes, memos, pleadings, submissions to regulators or Attorneys General, bills for services (final and pro forma), legal analyses, the lawyers' and consultants' work plans or business plans that describe the work completed for or to be completed on behalf of any Respondent, copies of regulations, statutes, or cases, and opinions by the lawyers or consultants or considered by the lawyers or consultants for any purpose. It should also include information provided by the client that was considered by any of the lawyers, law firms, consultants or other professionals. Please also note that the Bureau considers any lawyer, law firm, consultant or professional that represents a client not to have its own attorney-client privilege for its own internal communications during the time that the firm or lawyer was engaged by the client. Thus, for example, we consider subject to production per this request—and not subject to a claim of privilege—any written or emailed communication between a Hinckley Allen lawyer and the firm's risk managers, management committee or general counsel if the communication occurred during the time during which Hinckley Allen represented any Respondent.

The Bureau requests that responsive files be produced in the form in which they presently exist, either paper form or electronic form.

Please respond by the close of business on Thursday, January 19, 2012 advising me if you will or will not agree to this request and when you will make production. I know this is a fairly short period of time, but I am confident that you fully thought through the consequences of "advice of counsel" defenses before you asserted them. Failing to receive your assent, the Bureau will request permission to subpoena the relevant third parties in question.

Thank you.

[1] The Bureau reserves the right to challenge this advice of consultant defense as lacking any support in the law, but wishes to first understand the scope of Mr. Andrews' reliance.

Kind regards,

Andru H. Volinsky

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January 11, 2012

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Re: BSR v. LGC

Dear Bill,

After reading LGC's Answer to the September 2, 2011 Staff Petition (the Petition), it is clear that LGC is asserting the "advice of counsel" defense to many of the allegations outlined in the Petition. As such, the Bureau respectfully requests that the Respondents you represent (collectively, "LGC") produce all legal files pertaining to the allegations to which this defense has been asserted.

The Bureau's request for legal files related to defense includes, but is not limited to, the following issues:

1. All legal files pertaining to any and all legal advice regarding the 2003 merger and all subsequent corporate or company reorganizational activities. (Section III, A of LGC's Answer);
2. All legal files pertaining to any and all legal advice regarding the retaining of Pool member money for use in "rate stabilization" or the reduction in the future rates of Pool members. (Section III, B of LGC's Answer); and
3. All legal files pertaining to any and all legal advice regarding spending of Pool money, including but not limited to, the use of Pool monies for "strategic support" of the workers' compensation pool. (Section III, C of LGC's Answer).

By using the term, "legal files," the Bureau intends to request the entire contents of files, in whatever form they exist, maintained by Hinckley, Allen and Snyder, LLP, its lawyers or any other lawyers that analyzed or provided suggestions or advice to any of the Respondents in this matter or to the staffs, consultants or employees of the

Respondents that are or were entities. Although it is unlikely, we also intend this request to apply separately to Mr. Lloyd if he practiced in another entity, whether alone or as a part of another firm (e.g., Cleveland, Waters and Bass). The same is true for David Law.

The legal files should include, but not be limited to, notes, drafts, correspondence, minutes, memos, pleadings, submissions to regulators or Attorneys General, bills for services (final and pro forma), legal analyses, the lawyers' work or business plans that describe the work completed for or to be completed on behalf of any Respondent, copies of regulations, statutes, or cases, and opinions by the lawyers or considered by the lawyers for any purpose. It should also include information provided by the client that was considered by any of the lawyers or law firms. Please also note that the Bureau considers any lawyer or law firm that represents a client not to have its own attorney-client privilege for its own internal communications during the time that the firm or lawyer was engaged by the client. Thus, for example, we consider subject to production per this request—and not subject to a claim of privilege—any written or emailed communication between a Hinckley Allen lawyer and the firm's risk managers, management committee or general counsel if the communication occurred during the time during which Hinckley Allen represented any Respondent.

The Bureau requests that responsive files be produced in the form in which they presently exist, either paper form or electronic form.

Please respond by the close of business on Monday, January 16, 2012 advising me if you will or will not agree to this request and when you will make production. I know this is a fairly short period of time, but I am confident that you and your team fully thought through the consequences of "advice of counsel" defenses before you asserted them. Failing to receive your assent, the Bureau will request permission to subpoena the relevant third parties in question.

Otherwise, I hope you and your family are well and that you enjoy a happy new year.

Kind regards,

/S/

Andru H. Volinsky

cc Brian Quirk (bquirk@preti.com)

348 F.3d 16, 62 Fed. R. Evid. Serv. 1032
(Cite as: 348 F.3d 16)

See p. 10

▷

United States Court of Appeals,
First Circuit.
In re KEEPER OF THE RECORDS (GRAND JURY SUBPOENA ADDRESSED TO XYZ CORPORATION).
XYZ Corporation, Appellant,
v.
United States of America, Appellee.

Nos. 03-1726, 03-1784.
Heard Sept. 4, 2003.
Decided Oct. 22, 2003.

After corporation refused to produce documents requested by investigatory subpoena duces tecum issued by federal grand jury, on grounds that documents were shielded by attorney-client and work-product privileges, government moved to compel production. The United States District Court for the District of Massachusetts, William G. Young, Chief Judge, ordered corporation to produce documents, then cited corporation for contempt when it declined to do so. Corporation appealed. The Court of Appeals, Selya, Circuit Judge, held that: (1) as a matter of first impression, extrajudicial disclosure of attorney-client communications, not thereafter used by client to gain adversarial advantage in judicial proceedings, cannot work an implied waiver of all confidential communications on the same subject matter; (2) jurisdiction existed over appeals; (3) communications made during conference call were not confidential and were not subject to colorable claim of attorney-client privilege; (4) disclosures during conference call did not support implication of broad subject matter waiver of corporation's attorney-client privilege; and (5) corporation's pre-indictment proffers did not impliedly waive attorney-client privilege.

Reversed.

West Headnotes

[1] Contempt 93 ⚿66(1)

93 Contempt
93II Power to Punish, and Proceedings Therefor
93k66 Appeal or Error
93k66(1) k. Nature and Form of Remedy and Jurisdiction. Most Cited Cases

Federal Courts 170B ⚿556

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(C) Decisions Reviewable
170BVIII(C)1 In General
170Bk554 Nature, Scope and Effect of Decision
170Bk556 k. Discovery, Depositions, Witnesses or Affidavits. Most Cited Cases

Court of Appeals had jurisdiction over appeals in which corporation challenged order compelling production of documents requested by investigatory subpoena duces tecum that corporation had withheld based on attorney-client and work-product privileges, and order that cited corporation for contempt due to its failure to comply.

[2] Federal Courts 170B ⚿776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most Cited Cases

Federal Courts 170B ⚿823

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk823 k. Reception of Evidence. Most Cited Cases

Federal Courts 170B ⚿870.1

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)5 Questions of Fact, Verdicts and Findings
170Bk870 Particular Issues and Questions
170Bk870.1 k. In General. Most Cited Cases

On an appeal concerning a claim of privilege, the standard of review depends on the precise issue being litigated; Court of Appeals reviews rulings on questions of law de novo, findings of fact for clear error, and judgment calls-such as evidentiary determinations-for abuse of discretion.

[3] Federal Courts 170B ⚿763.1

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk763 Extent of Review Dependent on Nature of Decision Appealed from
170Bk763.1 k. In General. Most Cited Cases

Standard of review on appeal raising claim of privilege is not altered by the fact that the district court granted challenged motion without much elaboration of its thinking.

[4] Federal Courts 170B ⚿416

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(C) Application to Particular Matters
170Bk416 k. Evidence Law. Most Cited Cases

Federal common law governed question of whether corporation waived attorney-client privilege with respect to documents sought by investigatory subpoena duces tecum issued by federal grand jury.

[5] Grand Jury 193 ⚿36.3(2)

193 Grand Jury
193k36 Witnesses and Evidence
193k36.3 Grounds for Refusal to Appear, Testify, or Produce Evidence
193k36.3(2) k. Privilege. Most Cited Cases

Despite a grand jury's vaunted right to every man's evidence, it must respect a valid claim of privilege.

[6] Privileged Communications and Confidentiality 311H ⚿26

311H Privileged Communications and Confidentiality
311HI In General
311Hk24 Evidence
311Hk26 k. Presumptions and Burden of Proof. Most Cited Cases
(Formerly 410k222)

Party who invokes privilege bears the burden of establishing that it applies and has not been waived.

[7] Privileged Communications and Confidentiality 311H ⚿108

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk108 k. Absolute or Qualified Privilege. Most Cited Cases
(Formerly 410k198(1))

Attorney-client privilege is not limitless, and courts must take care to apply it only to the extent necessary to achieve its underlying goals.

[8] Privileged Communications and Confidentiality 311H ⚿112

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk112 k. Construction. Most Cited Cases
(Formerly 410k198(1))

Attorney-client privilege must be narrowly

construed because it comes with substantial costs and stands as an obstacle of sorts to the search for truth.

[9] Privileged Communications and Confidentiality 311H ⚿102

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk102 k. Elements in General; Definition. Most Cited Cases
(Formerly 410k205, 410k198(1))
Attorney-client privilege protects only those communications that are confidential and are made for the purpose of seeking or receiving legal advice.

[10] Privileged Communications and Confidentiality 311H ⚿168

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk168 k. Waiver of Privilege. Most Cited Cases
(Formerly 410k219(3))
Attorney-client privilege may be waived, in that when otherwise privileged communications are disclosed to a third party, the disclosure destroys the confidentiality upon which the privilege is premised.

[11] Privileged Communications and Confidentiality 311H ⚿168

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk168 k. Waiver of Privilege. Most Cited Cases
(Formerly 410k219(3))
Conduct can serve to waive the attorney-client privilege by implication.

[12] Privileged Communications and Confidentiality 311H ⚿168

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk168 k. Waiver of Privilege. Most Cited Cases
(Formerly 410k219(3))
Attorney-client privilege is highly valued, and therefore courts should be cautious about finding implied waivers.

[13] Privileged Communications and Confidentiality 311H ⚿168

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk168 k. Waiver of Privilege. Most Cited Cases
(Formerly 410k219(3))
Claims of implied waiver of attorney-client privilege must be evaluated in light of principles of logic and fairness, an evaluation which demands a fastidious sifting of the facts and a careful weighing of the circumstances.

[14] Privileged Communications and Confidentiality 311H ⚿156

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk156 k. Confidential Character of Communications or Advice. Most Cited Cases
(Formerly 410k205)
Outside counsel for corporation did not provide confidential advice during conference call involving corporation's officers, principals of corporation's co-venturer, and co-venturer's medical advisor, but rather merely helped to advocate corporation's position to co-venturer, and therefore communications made during call were not subject to colorable claim of attorney-client privilege.

[15] Privileged Communications and Confidentiality 311H ⚿102

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk102 k. Elements in General; Definition. Most Cited Cases
(Formerly 410k205)

Privileged Communications and Confidentiality 311H ⚷156

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk156 k. Confidential Character of Communications or Advice. Most Cited Cases
(Formerly 410k205)
For the attorney-client privilege to attach to a communication, the communication must have been made in confidence and for the purpose of securing or conveying legal advice, and the privilege evaporates the moment that confidentiality ceases to exist.

[16] Privileged Communications and Confidentiality 311H ⚷158

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk157 Communications Through or in Presence or Hearing of Others; Communications with Third Parties
311Hk158 k. In General. Most Cited Cases
(Formerly 410k206)
Presence of third parties is sufficient to undermine the confidentiality needed to establish that attorney-client privilege attached to a communica- tion.

[17] Privileged Communications and Confidentiality 311H ⚷168

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk168 k. Waiver of Privilege. Most Cited Cases
(Formerly 410k219(3))
Any previously privileged information of corporation that was actually revealed during conference call involving corporation, its outside counsel, and its co-venturer lost any veneer of attorney-client privilege by virtue of implied waiver resulting from lack of requisite confidentiality during call.

[18] Privileged Communications and Confidentiality 311H ⚷168

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk168 k. Waiver of Privilege. Most Cited Cases
(Formerly 410k219(3))
Waivers of attorney-client privilege by implication can sometimes extend beyond the matter actually revealed.

[19] Privileged Communications and Confidentiality 311H ⚷168

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk168 k. Waiver of Privilege. Most Cited Cases
(Formerly 410k219(3))
Extrajudicial disclosure of attorney-client communications, not thereafter used by client to gain adversarial advantage in judicial proceedings, cannot work an implied waiver of all confidential communications on the same subject matter.

[20] Grand Jury 193 ⚷36.3(2)

193 Grand Jury
193k36 Witnesses and Evidence
193k36.3 Grounds for Refusal to Appear, Testify, or Produce Evidence
193k36.3(2) k. Privilege. Most Cited Cases
Disclosures of confidential information that oc-

curred during extrajudicial conference call between officers of corporation and principals of co-venturer, which concerned parties' efforts to reach joint business decision regarding marketing and withdrawal of neoteric medical device, did not support implication of broad subject matter waiver of corporation's attorney-client privilege, so as to sustain order compelling corporation to produce otherwise privileged documents relating to subject matter of call pursuant to grand jury's investigatory subpoena duces tecum, particularly when corporation made no subsequent use of call in any judicial proceeding.

[21] Privileged Communications and Confidentiality 311H ⚿168

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk168 k. Waiver of Privilege. Most Cited Cases
(Formerly 410k219(3))

If confidential information is revealed in an extrajudicial context and later reused in a judicial setting, the circumstances of the initial disclosure will not immunize the client against a claim of waiver of attorney-client privilege.

[22] Federal Courts 170B ⚿753

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk753 k. Questions Considered in General. Most Cited Cases

Court of Appeals would consider argument that corporation's pre-indictment proffers waived attorney-client privilege, even though district court did not reach issue, when parties had briefed issues, facts pertaining to it were essentially uncontradicted, and an adjudication would expedite matters.

[23] Privileged Communications and Confidentiality 311H ⚿168

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk168 k. Waiver of Privilege. Most Cited Cases
(Formerly 410k219(3))

Corporation reasonably interpreted government's silence in face of corporation's repeated assertions of attorney-client privilege as acceptance of such reservations, and therefore corporation's pre-indictment proffers did not impliedly waive attorney-client privilege, particularly when government's silence encouraged and allowed disclosures to go forward, and government did not deny that it knew of oft-repeated privilege reservations. Restatement (Second) of Contracts § 69(1)(a).

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Before SELYA, LIPEZ and HOWARD, Circuit Judges.

SELYA, Circuit Judge.

Although the attorney-client privilege may be the most venerable of the privileges for confidential communications, its accoutrements are not the most clearly delineated. These appeals, which require us to answer delicate questions concerning implied waivers of the privilege, bear witness to that point.

The appeals have their genesis in an investigatory subpoena duces tecum issued by a federal grand jury (we use the adjective "investigatory" because no indictments have yet eventuated from the grand jury probe). The subpoenaed party, a corporation, refused to produce certain of the requested docu-

ments on the ground that they were shielded by the attorney-client and work-product privileges. The government sought to compel production, contending that any attendant privilege had been waived. The district court, eschewing an evidentiary hearing, ordered the corporation to produce the documents and cited it for contempt when it declined to do so. These appeals-there are two because the corporation filed a notice of appeal after the court ordered production of the withheld documents and another after the court adjudged it in contempt-followed.

After careful consideration, we conclude that the record fails to support the lower court's finding of a broad subject matter waiver. Accordingly, we reverse the turnover order and vacate the contempt citation.

I. BACKGROUND

We start with an abbreviated account of the events leading to the turnover order. Consistent with the secrecy that typically attaches to grand jury matters, *see, e.g.,* Fed.R.Crim.P. 6(e), these appeals have gone forward under an order sealing the briefs, the parties' proffers, and other pertinent portions of the record. To preserve that confidentiality, we use fictitious names for all affected parties and furnish only such background facts as are necessary to provide ambiance.

In the fall of 1998, XYZ Corporation (XYZ) began distributing a neoteric medical device. Soon after distribution began, XYZ learned that, on some occasions, the device was not functioning properly. It conducted an internal investigation and sought the advice of outside counsel to determine an appropriate course of action.

In fairly short order, XYZ made a preliminary decision to withdraw the device from the market (at least temporarily). Before doing so, however, XYZ's existing supply agreement obligated it to consult with its co-venturer, Smallco. Representatives of the two companies conferred telephonically. The participants in that discussion included two officers of XYZ, outside counsel for XYZ (Bernard Barrister), the principals of Smallco, and Smallco's ***20** medical advisor.[FN1] During this conversation, which we shall hereafter refer to as "the call," Barrister advocated XYZ's position in the face of strong counter-arguments from the Smallco hierarchs (who wished to keep the device on the market). Unbeknownst to XYZ, Smallco recorded the call.

> FN1. There is some suggestion in the record that two other employees of XYZ were on the line during the call. We need not resolve this uncertainty as the presence or absence of these individuals would not affect our analysis.

The next day, XYZ contacted the Food and Drug Administration (the FDA) to discuss the emerging problems. A dialogue ensued. Less than one month after its initial contact with the FDA, XYZ voluntarily withdrew the device from the market.

The Department of Justice got wind of what had transpired and commenced an investigation into the distribution of the device. As part of this probe, a federal grand jury issued a subpoena requiring XYZ to produce an array of documents.[FN2] XYZ withheld certain of the documents, instead producing privilege logs indexing what had been retained and the claims of privilege applicable thereto. As early as April of 2001, the government requested XYZ to waive its claims of privilege. XYZ refused.

> FN2. The grand jury also caused subpoenas duces tecum to be served on Barrister and Barrister's law firm. Those subpoenas are not before us (although we note parenthetically that neither recipient has surrendered the documents).

In late 2001, the government obtained a tape recording of the call. The government thereafter asked XYZ for permission to audit the tape. XYZ replied that it would not seek to prevent the govern-

ment from listening but admonished that this decision should not be viewed as a waiver of any privilege protecting other communications. The government agreed-in writing-to this condition. The investigation continued.

In February of 2002, federal prosecutors met with XYZ's new outside counsel to inform XYZ of the direction of their investigation. Pursuant to the request of a government attorney, XYZ's counsel authored two letters responding to concerns voiced at the February meeting. Each contained a footnote on the first page stating explicitly that the letter should not be construed as a waiver of the attorney-client or work-product privileges.[FN3] Following this correspondence, representatives of XYZ again met with the prosecutors to discuss the possible indictment of XYZ and/or its officers. This meeting took place in May of 2002.

FN3. The language, in its entirety, read:

> We submit this letter pursuant to Rule 11(e)(6) of the Federal Rules of Criminal Procedure. This letter may not be used as evidence against [XYZ] or any subsidiary, affiliate, successor or assign, employee or agent, in any civil or criminal proceeding. This letter describes certain facts as we understand them from the record developed during the Government's investigation. It is not intended to, and should not be interpreted to, constitute admissions on behalf of [XYZ] or any related entities or persons. It also is not intended, and should not be construed, as any waiver of the attorney-client, the attorney work product, or any other applicable privilege.

In April of 2003-after persistently requesting a voluntary waiver of the attorney-client privilege for two full years-the government changed its tune. It repaired to the federal district court and filed a motion to compel production of the disputed documents. In its motion, the government argued in effect that XYZ already had waived the attorney-client privilege as ***21** to the most important documents described in the subpoena. The motion asserted that, during the call, Barrister had given legal advice in the presence of third parties and had disclosed legal advice previously provided to XYZ. In the government's view, this conduct effected a waiver of the attorney-client privilege as to all communications anent the marketing and withdrawal of the device for a period extending from August 12, 1998 to October 8, 1998. As a fallback, the government asseverated that XYZ had waived the attorney-client privilege by means of the pre-indictment presentations made in response to the prosecutors' requests. To close the circle, the government maintained that the work-product doctrine, if applicable at all, likewise had been waived.[FN4]

> FN4. In addition, the government claimed that the crime-fraud exception to the attorney-client and work-product privileges abrogated any protections that had not been waived. Because the district court did not reach this claim, we express no opinion on it. The government remains free, if it so chooses, to reassert this claim in the district court.

The district court, acting ex parte, granted the motion to compel. In a four-sentence order, the court ruled that XYZ had "waived its attorney-client privilege with respect to the subject matter of the [call]." When the government moved for an expedited hearing to clarify the order and XYZ sought reconsideration, the district court again acted summarily. Without either conducting an evidentiary hearing or entertaining argument, it ruled *ore sponte* that XYZ's waiver of the attorney-client privilege applied both retrospectively (i.e., to communications before the call relating to the "same matter") and prospectively (i.e., to communications after the call relating to the "same matter").

In its bench decision, the district court went well beyond the three-month waiver window envisioned by the government; it declared, in effect,

that the waiver was to operate without limit of time (indeed, the court noted, as to future communications, that the waiver would have effect "so long as people are talking about that same subject," and might apply up to the time of trial). The court exempted from the waiver any attorney-client communications about the waiver issue itself and provided guidance as to the scope of the waiver by referring to the "doctrine of completeness." The court declined to resolve any additional issues, stating that it would cross those bridges as the need arose.

[1] Notwithstanding the district court's order, XYZ refused to produce the documents. The district court held the corporation in contempt (thus brushing aside, inter alia, its claim of a work-product privilege),[FN5] but stayed further proceedings pending appellate review. We have jurisdiction over the ensuing appeals because XYZ subjected itself to a citation for contempt. *See In re Grand Jury Subpoenas,* 123 F.3d 695, 696-97 (1st Cir.1997).

> FN5. This implied dismissal of the work-product privilege was fully consistent with comments made by the court in the course of its earlier bench decision.

II. STANDARD OF REVIEW

[2][3] On an appeal concerning a claim of privilege, the standard of review depends on the precise issue being litigated. *See Cavallaro v. United States,* 284 F.3d 236, 245 (1st Cir.2002); *United States v. Mass. Inst. of Tech.,* 129 F.3d 681, 683 (1st Cir.1997). We review rulings on questions of law de novo, findings of fact for clear error, and judgment calls-such as evidentiary determinations-for abuse of discretion. *Cavallaro,* 284 F.3d at 245. The standard of review is not altered by the fact that the district court granted the ***22** motion without much elaboration of its thinking. *FDIC v. Ogden Corp.,* 202 F.3d 454, 460 (1st Cir.2000). "Although a lower court's elucidation of its reasoning invariably eases the appellate task, motions often are decided summarily.... [W]e are aware of no authority that would allow us automatically to vary the standard of review depending on whether a district court has taken the time to explain its rationale." *Id.*

[4] With these background principles in mind, we proceed to the merits. In undertaking that task, we are mindful that, on the facts of this case, the question whether XYZ has waived the attorney-client privilege is governed by federal common law. *United States v. Rakes,* 136 F.3d 1, 3 (1st Cir.1998) .

III. ANALYSIS

[5][6] Despite a grand jury's vaunted right to every man's evidence, it must, nevertheless, respect a valid claim of privilege. *United States v. Calandra,* 414 U.S. 338, 346, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). But the party who invokes the privilege bears the burden of establishing that it applies to the communications at issue and that it has not been waived. *See State of Maine v. United States Dep't of the Interior,* 298 F.3d 60, 71 (1st Cir.2002); *United States v. Bollin,* 264 F.3d 391, 412 (4th Cir.2001). Thus, XYZ must carry the devoir of persuasion here.

[7][8] The attorney-client privilege is well-established and its rationale straightforward. By safeguarding communications between client and lawyer, the privilege encourages full and free discussion, better enabling the client to conform his conduct to the dictates of the law and to present legitimate claims and defenses if litigation ensues. *See Upjohn Co. v. United States,* 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). Still, the privilege is not limitless, and courts must take care to apply it only to the extent necessary to achieve its underlying goals. *In re Grand Jury Subpoena (Custodian of Records, Newparent, Inc.),* 274 F.3d 563, 571 (1st Cir.2001). In other words, the attorney-client privilege must be narrowly construed because it comes with substantial costs and stands as an obstacle of sorts to the search for truth. *See United States v. Nixon,* 418 U.S. 683, 709-10, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974).

[9][10] The dimensions of the privilege itself are reasonably well honed. The privilege protects only those communications that are confidential and are made for the purpose of seeking or receiving legal advice. *See Bollin,* 264 F.3d at 412; *see also* 8 John Henry Wigmore, Evidence § 2292, at 554 (John T. McNaughton ed. 1961). The idea that the attorney-client privilege may be waived is a direct outgrowth of this well-established construction. When otherwise privileged communications are disclosed to a third party, the disclosure destroys the confidentiality upon which the privilege is premised. *See* 2 Paul R. Rice, Attorney-Client Privilege in the U.S. § 9:79, at 357 (2d ed. 1999).

[11] Waivers come in various sizes and shapes. The easy cases tend to be those of express waiver. *See, e.g., United States v. Lussier,* 71 F.3d 456, 462 (2d Cir.1995); *United States v. Kingston,* 971 F.2d 481, 490 (10th Cir.1992); *Catino v. Travelers Ins. Co.,* 136 F.R.D. 534, 536-37 (D.Mass.1991). The more difficult cases tend to involve implied waivers. While it is generally accepted that conduct can serve to waive the attorney-client privilege by implication, *see, e.g.,* Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 503.41 (Joseph M. McLaughlin ed.1997) (collecting cases), the case law does not offer much assistance as to how ***23** broadly such implied waivers sweep. Like most courts, this court has yet to develop a jurisprudence clarifying the scope of such implied waivers. *See United States v. Desir,* 273 F.3d 39, 45 (1st Cir.2001).

[12][13] In approaching these unanswered questions, we start with the unarguable proposition that the attorney-client privilege is highly valued. Accordingly, courts should be cautious about finding implied waivers. *See In re Grand Jury Proceedings,* 219 F.3d 175, 186 (2d Cir.2000). Claims of implied waiver must be evaluated in light of principles of logic and fairness. *See* 2 Rice, *supra* § 9:79, at 357. That evaluation demands a fastidious sifting of the facts and a careful weighing of the circumstances. *Desir,* 273 F.3d at 45-46. Considering the need for this precise, fact-specific tamisage, it is not surprising that the case law reveals few genuine instances of implied waiver. *See* 8 Wigmore, *supra* § 2327, at 635.

A. *The Call.*

[14] With these considerations in mind, we turn first to the government's contention that XYZ impliedly waived the attorney-client privilege when it "sought, obtained, and discussed legal advice" from Barrister in the presence of outsiders. Appellee's Br. at 26. The district court not only found such a waiver but also concluded that it extended, without limit of time, to all past and future communications on the subject matters discussed during the call. We think that the court erred as a matter of law in making these determinations.

[15][16] For the attorney-client privilege to attach to a communication, it must have been made in confidence and for the purpose of securing or conveying legal advice. *See Cavallaro,* 284 F.3d at 245; *see also* 8 Wigmore, *supra* § 2292, at 554. The privilege evaporates the moment that confidentiality ceases to exist. With isthmian exceptions not pertinent here, the presence of third parties is sufficient to undermine the needed confidentiality. *See* 8 Wigmore, *supra* § 2311, at 601-03 & nn. 6-8 (collecting cases). So here: XYZ knew that third parties-representatives of Smallco-were participating in the call. Thus, it could not have had any expectation of confidentiality as to matters discussed therein. The lack of such an expectation shattered the necessary confidentiality. *See In re San Juan Dupont Plaza Hotel Fire Litig.,* 859 F.2d 1007, 1016 n. 6 (1st Cir.1988) ("Absent an expectation of confidentiality, none accrues.").

The short of it is that Barrister, regardless of his professional relationship with XYZ, did not provide confidential advice during the call but, rather, merely helped to advocate XYZ's position to its co-venturer. Consequently, the communications made during the call were not confidential (and, therefore, not subject to a colorable claim of privilege).

[17] The fact that no privilege attached to the call brings the government's waiver argument into sharper focus. It is crystal clear that any previously privileged information actually revealed during the call lost any veneer of privilege. *See, e.g., von Bulow v. von Bulow (In re von Bulow),* 828 F.2d 94, 102-03 (2d Cir.1987); *In re Sealed Case,* 676 F.2d 793, 817-18 (D.C.Cir.1982). XYZ does not contest the occurrence of such a waiver (indeed, it never listed the call on its privilege log). Rather, the bone of contention is whether that waiver had a ripple effect, i.e., whether it reached anything beyond that which was actually disclosed. We think not.

[18] There was no express waiver, so the question is one of implied waiver. It is well accepted that waivers by implication can sometimes extend beyond the matter ***24** actually revealed. *See, e.g., In re Grand Jury Proceedings,* 219 F.3d at 182-83; *Sedco Int'l, S.A. v. Cory,* 683 F.2d 1201, 1206 (8th Cir.1982). Such waivers are almost invariably premised on fairness concerns. *See von Bulow,* 828 F.2d at 101-03. As one respected treatise explains, "[t]he courts have identified a common denominator in waiver by implication: in each case, the party asserting the privilege placed protected information in issue for personal benefit through some affirmative act, and the court found that to allow the privilege to protect against disclosure of that information" would have been unfair to the opposing party. 3 Weinstein, *supra* § 503.41[1]. *See also Sedco,* 683 F.2d at 1206 (noting that courts have found waiver by implication when a client (i) testifies concerning portions of an attorney-client communication, (ii) places the attorney-client relationship itself at issue, or (iii) asserts reliance on an attorney's advice as an element of a claim or defense).

A paradigmatic example of this phenomenon is a case involving an advice of counsel defense. When such a defense is raised, the pleader puts the nature of its lawyer's advice squarely in issue, and, thus, communications embodying the subject matter of the advice typically lose protection. *See, e.g., United States v. Bilzerian,* 926 F.2d 1285, 1292 (2d Cir.1991). Implying a subject matter waiver in such a case ensures fairness because it disables litigants from using the attorney-client privilege as both a sword and a shield. Were the law otherwise, the client could selectively disclose fragments helpful to its cause, entomb other (unhelpful) fragments, and in that way kidnap the truth-seeking process.

[19] Virtually every reported instance of an implied waiver extending to an entire subject matter involves a judicial disclosure, that is, a disclosure made in the course of a judicial proceeding. *See von Bulow,* 828 F.2d at 103 (collecting cases). This uniformity is not mere happenstance; it exists because such a limitation makes eminently good sense. Accordingly, we hold, as a matter of first impression in this circuit, 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. *Accord von Bulow,* 828 F.2d at 102-03; *Yankee Atomic Elec. Co. v. United States,* 54 Fed. Cl. 306, 316 (2002).

The rationale behind our holding is self-evident. When an attorney participates in an extrajudicial meeting or negotiation, his participation alone does not justify implying a broad subject matter waiver of the attorney-client privilege. There is a qualitative difference between offering testimony at trial or asserting an advice of counsel defense in litigation, on the one hand, and engaging in negotiations with business associates, on the other hand. In the former setting, the likelihood of prejudice looms: once a litigant chooses to put privileged communications at issue, only the revelation of all related exchanges will allow the truth-seeking process to function unimpeded. In the latter scenario, however, such concerns are absent. The party has introduced its lawyer into the negotiations, but that act, in and of itself, does nothing to cause prejudice to the opposition or to subvert the truth-seeking process. Furthermore, a rule that would allow broad subject matter waivers to be implied from such

communications would provide perverse incentives: parties would leave attorneys out of commercial negotiations for fear that their inclusion would later force wholesale disclosure of confidential information. This would strike at the heart of the attorney-client relationship-and ***25** would do so despite the absence of any eclipsing reason for the implication of a waiver. Where a party has not thrust a partial disclosure into ongoing litigation, fairness concerns neither require nor permit massive breaching of the attorney-client privilege.[FN6] *See In re Grand Jury Proceedings,* 219 F.3d at 188-89 (finding no broad waiver when disclosure occurred in grand jury testimony and government did not show sufficient prejudice).

> FN6. Nothing in this opinion is intended to suggest that extrajudicial disclosures can never work an implied waiver of anything beyond that which actually was disclosed. But such cases will be rare, and the scope of any ensuing waiver will be narrow. *See von Bulow,* 828 F.2d at 102 n. 1. For today, it suffices that the government has neither argued for a narrow waiver nor identified any particular document to which such a waiver might extend. *See United States v. Zannino,* 895 F.2d 1, 17 (1st Cir.1990) (explaining that arguments not made in a party's briefs need not be considered).

[20] Viewed against this backdrop, the district court's turnover order cannot be sustained. Although plotting the precise line that separates judicial disclosures from extrajudicial disclosures sometimes can be difficult, no such difficulties are presented here. The call took place entirely outside the judicial context. The parties to it were coventurers bent on ironing out wrinkles and reaching a joint business decision. Given these facts, it would be fanciful to suggest that the disclosures cited by the government were made in anticipation of litigation.

That gets the grease from the goose. Because the call was plainly extrajudicial, the district court erred in using it as a fulcrum for the implication of a broad subject matter waiver of the attorney-client privilege. *See von Bulow,* 828 F.2d at 103; *Electro Scientific Indus. v. Gen. Scanning, Inc.,* 175 F.R.D. 539, 543-44 (N.D.Cal.1997).

[21] The government argues that even extrajudicial disclosures should be given broad scope when the waiving party seeks later to use that disclosure to its advantage. We agree in part: if confidential information is revealed in an extrajudicial context and later reused in a judicial setting, the circumstances of the initial disclosure will not immunize the client against a claim of waiver. *See Electro Scientific,* 175 F.R.D. at 544 (explaining that a past extrajudicial disclosure will not cause any prejudice in subsequent litigation as long as the disclosing party "does not try to use [the disclosure] in this litigation"); *cf. United States v. Workman,* 138 F.3d 1261, 1263-64 (8th Cir.1998) (finding subject matter waiver after client placed attorney's advice in issue in court case). The key is that the subsequent disclosure, *on its own,* would suffice to waive the privilege. Here, however, XYZ has not made use of the call in any judicial proceeding.[FN7]

> FN7. To the extent that the government implies that XYZ used the call in its pre-indictment proffers, that argument fails for the reasons discussed in Part III(B), *infra.*

At the risk of carting coal to Newcastle, we add that a *prospective* waiver will very rarely be warranted in extrajudicial disclosure cases. Courts have generally allowed prospective waivers in discrete and limited situations, almost invariably involving advice of counsel defenses. *See, e.g., Minn. Specialty Crops, Inc. v. Minn. Wild Hockey Club,* 210 F.R.D. 673, 679 (D.Minn.2002); *Chiron Corp. v. Genentech, Inc.,* 179 F.Supp.2d 1182, 1187 (E.D.Cal.2001). Every case the government cites in support of the district court's imposition of a prospective waiver involves precisely this scenario. *See Minn. Specialty Crops,* 210 F.R.D. at 679 (finding a prospective waiver effected "by the adoption of [an] advice-of-***26** counsel defense");

Chiron Corp., 179 F.Supp.2d at 1188 (same); *Gabriel Capital, L.P. v. Natwest Finance, Inc.,* No. 99-Civ.-10488, 2001 WL 1132050, at *1 (S.D.N.Y. Sept. 21, 2001) (same); *Dunhall Pharms., Inc. v. Discus Dental, Inc.,* 994 F.Supp. 1202, 1209 n. 3 (C.D.Cal.1998) (finding subject matter waiver throughout the time period of alleged patent infringement when putative infringer asserted advice of counsel defense); *see also Glenmede Trust Co. v. Thompson,* 56 F.3d 476, 486 (3d Cir.1995) (finding broad waiver where advice of counsel defense had been asserted); *Abbott Labs. v. Baxter Travenol Labs., Inc.,* 676 F.Supp. 831, 832 (N.D.Ill.1987) (same).

Enforcing a prospective waiver in such a case makes sense: once a litigant puts the legal advice given to him at issue, the opposing party should be entitled to all the information on that same subject regardless of when it was compiled. This ensures that a litigant is not able to present only selected bits of the story and thus distort the truth-seeking process. The case at hand is not one in which an advice of counsel defense has been asserted-indeed, there is no pending proceeding to serve as a vehicle for such a defense-and no such ends would be served by implying a broad prospective waiver.

B. *Presentations to the Government.*

[22] Our odyssey is not yet finished. Even though the district court did not reach the issue, the government invites us to consider, as an alternative basis on which to uphold the turnover order, its argument that XYZ's pre-indictment proffers waived the attorney-client privilege. *See Intergen N.V. v. Grina,* 344 F.3d 134, 142 (1st Cir.2003) [slip op. at 13] (explaining that the court of appeals can affirm a judgment on any ground made manifest by the record). The parties have briefed this issue, the facts pertaining to it are essentially uncontradicted, and an adjudication will expedite matters. These factors convince us to accept the government's invitation.

Many years ago, Justice Holmes warned that those who deal with the government must turn square corners. *Rock Island, Ark. & La. R.R. Co. v. United States,* 254 U.S. 141, 143, 41 S.Ct. 55, 65 L.Ed. 188 (1920). That advice cuts both ways: those who deal with the government have a right to expect fair treatment in return. The principle that the government must turn square corners in dealing with its constituents is dispositive here.

The facts are these. At the time the government filed the motion to compel, it had been engaged in discussions with XYZ for over two years. During that span, the government repeatedly had requested that XYZ waive the attorney-client privilege vis-à-vis communications concerning the device's withdrawal from the market, and XYZ steadfastly had refused. When the government sought permission to audit the tape recording of the call, XYZ agreed on the express condition that leave "was not to be viewed as a waiver of any applicable privilege protecting other communications." The government acceded to this condition.

In February of 2002, government attorneys met with XYZ's outside counsel to discuss the threatened indictment of the corporation and/or its officers. The government acknowledges that it solicited a response from XYZ in hopes of gaining information so that an indictment, if one eventuated, would be based on a fully informed account of the product-withdrawal decision.

Initially, this solicitation went unheeded. In late April, however, the government wrote to XYZ's outside counsel, formally identifying the corporation as a target of ***27** the grand jury investigation. That letter apparently got XYZ's attention. The next month, its counsel responded to the government's earlier request. This epistle, dated May 10, 2002, began with a clear and explicit statement, quoted *supra* note 3, that nothing contained therein should be deemed a waiver of the attorney-client privilege. The letter set forth various reasons why the government should forgo an indictment. It contained only one glancing mention of an attorney-client communication-a reference to the call (a communication to which the attorney-client privilege never attached). In all events, the government never

replied either to this letter or to the privilege reservation contained therein.

The May 10 letter advised the prosecutors that XYZ's counsel would be sending additional material within the next few weeks in order to complete the response that the government had solicited. As promised, XYZ's counsel sent a follow-up letter eleven days later. This missive contained the same privilege reservation (again conspicuously displayed on the first page). In the body of the letter, counsel discussed communications between XYZ and the FDA during September of 1998 (some of which involved Barrister). Once again, the privilege reservation evoked no response.

Both of counsel's letters referred to an anticipated meeting with the government. That meeting occurred on May 22, 2002. As the first order of business, XYZ's counsel renewed the privilege reservation, stating that any disclosures made during the meeting should not be interpreted as waiving the attorney-client privilege. The government's representatives received this announcement in stony silence. XYZ's presentation proved fruitless and the colloquy between the parties apparently ground to a halt. That was the state of affairs when the government endeavored to subpoena the disputed documents.

[23] The government now claims that these presentations resulted in a waiver of the attorney-client privilege as to the subjects discussed therein. But the circumstances, and particularly the government's own conduct, belie that claim. XYZ was careful to condition each and every disclosure on a clearly stated privilege reservation. The government did not raise the slightest question when these reservations were stated, but, rather, kept the dialogue going and invited additional disclosures. In the circumstances of this case, we think that XYZ reasonably interpreted the government's silence as an acceptance of the reservations. *Cf. McGurn v. Bell Microprods., Inc.,* 284 F.3d 86, 90 (1st Cir.2002) (stating that silence can serve as acceptance of a condition when the offeree, despite having a reasonable opportunity to reject the condition, takes the benefit of the offer without saying anything); Restatement (Second) of Contracts § 69(1)(a) (similar).

To be sure, the government now says that XYZ, if it wanted to guarantee preservation of the attorney-client privilege, should have secured a written agreement to that effect. In the absence of such a step, the government suggests, the unilaterally imposed privilege reservation was impuissant. This argument lacks force.

As we have said, in some cases silence can be the basis of acceptance. *See, e.g., McGurn,* 284 F.3d at 90. In this case, the undisputed facts show that the government knew of XYZ's intention to operate under a privilege reservation from the time that it first secured a tape recording of the call. It unquestionably accepted the reservation at that time. XYZ then repeated the reservation on the occasion of each of the three succeeding pre-indictment presentations***28** (two written and one oral). The government voiced no objection to the privilege reservation at any of these times. Its silence encouraged (indeed, allowed) the disclosures to go forward.

Here, moreover, the government does not deny that it knew of the oft-repeated privilege reservations. Hence, the government's long delay in raising a claim of waiver is itself an indication of such knowledge. *See Akamai Techs., Inc. v. Digital Island, Inc.,* No. C-00-3509CW, 2002 WL 1285126, at *6 (N.D.Cal. May 30, 2002) (finding privilege reservation valid, in part because opposition waited eight months after supposed waiver before seeking to compel production of documents). In turn, the government's ready acceptance of the proffers' benefits, notwithstanding its knowledge of the privilege reservations, makes its current position untenable. *Cf. 3 A's Towing Co. v. P & A. Well Serv., Inc.,* 642 F.2d 756, 758 n. 3 (5th Cir.1981) (finding ratification where delay in repudiating was long and failure to repudiate was "accompanied by acts indicating approval ... such as receiving and retaining

the benefits").

In short, the privilege reservations were not unilaterally imposed, but, rather, were accepted by the government's consistent course of conduct. That course of conduct signaled clearly the government's intention to acquiesce in the privilege reservations. We conclude, therefore, that the reservations were fully effective here. Having lured XYZ into making a series of proffers, the government cannot now be allowed to contradict that reasonable understanding by arguing, after the fact, that it never acceded to the reservations. *Cf. United States v. Tierney,* 760 F.2d 382, 388 (1st Cir.1985) ("Having one's cake and eating it, too, is not in fashion in this circuit.").

Although we ground this result in equitable principles, it also comports with sound policy. Arm's-length negotiations between the government and private parties, in advance of an indictment, aid the truth-seeking process. Such negotiations are to everybody's advantage. They give potential defendants an opportunity to explain away suspicious circumstances, give the government an opportunity to avoid embarrassing and wasteful mistakes, and give the public a greater likelihood of a just result. Requiring the government to turn square corners in such negotiations will make potential defendants more willing to deal with the government in the future. Conversely, refusing to hold the government to such a standard will send a signal to future litigants to negotiate with the government only at their peril. That is not a message that we wish to send-nor is it one that would serve the government's interests.

In a perfect world, of course, XYZ would have secured a written acknowledgment of its privilege reservation in advance of each and every disclosure. But XYZ did secure one such written acknowledgment, and its failure to do so on subsequent occasions is clearly outweighed by two facts: (i) it repeatedly set forth its position, and (ii) the government failed to question the privilege reservation in a timely manner. Under the circumstances of this case, we find that the proffers were made in the course of ongoing plea negotiations; that XYZ explicitly reserved all claims of attorney-client privilege with respect thereto; that the government effectively acquiesced in these reservations; and that the government is bound by them. Consequently, XYZ reserved the attorney-client privilege by means of its pre-indictment presentations.

IV. CONCLUSION

***29** We need go no further.[FN8] We hold that XYZ's extrajudicial disclosure did not give rise, by implication, to a broad subject matter waiver. We further hold that the government's seeming acquiescence in XYZ's privilege reservations precludes any claim that XYZ's pre-indictment presentations worked a waiver of any applicable privilege. Accordingly, we reverse the order appealed from, vacate the contempt citation, and remand to the district court for further proceedings not inconsistent herewith.

> FN8. In view of the fact that the attorney-client privilege remains intact, we need not address the work-product doctrine. Nor do we need to reach the government's contention that the inadequate detail on the privilege logs resulted in a waiver. If this is a line of attack that the government wishes to pursue, the district court should consider it in the first instance.

Reversed.

C.A.1 (Mass.),2003.
In re Keeper of Records (Grand Jury Subpoena Addressed to XYZ Corp.)
348 F.3d 16, 62 Fed. R. Evid. Serv. 1032

END OF DOCUMENT

Superior Court of New Hampshire.
Hillsborough County
IHEARSAFE, LLC,
v.
INGEMI, et al.
No. 10-C-5011.
September 1, 2010.

Order

Richard B. McNamara, Presiding Justice.
The Plaintiff, iHearsafe, LLC, brought this action against the Defendants, Christine Ingemi and Ocean Bank, Trustee, seeking damages for breach of contract. On June 1, 2009, Ms. Ingemi counterclaimed against Plaintiff, seeking, among other things, damages for fraud and intentional and negligent misrepresentation. On June 2, 2009, Ms. Ingemi also filed cross-claims against third-party Defendants Hillcrest Management, LLC, and Robert Finlay, individually, seeking, among other things, damages for fraud and intentional and negligent misrepresentation.

In support of her fraud and misrepresentation claims against Plaintiff and third-party Defendants, Ms. Ingemi testified to the following facts at her deposition. On July 29, 2008, her attorney, Joseph R. ("Jay") Maiona, Jr., sent her an email. Attached to the email was a redlined version of the Asset Purchase Agreement ("APA"). In the redlined APA, the following provision appeared struck out within Section 1.03: "For the sake of clarity, buyer shall not be obligated to make any distributions hereunder." Ms. Ingemi requested that Attorney Maiona ask Plaintiff to delete this provision from the APA.

Ms. Ingemi also testified that no authorized representative of Plaintiff represented to her that the above provision would be removed from the APA. Ms. Ingemi further testified that her understanding of the APA and Employment Agreement was derived entirely from her communications with Attorney Maiona. Ms. Ingemi stated that she signed the APA on July 30, 2008 without reading it.

Thereafter, Ms. Ingemi moved for summary judgment on her fraud and misrepresentation claims, arguing that Plaintiff, or its representatives, presented her with a materially different APA for her signature on July 30, 2008 than it presented to her on the previous date. In denying Ms. Ingemi's motion, the Court held that:
The Plaintiff has produced evidence that no one representing or related to it ever represented [that] the disputed language in the agreement would be removed. More importantly, Ms. Ingemi has admitted that she did not read the APA that was presented to her for her signature ..... Under these circumstances, there can be no doubt that at the very least, Plaintiffs Motion for Summary Judgment cannot succeed.

iHearsafe v. Ingemi, Merrimack County Superior Court, 10-C-5011, at 5 (May 11, 2010).

Subsequently, Plaintiff issued a subpoena *duces tecum* to depose Attorney Maiona on June 30, 2010. On May 19, 2010, Ms. Ingemi filed a Motion to Limit Scope of Subpoena to Jay Maiona, Esq. On May 24, 2010, the Plaintiff filed its objection. On June 28, 2010, Ms. Ingemi filed an Ex Parte Motion to Continue Deposition Scheduled for June 30, which Ms. Ingemi later withdrew. On July 14, 2010, Plaintiff moved to compel the testimony of Attorney Maiona and documents "improperly withheld based on an assertion of attorney-client privilege." On July 16, 2010, Ms. Ingemi moved to withdraw "that portion of any of her claims that relied on unauthorized changes having occurred to Section 1.03 of the [APA]."

Before the Court is Plaintiffs Motion to Compel Production of Documents and Motion to Compel Production of Documents and Further Testimony, and Respondent's Motion to Limit Scope of Subpoena Duces Tecum and Withdrawal By Christine Ingemi Of Issue As To Unauthorized Revisions To Section 1.03 of the Asset Purchase Agreement.

The Plaintiff argues that its Motion to Compel Production of Documents and Motion to Compel Production of Documents and Further Testimony should be granted because Ms. Ingemi has waived the attorney-client privilege between herself and Attorney Maiona concerning the negotiation and terms and conditions of the APA and Employment Agreement at issue.

"It is well settled law that 'in certain circumstances a party's assertion of factual claims can, out of consideration of fairness to a party's adversary, result in the involuntary forfeiture of privileges for matters pertinent to the claims asserted.' " *Lugosh v. Congel*, 2006 WL 931687, at *22 (N.D.N.Y. 2006) (quoting *John Doe Co. v. United States*, 350 F.3d 299, 302 (2d Cir. 2003)); *see Rhone-Poulenc Rorer. Inc. v. Home Indem. Co.*, 32 F.3d 851, 863 (3d Cir. 1994). "For example, a client may **waive** the [attorney-client] privilege as to certain communications with a lawyer by filing a malpractice action against the lawyer." *Rhone-Poulenc Rorer. Inc.*, 32 F.3d at 863. "A defendant may also **waive** the [attorney-client] privilege by asserting reliance on the **advice** of **counsel** as an affirmative defense." *Id.; see Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156 (9th Cir. 1992) (finding party's claim that its tax position was reasonable because it was based on the **advice** of **counsel** puts advice in issue and **waives** privilege); *see also Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (finding client **waives** attorney-client privilege when she alleges as a defense that she was mislead by counsel). As the Third Circuit has noted:

In these cases, the client has made the decision and taken the affirmative step in the litigation to place the advice of the attorney in issue. Courts have found that by placing the advice in issue, the client has opened to examination facts relating to that advice. Advice is not in issue merely because it is relevant, and does not necessarily become in issue merely because the attorney's advice might affect the client's state of mind in a relevant manner. The **advice** of **counsel** is placed in issue where the client asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney-client communication.

Rhone Poulenc Rorer. Inc., 32 F.3d at 863.

In this case, Ms. Ingemi has made the decision and taken the affirmative step in the litigation to place the communications between her and Attorney Maiona at issue. Ms. Ingemi has sued Plaintiff for fraud and intentional and negligent misrepresentation, alleging that Plaintiff presented her with a materially different APA on July 29, 2008 than on July 30, 2008. She further testified that her entire understanding of the APA and Employment Agreement was derived from her communications with Attorney Maiona. In this way, Ms. Ingemi is attempting to prove her fraud and misrepresentation claims by describing her and others communications with Attorney Maiona about the negotiation and terms and conditions of the APA and Employment Agreement. Thus, the Court finds that Ms. Ingemi has waived the attorney-client privilege between her and Attorney Maiona as it relates to the negotiation and terms and conditions of the APA and Employment Agreement. The fact that Ms. Ingemi has moved to withdraw "any of her claims that relied on unauthorized changes having occurred to Section 1.03 of the APA" does not change this result.

Ms. Ingemi argues that the testimony of Attorney Maiona regarding her fraud and misrepresentation claims is no longer relevant because she is withdrawing those claims to the extent they require Attorney Maiona's testimony. The Court disagrees that the withdrawn claim somehow resurrects the attorney-client privilege. Ms. Ingemi has filed a document entitled "Withdrawal By Christine Ingemi Of Issue As To Unauthorized Revisions To Section 1.03 of the Asset Purchase Agreement." Considering the pleading as a motion to non-suit a part of her fraud and misrepresentation claims, the withdrawal is GRANTED.

In New Hampshire,

[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery .... It is not a ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

In this case, the testimony of Attorney Maiona regarding Ms. Ingemi's fraud and misrepresentation claims is no longer privileged and reasonably calculated to lead to the discovery of admissible evidence, particularly credibility evidence. It is well settled that statements made in pleadings which are subsequently withdrawn are admissible at trial as admissions. *See* Dreier v. Upjohn. Co., 492 A.2d 164, 167 (Conn. 1985). Similarly, statements made by a party in a deposition may be admissible at trial as admissions. *See* N.H. R. Evid. 801. Plaintiffs counsel should therefore be allowed to depose Attorney Maiona to explore the truth of the statements Ms. Ingemi made at her deposition and in her motion for summary judgment that relate to her fraud and misrepresentation claims.

In sum, Ms. Ingemi has waived the attorney-client privilege between herself and Attorney Maiona as it relates to the negotiation and terms and conditions of the Asset Purchase Agreement and Employment Agreement. Petitioner's Motion to Compel Production of Documents and Motion to Compel Production of Documents and Further Testimony are therefore GRANTED. Ms. Ingemi's Motion to Limit Scope of Subpoena Duces Tecum is DENIED. Ms. Ingemi's Withdrawal By Christine Ingemi Of Issue As To Unauthorized Revisions To Section 1.03 of the Asset Purchase Agreement is GRANTED with prejudice.

Accordingly, the Court orders the following:
(a.) Attorney Maiona must comply with the subpoena *duces tecum* issued on May 11, 2010 and produce the following documents to Petitioner:
(i) All documents Attorney Maiona referenced in his Affidavit dated February 18, 2010, submitted in this matter;
(ii) All documents concerning any communication between Attorney Maiona and any other person or entity (including, but not limited to, Ms. Ingemi), concerning the negotiation and execution of the Asset Purchase Agreement;
(iii) All documents concerning any communication between Attorney Maiona and any other person or entity (including, but not limited to, Ms. Ingemi), concerning the negotiation and execution of the Employment Agreement; and
(iv) All documents concerning any communication between Attorney Maiona and any authorized representative of iHearsafe, LLC, or Hillcrest Management, LLC, specifically including, but not limited to, Daniel Monfried and Robert Finlay.
(b) If requested by Plaintiffs counsel, Attorney Maiona must appear for a second deposition and provide further testimony, including testimony regarding the documents produced by him pursuant to this Order and the subjects identified within the Motion to Compel Production of Documents and Further Testimony, filed on July 14, 2010.
(c) Attorney Maiona must also produce to Plaintiffs counsel all documents within his files regarding his representation of Ms. Ingemi and/or Ingemi Corporation, concerning the sale or potential sale of the assets of Ingemi, Corporation, and the negotiation of and the terms and conditions of the Asset Purchase Agreement and Employment Agreement.
(d) Ms. Ingemi must produce the following documents within 15 days of this Order:
(i) All documents identified on her Privilege Log and listed in the letter attached as Exhibit B to the Motion to Compel Production of Documents, dated July 14, 2010; and
(ii) All documents within the file Ms. Ingemi received from Attorney Maiona and which concern the sale or potential sale of the assets of Ingemi Corporation to Plaintiff, and the negotiation of and the terms and conditions of the Asset Purchase Agreement and Employment Agreement.

SO ORDERED.

9/1/10

Date

<<signature>>

Richard B. McNamara

Presiding Justice

Ihearsafe, LLC v. Ingemi
2010 WL 5559094 (N.H.Super.) (Trial Order)

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