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> [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.
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> –*XYZ Corporation v. United States (In re Keeper of the Records)*, 348 F.3d 16, 24 (1st Cir. 2003) (quoted in *Center Partners, Ltd. v. Growth Head GP, LLC*, No. 113107, 2012 Ill. LEXIS 1525 (Ill. Nov. 29, 2012)).



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Privilege law is arguably the most important doctrinal area in the law of evidence. Most evidentiary doctrines relate primarily to the courts' institutional concerns about the reliability of the evidence that the trier of fact relies on.[1] In contrast, privileges impact "extrinsic social policy."[2] During the 1973 congressional hearings on the then draft *Federal Rules of Evidence*, former United States Supreme Court Justice Arthur Goldberg distinguished privilege doctrine from other evidentiary rules:

> [Privilege law] is the concern of the public at large. [Privileges] involve the relations between husband and wife. As the Supreme Court [has] suggested . . . , the marital privilege constitutes the basis of the family relation and antedates even the adoption of our Constitution. They involve the relations between lawyer and client, a privilege that long antedates the

1. *See generally* Dale A. Nance, *The Best Evidence Principle*, 73 IOWA L. Rev. 227 (1988).

2. 8 WIGMORE, EVIDENCE (McNaughton rev. ed. 1961).

> adoption of our Constitution. They relate to the fundamental rights of citizens.[3]

It is no accident that since the adoption of the *Federal Rules of Evidence* in 1975, the Supreme Court has handed down more decisions relating to privilege law than concerning any other part of the *Federal Rules*.[4]

When a litigant raises a privilege objection to a question about a pretrial communication, several issues can arise. The threshold question is whether there is a prima facie case that the privilege attached to the communication. The judge must grapple with such questions as whether the litigant raising the objection has standing to assert the privilege[5] and whether the communication was confidential.[6] However, even when the objector can establish a prima facie case, the party seeking discovery can prevail. To begin with, the party may be able to invoke a special exception to the scope of the privilege.[7] For example, the attorney-client privilege yields if the party can demonstrate that the client sought the attorney's advice to enable the client to commit a future crime or fraud.[8] Alternatively, the party can overcome the privilege by demonstrating that the privilege has been waived.[9] One of the leading treatises on privilege law asserts that "[n]o area of the law of privilege is more fraught with complexity than the area of waivers."[10]

In recent years, the waiver issue has attracted a good deal of attention. One waiver issue has particularly caught Congress' eye. As individuals and businesses increasingly began to store their information on computers, electronic discovery became a major battleground in modern litigation. For example, in the ongoing litigation between Viacom and YouTube, the judge ordered the production of twelve terabytes of data, which is "the . . . equivalent

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3. *Rules of Evidence: Hearing Before the Subcomm. on Reform of Fed. Criminal Laws of the H. Comm. on the Judiciary*, 93th Cong. 142, 143-44 (1973) (testimony of Hon. Arthur H. Goldberg).

4. Molly Rebecca Bryson, *Protecting Confidential Communications Between a Psychotherapist and Patient:* Jaffee v. Redmond, 46 CATH. U. L. REV. 963, 963 (1997).

5. 1 EDWARD J. IMWINKELRIED, THE NEW WIGMORE: EVIDENTIARY PRIVILEGES § 6.5 (2d ed. 2009).

6. *Id.* § 6.8.

7. 2 *id.* § 6.13.

8. United States v. Zolin, 491 U.S. 554, 563 (1989).

9. 2 IMWINKELRIED, *supra* note 5, § 6.12 .

10. 1 EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE 636 (5th ed. 2007).

of the entire Library of Congress . . . [and] then some."[11] Given the size of these production events, it was inevitable that parties would sometimes inadvertently produce privileged information. Even with the benefit of computerized search techniques, screening millions of pages to identify privileged information is difficult. Consequently, a sharp dispute arose as to whether inadvertent production effected a waiver.[12] Some courts took the strict view that even if the party exercised reasonable diligence to prevent such inadvertent disclosure, the revelation resulted in a waiver. Fearing a waiver, many companies began spending enormous sums of money on pre-production privilege reviews. For instance, during a Department of Justice antitrust investigation, Verizon Communications, Inc. spent $13.5 million on a privilege review.[13] Congress became so concerned that in 2008 it intervened and enacted new Federal Rule of Evidence 502.[14] As a general proposition, Rule 502(b) announces that inadvertent production does not effect a waiver.[15] The Judicial Conference's September 26, 2007 letter to Congress explained that the "skyrocketing" costs of privilege review necessitated legislative intervention.[16]

While Rule 502 relates to waiver in one important pretrial setting, discovery, another controversy has arisen with respect to another pretrial setting, commercial negotiations. Suppose that in order to strengthen its argument during business negotiations, a party discloses information protected by the attorney-client privilege. For example, a party might be bargaining to have a certain provision included in the contract. The party might tell the opposing party that it needs that provision in order to obtain the tax benefits that make it economically feasible for the party to enter into the bargain. To bolster its argument, the party might show the other party an opinion letter from the party's attorney. Generally, when a party intentionally discloses privileged information, the scope of the waiver includes not only the disclosed information

11. Joe Dysart, *The Trouble with Terabytes, As Bulging Client Data Heads for the Cloud, Law Firms Ready for a Storm*, 97 A.B.A. J. 32 (Apr. 2011).

12. 2 IMWINKELRIED, *supra* note 5, § 6.12.4.

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

14. Edward J. Imwinkelried, *A Crash Course in Rule 502*, TRIAL, July 2010, at 38.

15. FED. R. EVID. 502(b).

16. Letter from Lee H. Rosenthal, Chairman, Judicial Conference of the United States Committee of Rules of Practice and Procedure, to Patrick J. Leahy, Chairman, and Arlen Specter, Ranking Member, Senate Committee on the Judiciary (Sept. 26, 2007), *available at* http://federalevidence.com/pdf/2008/06-June/Hill_Letter_EV_502on9-26-07.pdf; *see also* FED. R. EVID. 502 advisory committee's note ("the burdensome costs of privilege review").

but also other privileged information dealing with the same subject matter.[17] However, a dispute has arisen as to whether the general rule should extend to disclosures during pretrial business negotiations. As Part I of this article notes, there is now a three-way split of authority over that question. Some courts have refused to apply the normal subject-matter waiver rule for the stated reason that the extension of the rule to this context creates an intolerable risk of "in effect destroy[ing] the privilege whenever a party enters into negotiations, doing violence . . . to the policy of free disclosure between attorney and client."[18] These courts fear that the application of the subject-matter waiver rule to negotiations will create a "perverse incentive[] . . . [to] leave attorneys out of commercial negotiations for fear that their inclusion would later force wholesale disclosure of confidential information."[19]

The thesis of this article is that those fears are misguided and rest on misconceptions about the fundamental conception of "communication" in privilege law. The first part of this article describes the current split of authority over the issue of the application of the subject-matter waiver rule to business negotiations. The second part of the article critically evaluates the merits of the different positions the courts have taken on the issue. Furthermore, the second part addresses and ultimately rejects several secondary arguments against applying the subject-matter waiver rule to this setting. However, the primary focus of part two is on the contention that the extension of the rule to business negotiations will banish attorneys from the negotiating table. The article concludes that, quite to the contrary, the extension of the subject-matter waiver rule to commercial negotiations will reinforce the important, legitimate role that attorneys can play in such negotiations.

17. 2 IMWINKELRIED, *supra* note 5, § 6.12.7.

18. Int'l Bus. Mach. Corp. v. Sperry Rand Corp., 44 F.R.D. 10, 13 n.2 (D. Del. 1968).

19. XYZ Corp. v. United States (*In re* Keeper of the Records), 348 F.3d 16, 24 (1st Cir. 2003).

## I. A DESCRIPTION OF THE CURRENT SPLIT OF AUTHORITY OVER THE APPLICATION OF THE SUBJECT-MATTER WAIVER RULE TO BUSINESS NEGOTIATIONS

### *A. The Traditional Subject-Matter Waiver Rule: The Scope of Any Intentional Waiver Not Only Includes the Disclosed Communications but also Extends to Other Communications Relevant to the Same Subject Matter*

At common law, the general rule is that when a privilege holder discloses a privileged communication to someone outside the circle of confidence, the disclosure effects a waiver that includes not only the disclosed information but other privileged communications relevant to the same subject matter.[20] To be sure, courts differ in how broadly they interpret the expression "subject matter."[21] The early cases tended to interpret the expression broadly.[22] However, the recent trend has been to construe the expression narrowly[23] and limit the breadth of the waiver to the same specific subject matter.[24]

The proponents of the subject-matter waiver rule have advanced various justifications for the rule. Dean Wigmore favored extending the scope of the waiver to other communications relevant to the subject matter.[25] His position was expectable. Wigmore sympathized with the views of the great English utilitarian philosopher, Jeremy Bentham,[26] who attacked privileges as obstructions to the search for truth.[27] Of course, the broader the scope of the waiver, the less the obstructive effect of the privilege. Other proponents relied on the far more theoretical argument that a privilege is indivisible and that if the holder surrendered the protection for one privileged communication, the surrender necessarily ap-

20. EPSTEIN, *supra* note 10, at 584; Alan J. Martin, Demetrios G. Metropoulos & Nicole J. Highland, *Putting Attorneys on the Witness Stand and Their Advice at Issue: The Perils of Selective Waiver of Privilege*, *in* THE ATTORNEY-CLIENT PRIVILEGE IN CIVIL LITIGATION 429, 447 (5th ed. 2012).

21. EPSTEIN, *supra* note 10, at 584-85; Martin et al., *supra* note 20, at 448.

22. EPSTEIN, *supra* note 10, at 591.

23. Martin et al., *supra* note 20, at 448.

24. PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 9.81 n.4 (2d ed. 2011), *available at* Westlaw ACPRIV-FED (citing *In re* United Mine Workers of Am. Emp. Benefits Plans Litig., 159 F.R.D. 307, 309 n.2 (D. D.C. 1994)).

25. EPSTEIN, *supra* note 10, at 585.

26. 1 IMWINKELRIED, *supra* note 5, § 3.1.

27. *Id.* § 2.5.

plied to all related communications.[28] Still others relied on a two-pronged fairness argument. At least when the holder intentionally waived, there was no element of unfairness to the holder.[29] Moreover, if the scope of the waiver did not extend to other related communications, the holder could unfairly disadvantage an opponent by using the privilege as both a sword and a shield.[30] The holder would be able to unfairly pick and choose; the holder could mislead the listener by selectively disclosing favorable communications while invoking the privilege to defensively suppress unfavorable communications.[31]

The courts and commentators have described the subject-matter waiver rule as the traditional prevailing doctrine. For its part, the *Restatement of the Law Governing Lawyers* asserts that the general rule applies to "nontestimonial setting[s]" such as business negotiations.[32] A Restatement comment states that a "clear majority of decisions" support that position.[33] One such decision was *Flagstar Bank, FSB v. Freestar Bank, N.A.* There, before any threat of litigation, the holder's president disclosed a privileged, April 13, 2006 letter to an employee of a marketing firm with whom the privilege-holder consulted regarding an organizational name change.[34] The court ruled that "disclosing the April 13 letter . . . effectuated a waiver of the attorney client privilege as to that document and to any other documents of the same subject matter."[35] Likewise, in *United States of America v. South Chicago Bank,*[36] a holder bank disclosed a privileged note to the year-end audit team. The court held that the waiver extended to other re-

28. RICE, *supra* note 24, § 9:81 n.2 (citing *In re* Assoc. Gas & Elec. Co., 59 F. Supp. 743, 744 (S.D.N.Y. 1944)).

29. *See* EPSTEIN, *supra* note 10, at 586.

30. *Id.* at 508, 517, 531, 540, 543; Martin et al., *supra* note 20, at 431-32; RICE, *supra* note 24, § 9:79, § 9:81; CHRISTOPHER MUELLER & LAIRD KIRKPATRICK, EVIDENCE § 5:30, at 400 n.7 (4th ed. 2009); *see also* EPSTEIN, *supra* note 10, at 507-08 (the holder should not be able to have his or her cake and eat it).

31. RICE, *supra* note 24, § 9:81.

32. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 79 cmt. f ("If partial disclosure occurs in a nontestimonial setting or in the context of pretrial discovery, a clear majority of decisions indicates that a similar broad [subject-matter] waiver will be found, even though the disclosure is not intended to obtain advantage as a possibly misleading halftruth in testimony.").

33. *Id.* In *Center Partners, Ltd. v. Growth Head GP, LLC*, No. 113107, 2012 Ill. LEXIS 1525 (Ill. Nov. 29, 2012), the court listed several cases, including *Flagstar Bank, FSB v. Freestar Bank, N.A.*, 2009 WL 2706965, 2009 U.S. Dist. LEXIS 76842 (N.D. Ill. Aug. 25, 2009), that adopt this view.

34. *Flagstar*, 2009 WL 2706965.

35. *Id.* at *6.

36. 1998 WL 774001, 1998 U.S. Dist. LEXIS 17445 (N.D. Ill. Oct. 30, 1998).

lated notes and commented that "[u]nder the doctrine of partial waiver, the disclosure of part of a privileged document or a set of such waives the privilege as to the rest of it."[37]

### B. *The Contrary View that in the Business Negotiation Setting, the Scope of the Waiver Is Generally Limited to the Disclosed Communications*

As the Introduction pointed out, although the subject-matter waiver rule is the traditional rule, there is now a good deal of case law refusing to extend the rule to waivers made during business negotiations. In recent years, the general trend has been to restrict subject-matter waivers.[38] More specifically, the courts have tended to confine the subject-matter waiver rule to the litigation setting and to restrict the scope of extrajudicial waivers to the disclosure itself.[39] One court adopting this limitation commented that a uniform view is emerging;[40] after surveying the precedents, the court remarked that "[v]irtually every reported instance of an implied waiver extending to an entire subject matter involves a . . . disclosure made in the course of a judicial proceeding."[41] When the disclosure occurs in a setting "far removed from court,"[42] there is a growing[43] trend[44] to limit the scope of the waiver to only what "was actually disclosed."[45]

These courts believe that there is a qualitative difference between the litigation and business negotiation settings.[46] Like the

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37. *Id.* at *3.

38. MUELLER & KIRKPATRICK, *supra* note 30, § 5:28, at 393.

39. Gregory P. Joseph, *Privilege Waiver Rule I*, NAT'L L.J., May 8, 2006, at 15 (citing Joe Doe Co. v. United States (*In re* Grand Jury Proceedings), 350 F.3d 299 (2d Cir. 2003); XYZ Corp. v. United States (*In re* Keeper of the Records), 348 F.2d 16 (1st Cir. 2003)); Paul R. Rice, *A Gap in the Privilege This Time*, LEGAL TIMES, Mar. 16, 1998, at 26.

40. XYZ Corp. v. United States (*In re* Keeper of the Records), 348 F.3d 16, 24 (1st Cir. 2003).

41. *Id.*; Ctr. Partners, Ltd. v. Growth Head GP, LLC, No. 113107, 2012 Ill. LEXIS 1525 (Ill. Nov. 29, 2012).

42. MUELLER & KIRKPATRICK, *supra* note 30, § 5:28, at 385.

43. *Id.* § 5:33.

44. *Id.* § 5:28, at 393.

45. RICE, *supra* note 24, § 9:93.

46. Barry Tarlow, *Running the Rapids: Subpoenas for Confidential Information*, THE CHAMPION, Aug. 2005, at 55, 60. (discussing XYZ Corp. v. United States (*In re* Keeper of the Records), 348 F.3d 16 (1st Cir. 2003) and stating, in relevant part, that the "[t]he court observed a 'qualitative difference' between seeking to gain advantage in judicial proceedings and engaging in business negotiations" since in litigation, the court is more likely to conclude that, at least in part, the opponent made the prior disclosure to gain a tactical advantage).

proponents of the extension of the subject-matter waiver rule to negotiations, the opponents have presented multiple arguments. To begin, they argue that a holder's partial disclosure during business negotiations poses less risk of unfairness to the other party.[47] They claim that in the negotiation context, there is less danger that the holder has made a partial revelation for manipulative, tactical reasons.[48] In addition, as the Introduction noted, they contend that the application of the subject-matter waiver rule to negotiations pressures lay clients to forbid their attorneys from actively participating in the negotiations; the clients will supposedly have a "perverse incentive[] . . . [to] leave attorneys out of commercial negotiations for fear that their inclusion would later force wholesale disclosure of confidential information."[49] Ultimately, they say, the application of the subject matter waiver rule "would in effect destroy the [attorney-client] privilege" in business negotiations.[50]

### C. *The Compromise View*

Although most jurisdictions subscribe to one of the two competing views discussed above, there is a compromise position. The courts adopting the compromise position generally follow the view that extrajudicial disclosure does not effect a subject-matter waiver. Two cases are illustrative. *In re von Bulow* is a case on point.[51] After a notorious murder trial, one of the defense attorneys, Professor Alan Dershowitz, wrote a book about the case.[52] With the permission of the client, Claus von Bulow, Dershowitz disclosed certain privileged communications in the book. However, a court later ruled that the resulting waiver applied only to the publicly disclosed matters. The court explained:

> Although it is true that disclosures in the public arena may be "one-sided" or "misleading," as long as such are and remain extrajudicial, there is no *legal* prejudice that warrants a broad

47. *In re* Consolidated Litig. Concerning Int'l Harvester's Disposition of Wis. Steel, 1987 WL 20408, at *6 (N.D. Ill. Nov. 20, 1987).

48. *See generally* Graco Children's Prods., Inc. v. Dressler, Goldsmith, Shore & Milnamow, Ltd., 1995 WL 360590, at *8, 1995 U.S. Dist. LEXIS 8157 (N.D. Ill. June 14, 1995).

49. *XYZ Corp.*, 348 F.3d at 24.

50. *Id.* at n.2; Ctr. Partners, Ltd. v. Growth Head GP, LLC, No. 113107, 2012 Ill. LEXIS 1525 (Ill. Nov. 29, 2012).

51. 828 F.2d 94 (2d Cir. 1987).

52. ALAN M. DERSHOWITZ, REVERSAL OF FORTUNE: INSIDE THE *VON BÜLOW* CASE (1986).

court-imposed subject matter waiver. The reason is that disclosures made in public rather than in court–even if selective–create no risk of *legal* prejudice until put at issue in the litigation by the privilege-holder.[53]

Similarly, when presented with an alleged waiver stemming from a "News Release," the *Electro Scientific Industries, Inc. v. General Scanning, Inc.* court professed that it could not see how "past disclosure, standing alone, would cause any prejudice in this litigation to [Electro Scientific Industries]", the party seeking disclosure.[54] "It follows that as long as [the privilege holder] does not try to use in this litigation the sentence in the 'News Release' that discloses the communication from counsel, the scope of the waiver should be narrow."[55] However, when the extrajudicial meeting is closely connected to litigation, these courts follow the traditional subject-matter waiver rule. Thus, the court invoked the traditional rule in *Pensacola Firefighters' Relief Pension Fund Board of Trustees v. Merrill Lynch Pierce Fenner & Smith, Inc.*[56] The court reasoned that although the disclosure did not occur during litigation, it was motivated by a desire to avoid litigation.[57]

## II. A CRITICAL EVALUATION OF THE MERITS OF THE COMPETING VIEWS ON THE QUESTION OF THE APPLICATION OF THE SUBJECT-MATTER WAIVER RULE TO BUSINESS NEGOTIATIONS

The crucial issue underlying the split of authority is whether, as a matter of policy, it is justifiable to treat the litigation and business negotiation settings differently. As Part I.B indicated, the opponents of extending the subject-matter waiver rule to negotiations have presented three arguments for distinguishing the two settings.

53. *In re von Bulow*, 828 F.2d at 103; EPSTEIN, *supra* note 10, at 594.

54. Electro Scientific Indus., Inc. v. Gen. Scanning, Inc., 175 F.R.D. 539, 543-44 (N.D. Cal. 1997), *aff'd*, 247 F.3d 1341 (Fed. Cir. 2001).

55. *Id.* at 543; RICE, *supra* note 24, § 9:81.

56. 265 F.R.D. 589, 596 (N.D. Fla. 2010).

57. *Id.* at 596.

### A. *A Partial Disclosure During Business Negotiations Does Not Present the Same Risk of Prejudice to the Opponent as a Partial Disclosure During Litigation*

The *von Bulow* court voiced this argument when it asserted that partial extrajudicial disclosure cannot cause "legal prejudice" to the opponent unless and until the holder "put[s] [the communication] at issue in [later] litigation."[58] The court used the adjective "legal" advisedly. Although this argument employs a technical, legal sense of "prejudice," common sense suggests that even a partial extrajudicial disclosure can cause the opponent severe actual evidentiary and economic prejudice.

Suppose that although the disclosed information is favorable to the holder, the related undisclosed information includes communications that would be devastating to the holder's case in subsequent litigation. Even the courts resisting the application of the subject-matter waiver rule to business negotiations concede that the traditional view governs the effect of disclosures occurring during litigation. Thus, if the selective disclosure is made during litigation, the opponent can defeat the privilege claim and obtain the information that will lead to the holder's loss at trial. However, positing the limitation of the subject-matter waiver rule to litigation, if the opponent discloses the identical information during business negotiations, there will be no subject-matter waiver. Consequently, the opponent will be denied discovery of the undisclosed information, and the holder may win a wrongful verdict. That wrongful verdict amounts to genuine prejudice. As this hypothetical illustrates, the timing of the disclosure has no effect on the existence or extent of the evidentiary prejudice to the opponent.

Assume, alternatively, that the negotiations never lead to litigation. During negotiations, the holder's misleadingly incomplete disclosure prompts the opponent to agree to a contract term that costs the opponent $1,000,000. What if the judge permitted the holder to make the same partial disclosure during litigation without being required to reveal related communications that would be devastating to the holder's case? Denied the related communications, the opponent might be unable to prevail on a $1,000,000 cause of action. Here, too, the opponent suffers real prejudice and,

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58. *In re* von Bulow, 828 F.2d 94, 103 (2d Cir. 1987); Ctr. Partners, Ltd. v. Growth Head GP, LLC, No. 113107, 2012 Ill. LEXIS 1525 (Ill. Nov. 29, 2012).

again, the timing of the disclosure has no effect on the degree of the economic prejudice to the opponent.

As the Introduction pointed out, unlike other doctrinal areas in evidence such as authentication and hearsay, privilege law is not inspired by the legal system's institutional concern about the reliability of testimony. Rather, privilege law affects "extrinsic social policy."[59] If any area of law should be shaped by practical concerns, it is privilege law. In an analysis of privilege doctrine, it is wrong-minded to myopically focus on "legal" prejudice. Like a partial judicial disclosure, a selective extrajudicial disclosure during business negotiations can cause the opponent real world evidentiary and economic prejudice. In short, the first proposed justification for the distinction between judicial and extrajudicial disclosures cannot withstand scrutiny.[60]

### B. *Unlike a Partial Disclosure During Litigation, a Partial Disclosure During Business Negotiations Cannot Enable the Holder to Gain an Unfair Tactical Advantage*

This proposed justification for the differential treatment of judicial and extrajudicial disclosures is a variation of the prior justification. Although the first argument is generally phrased in terms of "legal prejudice," this argument identifies a more specific type of prejudice, that is, an unfair tactical advantage gained against the opponent.

The courts and commentators favoring the differential treatment of judicial and extrajudicial disclosures have frequently relied on this argument.[61] It is certainly true that counsel sometimes use selective disclosures in litigation in an attempt to obtain tactical advantage.[62] Such disclosures can impede "the truth-

59. WIGMORE, *supra* note 2.

60. James P. McLoughlin, Jr., Neil T. Bloomfield, Renee D.K. Miller & Tonya L. Mercer, *Navigating Implied Waiver of the Attorney-Client Privilege After Adoption of Federal Rule 502 of the Federal Rules of Evidence*, 67 N.Y.U. ANN. SURV. AM. L. 693, 740-41 (2012).

61. *See, e.g.*, United States v. S. Chi. Bank, 1998 WL 774001, at *4 (N.D. Ill. Oct. 30, 1998) ("defendants did not gain a strategic advantage . . . by selectively disclosing interview information, extrajudicially, to the FDIC or its insurer").

62. RICE, *supra* note 24, § 9:81, at n.4 (citing *In re* Sealed Case, 676 F.2d 793, 808-09 (D.C. Cir. 1982); Donovan v. Robbins, 1983 U.S. Dist. LEXIS 11721, at *12-13 (N.D. Ill. Nov. 18, 1983) (stating that "[i]t is a recognized principle that a party may not selectively waive the attorney-client privilege so as to create a false and distorted impression of the nature or content of a communication or series of communications between the attorney and client.")).

seeking process" of litigation.[63] Based on this reasoning, courts have applied the subject-matter waiver rule to waivers effected by testimony during depositions[64] and at trial.[65] These courts view the rule as an antidote for unfair litigation tactics.

As Part I.C noted, some jurisdictions do not apply the rule to public disclosures of privileged information such as the revelations in the attorney's book in *von Bulow*.[66] In that situation, it strains the facts to claim that either the attorney or the client consenting to the revelation was endeavoring to achieve any tactical advantage. It would be silly to suggest that Professor Dershowitz was striving for some advantage over the publisher or that Claus von Bulow was maneuvering for advantage against the readers. In this setting, it is hard to conceive how selective disclosure could result in any identifiable prejudice or unfairness.

However, the business negotiation setting is distinguishable. The parallels between business negotiation and litigation are striking. In negotiation, as in litigation, there are at least two sides. In negotiation, as in litigation, each side is pursuing its self-serving purposes.[67] "Bargaining, like the litigation itself, partakes of the adversary procedure."[68] Like litigants, parties engaged in business negotiations commonly jockey for tactical advantage. Most importantly, like a selective disclosure in litigation, a partial disclosure during negotiations can result in unfairness to the opponent. When a plaintiff's incomplete disclosure misleads a defendant into abandoning a meritorious affirmative defense, there is undeniably a species of unfairness to the defendant. However, unfairness can take other forms, as it may in business negotiation.

One form of such unfairness can occur when a holder makes a partial disclosure that is a half-truth, causing the other party to

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63. XYZ Corp. v. United States (*In re* Keeper of the Records), 348 F.3d 16, 24 (1st Cir. 2003).

64. *See, e.g.*, *In re* Grand Jury January 246, 651 N.E.2d 696, 700 (Ill. App. Ct. 1995) (deposition).

65. *See, e.g.*, People v. O'Connor, 345 N.E.2d 520, 523-24 (Ill. App. Ct. 1976) (trial testimony).

66. EPSTEIN, *supra* note 10, at 594, (discussing *In re* von Bulow, 828 F.2d 94, 102-03 (2d Cir. 1987)).

67. RICE, *supra* note 24, § 9:81, at n.2, (citing Smith v. Alyeska Pipeline Serv. Co., 538 F. Supp. 977, 979 (D. Del. 1982), *aff'd*, 758 F.2d 668 (Fed. Cir. 1984) ("self-serving purposes"), *cert. denied*, 471 U.S. 1066 (1985)); *see also XYZ Corp.*, 348 F.3d at 23 ("for personal benefit").

68. RICE, *supra* note 24, § 9:93, at n.10 (quoting Sylgab Steel & Wire Corp. v. Imoco-Gateway Corp., 62 F.R.D. 454, 458 (N.D. Ill. 1974), *aff'd*, 534 F.2d 330 (7th Cir. 1976)).

the bargaining process to agree to a contract term that it otherwise would have rejected. In economic terms, that unfairness can be just as costly to the opponent as a selective litigation disclosure that prompts a defendant to abandon a valid affirmative defense. If anything, the law should be more concerned about preventing such unfairness in the bargaining context. In the litigation setting, the opponent will almost always be represented by a lawyer who may suspect that the disclosure is incomplete. In litigation, the opponent's lawyer is in a position to expose the selective disclosure and prevent the unfairness. However, the opponent may not be represented by counsel at the bargaining table. In short, in the bargaining setting there is a greater risk that the holder's attempt to mislead the opponent will succeed and cause the opponent a substantial economic loss. Significantly, the Comment to American Bar Association Model Rule of Professional Conduct 1.6 indicates that the exceptions to the attorney's confidentiality duty can come into play in "negotiation" as well as "litigation."[69]

For that matter, a pretrial selective disclosure during bargaining can cause unfairness in subsequent litigation even if the disclosure is not repeated during the litigation. Some opinions refusing to apply the subject-matter waiver rule seem to assume that a partial disclosure cannot cause "legal prejudice" unless the disclosure is reiterated during the litigation.[70] However, that assumption is false. Suppose, for example, that during pretrial business negotiations, the holder makes a misleadingly incomplete disclosure. Assume further that the parties later fall out and that litigation ensues. Finally, assume that the holder does not repeat the selective disclosure during the litigation. It is nevertheless possible that in shaping his or her trial strategy, the opponent might mistakenly rely on the holder's earlier selective disclosure.[71] There is nothing magical about the timing of the selective disclosure; whether it occurred before or during litigation, the opponent might detrimentally rely on it[72] and consequently adopt a less effective trial strategy. In sum, the second proposed justification for the differential treatment of litigation disclosures and extrajudicial bargaining disclosures is flawed.

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69. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 7 (2011).

70. *In re von Bulow*, 828 F.3d at 103 ("[D]isclosures made in public rather than in court—even if selective—create no risk of *legal* prejudice until put at issue in the litigation by the privilege-holder.")

71. *See* 2 IMWINKELRIED, *supra* note 5, § 6.12.7, at 1122.

72. *See id.*

### C. *The Application of the Subject-Matter Waiver Rule to Commercial Negotiations Pressures Clients to Conduct the Negotiations Without the Benefit of Counsel*

As the Introduction pointed out, the primary argument against extending the subject-matter waiver rule to commercial negotiations has been the contention that the application of the rule in that setting gives clients a "perverse incentive[] . . . [to] leave attorneys out of commercial negotiations for fear that their inclusion would later force wholesale disclosure of confidential information."[73] The advocates of this contention make the rhetorical, dire prediction that the application of the rule "would in effect destroy the privilege" in business negotiations.[74] In truth, that prediction is a gross exaggeration, reflecting misconceptions about both the negotiation process and privilege law.

Before a court could find any waiver during negotiations and then invoke the subject matter waiver rule, there would have to be some discussion of the holder's legal position during the negotiations. In many cases, there is no such discussion. The holder often does not consult with an attorney to obtain legal arguments to employ during the negotiations. Rather, in light of the relevant tax or securities law, the holder simply wants to know what contract terms he or she should seek during negotiation in order to maximize his or her profits from the transaction. The holder frequently has the economic leverage to demand the term. The holder's communications with his or her attorney explain why the holder is insisting on the contract term, but given the holder's superior economic bargaining position, there will be no need for the holder to advance any legal arguments during the negotiations. If so, there is no occasion to disclose any protected attorney-client communications during the negotiations. If there is no disclosure at all,[75] there is no waiver, and the court never reaches the issue of the scope of the waiver.

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73. XYZ Corp. v. United States (*In re* Keeper of the Records), 348 F.3d 16, 24 (1st Cir. 2003).

74. Int'l Bus. Mach. Corp. v. Sperry Rand Corp., 44 F.R.D. 10, 13 n.2 (D. Del. 1968).

75. Pallares v. Kohn (*In re* Chevron), 650 F.3d 276, 290 (3d Cir. 2011) (noting that if the holder does not disclose any privileged information, then there can be no waiver); W. United Life Assurance Co. v. Fifth Third Bank, 2004 WL 2583916, at *3, 2004 U.S. Dist. LEXIS 23073 (N.D. Ill. Nov. 12, 2004) ("In the first instance, there must be a disclosure of part of a privileged communication; if no privileged information is disclosed, there can be no 'partial waiver.'"); Allen-Bradley Co. v. Autotech Corp., 1989 WL 134500, at *1 (N.D. Ill. Oct. 11, 1989) ("In short, waiver cannot stem from an unprivileged communication.").

Alternatively, assume that the parties have relatively equal economic bargaining power and that the holder/client may want to present a legal argument as a justification for seeking a particular contract term during the negotiations. Even on that assumption, that application of the subject-matter waiver rule will not drive attorneys from the bargaining table. As we shall now see, the application of the rule actually heightens the need for the client to have his or her attorney at the table.

### 1. *The Client's Role in Commercial Bargaining*

If the client can no longer safely have the attorney sit at the negotiating table, the client will have to conduct the negotiations; and if the need arises, it will be the client presenting the legal argument for the contract term. How great is the risk of a waiver when the client does so?

On the one hand, the client may make several types of references to his or her consultation with the attorney without waiving the attorney-client privilege. The attorney-client privilege protects only "communications" between the client and attorney.[76] The client has disclosed a protected "communication" only if the client refers to the substance of the communication between the client and the attorney.[77] Given the definition of "communication" in privilege law, the client may refer to the following facts without losing the privilege: There was a communication; more specifically, at a particular place and time certain parties engaged in a communication; and, even beyond that, the communication related to a certain general topic such as "tax law."[78] None of these statements by the client would forfeit the protection of the privilege because none of them discloses the substantive content of a privileged attorney-client communication.[79]

On the other hand, a court would probably conclude that even if the client does not expressly refer to communications exchanged

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76. 1 IMWINKELRIED, *supra* note 5, § 6.7.

77. EPSTEIN, *supra* note 10, at 536-37 (citing *In re* Brand Name Prescription Drugs Antitrust Litig., 1995 WL 531805, at *1-2, *11 (N.D. Ill. Aug. 18, 1995)).

78. 1 IMWINKELRIED, *supra* note 5, § 6.7.1, at 730.

79. MUELLER & KIRKPATRICK, *supra* note 30, § 5:28, at 386-87 ("Waiver does not occur merely because a client discusses with others the same facts that she earlier discussed with the attorney but only where she reveals the substance of the attorney-client communications . . . . A client's statement that she discussed the subject with her attorney does not waive the privilege for the contents or substance of what she told her lawyer."); *see also* RICE, *supra* note 24, § 9:85 (quoting Sylgab Steel & Wire Corp. v. Imoco-Gateway Corp., 62 F.R.D. 454, 458 (N.D. Ill. 1974), *aff'd*, 534 F.2d 330 (7th Cir. 1976)).

between the client and attorney, the client waived the privilege by describing the legal argument that the attorney conveyed to the client. The court's reasoning in reaching this conclusion would likely involve two steps.

The first step entails the realization that modernly, the attorney-client privilege applies to the attorney's statements to the client as well as the client's statements to the attorney.[80] At early common law, some courts applied the privilege only to the client's statements conveying facts to the attorney.[81] Today, however, the privilege functions as a two-way street, also protecting the attorney's statements conveying legal advice to the client.[82] One of the last holdouts on this issue was Pennsylvania, but in early 2011 the Pennsylvania Supreme Court relented and joined the ranks of the courts shielding the attorney's statements to the client.[83]

The second step is appreciating that the definition of "communication" includes knowledge based on privileged communications.[84] The leading precedent is the United States Supreme Court's 1951 decision in *Blau v. United States*.[85] A grand witness's spouse had hidden herself to avoid service of a subpoena. The grand jury demanded that the witness reveal his knowledge of his wife's whereabouts. He refused on the ground that the basis for his knowledge was a confidential spousal communication.[86] The Court held that the witness's refusal to answer was lawful. In the Court's words, "[i]t is not disputed in the present case that petitioner obtained his knowledge as to where his wife was by communication from her."[87] Thus, a person's knowledge is treated as privileged if the knowledge rests squarely on privileged communications.

Apply that reasoning to the client's presentation of a legal argument during a negotiation session in the attorney's absence. The attorney may not be present but because the client lacks legal training, the client is implicitly relying on the attorney's communications to the client.[88] Those communications are the basis for the client's statements about the legal argument during the nego-

80. 1 IMWINKELRIED, *supra* note 5, § 6.6.4, at 686.
81. *Id.* § 6.6.4, at 685.
82. *See id.*
83. Gillard v. AIG Ins. Co., 15 A.3d 44, 59 (Pa. 2011).
84. *See* 1 IMWINKELRIED, *supra* note 5, § 6.6.7, at 712-14.
85. 340 U.S. 332, 333-34 (1951).
86. *Id.* at 333.
87. *Id.*
88. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 cmt. c (2000) ("[A] person untrained in the law").

tiation. The attorney's communications serve as the basis for the client's understanding of the law,[89] just as Blau's wife's communication to him was the basis for his knowledge of her whereabouts. Since the contemporary privilege applies to the attorney's statements to the client, the client waives the privilege during bargaining when he or she makes the legal argument taught the client by the attorney's statements. The waiver does not require an explicit reference to the attorney's statements since, like the statements, the client's knowledge based on the statements is privileged. In such circumstances, there is an implied waiver;[90] it results even if the holder did not subjectively intend to surrender the privilege.[91] The upshot is that if the client needs to advance a legal argument for a contract term during negotiations and attempts to present that argument in the attorney's absence, there is a grave risk that the client's statements about the legal argument will effect a waiver.

### 2. *The Attorney's Role in Commercial Bargaining*

As previously stated, the opponents of applying the subject-matter waiver rule to business negotiations contend that applying the rule in that setting pressures the client to "leave attorneys out of commercial negotiations for fear that their inclusion would later force wholesale disclosure of confidential information."[92] That contention rests on a fundamental misconception about the definition of "communication" in privilege law.[93]

In contrast to the client, during business negotiations the attorney can present the client's legal position in detail without waiv-

89. MUELLER & KIRKPATRICK, *supra* note 30, § 5:30, at 401 n.15 (citing United States v. Bilzerian, 926 F.2d 1285, 1292 (2d Cir. 1991) (using the phrase "the basis for his understanding of what the law required"), *cert. denied*, 502 U.S. 813 (1991)).

90. *See* RICE, *supra* note 24, at § 9:24.

91. *Id.* § 9:81 n.2 (citing First Fed. Sav. & Loan Ass'n of Pittsburgh v. Oppenheim, Appel, Dixon & Co., 110 F.R.D. 557, 567 (S.D.N.Y. 1986)); MUELLER & KIRKPATRICK, *supra* note 30, § 5:28, at 387 n.21, (citing *In re* Grand Jury Investigation of Ocean Transp., 604 F.2d 672, 675 (D.C. Cir. 1979), *cert. denied sub nom.* Sea Land Serv., Inc. v. United States, 444 U.S. 915 (1979)).

92. XYZ Corp. v. United States (*In re* Keeper of the Records), 348 F.3d 16, 24-25 (1st Cir. 2003).

93. Quite apart from the privilege analysis, as a matter of history this contention is curious. As Part I notes, although there are recent authorities refusing to extend the subject matter waiver rule to business negotiations, the rule is the traditional view. *See supra* Part I.A. The major role that attorneys currently play in business negotiations presumably evolved while the traditional rule was dominant. If the dominance of that view did not prevent the attorney's role from developing, it is difficult to understand how continued recognition of the traditional rule will drastically curtail that role.

ing the privilege.[94] Neither the factual nor the legal component of the attorney's presentation entails a divulgence of privileged information. Although the attorney's legal argument during the negotiations will be premised on certain facts, ordinarily the attorney's reliance on that premise will not effect a waiver. Facts do not constitute privileged information.[95] As the Supreme Court has underscored, "the protection of the [attorney-client] privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing."[96] Admittedly, immediately after the initial client interview and before the bargaining session, the attorney's position is analogous to Blau's position before the grand jury. In *Blau,* the sole basis for the husband's knowledge of his wife's whereabouts was a confidential communication from his wife.[97] Similarly, before the attorney has had any opportunity to confirm the facts the client stated in the very first client interview, the basis for the attorney's knowledge of the facts is confidential communication from the client. However, by the time of the subsequent negotiation session, the attorney has almost always corroborated the client's statements about the facts; at that point in the chronology, the attorney's knowledge of the facts no longer rests solely or even primarily on confidential communications from the client.[98] For that matter, to be persuasive to the opponent during the bargaining session, the attorney's legal argument will have to be based on facts known to the opponent. The opponent is unlikely to be persuaded by a legal argument premised on facts the attorney is unwilling to disclose to the opponent. As a practical matter, the attorney's argument must be predicated on facts accessible to the opponent;

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94. *See, e.g.*, Am. Optical Corp. v. Medtronic, Inc., 56 F.R.D. 426, 431 (D. Mass. 1972) (rejecting the argument that "a party waives its privilege if its lawyer, bargaining on its behalf, contends vigorously and even in some detail that the law favors his client's position on a point in issue"); RICE, *supra* note 24, § 9:93.

95. 1 IMWINKELRIED, *supra* note 5, § 6.7.1, at 729.

96. Upjohn Co. v. United States, 449 U.S. 383, 395-96 (1981) (quoting Philadelphia v. Westinghouse Elec. Corp., 205 F. Supp. 830, 831 (E.D. Pa. 1962); Magill v. Superior Court, 103 Cal. Rptr. 2d 355, 384 (Cal. Ct. App. 2001) (nothing that "privilege does not protect disclosure of underlying facts"). "The client cannot be compelled to answer the question, 'What did you say or write to the attorney?,' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney." *Upjohn*, 449 U.S. at 395-96 (quoting *Phliadelphia*, 205 F. Supp. at 831).

97. Blau v. United States, 340 U.S. 332, 333 (1951).

98. MUELLER & KIRKPATRICK, *supra* note 29, § 5:28, at 386. In some cases, the client may call his or her attorney as a fact witness at trial without waiving the privilege. *Id.*

and if the facts are accessible in that fashion, the attorney's implicit reliance on the facts cannot effect a waiver.

Nor does the attorney's description of the legal component of the argument entail a waiver of any privileged attorney. Lacking legal training, the client must implicitly draw on the attorney's communications about the law to present the legal argument to the opponent during the bargaining session. However, precisely because he or she possesses legal training, the lawyer has no need to rely on any communications from the client about the law. The lawyer is drawing on his or her own legal research and analysis. It is therefore clear that in the typical bargaining session, the attorney may present the client's legal argument for a desired contract term without forfeiting the client's privilege.[99] On a moment's reflection, it would be shocking to find a waiver here. Every day in trial and appellate courts throughout the United States, attorneys stand up and describe in detail their client's legal position on the facts before the court. No one could seriously suggest that by making those arguments, the attorneys were waiving their clients' attorney-client privilege. The wording of the attorney's description of the client's legal argument during a bargaining session could be identical to the later description of the argument to a trial or appellate judge. If the attorney's presentation of the argument in court does not effect a waiver, the attorney's explanation of the identical argument at the bargaining table should not have that effect.

There are, of course, exceptional cases in which an attorney's statement during bargaining can result in a waiver. Suppose, for example, that after the attorney initially described the client's legal argument in a bargaining session, the opponent states, "You say that now. But I doubt whether you would have taken that position a month ago before the value of your client's stock declined." To respond to that statement, with the client's authorization, the attorney might disclose a prior communication between the attorney and client such as a letter written two months earlier in which the lawyer outlined the same argument presented during

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99. RICE, *supra* note 24, at § 9:93. "If . . . an attorney makes a detailed explanation of a legal matter during negotiations in an effort to convince the adversary about the merits of his client's cause, that does not waive the privilege." *Id.*; *see also* Cardiac Pacemakers, Inc. v. St. Jude Med., Inc., 2001 WL 699889, at *1 (S.D. Ind. Apr. 26, 2001) ("Defendants seem to be arguing that when a lawyer talks with an adverse party about an issue, that conversation might have 'divulged the content' of the lawyer's private, privileged documents on the same subject so as to waive applicable privileges. That theory is a non-starter.").

the bargaining session. The attorney might do so to enhance the credibility of the client's bargaining position;[100] the letter shows that the attorney advocated the same analysis even before the stock decline. In this variation of the fact situation, the attorney has not only described the client's current legal position on the issue; the attorney has also disclosed a prior, privileged attorney-client communication. On these facts, the court should find a waiver.[101] However, that is a rare case, and in the run-of-the-mill bargaining session, the attorney can explain the client's present legal argument in depth without forfeiting the client's privilege.

In summary, when the client needs to present a legal argument at the bargaining table to justify a desired contract term, it is much safer for the client to call on the attorney to make the presentation. If the client himself or herself were to do so, there would be a substantial risk of an implied waiver; the client will almost necessarily be relying on confidential communications from the attorney. That risk declines markedly when the attorney presents the legal argument. Since the attorney is familiar with evidence law, he or she is much more likely to know whether a particular statement will effect a waiver. Furthermore, as we have seen, under *Blau* there is much less likelihood that the court will find that a waiver has been implied from the attorney's statements explaining the legal argument. Of course, the possible application of the subject-matter waiver rule significantly increases the stakes.

If there is a waiver and the court applies the subject-matter waiver rule, the extent of the waiver will usually include not only the disclosed information but at least some previously undisclosed, potentially damaging communications.[102] The possibility of the court's invocation of the subject-matter waiver rule gives the client

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100. RICE, *supra* note 24, § 9:93.

101. *Id.*

102. Although in most cases the application of the subject-matter waiver rule will increase the volume of information disclosed to the party seeking discovery, the application of the rule does not invariably lead to the result that the party gains additional information. To be discoverable, the communication must at least be relevant. 2 IMWINKELRIED, *supra* note 5, § 6.12.7, at 1112-13. Unless a client relies on an advice of counsel defense, the attorney's statements to the client may be irrelevant. *See* LID Assoc. v. Dolan, 324 Ill. App. 3d 1047, 1058-60, 756 N.E.2d 866, *appeal denied*, 197 Ill.2d 564, 763 N.E.2d 771 (2001) (allow a real estate lawyer to testify to his view of the scope of fiduciary duties owed to the plaintiff limited partners was deemed irrelevant). Unless under the substantive law it is for some reason relevant to show the attorney's or client's belief about the state of the law, attorney-client communications may be irrelevant. In the typical case, the legal determinant is the view of the presiding judge, not that of a litigant or the litigant's attorney.

all the more reason to assign the attorney the task of describing the client's legal argument during the bargaining session. Assigning that task to the attorney minimizes the risk of a waiver and will hopefully moot the issue of the application of the subject-matter waiver rule. Hence, rather than threatening to banish the attorney from the bargaining table, the subject-matter waiver rule gives the client a much stronger incentive to give his or her attorney both a seat at the table and a large role in the negotiations. To borrow a phrase from a Fifth Circuit decision on expert testimony, the prediction that the extension of the subject matter waiver rule to commercial negotiations will drive attorneys from the bargaining table is "exactly backwards."[103]

## III. CONCLUSION

The point of this article is not to evaluate the wisdom of the subject-matter waiver rule. It is debatable whether the courts ought to broadly define subject matter when they invoke the rule.[104] As Part I.A indicated, Dean Wigmore's advocacy of a broad definition may have reflected his hostility to privileges that obstruct the search for truth. Today there is a widespread public consensus that personal privacy deserves additional protection,[105] and privileges are a means of affording such protection. A broad subject-matter waiver rule certainly requires a more concrete justification than the metaphysical notion of the indivisibility of a privilege.[106] There has been a modern trend to limit the scope of subject-matter waivers[107] and define subject matter more narrowly.[108] Professor Richard Marcus has constructed a strong case that rather than purporting to rely on any definition of "subject matter," the courts should employ a fairness test to determine the extent of a waiver.[109] In his view, the waiver ought to extend to the undisclosed communications only if, without the context supplied by the undisclosed communications, the selective disclosure is likely to op-

103. Watkins v. Telsmith, Inc., 121 F.3d 984, 991 (5th Cir. 1997).
104. 2 IMWINKELRIED, *supra* note 5, § 6.12.7, at 1113-19.
105. 1 *id.* § 1.1, at 5-6.
106. RICE, *supra* note 24, § 9:83.
107. MUELLER & KIRKPATRICK, *supra* note 30, § 5:28, at 393.
108. *Id.*
109. Richard Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 MICH. L. REV. 1605, 1627 (1986); 2 IMWINKELRIED, *supra* note 5, § 6.12.7, at 1113-17 (discussing Professor Marcus's view).

erate as a misleading half-truth.[110] Professor Marcus's test prevents the holder from using a partial disclosure as a manipulative tool to distort[111] or garble[112] the truth. When Congress enacted new waiver rule in 2008, Congress decided to incorporate a fairness test in Rule 502(a)(3) to limit the scope of subject-matter waivers.[113]

Rather, the point of this article is that *if* there is to be any subject-matter waiver rule, the rule should apply to waivers effected in business negotiations as well as litigation. Some extrajudicial waivers such as the revelations in the book in *von Bulow*[114] are highly unlikely to directly cause any prejudice or unfairness. However, selective disclosures in business negotiations differ. Realistically, like litigation, negotiation is an adversarial setting. Like incomplete litigation disclosures, partial disclosures during negotiations can cause significant prejudice and result in unfairness. On close examination, the asserted differences between the litigation and negotiation settings prove to be largely illusory; in both settings selective disclosures can result in real prejudice, and in both contexts parties can employ selective disclosures to maneuver for tactical advantage.

Finally, it is plainly wrong to predict that the application of the subject-matter waiver rule to negotiations will prompt clients to "leave attorneys out of commercial negotiations . . . ."[115] If, in counsel's absence, the client presents a legal argument for a desired contract term, there is a considerable risk that the client's presentation will trigger a privilege waiver. That risk virtually evaporates if, instead, the client relies on the attorney to present the legal argument during negotiations. The prospect of a subject-matter waiver gives the client a powerful motivation to have counsel present to explain the client's legal argument. Thus, rather than imperiling the attorney's role in business negotiations, the subject-matter waiver rule secures counsel's prominent place at the bargaining table.

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110. Marcus, *supra* note 109, at 1628.

111. *See, e.g.*, RICE, *supra* note 24, § 9:81, at n.4 (citing Donovan v. Robbins, 588 F. Supp. 1268 (N.D. Ill. 1984)).

112. EPSTEIN, *supra* note 10, at 589.

113. FED. R. EVID. 502.

114. *In re* von Bulow, 828 F.2d 94, 101-04 (2d Cir. 1987).

115. XYZ Corp. v. United States (*In re* Keeper of the Records), 348 F.3d 16, 24 (1st Cir. 2003).