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***Provision of Privileged Communications to Family
Members Prior to Litigation Did Not Result in
Subject Matter Waiver of Privilege***

In *Allen v. Christensen*, Kirk Allen (“Allen”) brought suit against his former employer and others in December 2022. Two years before Allen brought suit, he forwarded nine attorney-client privileged emails to his family members.

During the course of the litigation, the Suffolk Superior Court (“Court”) found that Allen had spoliated evidence when he, among other things, wiped his work laptops before returning them. Defendants then subpoenaed Allen’s family members looking for documents that Allen may not have produced, which process resulted in production of a privilege log identifying 146 privileged documents. The Defendants then moved to compel the production of the documents withheld as privileged, arguing that Allen’s provision of the nine emails to family members before litigation constituted an implied waiver of all communications pertaining to the same subject matter.

The Court stated that it had not located any Massachusetts appellate authority that directly answered the question of whether extrajudicial disclosure of privileged material not relied upon in litigation constitutes a waiver of all privileged communications on that subject matter. Nevertheless, the Court found the reasoning in a First Circuit case, *In re Keeper of Recs. (Grand Jury Subpoena Addressed to XYZ Corp.)*, 348 F.3d 16 (1st Cir. 2003), to be instructive. The Court concluded that extrajudicial disclosure of privileged information does *not* constitute an implied waiver of privileged communications on the subject matter *unless* the party thereafter puts the privileged information at issue or attempts to use it to his benefit in litigation. The Court explained that its conclusion “appropriately balances the protections of the attorney-client privilege and the requirements of fairness to both parties in litigation.” The Court particularly noted that Allen’s minor express waiver of privilege in 2020 did nothing to cause prejudice to the opposing parties or to subvert the truth-seeking process. The Court also was not persuaded by Defendants’ argument that the Court’s prior finding of spoliation justified finding an implied subject matter waiver of the privilege.

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