

Articles

The Frightening At-Issue Exception to the Attorney-Client Privilege

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ABSTRACT

The attorney-client relationship is understood by lawyers and the public to be infused with confidentiality, and the attorney-client privilege, which is essential to this sensitive and important relationship, is much revered. As vital as it may be, however, the attorney-client privilege is narrowly construed, laden with exceptions, and easily waived. On the theory that the attorney-client privilege is intended for use as a shield and not as a sword, it may be lost if a litigant asserts a claim or defense that requires inquiry into the litigant's privileged communications with its lawyer to fairly rebut or refute. This principle is commonly described as the "at-issue exception" to the attorney-client privilege. The at-issue exception represents the most frightening type of privilege forfeiture because the law does not clearly warn clients of its risk and because lawyers may not realize its effect in time to avoid calamity. For this reason, lawyers must understand courts' analysis and application of the at-issue exception. This article advances that process. In doing so, it carefully examines and critiques the three principal tests courts use to decide whether the at-issue exception applies, and discusses

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several types of cases and circumstances in which lawyers seem especially prone to missing the serious threat to the attorney-client privilege that the at-issue exception potentially poses.

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I. INTRODUCTION

The attorney-client relationship is understood by lawyers and the public to be infused with confidentiality, and the attorney-client privilege, which is essential to this sensitive and important relationship, is much revered.¹ As vital as it may be, however, the attorney-client privilege is not absolute.² Indeed, it is not as broad or protective as most clients and many lawyers believe.³ To the contrary, the attorney-client privilege is narrowly construed, laden with exceptions, and easily waived.

1. See *Commonwealth v. Chmiel*, 738 A.2d 406, 414 (Pa. 1999) (describing the attorney-client privilege as “the most revered of the common law privileges”).

2. *In re Grand Jury Subpoena*, 745 F.3d 681, 687 (3d Cir. 2014); *DCP Midstream, LP v. Anadarko Petrol. Corp.*, 303 P.3d 1187, 1198 (Colo. 2013); *Adams v. Franklin*, 924 A.2d 993, 999 (D.C. 2007); *100 Harborview Dr. Condo. Council of Unit Owners v. Clark*, 119 A.3d 87, 113 (Md. Ct. Spec. App. 2015); *Culbertson v. Culbertson*, 455 S.W.3d 107, 132 (Tenn. Ct. App. 2014); *Youkers v. State*, 400 S.W.3d 200, 212 (Tex. App. 2013).

3. See EDNA S. EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* 6 (5th ed. 2007) (“Many communications that clients and attorneys alike believe will be privileged are not.”).

On the theory that the attorney-client privilege is intended for use as a shield and not as a sword, it may be lost if a litigant asserts a claim or defense that requires inquiry into the litigant's privileged communications with its lawyer to fairly rebut or refute.⁴ This principle is commonly described as the "at-issue exception" to the attorney-client privilege.⁵

Unfortunately, even essential aspects of at-issue doctrine that lawyers should grasp—such as merely filing suit does not put at issue attorney-client communications forming the basis for the plaintiff's complaint or petition,⁶ a defendant's denial of allegations does not put at issue related communications with her lawyer,⁷ and neither a plaintiff nor a defendant may place an opponent's privileged communications at issue by its own pleading of claims or defenses⁸—are often contested, and

4. CR-RSC Tower I, LLC v. RSC Tower I, LLC, 56 A.3d 170, 198–207 (Md. 2012).

5. See, e.g., Alaska Elec. Pension Fund v. Brown, 988 A.2d 412, 419 (Del. 2010) (discussing the "at issue exception" to the attorney-client privilege); Aimee B. Anderson, *Preserving the Confidentiality of Investigations by In-House and Outside Counsel*, in ATTORNEY-CLIENT PRIVILEGE IN CIVIL LITIGATION 223, 233 (Vincent S. Walkowiak ed., 3d ed. 2004) ("The 'at-issue exception' comes into play by virtue of a party's reliance on a privileged communication as an essential part of its claim or defense. Fairness requires such an exception.") (footnotes omitted); Kenneth Duvall, *Rules, Standards, and the Attorney-Client Privilege: When the Privilege is "At-Issue" in the Discovery Rule Context*, 32 N. ILL. U. L. REV. 1, 2 (2011) ("In recent decades, the privilege battles have in large part been waged over one particular exception to the privilege—the 'at-issue' carve-out.").

6. See, e.g., Guar. Ins. Co. v. Heffernan Ins. Brokers, Inc., 300 F.R.D. 590, 593–94 (S.D. Fla. 2014) (stating that under Florida law, a party does not waive the attorney-client privilege simply by bringing a lawsuit); Navajo Nation v. Peabody Holding Co., 255 F.R.D. 37, 50 (D.D.C. 2009) (finding that the Navajo did not place the advice of their counsel at issue through claims of fraudulent concealment and affirmative reliance even though such evidence might be relevant to their claims); Empire W. Title Agency, L.L.C. v. Talamante ex rel. Cty. of Maricopa, 323 P.3d 1148, 1150 (Ariz. 2014) (noting the court's continuing position "that merely filing an action or denying an allegation does not waive the [attorney-client] privilege").

7. See, e.g., Lorenz v. Valley Forge Ins. Co., 815 F.2d 1095, 1098 (7th Cir. 1987) ("To waive the attorney-client privilege by voluntarily injecting an issue in the case, a defendant must do more than merely deny a plaintiff's allegations."); Smith v. Scottsdale Ins. Co., 40 F. Supp. 3d 704, 724 (N.D. W. Va. 2014) (discussing the at-issue doctrine and stating that "[i]f merely denying the allegations in a complaint waived the attorney-client privilege, the privilege would be moot"); Shukh v. Seagate Tech., LLC, 872 F. Supp. 2d 851, 857 (D. Minn. 2012); Empire W. Title Agency, L.L.C., 323 P.3d at 1150 (reminding lawyers "that merely . . . denying an allegation does not waive the [attorney-client] privilege").

8. See, e.g., Exec. Mgmt. Servs., Inc. v. Fifth Third Bank, 309 F.R.D. 455, 462 (S.D. Ind. 2015) (explaining that a defendant's assertion of affirmative defenses cannot have the effect of waiving the plaintiff's attorney-client privilege); Gardner v. Major Auto. Cos., Inc., No. 11 Civ. 1664(FB)(VMS), 2014 WL 1330961, at *7 (E.D.N.Y. Mar. 31, 2014) (rejecting the plaintiffs' argument that the allegations in their complaint forced

harder issues remain. In short, many lawyers either do not understand the at-issue exception to the privilege or fail to appreciate its application. Their misunderstanding or insensitivity perhaps matches courts' struggles to characterize at-issue doctrine. This uncertainty is capsulized in the following question: does a party's loss of the privilege by placing confidential attorney-client communications at issue reflect an exception to the privilege or is it a form of a waiver? There is no clear answer.

If you reason that an "exception" to the privilege should be understood to refer to a situation in which the privilege does not attach to an attorney-client communication in the first place,⁹ then describing at-issue doctrine as an exception to the privilege seems wrong because it operates to strip an otherwise privileged communication of its protection. Yet there are other situations in which a client relinquishes the attorney-client privilege after it has attached that are also characterized as exceptions.¹⁰

Describing at-issue doctrine as a form of waiver is equally unsatisfying. On the one hand, "waiver" generally describes the intentional or voluntary relinquishment of a known right or privilege,¹¹ and at-issue doctrine is often invoked where a party defends allegations against it on the basis that it acted on advice of counsel.¹² In that instance, waiver would appear to be an apt characterization of the doctrine.¹³ On the other hand, a party may put privileged

the defendants to put their lawyer's advice at issue); *Fischel & Kahn, Ltd. v. van Straaten Gallery, Inc.*, 727 N.E.2d 240, 244 (Ill. 2000) ("To allow *Fischel & Kahn* to invade the attorney-client privilege . . . simply by filing the affirmative defenses it did would render the privilege illusory with respect to the communications between *van Straaten* and *Pope & John*. Thus . . . the allegations raised in *Fischel & Kahn*'s affirmative defenses were insufficient to put the cause of *van Straaten*'s damages at issue, resulting in waiver of the attorney-client privilege in this case.").

9. See *Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp.*, 937 N.E.2d 533, 543 (Ohio 2010) (distinguishing exceptions from waivers for purposes of Ohio's attorney-client privilege statute).

10. See, e.g., *id.* at 541 (discussing the self-protection or self-defense exception to the attorney-client privilege).

11. *Wiggins v. State*, 782 S.E.2d 31, 35 (Ga. 2016) (quoting *Taylor v. Ricketts*, 238 S.E.2d 52, 54 (Ga. 1977)); *State v. McSwine*, 873 N.W.2d 405, 420 (Neb. 2016).

12. Advice of counsel is not a true affirmative defense to allegations of misconduct; rather, good faith reliance on advice of counsel negates the element of wrongful intent that may be required for conviction or liability. See *United States v. Peterson*, 101 F.3d 375, 381–82 (5th Cir. 1996) (discussing criminal liability for securities fraud); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 29(1) (AM. LAW INST. 2000) ("When a client's intent or mental state is in issue, a tribunal may consider otherwise admissible evidence of a lawyer's advice to the client.").

13. See, e.g., *Chen-Oster v. Goldman, Sachs & Co.*, 293 F.R.D. 547, 556 (S.D.N.Y. 2013) ("Assertion of an advice of counsel defense is the 'quintessential example' of an implied waiver.") (quoting *In re Cty. of Erie*, 546 F.3d 222, 228 (2d Cir. 2008)).

communications at issue and thus lose confidentiality without meaning to do so.¹⁴ In that case, waiver terminology seems fundamentally misplaced. And, if there were a third hand, at-issue doctrine might be described as an implied or implicit waiver of the attorney-client privilege despite a lack of intent to waive, because in contrast to other areas of the law, waiver in the attorney-client privilege context does not require intentional or knowing conduct by the waiving party.¹⁵ Rather, a party may waive the privilege inadvertently or through conduct that would make it unfair to later assert the privilege in connection with that conduct.¹⁶ In fact, in the attorney-client privilege context, waiver is but “a loose and misleading label for . . . a collection of different rules addressed to different problems.”¹⁷

Ultimately, terminology is unimportant. Practically what matters is that the at-issue exception represents “the most frightening type” of privilege forfeiture “because the law does not clearly warn clients of its risk and because lawyers may not realize its effect in time to avoid disaster.”¹⁸ For this reason, lawyers must understand courts’ analysis and application of the at-issue exception regardless of how they describe it.¹⁹ This article is intended to advance that process.

Looking ahead, Part II of this article provides a short primer on the attorney-client privilege. Some foundational knowledge of the privilege is required to understand the at-issue exception. Part III examines the three principal tests courts use to decide whether the at-issue exception applies. These tests are derived from the decisions in *Hearn v. Rhay*,²⁰ *In re County of Erie*,²¹ and *Rhone-Poulenc Rorer Inc. v. Home Indemnity Co.*²² This Part concludes that the *Rhone-Poulenc* test is superior to the other two, and recommends that courts adopt it. Finally, Part IV discusses several types of cases and circumstances in which lawyers seem especially prone to missing the serious threat to the attorney-client privilege that the at-issue exception potentially poses.

14. THOMAS E. SPAHN, *THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE: A PRACTITIONER’S GUIDE* 773 (3d ed. 2013).

15. EPSTEIN, *supra* note 3, at 390–91.

16. *Id.* at 391.

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

18. SPAHN, *supra* note 14, at 773.

19. *See id.* (asserting that “courts’ nomenclature is not as important as their analyses” of the at-issue exception).

20. 68 F.R.D. 574 (E.D. Wash. 1975).

21. 546 F.3d 222 (2d Cir. 2008).

22. 32 F.3d 851 (3d Cir. 1994).

II. A PRIMER ON THE ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege is one of the oldest common law privileges protecting confidential communications,²³ and it is now widely codified.²⁴ “The privilege allows for open communications between an attorney and his or her client, free from apprehension of compelled disclosures, thereby enabling the attorney to gather complete and accurate information about the client’s situation.”²⁵ Recognizing the privilege also encourages the public to seek early legal assistance.²⁶

The “foundational building blocks”²⁷ of the attorney-client privilege were announced nearly 70 years ago in *United States v. United Shoe Machinery Corp.*²⁸ The *United Shoe* test famously provides that the privilege applies if:

- (1) the asserted holder of the privilege is or sought to become a client;
- (2) the person to whom the communication was made (a) is the member of the bar of court, or his subordinate and (b) in connection with this communication is acting as a lawyer;
- (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion of law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of

23. *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998); *Wal-Mart Stores, Inc. v. Ind. Elec. Workers Pension Tr. Fund IBEW*, 95 A.3d 1264, 1278 (Del. 2014); *Ctr. Partners, Ltd. v. Growth Head GP, LLC*, 981 N.E.2d 345, 355 (Ill. 2012); *Wemark v. State*, 602 N.W.2d 810, 815 (Iowa 1999); *State v. Gonzalez*, 234 P.3d 1, 12 (Kan. 2010); *Suffolk Constr. Co. v. Div. of Capital Asset Mgmt.*, 870 N.E.2d 33, 38 (Mass. 2007) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)); *In re Miller*, 584 S.E.2d 772, 782 (N.C. 2003); *Frease v. Glazer*, 4 P.3d 56, 60 (Or. 2000); *Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259, 1263 (Pa. Super. Ct. 2007); *In re XL Specialty Ins. Co.*, 373 S.W.3d 46, 49 (Tex. 2012) (quoting *United States v. Zolin*, 491 U.S. 554, 562 (1989)); *Doe v. Maret*, 984 P.2d 980, 982 (Utah 1999).

24. *See, e.g.*, CAL. EVID. CODE §§ 950–62 (2016); FLA. STAT. § 90.502 (2015); KAN. STAT. ANN. § 60-426 (2013).

25. *Neuman v. State*, 773 S.E.2d 716, 719 (Ga. 2015); *see also Cedell v. Farmers Ins. Co. of Wash.*, 295 P.3d 239, 249 (Wash. 2013) (“The purpose of [the] attorney-client privilege is to allow clients to fully inform their attorneys of all relevant facts without fear of consequent disclosure.”).

26. *Genova v. Longs Peak Emergency Physicians, P.C.*, 72 P.3d 454, 461–62 (Colo. Ct. App. 2003) (quoting *Nat’l Farmers Union Prop. & Cas. Co. v. Dist. Ct.*, 718 P.2d 1044 (Colo. 1986)); *McLaughlin v. Freedom of Info. Comm’n*, 850 A.2d 254, 258 (Conn. App. Ct. 2004).

27. Henry S. Bryans, *Employed Lawyers and the Attorney-Client Privilege—Parsing the Trade-Offs*, 47 U. TOL. L. REV. 109, 114 (2015).

28. 89 F. Supp. 357 (D. Mass. 1950).

committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.²⁹

The Restatement (Third) of the Law Governing Lawyers articulates the elements of the attorney-client privilege more succinctly.³⁰ Section 68 provides that the privilege may be asserted “with respect to: (1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client.”³¹ Continuing, section 70 explains that “privileged persons” include the client or prospective client, the lawyer, agents of the client or prospective client and the lawyer who facilitate communications between them, and agents of the lawyer who assist in the client’s representation.³²

The right to assert the attorney-client privilege belongs to the client.³³ When a lawyer invokes the privilege to prevent the disclosure of confidential communications, she does so as the client’s agent—not as a holder of the privilege.³⁴ Similarly, if the lawyer waives the privilege, she does so as the client’s agent rather than as the owner of the privilege.³⁵

29. *Id.* at 358–59. Although the *United Shoe* test implies that the privilege covers only communications from the client to the attorney, that is not correct; confidential communications from an attorney to a client are also privileged. The attorney-client privilege is a two-way street. *United States v. Christensen*, 801 F.3d 970, 1007 (9th Cir. 2015) (applying federal privilege law); *Byrd v. State*, 929 S.W.2d 151, 154 (Ark. 1996); *Metro. Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 730 A.2d 51, 60 (Conn. 1999); *Clausen v. Nat’l Grange Mut. Ins. Co.*, 730 A.2d 133, 137–38 (Del. Super. Ct. 1997); *People v. Radojicic*, 998 N.E.2d 1212, 1221 (Ill. 2013); *Squealer Feeds v. Pickering*, 530 N.W.2d 678, 684 (Iowa 1995); *Rent Control Bd. v. Praught*, 619 N.E.2d 346, 350 (Mass. App. Ct. 1993); *Shorter v. State*, 33 So. 3d 512, 516 (Miss. Ct. App. 2009) (quoting *Hewes v. Langston*, 853 So. 2d 1237, 1244 (Miss. 2003)); *Palmer v. Farmers Ins. Exch.*, 861 P.2d 895, 906 (Mont. 1993); *Gillard v. AIG Ins. Co.*, 15 A.3d 44, 59 (Pa. 2011); *Giammarco v. Giammarco*, 959 A.2d 531, 533 (R.I. 2008) (quoting *Mortg. Guar. & Title Co. v. Cunha*, 745 A.2d 156, 158–59 (R.I. 2000)); *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 213 (Tenn. Ct. App. 2002); *Zink v. City of Mesa*, 256 P.3d 384, 403 (Wash. Ct. App. 2011); *State ex rel. Montpelier U.S. Ins. Co. v. Bloom*, 757 S.E.2d 788, 994 (W. Va. 2014) (quoting FRANKLIN D. CLECKLEY ET AL., LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE § 26(b)(1), at 693 (4th ed. 2012)).

30. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (AM. LAW INST. 2000).

31. *Id.*

32. *Id.* § 70.

33. *Holt v. McCastlain*, 182 S.W.3d 112, 117 (Ark. 2004); *OXY Res. Cal. LLC v. Super. Ct.*, 9 Cal. Rptr. 3d 621, 644–45 (Ct. App. 2004); *Ctr. Partners, Ltd. v. Growth Head GP, LLC*, 981 N.E.2d 345, 356 (Ill. 2012); *Arnoldy v. Mahoney*, 791 N.W.2d 645, 657 (S.D. 2010).

34. *See* EPSTEIN, *supra* note 3, at 25 (discussing who may act on a client’s behalf to assert or waive the attorney-client privilege).

35. *See, e.g., San Francisco Residence Club, Ltd. v. Baswell-Guthrie*, 897 F. Supp. 2d 1122, 1216 (N.D. Ala. 2012) (“The principle that the client, and not the attorney, owns

The privilege attaches to initial consultations between attorneys and prospective clients, even if the client does not ultimately retain the attorney.³⁶ Thereafter, the client may invoke the privilege any time during the attorney-client relationship or after the relationship terminates.³⁷ The privilege even survives the client's death.³⁸

Because the privilege attaches to communications, an otherwise privileged exchange between a client and a lawyer containing information that could be discovered by other means remains shielded from discovery.³⁹ There is, however, no blanket privilege covering all attorney-client communications.⁴⁰ The client must assert the privilege with respect to each communication in question, and the court hearing the matter must scrutinize each communication independently.⁴¹ The party asserting the attorney-client privilege bears the burden of establishing its application to particular communications.⁴² This is a fact-specific inquiry.⁴³ The form of the communication between the

the privilege, means that [the clients] had the right to waive the privilege, and that waiver may be effected through their attorney, *i.e.*, their agent.”).

36. *Barton v. United States Dist. Ct. for the Cent. Dist. of Cal.*, 410 F.3d 1104, 1111 (9th Cir. 2005) (applying California law); *State v. Fodor*, 880 P.2d 662, 669 (Ariz. Ct. App. 1994); *Popp v. O’Neil*, 730 N.E.2d 506, 511 (Ill. App. Ct. 2000); *Lovell v. Winchester*, 941 S.W.2d 466, 467 (Ky. 1997); *Mixon v. State*, 224 S.W.3d 206, 212 (Tex. App. 2007).

37. *See O’Boyle v. Borough of Longport*, 94 A.3d 299, 309 (N.J. 2014) (noting that the privilege survives the termination of the attorney-client relationship).

38. *Swidler & Berlin v. United States*, 524 U.S. 399, 405 (1998); *Zook v. Pesce*, 91 A.3d 1114, 1119 (Md. 2014); *see also In re Miller*, 584 S.E.2d 772, 779 (N.C. 2003) (collecting state court cases on this point).

39. *Costco Wholesale Corp. v. Super. Ct.*, 219 P.3d 736, 741 (Cal. 2009).

40. *DCP Midstream, LP v. Anadarko Petroleum Corp.*, 303 P.3d 1187, 1199 (Colo. 2013); *see also Scott v. Peterson*, 126 P.3d 1232, 1234 (Okla. 2005) (“[T]he mere status of an attorney-client relationship does not make every communication between attorney and client protected by the privilege.”).

41. *Wesp v. Everson*, 33 P.3d 191, 197 (Colo. 2001); *Brown v. Katz*, 868 N.E.2d 1159, 1167 (Ind. Ct. App. 2007).

42. *Cencast Servs., L.P. v. United States*, 91 Fed. Cl. 496, 502 (Fed. Cl. 2010); *Wesp*, 33 P.3d at 198; *In re Dole Food Co.*, 114 A.3d 541, 561 (Del. Ch. 2014) (quoting *Moyer v. Moyer*, 602 A.2d 68, 72 (Del.1992)); *Lender Processing Servs., Inc. v. Arch Ins. Co.*, 183 So. 3d 1052, 1059 (Fla. Dist. Ct. App. 2015); *Kirk v. Ford Motor Co.*, 116 P.3d 27, 34 (Idaho 2005); *Collins v. Braden*, 384 S.W.3d 154, 161, 163 (Ky. 2012); *Maldonado v. Kiewit La. Co.*, 152 So. 3d 909, 927 (La. Ct. App. 2014); *Clair v. Clair*, 982 N.E.2d 32, 40–41 (Mass. 2013); *State ex rel. Koster v. Cain*, 383 S.W.3d 105, 116 (Mo. Ct. App. 2012); *State ex rel. AMISUB, Inc. v. Buckley*, 618 N.W.2d 684, 694 (Neb. 2000); *Bhandari v. Artesia Gen. Hosp.*, 317 P.3d 856, 860 (N.M. Ct. App. 2013); *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 998 N.Y.S.2d 329, 333 (N.Y. App. Div. 2014); *In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 223 (Tex. 2004); *State ex rel. HCR Manorcare, LLC v. Stucky*, 776 S.E.2d 271, 282 (W. Va. 2015); *Dishman v. First Interstate Bank*, 362 P.3d 360, 367 (Wyo. 2015).

43. *State ex rel. Koster*, 383 S.W.3d at 118.

client and the lawyer is irrelevant to attorney-client privilege analysis as long as the communication otherwise qualifies as privileged. For example, the privilege attaches to telephone calls, personal conversations, correspondence, notes, text messages, and e-mail messages.⁴⁴ Nonverbal communications between clients and lawyers—such as nods and silence—may be privileged.⁴⁵

A party seeking to protect written or electronic communications from discovery does not have to identify them as “privileged” or “confidential” for the attorney-client privilege to attach.⁴⁶ On the other hand, a party cannot shield a communication from discovery simply by branding it “confidential” or “privileged.”⁴⁷ The test is whether a communication satisfies the elements necessary to establish the privilege—not how it is identified or labeled. Similarly, a client cannot cloak a communication in the attorney-client privilege simply by routing it through a lawyer.⁴⁸ Again, a communication must bear all of the hallmarks of the privilege for it to be protected.⁴⁹

The attorney-client privilege benefits organizations as well as individuals. For example, corporations can assert the attorney-client privilege,⁵⁰ as can partnerships,⁵¹ limited liability companies,⁵²

44. See EPSTEIN, *supra* note 3, at 66 (stating that a privileged communication “may be oral or written”).

45. *Id.*

46. See, e.g., *Baptiste v. Cushman & Wakefield, Inc.*, No. 03Civ.2102(RCC)(THK), 2004 WL 330235, at *1–2 (S.D.N.Y. Feb. 20, 2004) (rejecting the argument that failing to label an e-mail message as privileged deprived it of privileged status); *Blumenthal v. Kimber Mfg., Inc.*, 826 A.2d 1088, 1098 (Conn. 2003) (discussing e-mail and stating: “Whether a document expressly is marked as ‘confidential’ is not dispositive, but is merely one factor a court may consider in determining confidentiality.”); *Chrysler Corp. v. Sheridan*, No. 227511, 2001 WL 773099, at *3 (Mich. Ct. App. July 10, 2001) (involving the inadvertent disclosure of an e-mail message that was not identified as “privileged” or “confidential”).

47. *Blumenthal*, 826 A.2d at 1098; cf. *Ledgin v. Blue Cross & Blue Shield of Kan. City*, 166 F.R.D. 496, 499 (D. Kan. 1996) (describing a party’s document stamp of “attorney work product” as a “self-serving embellishment” that did not preclude discovery).

48. *Stopka v. Am. Family Mut. Ins. Co.*, 816 F. Supp. 2d 516, 528 (N.D. Ill. 2011) (quoting *Equity Residential v. Kendall Risk Mgmt., Inc.*, 246 F.R.D. 557, 563 (N.D. Ill. 2007)); *Opus Corp. v. IBM.*, 956 F. Supp. 1503, 1510 (D. Minn. 1996); *U.S. Postal Serv. v. Phelps Dodge Ref. Corp.*, 852 F. Supp. 156, 160 (E.D.N.Y. 1994); *Va. Elec. & Power Co. v. Westmoreland-LG & E Partners*, 526 S.E.2d 750, 755 (Va. 2000).

49. *Stopka*, 816 F. Supp. 2d at 528.

50. *Commodity Futures Trading Comm’n v. Weintraub*, 471 U.S. 343, 348 (1985); *In re Teleglobe Comm’n Corp.*, 493 F.3d 345, 360 (3d Cir. 2007); *St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.*, 746 S.E.2d 98, 103 (Ga. 2013); *State ex rel. HCR Manorcare, LLC v. Stucky*, 776 S.E.2d 271, 282 (W. Va. 2015).

51. See, e.g., *In re Bieter Co.*, 16 F.3d 929, 935 (8th Cir. 1994).

governmental agencies or units,⁵³ and trusts.⁵⁴ Organizations may claim the privilege with respect to communications with in-house counsel.⁵⁵

In the organizational context, the most common problem is determining who among the entity's employees may speak on its behalf. This analysis is complicated by the fact that the group that constitutes the client for purposes of creating the attorney-client privilege is larger than the group that is permitted to assert or waive the privilege.⁵⁶ Courts have traditionally applied two tests to analyze organizational privilege claims: the "control group" test and the "subject matter" test. A few courts have adopted a third test that closely tracks the subject matter test,⁵⁷ and which is sometimes called the "modified subject matter test."⁵⁸

Applying the control group test, communications must be made by an employee who is positioned "to control or take a substantial part in the determination of corporate action in response to legal advice" for the privilege to attach.⁵⁹ Only these employees qualify as the "client" for attorney-client privilege purposes.⁶⁰ The control group test essentially

52. See, e.g., *Carpenters Pension Tr. v. Lindquist Family LLC*, No. C-13-01063 DMR, 2014 WL 1569195, at *3-4 (N.D. Cal. Apr. 18, 2014) (applying corporate attorney-client privilege law to an LLC); *Montgomery v. eTrepid Techs., LLC*, 548 F. Supp. 2d 1175, 1179-87 (D. Nev. 2008) (reasoning that an LLC should be treated like a corporation for purposes of federal common law attorney-client privilege).

53. See, e.g., *Sandra T.E. v. S. Berywn Sch. Dist.* 100, 600 F.3d 612, 621 (7th Cir. 2009) ("The public interest is best served when agencies of the government have access to the confidential advice of counsel regarding the legal consequences of their . . . activities and how to conform their future operations to the requirements of the law."); *Suffolk Constr. Co. v. Div. of Capital Asset Mgmt.*, 870 N.E.2d 33, 38 (Mass. 2007) (stating that "confidential communications between public officers and employees and governmental entities and their legal counsel undertaken for the purpose of obtaining legal advice or assistance are protected under the normal rules of the attorney-client privilege") (footnote omitted).

54. *Snow, Christensen & Martineau v. Lindberg*, 299 P.3d 1058, 1066-67 (Utah 2013).

55. *Avid Tech., Inc. v. Media Gobbler, Inc.*, Civ. A. No. 14-13746-PBS, 2016 WL 696092, at *3 (D. Mass. Feb. 19, 2016); *New Jersey v. Sprint Corp.*, 258 F.R.D. 421, 425 (D. Kan. 2009); *Fla. Marlins Baseball Club, LLC v. Certain Underwriters at Lloyd's London*, 900 So. 2d 720, 721 (Fla. Dist. Ct. App. 2005); *St. Simon's Waterfront, LLC*, 746 S.E.2d at 103; *RFF Family P'ship, LP v. Burns & Levinson, LLP*, 991 N.E.2d 1066, 1071 (Mass. 2013).

56. There may further be overlapping or related questions about whether an employee's communications are covered by the individual employee's attorney-client privilege or whether the organization's attorney-client privilege applies. See *Keefe v. Bernard*, 774 N.W.2d 663, 669-72 (Iowa 2009) (discussing this overlap).

57. *In re Bieter Co.*, 16 F.3d 929, 935-36 (8th Cir. 1994).

58. See, e.g., *Baisley v. Missiquoi Cemetery Ass'n*, 708 A.2d 924, 931 (Vt. 1998) ("Following *Upjohn*, two tests have emerged to define the client in the corporate context: the subject-matter test, and the modified subject-matter test.").

59. EPSTEIN, *supra* note 3, at 142.

60. *Id.*

requires that the employee with whom an attorney communicates be a member of senior management for the communication to be privileged. The control group test has been criticized because it chills corporate communications, frustrates the purpose of the attorney-client privilege by discouraging subordinate employees from sharing important information with corporate counsel, makes it difficult for corporate counsel to properly advise their clients and to ensure their clients' compliance with the law, and yields unpredictable results.⁶¹ Nonetheless, a handful of jurisdictions adhere to this test.⁶²

Some courts, perhaps recognizing the difficulties caused by strict application of the control group test, have loosened it. In *Becker v. ConAgra Foods, Inc.*,⁶³ for example, the court explained that under Illinois law, "[t]he privilege extends to a control group made up of those who act as decision-makers and those whose advisory role is such that a decision would not normally be made without his or her input, and whose opinion in fact forms the basis of any final decision by those with authority."⁶⁴ Thus, under this formulation of the control group test, the control group may extend beyond the actual corporate decision-makers.⁶⁵ Even under this more liberal interpretation, however, the control group test does not protect as privileged lawyers' communications with employees who merely supply a corporation's decision-makers with facts.⁶⁶

The subject matter test affords much broader privilege protection to corporate clients. Under the subject matter test as originally conceived, a communication with any employee may be privileged if it is made for the purpose of securing legal advice for the corporation, the employee is communicating with the lawyer at a superior's request or direction, and the employee's responsibilities include the subject of the communication.⁶⁷ Applying this test, the employee's position or rank is irrelevant to the privilege analysis.⁶⁸ The Supreme Court embraced the subject matter approach in *Upjohn Co. v. United States*,⁶⁹ which is

61. See *Upjohn Co. v. United States*, 449 U.S. 383, 391–93 (1981).

62. See, e.g., *Langdon v. Champion*, 752 P.2d 999, 1002 (Alaska 1988) (referring to Alaska Rule of Evidence 503(a)(2)); *Bridgeview Health Care Ctr., Ltd. v. State Farm Fire & Cas. Co.*, 10 N.E.3d 902, 908 (Ill. 2014) (applying Illinois law).

63. Case No. 10-cv-952-MJR-PMF, 2011 U.S. Dist. LEXIS 101187 (S.D. Ill. Sept. 8, 2011).

64. *Id.* at *3.

65. SPAHN, *supra* note 14, at 108.

66. *Id.*

67. EPSTEIN, *supra* note 3, at 143, 145.

68. *Id.* at 143.

69. 449 U.S. 383 (1981).

regarded as “the foundational case on attorney-client privilege in the corporate environment,”⁷⁰ although the Court declined to formulate a specific test.⁷¹ The *Upjohn* court’s reticence has since led courts to reason that there are two forms of the subject matter test.⁷² Regardless, it is clear following *Upjohn* that under the subject matter test, however it is articulated, a lawyer’s confidential communications with any employee are privileged when they concern matters within the scope of the employee’s responsibilities and the employee is aware that the communication is intended to enable or facilitate the lawyer’s representation of the corporation.⁷³ Furthermore, any form of the subject matter test is superior to the traditional formulation of the control group test because it recognizes that employees outside the corporate control group may be aware of facts that are essential to the corporation’s need for, or reliance on, legal advice.⁷⁴ The subject matter test also more realistically reflects the manner in which organizations collect and process information, and the means by which they make decisions.⁷⁵

The third test, which was formulated before the Supreme Court embraced the subject matter approach in *Upjohn*, is often referred to as the “modified *Harper & Row* test,” or the “*Diversified Industries* test,” after the federal appellate cases from which it derives: *Harper & Row*

70. *In re GM LLC Ignition Switch Litig.*, 80 F. Supp. 3d 521, 527 (S.D.N.Y. 2015) (noting that in some cases, the privilege may apply to lawyers’ communications with former employees of a corporation).

71. *Upjohn*, 449 U.S. at 396.

72. *See, e.g.*, *Baisley v. Missiquoi Cemetery Ass’n*, 708 A.2d 924, 931 (Vt. 1998) (“Following *Upjohn*, two tests have emerged to define the client in the corporate context: the subject-matter test, and the modified subject-matter test.”).

73. *See, e.g.*, *Grand Canyon Skywalk Dev. LLC v. Cieslak*, Nos. 2:15-cv-01189-JAD-GWF, 2:13-cv-00596-JAD-GWF, 2015 WL 4773585, at *8 (D. Nev. Aug. 13, 2015) (“*Upjohn* holds that the privilege applies to communications with corporate employees, regardless of their position, when the communications concern matters within the scope of the employee’s corporate duties and the employee is aware that the information is being furnished to enable the attorney to provide legal advice to the corporation.”); *MGA Ent., Inc. v. Nat’l Prods. Ltd.*, No. CV 10-07083 JAK (SSx), 2012 WL 3150532, at *2 (C.D. Cal. Aug. 2, 2012) (“According to the Supreme Court, the privilege applies to communications by any corporate employee regardless of position when the communications concern matters within the scope of the employee’s corporate duties and the employee is aware that the information is being furnished to enable the attorney to provide legal advice to the corporation.”); *United States v. Ghavami*, 882 F. Supp. 2d 532, 538–39 (S.D.N.Y. 2012) (“Within a corporation, then, the attorney-client privilege protects communications by corporate employees to counsel for the corporation who is acting as a lawyer, as long as the communications are made at the direction of corporate superiors in order to secure legal advice and the employees are aware that they are being questioned in connection with the provision of such advice.”).

74. EPSTEIN, *supra* note 3, at 144.

75. *Id.*

Publishers, Inc. v. Decker,⁷⁶ and *Diversified Industries, Inc. v. Meredith*.⁷⁷ As noted earlier, some courts describe it as the modified subject matter test.⁷⁸ Using this test:

The attorney-client privilege is applicable to an employee's communication if (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.⁷⁹

The modified *Harper & Row* test or *Diversified Industries* test is basically the subject matter test with additional limitations,⁸⁰ hence the modified subject matter test moniker. The obvious addition to the subject matter test is the "need to know" element.⁸¹ As should be apparent, the "need" refers to an employee's need for the lawyer's advice to perform her duties—not to the lawyer's need for the information known by the employee.⁸²

With respect to partnerships, organizational structure may drive application of the privilege insofar as partners are concerned. In general partnerships, all partners may assert the privilege concerning communications with lawyers about partnership affairs.⁸³ Limited partnerships spawn differing views.⁸⁴ There is authority for the proposition that limited partners, like general partners, are co-holders of

76. 423 F.2d 487 (7th Cir. 1970).

77. 572 F.2d 596 (8th Cir. 1977).

78. See, e.g., *Baisley v. Missiquoi Cemetery Ass'n*, 708 A.2d 924, 931 (Vt. 1998).

79. *In re Bieter Co.*, 16 F.3d 929, 936 (8th Cir. 1994) (quoting *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 609 (8th Cir. 1977)).

80. *Keefe v. Bernard*, 774 N.W.2d 663, 671 (Iowa 2009).

81. See also *S. Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377, 1383 n.10 (Fla. 1994) ("In *Diversified Industries* . . . the court modified the subject matter test in an effort to focus on why the attorney was consulted and to prevent the routine channeling of information through the attorney to prevent subsequent disclosure.").

82. SPAHN, *supra* note 14, at 118.

83. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73 cmt. d (AM. LAW INST. 2000).

84. Limited partnerships must be distinguished from limited liability partnerships (LLPs). An LLP is a general partnership that has registered as an LLP under a particular state's laws to obtain statutory protections for its partners against personal liability. See Douglas R. Richmond, *The Partnership Paradigm and Law Firm Non-equity Partners*, 58 U. KAN. L. REV. 507, 507 n.2 (2010) (citing *Hart v. Theus, Grisham, Davis & Leigh, L.L.P.*, 877 So. 2d 1157, 1163 (La. Ct. App. 2004)).

the partnership's attorney-client privilege.⁸⁵ There is also a competing view that limited partners are generally analogous to corporate shareholders, and therefore cannot invoke the limited partnership's privilege.⁸⁶ Under the latter approach, among the partners of a limited partnership, only the general partners may claim the partnership's attorney-client privilege.⁸⁷ Regardless of whether a partnership is general or limited, employees of the partnership may serve as its agents in making privileged communications.⁸⁸ Whether a partnership employee's communications with partnership counsel are privileged is generally evaluated under any of the tests applied to corporations.⁸⁹

Courts narrowly or strictly construe the attorney-client privilege because it limits full disclosure of the truth.⁹⁰ For example, the privilege ordinarily does not protect a client's identity.⁹¹ The privilege does not

85. See, e.g., *Roberts v. Keim*, 123 F.R.D. 614, 625 (N.D. Cal. 1988) (concluding that limited partners and general partners were co-holders of the attorney-client privilege).

86. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73 cmt. d (AM. LAW INST. 2000).

87. *Id.*

88. *Id.*

89. See, e.g., *In re Bieter Co.*, 16 F.3d 929, 935 (8th Cir. 1994) (observing that the *Diversified Industries* test, "although expressly applicable to corporations and their employees, is no less instructive as applied to a partnership, or some other client entity . . . and its employees") (footnote omitted); *United States v. Daugerdas*, 757 F. Supp. 2d 364, 370 (S.D.N.Y. 2010) ("As an initial matter . . . Field's privilege claim is properly evaluated under the *Teamsters* standard [governing communications between corporate employees and corporate counsel], notwithstanding that BDO is a partnership rather than a corporation.").

90. *In re Pac. Pictures Corp.*, 679 F.3d 1121, 1126 (9th Cir. 2012); *PSE Consulting, Inc. v. Frank Mercede & Sons, Inc.*, 838 A.2d 135, 167 (Conn. 2004); *Ctr. Partners, Ltd. v. Growth Head GP, LLC*, 981 N.E.2d 345, 356 (Ill. 2012); *In re Bryan*, 61 P.3d 641, 656 (Kan. 2003); *Clair v. Clair*, 982 N.E.2d 32, 40 (Mass. 2013); *Am. Zurich Ins. Co. v. Mont. Thirteenth Judicial Dist. Ct.*, 280 P.3d 240, 245 (Mont. 2012); *Walton v. Mid-Atlantic Spine Specialists, P.C.*, 694 S.E.2d 545, 549 (Va. 2010) (quoting *Commonwealth v. Edwards*, 370 S.E.2d 296, 301 (Va. 1988)); *Lane v. Sharp Packaging Sys., Inc.*, 640 N.W.2d 788, 798 (Wis. 2002) (quoting cases).

91. *Reiserer v. United States*, 479 F.3d 1160, 1165–66 (9th Cir. 2007) (explaining why clients' identities were not incriminating information so as to make privilege applicable); *United States v. BDO Seidman*, 337 F.3d 802, 811 (7th Cir. 2003) (noting, however, that "the identity of a client may be privileged in the rare circumstance when so much of an actual confidential communication has been disclosed already that merely identifying the client will effectively disclose that communication"); *United States v. Sindel*, 53 F.3d 874, 876 (8th Cir. 1995) (noting exceptions to this rule, all related to criminal consequences for the client); *Tenet Healthcare Corp. v. La. Forum Corp.*, 538 S.E.2d 441, 444–45 (Ga. 2000) (noting two exceptions: (1) where identifying the client may expose the client to criminal liability for acts previously committed about which the client consulted the attorney; and (2) where disclosure of the client's identity would reveal the substance of confidential attorney-client communications); *Nester v. Jernigan*, 908 So. 2d 145, 149 (Miss. 2005) (holding that privilege protected a client's identity

shield from discovery the mere fact that an attorney-client relationship exists, when that relationship began, the general nature of the services for which the client retained the attorney, or the terms and conditions of the attorney's engagement.⁹² While the privilege protects the content of attorney-client communications from disclosure, it does not prevent disclosure of the facts communicated.⁹³ Those facts remain discoverable by other means. Nor does the attorney-client privilege shield from discovery communications generated or received by an attorney acting in some other capacity,⁹⁴ or communications in which an attorney is giving business advice rather than legal advice.⁹⁵

Finally, and as indicated earlier, the attorney-client privilege may be waived either voluntarily or by implication.⁹⁶ The most obvious example of a waiver is a client's knowing revelation of otherwise privileged information to a third party who is not necessary to the client's representation.⁹⁷ In any event, the burden of establishing a waiver

because revealing the client's identity would reveal a confidential communication); *Levy v. Senate of Pa.*, 65 A.3d 361, 371–72 (Pa. 2013) (“Consistently with many of our sister courts, we hold that, while a client’s identity is generally not privileged, the attorney-client privilege may apply in cases where divulging the client’s identity would disclose either the legal advice given or the confidential communications provided.”).

92. *See, e.g.*, *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 603 (8th Cir. 1977) (rejecting the privilege with respect to a law firm memorandum); *State ex rel. Koster v. Cain*, 383 S.W.3d 105, 119 (Mo. Ct. App. 2012) (“[T]he great weight of authority on the subject recognizes that with rare exception, the mere fact of the existence of a relationship between an attorney and a client, and the nature of the fee arrangements between the attorney and a client are not attorney-client privileged communications.”); *Commonwealth v. Chmiel*, 889 A.2d 501, 531–32 (Pa. 2005) (determining that a fee arrangement with a lawyer was not privileged).

93. *New Jersey v. Sprint Corp.*, 258 F.R.D. 421, 426 (D. Kan. 2009) (quoting *Williams v. Sprint/United Mgmt. Co.*, No. 03–2200, 2006 WL 1867478, at *10 (D. Kan. July 1, 2006)); *Hagans v. Gatorland Kubota, LLC/Sentry Ins.*, 45 So. 3d 73, 76 (Fla. Dist. Ct. App. 2010); *Collins v. Braden*, 384 S.W.3d 154, 159 (Ky. 2012); *W. Horizons Living Ctrs. v. Feland*, 853 N.W.2d 36, 41 (N.D. 2014); *Snow, Christensen & Martineau v. Lindberg*, 299 P.3d 1058, 1070 (Utah 2013); *Youngs v. Peacehealth*, 316 P.3d 1035, 1039 (Wash. 2014).

94. *See, e.g.*, *G & S Invs. v. Belman*, 700 P.2d 1358, 1365 (Ariz. Ct. App. 1984) (“The [attorney-client] privilege does not apply where one consults an attorney not as a lawyer but as a friend or business advisor.”).

95. *Adair v. EQT Prod. Co.*, 285 F.R.D. 376, 380 (W.D. Va. 2012) (applying Virginia law); *Costco Wholesale Corp. v. Super. Ct.*, 219 P.3d 736, 743 (Cal. 2009); *Gillard v. AIG Ins. Co.*, 15 A.3d 44, 78 n.8 (Pa. 2011).

96. *Cormack v. United States*, 118 Fed. Cl. 39, 43 n.3 (Fed. Cl. 2014); *People v. Curren*, 348 P.3d 467, 480 (Colo. Ct. App. 2014).

97. *See Am. Zurich Ins. Co. v. Mont. Thirteenth Judicial Dist. Ct.*, 280 P.3d 240, 245 (Mont. 2012) (“Disclosure to third parties waives [the] attorney-client privilege unless disclosure is necessary for the client to obtain informed legal advice.”); *O’Boyle v. Borough of Longport*, 94 A.3d 299, 309 (N.J. 2014) (stating that if “the third party is a person to whom disclosure of confidential attorney-client communications is necessary to

generally is borne by the party seeking to overcome the privilege,⁹⁸ although some courts hold that the party asserting the privilege bears the burden of establishing that it has not been waived.⁹⁹

Although a lawyer is presumed to have authority to waive the privilege on a client's behalf, and many waiver cases pivot on a lawyer's conduct, only the client may waive the privilege.¹⁰⁰ Again, the privilege belongs to the client. A lawyer may not waive the privilege over a client's objection.¹⁰¹ And, if a client has knowingly waived the privilege regarding a particular communication, a lawyer cannot later claim that the privilege applies to the disclosed information and attempt to withhold it on that basis.¹⁰²

III. THE AT-ISSUE EXCEPTION TESTS

As previously noted, the attorney-client privilege may be lost in various ways—and it may be lost with frightening ease as a result of the at-issue exception. Courts analyzing the possible application of the at-issue exception typically apply one of three tests derived from federal case law. The cases articulating those tests are *Hearn v. Rhay*,¹⁰³ *In re County of Erie*,¹⁰⁴ and *Rhone-Poulenc Rorer Inc. v. Home Indemnity*

advance the representation," there is no resulting waiver); *Zink v. City of Mesa*, 256 P.3d 384, 403 (Wash. Ct. App. 2011) (noting that there is no waiver where the third party is necessary for the communication). It is worth remembering that a client does not waive the attorney-client privilege merely by acknowledging that she received legal advice. Rather, a client waives the privilege only by disclosing the substance of her confidential communications with her lawyer. *Md. Bd. of Physicians v. Geier*, 123 A.3d 601, 625 n.26 (Md. Ct. Spec. App. 2015).

98. *Wesp v. Everson*, 33 P.3d 191, 198 (Colo. 2001); *Yocabet v. UPMC Presbyterian*, 113 A.3d 1012, 1019 (Pa. Super. Ct. 2015); *Andrews v. Ridco, Inc.*, 863 N.W.2d 540, 547 (S.D. 2015); *McAfee v. State*, 467 S.W.3d 622, 643 (Tex. App. 2015); *State ex rel. Med. Assur. of W. Va., Inc. v. Recht*, 583 S.E.2d 80, 89 (W. Va. 2003).

99. *See, e.g.*, *United States v. Bolander*, 722 F.3d 199, 222 (4th Cir. 2013); *In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 255 (Bankr. S.D.N.Y. 2005); *In re Grand Jury Investig.*, 902 N.E.2d 929, 932 (Mass. 2009); *Walton v. Mid-Atlantic Spine Specialists, P.C.*, 694 S.E.2d 545, 549 (Va. 2010).

100. *People v. Delgadillo*, 275 P.3d 772, 776 (Colo. Ct. App. 2012); *Ctr. Partners, Ltd. v. Growth Head GP, LLC*, 981 N.E.2d 345, 356 (Ill. 2012); *Girl Scouts-W. Okla., Inc. v. Barringer-Thomson*, 252 P.3d 844, 847 (Okla. 2011).

101. *Ctr. Partners, Ltd.*, 981 N.E.2d at 356.

102. *San Francisco Residence Club, Inc. v. Baswell-Guthrie*, 897 F. Supp. 2d 1122, 1214–16 (N.D. Ala. 2012) (involving the client's former attorney); *Sorenson v. Riffo*, No. 2:06-CV-749 TS, 2008 WL 2465454, at *3 (D. Utah June 16, 2008).

103. 68 F.R.D. 574 (E.D. Wash. 1975).

104. 546 F.3d 222 (2d Cir. 2008).

Co.¹⁰⁵ Regardless of the test selected, application of the at-issue exception always requires fact-specific inquiry.¹⁰⁶

A. *The Hearn Test*

The most liberal test for fashioning an at-issue exception to the privilege is derived from a 1975 decision, *Hearn v. Rhay*.¹⁰⁷ The plaintiff, James Hearn, was an inmate at the Washington State Penitentiary.¹⁰⁸ He sued prison officials for violating his right to due process and his Eighth Amendment right against cruel and unusual punishment by confining him in the prison's mental health unit without the benefit of a hearing or other administrative review.¹⁰⁹ The defendants denied Hearn's allegations and asserted several affirmative defenses, including the defense that they acted in good faith and were therefore immune from suit.¹¹⁰ To overcome this defense, Hearn sought to discover advice regarding his confinement that the defendants had received from the Washington attorney general.¹¹¹ In response, the defendants asserted the attorney-client privilege, and refused to produce relevant documents or answer related deposition questions.¹¹²

Hearn then moved to enforce discovery. He argued that by asserting their good faith immunity affirmative defense, the defendants had "ipso facto waived" their attorney-client privilege.¹¹³ He analogized this case to cases in which a plaintiff waives the physician-patient privilege by filing a suit that puts his physical condition in controversy.¹¹⁴ More persuasively, he compared his situation to habeas corpus cases holding that a petitioner impliedly waives the attorney-client privilege by challenging the constitutionality of his state court conviction.¹¹⁵ Courts find an implied waiver in those cases "in order to allow inquiry of the petitioner's attorney concerning deliberate bypass of the right alleged to have been violated, the basis of the waiver being that privileged communications were the sole source of evidence" on that issue.¹¹⁶

105. 32 F.3d 851 (3d Cir. 1994).

106. Alaska Elec. Pension Fund v. Brown, 988 A.2d 412, 419 (Del. 2010).

107. *Hearn*, 68 F.R.D. at 574.

108. *Id.* at 576.

109. *Id.* at 577.

110. *Id.* at 577-78.

111. *Id.* at 577-78.

112. *Id.* at 577.

113. *Id.* at 580.

114. *Id.*

115. *Id.* at 581.

116. *Id.*

The court observed that the cases to which *Hearn* analogized and others in which a party was held to have impliedly waived the attorney-client privilege had a common core: the party asserting the privilege placed otherwise privileged information at issue through an affirmative act for its own benefit, and to prevent discovery of that information on privilege grounds would have been “manifestly unfair to the opposing party.”¹¹⁷ The court then summarized the factors common to each exception to the privilege as follows:

(1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense.¹¹⁸

Where these three conditions are satisfied, the *Hearn* court reasoned, the party asserting the attorney-client privilege should be held to have waived it through its own affirmative conduct.¹¹⁹

Although the cases to which *Hearn* and the court analogized were distinguishable because there the parties putting the privilege at issue had initiated the litigation, that distinction was inconsequential.¹²⁰ All of the elements common to a finding of waiver were present, as the court explained:

[The] defendants invoked the privilege in furtherance of an affirmative defense they asserted for their own benefit; through this affirmative act they placed the protected information at issue, for the legal advice they received is germane to the qualified immunity defense they raised; and one result of asserting the privilege has been to deprive plaintiff of information necessary to “defend” against defendants’ affirmative defense, for the protected information is also germane to plaintiff’s burden of proving malice or unreasonable disregard of his clearly established constitutional rights. Since all the elements of an implied waiver exist, defendants must be found to have waived their right to assert the attorney-client privilege by virtue of having raised the affirmative defense of immunity.¹²¹

117. *Hearn*, 68 F.R.D. at 581.

118. *Id.*

119. *Id.*

120. *See id.* (noting that the defendants asserted the attorney-client privilege in connection with an affirmative defense).

121. *Id.* (footnote omitted).

Finally, it was impossible to reconcile the defendants' assertion of the attorney-client privilege with the purpose behind it.¹²² While in most cases attorney-client communications are incidental to the litigation and other means of proof are normally available, here the defendants' communications with the attorney general's office were inseparably blended with the elements of Hearn's case and the defendants' immunity.¹²³ To deny Hearn access to these communications would prevent "a fair and just determination of the issues. To allow assertion of the privilege in this manner would pervert its essential purpose and transform it into a potential tool for concealment of unconstitutional conduct behind a veil of confidentiality."¹²⁴ In this instance, the benefit to be gained from the disclosure of the defendants' privileged communications substantially outweighed any resulting harm to the attorney-client relationship.¹²⁵

In conclusion, the *Hearn* court found that the defendants' assertion of their qualified immunity affirmative defense impliedly waived their attorney-client privilege with respect to any legal advice or confidential communications with the Washington attorney general regarding their malice toward Hearn or their knowledge of his constitutional rights.¹²⁶ The court further found that due to the nature of Hearn's lawsuit, which put squarely at issue the legal advice the defendants received, the policy behind the privilege was outweighed by the need for disclosure and the privilege therefore did not apply.¹²⁷ The court accordingly granted Hearn's motion to enforce discovery.¹²⁸

Although the *Hearn* test has been widely adopted,¹²⁹ courts have criticized it for its confusing and inconsistent application, and for

122. *Id.* at 582.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 583.

127. *Hearn*, 68 F.R.D. at 583.

128. *Id.*

129. *See, e.g.*, *Seneca Ins. Co. v. W. Claims, Inc.*, 774 F.3d 1272, 1276 (10th Cir. 2014) (predicting Oklahoma law); *Lillieros v. Starr Indem. & Liab. Co.*, No. CIV-12-1359-D, 2016 WL 502074, at *1-2 (W.D. Okla. Feb. 8, 2016) (finding no waiver under *Hearn*); *DeWitt v. Sw. Bell Tel. Co.*, No. 12-2605-SAC, 2014 WL 695744, at *5 (D. Kan. Feb. 24, 2014) (discussing Tenth Circuit and Kansas law); *IntegraMed Am., Inc. v. Patton*, 298 F.R.D. 326, 329 (D.S.C. 2014) (calling *Hearn* "the leading case on the 'at issue' waiver doctrine"); *Billings v. Stonewall Jackson Hosp.*, 635 F. Supp. 2d 442, 446 (W.D. Va. 2009) (reasoning that *Hearn* creates a "narrow" exception to the attorney-client privilege); *Lee v. State Farm Mut. Auto. Ins. Co.*, 249 F.R.D. 662, 682-83 (D. Colo. 2008) (applying Colorado law); *Union Cty. v. Piper Jaffray & Co.*, 248 F.R.D. 217, 222 (S.D. Iowa 2008) ("While critics of the *Hearn* approach argue that it is . . . a slippery slope, over three decades of case law make clear that such concerns are without

yielding unstable results.¹³⁰ Because attorney-client privileged communications are potentially relevant in any case, the second element of the *Hearn* test is dangerously broad, and the entire test is flawed because nowhere does it require a party to rely on privileged advice to accomplish a waiver.¹³¹ Courts have also criticized the test for potentially chilling attorney-client communications, for increasing litigation costs through discovery disputes, and as tending to favor wealthier litigants.¹³² For these reasons, the *Hearn* test has lost favor with courts.¹³³ Nevertheless, some courts continue to apply it,¹³⁴ sometimes tweaking it to alleviate concerns about its utility. In *Anchondo v. Anderson, Crenshaw & Associates, L.L.C.*,¹³⁵ for example, the court cautiously adopted the *Hearn* test with the qualification that the third element—that is, upholding the privilege would deny the

substantial foundation. The reasonableness of the *Hearn* approach is particularly evident where, as here, a defendant has no alternative means of defending a claim brought by the party asserting the privilege.”); *UUSI, LLC v. United States*, 121 Fed. Cl. 218, 225 (Fed. Cl. 2015) (quoting *Hearn*); *Gefre v. Davis Wright Tremaine, LLP*, 306 P.3d 1264, 1280 (Alaska 2013) (footnote omitted) (“Because we continue to believe fairness to the opposing party should be included in the implied waiver analysis, we adopt the *Hearn* test.”); *State Farm Mut. Auto. Ins. Co. v. Lee*, 13 P.3d 1169, 1174 (Ariz. 2000) (noting Arizona courts’ adoption of the *Hearn* test); *In re Marriage of Perry*, 293 P.3d 170, 179 (Mont. 2013) (reciting the *Hearn* test from a Montana federal case); *Dana v. Piper*, 295 P.3d 305, 312–13 (Wash. Ct. App. 2013) (applying the *Hearn* test).

130. *Pub. Serv. Co. of N.M. v. Lyons*, 10 P.3d 166, 172–74 (N.M. Ct. App. 2000).

131. *In re Cty. of Erie*, 546 F.3d 222, 229 (2d Cir. 2008).

132. *Mortg. Guar. & Title Co. v. Cunha*, 745 A.2d 156, 159 (R.I. 2000).

133. *See, e.g., Bacchi v. Mass. Mut. Life Ins. Co.*, 110 F. Supp. 3d 270, 275–76 (D. Mass. 2015) (rejecting the *Hearn* test in favor of the approach announced in *In re County of Erie*, 546 F.3d 222 (2d Cir. 2008)); *Ariz. Dream Act Coal. v. Brewer*, No. CV-12-02546-PHX-DGC, 2014 WL 171923, at *6 (D. Ariz. Jan. 15, 2014) (favoring the test announced in *Rhone-Poulenc Rorer Inc. v. Home Indemnity Co.*, 32 F.3d 851 (3d Cir. 1994), over the *Hearn* test); *Elat v. Emandopngoubene*, No. PWG-11-2931, 2013 WL 1146205, at *4–6 (D. Md. Mar. 18, 2013) (rejecting the *Hearn* approach in favor of the test announced in *Rhone-Poulenc*); *Trs. of Elec. Workers Local No. 26 Pension Tr. Fund v. Tr. Fund Advisors, Inc.*, 266 F.R.D. 1, 10–11 (D.D.C. 2010) (rejecting the *Hearn* test based on criticisms expressed in *In re County of Erie* and *Rhone-Poulenc*); *Wardleigh v. Second Judicial Dist. Ct.*, 891 P.2d 1180, 1187 (Nev. 1995) (rejecting the *Hearn* test in favor of the *Rhone-Poulenc* test, which the court described as the “anticipatory waiver theory”); *Bertelsen v. Allstate Ins. Co.*, 796 N.W.2d 685, 703 (S.D. 2011) (supplementing the *Hearn* test with a reliance element because “[a]pplication of the *Hearn* test alone provides insufficient guidance to be just and workable”).

134. *See, e.g., 01 Communique Lab., Inc. v. Citrix Sys., Inc.*, No. 1:06-cv-253, 2016 WL 111443, at *4–5 (N.D. Ohio Jan. 10, 2016) (agreeing with the magistrate judge that there was no waiver under *Hearn* in part because the requesting party had received adequate non-privileged information concerning the license in dispute).

135. 256 F.R.D. 661 (D.N.M. 2009).

discovering party vital information—be understood to require that the information sought be available from no other source.¹³⁶

B. The County of Erie Test

Again, a fundamental criticism of the *Hearn* test is that it does not require the party losing the privilege to have relied on its lawyer's advice in order to put the advice at issue.¹³⁷ The Second Circuit remedied this perceived deficiency in formulating a new test for the at-issue exception in *In re County of Erie*.¹³⁸

The *County of Erie* plaintiffs alleged that the Erie County, New York sheriff's policy requiring all detainees entering Erie County detention facilities to be strip searched violated the Fourth Amendment.¹³⁹ The plaintiffs sued the county, the sheriff, and other senior law enforcement officials under 42 U.S.C. § 1983.¹⁴⁰ The plaintiffs sought the production of ten e-mail messages reflecting communications between members of the sheriff's office and lawyers in the office of the Erie County attorney.¹⁴¹ In these messages the county attorney's office reviewed the law on detainee strip searches, evaluated the county's strip search policy, recommended alternative policies, and tracked the implementation of policy revisions.¹⁴² The defendants withheld the e-mails on attorney-client privilege grounds, but the district court determined that they had impliedly waived the privilege by putting the contents of those messages at issue in asserting a qualified immunity defense.¹⁴³ In so holding, the district court relied on the *Hearn* test.¹⁴⁴

In its analysis, the district court focused on the deposition testimony of two individual defendants.¹⁴⁵ The first was Donald Livingston, who was a supervisor at the county jail.¹⁴⁶ When questioned regarding a memorandum he prepared directing jail staff to stop routinely strip searching new inmates, Livingston testified that there were ongoing

136. *Id.* at 670–71 (quoting *Frontier Ref. Inc. v. Gorman-Rupp Co.*, 136 F.3d 695, 701 (10th Cir. 1998)).

137. *See Bertelsen*, 796 N.W.2d at 703 (criticizing the *Hearn* approach and stating that in applying the at-issue exception, “[t]he key factor is reliance of the client upon the advice of his attorney”).

138. 546 F.3d 222 (2d Cir. 2008).

139. *Id.* at 224.

140. *Id.*

141. *Id.*

142. *Id.* at 225 (quoting *In re Cty. of Erie*, 473 F.3d 413, 416 (2d Cir. 2007)).

143. *Id.* at 226.

144. *Id.*

145. *Id.* at 226–27.

146. *Id.* at 226.

discussions with lawyers in the county attorney's office regarding changes in the relevant law.¹⁴⁷ Defense counsel then objected and halted any further questioning regarding legal advice the defendants had received.¹⁴⁸ The second defendant was McCarthy Gipson, a jail employee who signed the memorandum that Livingston prepared.¹⁴⁹ Gipson testified that the county attorney's office participated in rewriting the strip search policy.¹⁵⁰

Acting on the defendants' petition for a writ of mandamus, the Second Circuit noted that while it had previously cited *Hearn* for some general propositions, it had never decided whether the *Hearn* test was definitive in its entirety.¹⁵¹ The court observed that courts in its circuit and elsewhere had criticized the *Hearn* test and applied it unevenly, and that the *Hearn* test was also the subject of academic criticism.¹⁵² In light of these facts, the *County of Erie* court saw a need to clarify "the scope of the at-issue waiver and the circumstances under which it should be applied."¹⁵³

The Second Circuit agreed with critics' contention that the *Hearn* test is too broad and concluded that the district court erred in applying it.¹⁵⁴ As the court explained:

According to *Hearn*, an assertion of privilege by one who pleads a claim or affirmative defense "put[s] the protected information at issue by making it relevant to the case." . . . But privileged information may be in some sense *relevant* in any lawsuit. A mere indication of a claim or defense certainly is insufficient to place legal advice at issue. The *Hearn* test presumes that the information is relevant and should be disclosed and would open a great number of privileged communications to claims of at-issue waiver. Nowhere in the *Hearn* test is found the essential element of reliance on privileged advice in the assertion of the claim or defense in order to effect a waiver.¹⁵⁵

The court therefore held that "a party must *rely* on privileged advice from his counsel to make his claim or defense" to put that advice at issue.¹⁵⁶ That was not the situation here. The defendants did not put the county attorney's advice at issue by asserting qualified immunity as a

147. *Id.*

148. *Cty. of Erie*, 546 F.3d at 226.

149. *Id.* at 227.

150. *Id.*

151. *Id.*

152. *Id.* at 227–28.

153. *Id.* at 228.

154. *Id.* at 229.

155. *Id.* (citation omitted).

156. *Id.*

defense because qualified immunity shields government officials from civil liability for “damages as long as their conduct does not violate clearly established constitutional or statutory rights of which a reasonable person would have known.”¹⁵⁷ Whether rights are “clearly established” in this context is determined by reference to case law existing at time of the alleged offense.¹⁵⁸ Because this is an objective standard, reliance on advice of counsel cannot be invoked to support a qualified immunity defense.¹⁵⁹

The court further explained that defendants had not asserted “a good faith or state of mind defense,” but had contended only that their actions were lawful or, alternatively, that the plaintiffs’ claimed rights were not clearly established.¹⁶⁰ Thus, any legal advice the county attorney’s office gave them was irrelevant to any defense they raised.¹⁶¹ Protecting the e-mail messages as privileged was not unfair to the plaintiffs because they were “in no way worse off” as a result of the disclosure that communications exist than they would be if they were unaware of them.”¹⁶² Finally, withholding the e-mails as privileged would not deny the plaintiffs access to information vital to their claims.¹⁶³

After concluding that Livingston’s and Gipson’s deposition testimony had not waived the defendants’ attorney-client privilege, the *County of Erie* court granted the defendants’ petition for mandamus and directed the district court to enter an order protecting the confidentiality of the disputed e-mail messages.¹⁶⁴ In closing, the Second Circuit reminded the parties that the plaintiffs could reargue the applicability of the privilege in the district court should the defendants attempt to assert advice of counsel or their good faith as defenses at trial.¹⁶⁵

Returning now to the reliance element in the interest of fleshing it out, under *County of Erie*, it is not necessary for purposes of establishing reliance to show that the party intends to introduce or use evidence of otherwise privileged attorney-client communications at trial.¹⁶⁶ Rather,

157. *Id.* (quoting *Gilles v. Repicky*, 511 F.3d 239, 243 (2d Cir. 2007) (internal quotation marks omitted)).

158. *Cty. of Erie*, 546 F.3d at 229 (citing *Moore v. Andreno*, 505 F.3d 203, 215–16 (2d Cir. 2007)).

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* (quoting *John Doe Co. v. United States*, 350 F.3d 299, 305 (2d Cir. 2003)).

163. *Id.* (quoting *Pritchard v. City of Erie*, No. 04-CV-00534C, 2007 WL 3232096, at *2 (W.D.N.Y. Oct. 31, 2007) (citing *Hearn v. Rhay* 68 F.R.D. 574, 581 (E.D. Wash. 1975)), *vacated by In re Cty. of Erie*, 546 F.3d 222 (2d Cir. 2008)).

164. *Id.* at 230.

165. *Id.*

166. *Bacchi v. Mass. Mut. Life Ins. Co.*, 110 F. Supp. 3d 270, 276 (D. Mass. 2015).

the at-issue exception is triggered if the party's claim or defense "relies on certain facts that can only be tested or rebutted if the adversary is given access to the privileged material."¹⁶⁷ For example, if the defendants in *County of Erie* had defended based on their own subjective good faith belief that the strip search policy was legal, then the reliance element would likely be met even if they disclaimed any intent to offer evidence of advice from the county attorney's office.¹⁶⁸

C. *The Rhone-Poulenc Test*

The third test, which is most protective of the attorney-client privilege, comes from the Third Circuit's decision in *Rhone-Poulenc Rorer Inc. v. Home Indemnity Co.*¹⁶⁹ In that case, over 200 plaintiffs sued Armour, a pharmaceutical company that Rhone-Poulenc had acquired, alleging that Armour's blood clotting drug, Factorate, had infected them with HIV.¹⁷⁰ Rhone-Poulenc sought coverage for these lawsuits from its primary liability insurer, Home Indemnity Co., and its excess liability insurer, Pacific Employers Insurance Co.¹⁷¹ Home denied coverage and Rhone-Poulenc filed a declaratory judgment action alleging that Home did, in fact, owe coverage for the AIDS-related suits.¹⁷² Home brought Pacific Employers into the declaratory judgment action by way of a third-party complaint.¹⁷³

Home and Pacific Employers contended that Rhone-Poulenc knew of Factorate's alleged transmission of HIV when it purchased the insurance policies, meaning that there were no "occurrences" under the policies and thus there was no coverage.¹⁷⁴ Similarly, the insurers asserted that Rhone-Poulenc and Armour had wrongfully obtained coverage by concealing their knowledge of the potential for AIDS-related claims resulting from the use of Factorate.¹⁷⁵ Finally, Home and Pacific Employers alleged that Armour sold Factorate knowing that it posed an unreasonable risk of harm to its users, and therefore any resulting claims were uninsurable.¹⁷⁶

167. *Id.* (citing *Cty. of Erie*, 546 F.3d at 229).

168. *Cty. of Erie*, 546 F.3d at 228–29; *Bacchi*, 110 F. Supp. 3d at 276.

169. 32 F.3d 851 (3d Cir. 1994).

170. *Id.* at 855.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 855–56.

175. *Id.* at 856.

176. *Id.*

In an effort to establish these defenses, Home and Pacific Employers deposed Robert E. Cawthorn, Rhone-Poulenc's chairman and CEO.¹⁷⁷ He testified about Rhone-Poulenc's due diligence in deciding to acquire Armour.¹⁷⁸ He testified that while Rhone-Poulenc was negotiating Armour's purchase, he and others at Rhone-Poulenc were aware of press reports discussing the transmission of the AIDS virus through blood products, and had sought legal advice regarding associated potential liabilities.¹⁷⁹ Cawthorn recalled:

We had got the advice of outside counsel on the potential legal liabilities in this area and had learned that blood products are not considered in most states as products, per se, and are not subject to the same liability laws as regular pharmaceutical products. We had learned that there was some precedence [sic] in terms of transmission of the hepatitis virus which these plasma products had transmitted to hemophiliacs. And that, in fact, my recollection is we were told that there had been no successful cases against the fractionaters [sic] and hepatitis because of the particular legal situation. And the opinion was that that should hold, also, for the AIDS virus.¹⁸⁰

Home and Pacific Employers subsequently moved to compel Rhone-Poulenc to produce all evaluations of its potential AIDS-related liability, including any documents reflecting the advice Cawthorn described.¹⁸¹ When Rhone-Poulenc produced some documents but not all the documents they wanted, the insurers pressed their motion to

177. *Id.*

178. *Id.*

179. *Rhone-Poulenc*, 32 F.3d at 856. Although apparently not a concern with respect to Cawthorn's deposition in *Rhone-Poulenc*, baiting a deponent into saying he relied on the advice of counsel does not put that advice at issue. *See, e.g.,* *Syngy, Inc. v. ZS Assocs., Inc.*, No. 07-3536, 2013 WL 3914483, at *2-3 (E.D. Pa. July 29, 2013) (denying the defendants' motion to compel on the basis that the plaintiff had not waived the attorney-client privilege by relying on advice of counsel); *N.J. v. Sprint Corp.*, 258 F.R.D. 421, 432 (D. Kan. 2009) ("[T]he Sprint defendants have not impliedly waived the attorney-client privilege by placing advice of counsel at issue through the above-cited deposition testimony. . . . [T]he testimony was elicited by the lead plaintiff's counsel during the depositions. Although the questions may not have been as clearly directed at eliciting privileged information as those in [an earlier case], the Sprint defendants did not voluntarily raise their reliance on advice of counsel."); *In re Truscott*, No. A15-1767, 2016 WL 2946218, at *9 (Minn. Ct. App. May 23, 2016) ("Truscott was compelled in a deposition—in a case in which she is a defendant—to answer respondents' questions as to whether she relied on the advice of her counsel. She gave one-word responses to the questions. These compelled responses are not affirmative steps taken by a client to place privileged communications 'at issue.'").

180. *Rhone-Poulenc*, 32 F.3d at 856.

181. *Id.*

compel.¹⁸² The insurers argued that by filing the declaratory judgment action and putting its lawyers' advice at issue, Rhone-Poulenc waived any right to resist the disclosure of the requested documents on attorney-client privilege grounds.¹⁸³ The magistrate judge on the case sided with the insurers, as did the district judge.¹⁸⁴ The district judge wrote:

In accordance with [the magistrate judge's] findings, this court adjudges the subpoenas to pertain to directly relevant information. At issue is [Rhone-Poulenc's] knowledge of the liabilities associated with the acquisition of Armour. The issues put into question by this lawsuit focus around [Rhone-Poulenc's] knowledge of the underlying claims and when they became aware of such claims. This court finds that the documents The Home and PEIC seek will aide in disclosing what and when [Rhone-Poulenc] knew of the underlying claims. Thus, the information contained in the requested documents is directly relevant. Therefore, in this instance this court finds it necessary to invade the attorney-client privilege.¹⁸⁵

After the district court denied its motion for reconsideration, Rhone-Poulenc appealed to the Third Circuit.¹⁸⁶

The *Rhone-Poulenc* court observed that because the attorney-client privilege serves the interests of justice, it deserves "maximum legal protection."¹⁸⁷ Furthermore, courts must apply the privilege certainly and predictably, because an uncertain privilege is little better than no privilege at all.¹⁸⁸ Although there was authority holding that a party can waive its attorney-client privilege by putting its lawyer's advice at issue, the court noted that in such cases the client "made the decision and taken the affirmative step" to put its lawyer's advice at issue.¹⁸⁹ Abrogating the attorney-client privilege in that instance is consistent with basic privilege doctrine.¹⁹⁰ That is, by allowing the client to decide whether to waive the privilege by placing her lawyer's advice at issue, a court (1) provides certainty by ensuring that the client's confidential communications will stay private unless she affirmatively surrenders the privilege, and (2) furnishes predictability around the circumstances in

182. *Id.* at 856–57.

183. *Id.* at 857.

184. *Id.* at 858–60.

185. *Id.* at 859.

186. *Id.* at 860 (explaining that Rhone-Poulenc petitioned for a writ of mandamus and filed a notice of appeal).

187. *Id.* at 862 (citing *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 90 (3d Cir. 1992)).

188. *Id.* at 863 (quoting *In re von Bulow*, 828 F.2d 94, 100 (2d Cir. 1987)).

189. *Id.*

190. *Rhone-Poulenc*, 32 F.3d at 863.

which the client may lose the privilege.¹⁹¹ This stability allows clients to consult with their lawyers “free from the apprehension that the communications will be disclosed without their consent.”¹⁹²

Citing *Hearn v. Rhay*¹⁹³ and another district court case, *Byers v. Burlison*,¹⁹⁴ the *Rhone-Poulenc* court observed that some courts had enlarged the at-issue exception to permit the disclosure of privileged communications where the client’s state of mind was at issue in the litigation.¹⁹⁵ But the Third Circuit considered these decisions to be “of dubious validity”¹⁹⁶ because:

While the opinions dress up their analysis with a checklist of factors, they appear to rest on a conclusion that the information sought is relevant and should in fairness be disclosed. Relevance is not the standard for determining whether or not evidence should be protected from disclosure as privileged, and that remains the case even if one might conclude the facts to be disclosed are vital, highly probative, directly relevant or even go to the heart of an issue.¹⁹⁷

Penetrating the privilege based on the relevance of a communication would erode clients’ expectation of confidentiality in dealings with their lawyers, thereby subverting a central purpose of the privilege.¹⁹⁸ Clients would further risk the loss of confidentiality in relation to their most important affairs.¹⁹⁹ Finally, because any relevance determination will likely depend on the facts and circumstances of unknown future litigation, the client can never be confident that its communications with its lawyer will remain private.²⁰⁰

The *Rhone-Poulenc* court reasoned that a party does not lose her attorney-client privilege when her state of mind is at issue in a case.²⁰¹ Even if her lawyer’s advice may be relevant, the interests the attorney-client privilege is intended to protect remain “served by confidentiality.”²⁰²

Here, the sole matter at issue was whether Rhone-Poulenc knew that Factorate was transmitting HIV before it obtained liability insurance

191. *Id.*

192. *Id.* at 863–64.

193. 68 F.R.D. 574 (E.D. Wash. 1975).

194. 100 F.R.D. 436 (D.D.C. 1983).

195. *Rhone-Poulenc*, 32 F.3d at 864.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

from Home and Pacific Employers.²⁰³ The court concluded that Rhone-Poulenc had not waived its attorney-client privilege by filing the declaratory judgment action or by putting its state of mind at issue.²⁰⁴ Because Rhone-Poulenc had “not interjected the advice of counsel as an essential element of a claim in [the] case,” the district court erred in affirming the magistrate judge’s decision and in ordering Rhone-Poulenc to produce the disputed documents.²⁰⁵

In summary, for the at-issue exception to apply under *Rhone-Poulenc*, a party must (1) assert a claim or defense, and (2) attempt to establish that claim or defense by describing or disclosing an otherwise privileged attorney-client communication.²⁰⁶ It is not enough that a party may have been influenced by communications with her lawyer and thus that the lawyer’s advice is relevant to the party’s state of mind; rather, the party triggers the at-issue exception only by affirmatively using the lawyer’s advice to establish a claim or defense.²⁰⁷ Finally, however strict or protective the *Rhone-Poulenc* test may be, it is still fair to all concerned because it prevents a litigant “from asserting advice of counsel only to its benefit, thereby eliminating the risk that a party will attempt to use the advice-of-counsel as both a sword and a shield.”²⁰⁸

D. Summary and Synthesis

The attorney-client privilege is a critically important doctrine that serves the interests of justice, and the confidentiality it provides deserves maximum protection.²⁰⁹ Exceptions to the privilege should, therefore, be

203. *Id.*

204. *Id.*

205. *Rhone-Poulenc*, 32 F.3d at 864 (citing *Remington Arms Co. v. Liberty Mut. Ins. Co.*, 142 F.R.D. 408 (D. Del. 1992)).

206. *See, e.g., Piazza v. Cty. of Luzerne*, No. 3:13-CV-1755, 2015 WL 6690090, at *3–4 (M.D. Pa. Oct. 30, 2015) (finding that the *Rhone-Poulenc* two step inquiry was satisfied and that the defendants had placed their counsel’s advice at issue); *Nesselrotte v. Allegheny Energy Inc.*, No. 06-01390, 2008 WL 2858401, at *6–7 (W.D. Pa. July 22, 2008) (applying this “two step inquiry”).

207. *See, e.g., DR Distribs., LLC v. 21 Century Smoking, Inc.*, No. 12 CV 50324, 2015 WL 5123652, at *7 (N.D. Ill. Sept. 1, 2015) (“Here . . . the plaintiff is using only the fact that he consulted with counsel to establish his good faith defense rather than the content of the advice received. . . . Accordingly, the plaintiffs are walking the fine line of privilege without crossing over the line into waiver.”) (citation omitted).

208. *Elat v. Emandopngoubene*, No. PWG-11-2931, 2013 WL 1146205, at *6 (D. Md. Mar. 18, 2013).

209. *Rhone-Poulenc*, 32 F.3d at 862.

carefully crafted.²¹⁰ Any related test should provide certain and predictable results.

Of the three tests for determining whether a party's privileged communications have been placed at issue, the *Hearn* test is "the most widely accepted."²¹¹ Again, under *Hearn*, the at-issue exception applies when (1) assertion of the privilege was a result of some affirmative act by the asserting party, such as filing suit; (2) by so acting, the party placed the privileged communication at issue by making it relevant to the case; and (3) enforcing the privilege would deny the opposing party information vital to its claim or defense.²¹² But while the *Hearn* test may be popular, it is unsatisfactory for several reasons.

First, courts generally agree that a party does not place its lawyer's advice at issue simply by filing suit.²¹³ The first element of the *Hearn* test, therefore, contradicts settled law. Second, relevance is not the standard for deciding whether evidence should be shielded from disclosure because "privileged information may be in some sense relevant in any lawsuit."²¹⁴ Furthermore, because the definition of relevance will depend on the facts and circumstances of unspecified future litigation, the client cannot judge whether a communication with her lawyer may be relevant to some future issue, and thus can never be assured that it will stay confidential.²¹⁵ Such uncertainty and unpredictability undermines the purposes behind the privilege.²¹⁶ Third, whether upholding the privilege will deny an opponent information vital to its claim or defense should not be a factor because it confuses the attorney-client privilege with tangible work product immunity. This is a material error. While a party may discover an opponent's tangible work product by showing substantial need for the materials and the inability to obtain their substantial equivalent without undue hardship,²¹⁷ attorney-client communications do not become discoverable by virtue of the

210. See *In re Cty. of Erie*, 546 F.3d 222, 228 (2d Cir. 2008) (reasoning that "rules which result in waiver of this privilege and thus possess the potential to weaken attorney-client trust, should be formulated with caution").

211. *Botkin v. Donegal Mut. Ins. Co.*, No. 5:10cv00077, 2011 WL 2447939, at *4 (W.D. Va. June 15, 2011) (citing *Metric Constructors, Inc. v. Bank of Tokyo-Mitsubishi, LTD.*, No. 5:97-CV-369BR1, 1998 WL 1742589, at *6 n.6 (E.D.N.C. Sept. 28, 1998); *City of Myrtle Beach v. United Nat'l Ins. Co.*, No. 4:08-1183-TLW-SVH, 2010 WL 3420044 (D.S.C. Aug. 27, 2010).

212. *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975).

213. See *supra* note 6 and accompanying text.

214. *In re Cty. of Erie*, 546 F.3d at 229.

215. *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 864 (3d Cir. 1994).

216. *Id.*

217. FED. R. CIV. P. 26(b)(3).

requesting party's inability to obtain the information from other sources.²¹⁸ Privileged information is simply not subject to discovery based on another party's substantial need or undue hardship.²¹⁹

The *County of Erie* test represents an improvement over the *Hearn* test because it diminishes the relevance element²²⁰ and adds a reliance element.²²¹ The *County of Erie* test is still flawed, however, because it leaves intact the third element of the *Hearn* test—that is, upholding the privilege would deny the discovering party information vital to its claim or defense.²²²

The problems with the *Hearn* and *County of Erie* tests, plus other considerations, lead to the conclusion that the *Rhone-Poulenc* test supplies the proper standard for determining whether a party has placed its lawyer's advice at issue. Courts that have not already selected a test or that are not required to apply a test favored by a superior court should adopt the *Rhone-Poulenc* test. Courts that have adopted a different test should reconsider. Again, the *Rhone-Poulenc* test holds that “[t]he 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.”²²³

The *Rhone-Poulenc* test is superior first because it adheres to the principle that the attorney-client privilege is a shield, not a sword.²²⁴ Second, by leaving to the client the decision whether to surrender the privilege by placing its lawyer's advice at issue, the test provides certainty, consistency, and predictability as to any possible application of

218. *Collins v. Braden*, 384 S.W.3d 154, 159 (Ky. 2012) (citing *St. Luke Hosps., Inc. v. Kopowski*, 160 S.W.3d 771, 777 (Ky. 2005)).

219. *See United States v. Wells Fargo Bank, N.A.*, 132 F. Supp. 3d 558, 563 (S.D.N.Y. 2015) (stating that the attorney-client privilege cannot be overcome by a showing of sufficient need); *Hagans v. Gatorland Kubota, LLC/Sentry Ins.*, 45 So. 3d 73, 76 (Fla. Dist. Ct. App. 2010) (“The attorney-client privilege is not subject to any balancing test and, unlike matters protected by work-product privilege, cannot be discovered by a showing of need, undue hardship, or some other competing interest.”); *Collins*, 384 S.W.3d at 159 (referring to “great need and hardship”).

220. *See In re Cty. of Erie*, 546 F.3d 222, 229 (2d Cir. 2008) (“But privileged information may be in some sense *relevant* in any lawsuit. A mere indication of a claim or defense certainly is insufficient to place legal advice at issue.”).

221. *See id.* (holding that a party must rely on privileged advice from its lawyer to make its claim or defense).

222. *See id.* (explaining that in upholding the privilege, the court was not denying the plaintiffs information vital to their claims).

223. *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 863 (3d Cir. 1994).

224. *Elat v. Emandopngoubene*, No. PWG-11-2931, 2013 WL 1146205, at *6 (D. Md. Mar. 18, 2013); *Pub. Serv. Co. of N.M. v. Lyons*, 10 P.3d 166, 174 (N.M. Ct. App. 2000).

the at-issue exception and the circumstances in which the privilege may be lost.²²⁵ For this reason, the *Rhone-Poulenc* test also honors the principle that the client alone—not an adversary—holds and controls the privilege.²²⁶ Third, by stabilizing the at-issue exception, the *Rhone-Poulenc* test encourages clients to confide in their lawyers without having to fear that their communications will be disclosed without their consent.²²⁷ In this way the test embraces the basic principle underlying the attorney-client privilege, which is to encourage full and frank communications between lawyers and clients, thereby promoting the broader public interest in fidelity to law and the administration of justice.²²⁸ Fourth, by restricting the at-issue exception to well-defined circumstances, the *Rhone-Poulenc* test discourages discovery disputes and thus reduces litigation costs.²²⁹ Fifth, this test promotes fundamental principles of justice by discouraging parties from seeking an unfair litigation advantage through the attempted discovery of adversaries' privileged communications.²³⁰

Once a party places its lawyer's advice at issue under any of the tests, the focus shifts to the scope of the intrusion into the party's communications with its lawyer. Generally, the at-issue exception "extends to all of the communications bearing on the subject matter that the court deems necessary to litigate the issue fairly."²³¹ Thus, with respect to otherwise privileged matters that have been put at issue, the discovering party will enjoy great range.²³² The client's communications

225. *Rhone-Poulenc*, 32 F.3d at 863.

226. *See In re Seagate Tech., LLC*, 497 F.3d 1360, 1372 (Fed. Cir. 2007) ("The attorney-client privilege belongs to the client, who alone may waive it.").

227. *Rhone-Poulenc*, 32 F.3d at 863–64.

228. *Pub. Serv. Co. of N.M.*, 10 P.3d at 174 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

229. *See generally* *Remington Arms Co. v. Liberty Mut. Ins. Co.*, 142 F.R.D. 408, 413 (D. Del. 1992) (noting the criticism that "extremely liberal waiver rules increase litigation costs and judicial time spent on discovery disputes"); *Wardleigh v. Second Judicial Dist. Ct.*, 891 P.2d 1180, 1187 (Nev. 1995) (making the same observation and citing *Remington Arms*, among other sources).

230. *See, e.g.,* *Syngy, Inc. v. ZS Assocs., Inc.*, No. 07-3536, 2013 WL 3914483, at *2–3 (E.D. Pa. July 29, 2013) (relying on *Rhone-Poulenc* in concluding that a party could not bait a deponent into waiving the attorney-client privilege by testifying that he had relied on advice of counsel).

231. DAVID M. GREENWALD ET AL., *TESTIMONIAL PRIVILEGES* § 1:88, at 351 (2015 ed.) (footnote omitted).

232. *See In re Seagate Tech., LLC*, 497 F.3d 1360, 1372 (Fed. Cir. 2007) ("The widely applied standard for determining the scope of a waiver . . . is that the waiver applies to all other communications relating to the same subject matter.' . . . This broad scope is grounded in principles of fairness and serves to prevent a party from simultaneously using the privilege as both a sword and a shield; that is, it prevents the

with its lawyer about matters that were not placed at issue, however, remain confidential.²³³ Moreover, where a client is represented by two separate lawyers or law firms in a matter, placing one lawyer's or firm's advice at issue does not necessarily expose the client's communications with the second lawyer or law firm to discovery.²³⁴ From an overall perspective, then, the scope of the at-issue exception—or the scope of at-issue waiver in courts that favor waiver terminology—is limited or narrow.²³⁵

Three other points bear mention. One, and as should hopefully be apparent, the at-issue exception applies only where the legal advice the client places at issue is that of its own lawyer—that is, the lawyer with whom it shares an attorney-client relationship.²³⁶ Thus, in the rare case where a party relies on the advice of lawyers other than its own in pursuing a course of action, it does not rupture the attorney-client privilege cloaking communications with its own lawyer, even if the other lawyers' advice or opinions relate to the same subject.²³⁷

Two, even where a party's good faith is a central element of its claim or defense—a scenario in which the at-issue exception is regularly

inequitable result of a party disclosing favorable communications while asserting the privilege as to less favorable ones.”) (citation omitted).

233. GREENWALD ET AL., *supra* note 231, § 1:88, at 351–52. See, e.g., *Lambright v. Ryan*, 698 F.3d 808, 818 (9th Cir. 2012) (explaining that when a federal habeas petitioner alleges ineffective assistance of counsel, the implied waiver of his attorney-client privilege “does not extend beyond the adjudication of the ineffectiveness claim in the federal habeas proceeding”); *CCC Info. Servs., Inc. v. Mitchell Int'l, Inc.*, No. 03 C 2695, 2006 WL 3486810, at *6 (N.D. Ill. Dec. 1, 2006) (reasoning that because the scope of waiver is limited to the subject of the legal opinion at issue, and because the information sought related solely to the issue of potential damages and not to liability, which was the subject of the advice-of-counsel defense, disclosure was inappropriate); *McGuire v. Am. Family Mut. Ins. Co.*, No. 08-1072-JTM, 2009 WL 1044945, at *3 (D. Kan. Aug. 3, 2009) (confining examination of the insurer's in-house lawyer to the time preceding the insurer's termination of the plaintiff's agency; the insurer asserted advice of counsel as a defense to the plaintiff's wrongful termination claims).

234. See *In re Seagate Tech.*, 497 F.3d at 1374 (“In sum, we hold, as a general proposition, that asserting the advice of counsel defense and disclosing opinions of *opinion counsel* do not constitute waiver of the attorney-client privilege for communications with *trial counsel*.”) (emphasis added).

235. See, e.g., *Lambright*, 698 F.3d at 818 (noting that at-issue waiver is “narrow” and “limited” in ineffective assistance of counsel cases); *In re Target Tech. Co., LLC*, 208 F. App'x 825, 827 (Fed. Cir. 2006) (stating that the scope of the at-issue waiver in the case was “necessarily limited”); *Simmons, Inc. v. Bombardier, Inc.*, 221 F.R.D. 4, 10 (D.D.C. 2004) (adopting the “narrow waiver” approach in a patent infringement case); *Clair v. Clair*, 982 N.E.2d 32, 43 (Mass. 2013) (quoting *Darius v. Boston*, 741 N.E.2d 52, 58 (Mass. 2001)).

236. *DRFP, LLC v. Republica Bolivariana de Venezuela*, No. 2:04-cv-793, 2015 WL 2452970, slip op. at *6 (S.D. Ohio May 22, 2015).

237. *Id.*

held to apply by courts relying on the *Hearn* and *County of Erie* tests—its lawyer’s involvement in formulating that claim or defense does not place the lawyer’s advice at issue if the thrust of the party’s argument is that its conduct was lawful or was approved by regulators.²³⁸ In that case, the party’s argument depends on objective facts rather than its subjective belief, and its lawyer’s advice is therefore irrelevant.²³⁹ In short, there is a difference between a claim or defense based on the actual legality or regulatory approval of a party’s conduct, which should not trigger the at-issue exception, and a party’s assertion that it held a good faith belief that its conduct was lawful or would pass regulatory muster, which may well put its lawyer’s advice at issue depending on the test employed.²⁴⁰

Finally, the at-issue exception is a common law creation. Most states have codified the attorney-client privilege to some extent. In some states that have codified the privilege, courts will not recognize an exception to the privilege that is not provided by statute.²⁴¹ It is therefore possible that a court in a state that has not codified the at-issue exception will decline to recognize it on that basis.²⁴² It is also possible, however, that even in a state that purports not to recognize *exceptions* to the

238. See, e.g., *Bacchi v. Mass. Mut. Life Ins. Co.*, 110 F. Supp. 3d 270, 277–78 (D. Mass. 2015) (“[T]he defendant has not waived any privilege . . . by virtue of asserting the defenses of good faith and regulatory approval. . . . [T]he plaintiff does not presently need to inquire into counsel’s advice . . . to interpret the [Department of Insurance’s] guidance . . . or to assess whether the defendant had a good faith basis to follow that guidance. The defendant . . . intends to argue, simply, that its actions accorded with the guidance . . . and were consistent with the actions others . . . would take. The plaintiff does not need to discover counsel’s privileged communications to test whether this defense has any merit; rather, it has been provided with the same DOI information . . . and thus is in a position to test and rebut the defendant’s assertions.”); *Banco Do Brasil, S.A. v. 275 Wash. St. Corp.*, No. 09-11343-NMG, 2011 WL 3208027, at *3 (D. Mass. July 27, 2011) (“Attorney Scott has indicated only that she and Bank employees worked . . . to obtain the approval of regulators. The Bank has not sought to excuse its performance by claiming it relied on its counsel. . . . The Trust is free to explore the steps the Bank and its attorney took. What it is not free to do is inquire into confidential communications between the Bank and its counsel.”) (footnote omitted).

239. *Bacchi*, 110 F. Supp. 3d at 277.

240. See *id.* at 276–77 (illustrating this distinction).

241. See, e.g., *Chubb & Son v. Super. Ct.*, 176 Cal. Rptr. 3d 389, 396 (Ct. App. 2014) (“Because the attorney-client privilege in California is a product of statute . . . there are no exceptions to the privilege unless expressly provided by statute.”) (citation omitted).

242. See, e.g., *Jackson v. Greger*, 854 N.E.2d 487, 491 (Ohio 2006) (“In reaching this holding [rejecting waiver based on *Hearn*], we are aware that several Ohio courts of appeals have applied the *Hearn* test. We are nevertheless guided by the significant body of law from this court that has consistently rejected the adoption of judicially created waivers, exceptions, and limitations for testimonial privilege statutes.”) (footnote omitted).

privilege beyond those provided by statute, a court might recognize the at-issue doctrine by characterizing it as a form of *waiver*.²⁴³ It is additionally possible that a court will conclude that it is free to craft new exceptions to the privilege beyond those that are statutorily-created where fairness requires as much on the theory that the statutory exceptions are not exclusive.²⁴⁴ In summary, a party that wants to argue that it has not put its lawyer's advice at issue may wish to consider whether it has a statutory basis for its position, but the likely success of that argument is difficult to gauge.

IV. AT-ISSUE EXCEPTION TROUBLE SPOTS

In some cases, lawyers should recognize that clients' privileged communications will be at issue. For example, a party's assertion of an advice of counsel defense unquestionably places its lawyer's advice at issue,²⁴⁵ as does a party's assertion of a claim that pivots on the advice of, or consultation with, counsel.²⁴⁶ Ineffective assistance of counsel allegations plainly implicate privileged advice the defendant received from his lawyer.²⁴⁷ In other cases, though, clients and lawyers may stray

243. See, e.g., *Wellpoint Health Networks, Inc. v. Super. Ct.*, 68 Cal. Rptr. 2d 844, 855–56 (Ct. App. 1997) (“The . . . employer’s injection into the lawsuit of an issue concerning the adequacy of the investigation where the investigation was undertaken by an attorney or law firm must result in waiver of the attorney-client privilege. . . . As our Supreme Court has held, waiver is established by a showing that ‘the client has put the otherwise privileged communication directly at issue and that disclosure is essential for a fair adjudication of the action.’”) (quoting *S. Cal. Gas Co. v. Pub. Utils. Comm’n*, 784 P.2d 1373, 1378 (Cal. 1990)).

244. *S. Cal. Gas Co.*, 784 P.2d at 1378; *Squire, Sanders, & Dempsey, L.L.P. v. Givaudan Flavors Corp.*, 937 N.E.2d 533, 538–44 (Ohio 2010).

245. See, e.g., *In re Echo Star Comm’n Corp.*, 448 F.3d 1294, 1299 (Fed. Cir. 2006) (“Once a party announces that it will rely on advice of counsel, for example, in response to an assertion of willful infringement, the attorney-client privilege is waived.”).

246. See, e.g., *3M Co. v. Engle*, 328 S.W.3d 184, 189 (Ky. 2010) (reasoning that because the plaintiffs asserted that their causes of action did not accrue until their attorney told them of a connection between their respirator equipment and their illnesses, the nature and timing of their communications with their attorney regarding this connection became “not only relevant, but in fact critical to the case”).

247. See, e.g., *Barnes v. Hammer*, 765 F.3d 810, 812 n.2 (8th Cir. 2014) (noting that “because Barnes alleged ineffective assistance of counsel . . . he affirmatively waived his right to the attorney-client privilege insofar as the conversations related to the specifics of the plea negotiations, as this was the basis for his ineffective assistance claim”); *Lambright v. Ryan*, 968 F.3d 808, 818 (9th Cir. 2012) (“The defendant impliedly waives his attorney-client privilege the moment he files a habeas petition alleging ineffective assistance of counsel.”); *Johnson v. State*, 860 N.W.2d 913, 921 (Iowa Ct. App. 2014) (asserting that a criminal defendant waives the attorney-client privilege “when he puts at issue the effectiveness of counsel”); *In re Medina*, 475 S.W.3d 291, 302 (Tex. App. 2015) (explaining that “a defendant waives the attorney-client privilege when he argues

into the at-issue exception without having considered it or recognized its potential application when evaluating causes of action or deliberating on strategy. If, for example, a party was advised on a transaction by both an accountant and a lawyer and later sued the accountant for negligent advice, in many jurisdictions the party likely placed her lawyer's advice at issue.²⁴⁸ After all, if the lawyer's advice contradicted the accountant's and the party nevertheless took the accountant's advice, the accountant may prevail for want of proximate cause.²⁴⁹ Similarly, a party who sues someone for negligent misrepresentation or fraud arising out of a transaction in which the party was represented by counsel or consulted with a lawyer may have put her lawyer's advice at issue because it may show that her reliance on the defendant's representations was unreasonable.²⁵⁰

Several situations or types of cases consistently present at-issue exception traps. As briefly noted earlier,²⁵¹ any case in which a party asserts its subjective good faith as a basis for a claim or defense is potentially perilous.²⁵² Other examples include contract disputes where the parties' intent or the circumstances surrounding formation of the contract are in dispute, two types of employment litigation, insurance bad faith litigation, and the use of privileged documents to refresh witnesses' recollections in preparation for depositions. These are discussed in order below.

that his sentence should be overturned because his counsel was constitutionally ineffective").

248. See, e.g., *Chin v. Rogoff & Co.*, No. 05 Civ. 8360(NRB), 2008 WL 2073934, at *5–6 (S.D.N.Y. May 8, 2008) (following *Hearn*).

249. *Id.* at *6.

250. See, e.g., *Union Cty. v. Piper Jaffray & Co.*, 248 F.R.D. 217, 222–25 (S.D. Iowa 2008) (applying the *Hearn* test in a lawsuit against an investment banking firm arising out of a bond issue); *Minebea Co. v. Papst*, 355 F. Supp. 2d 518, 524 (D.D.C. 2005) (involving a fraud claim related to the scope of patent licenses).

251. See *supra* note 238 and accompanying text.

252. See, e.g., *Skyline Steel, LLC v. PilePro, LLC*, No. 13-CV-8171 (JMF), 2015 WL 4480725, slip op. at *3 (S.D.N.Y. July 22, 2015) (explaining that the defendant in a patent infringement case could not argue that it acted in good faith and free from any improper motive and, at the same time, shield as privileged advice that it received from its lawyers in formulating its course of action) (quoting *Pereira v. United Jersey Bank*, No. 94-CV-1565 (LAP), 1997 WL 773716, at *6 (S.D.N.Y. Dec. 11, 1997)). *But cf.* 2002 Lawrence R. Buchalter Alaska Tr. v. Phila. Fin. Assur. Co., 12 Civ. 6808 (KMK)(PED), 2016 WL 1060336, slip op. at *2 (S.D.N.Y. Mar. 11, 2016) (explaining that “implied reliance [for at-issue exception purposes] is confined to situations involving a party’s state of mind concerning a question of law, such as the party’s belief as to the lawfulness of its conduct,” and does not apply where the issue is what a party knew or reasonably should have known as a factual matter).

A. *Contract Disputes*

Courts routinely hold that a party who either alleges that an agreement does not reflect her intent or alleges that extrinsic evidence is required to support her interpretation of a contract or establish the meaning of a contract puts her lawyer's advice concerning the subject at issue.²⁵³ *Stovall v. United States*²⁵⁴ is a representative case.

Michael Stovall, an African-American farmer, settled a discrimination claim against the United States Department of Agriculture (USDA).²⁵⁵ Under the parties' "resolution agreement," Stovall waived his rights against the USDA and its employees in exchange for the USDA's promise to pay him \$145,000, discharge his debts to the USDA's farm service agency, offer him priority consideration on future loan applications, and pay his reasonable attorney's fees and costs, among other relief.²⁵⁶ The USDA's Office of General Counsel (OGC) helped negotiate and draft the resolution agreement.²⁵⁷ Stovall later sued the USDA for breaching the agreement when the USDA refused to extend him additional credit and declined to restructure his existing loans.²⁵⁸

Stovall attempted to discover a memorandum prepared by the OGC for the USDA regarding his claims in the new lawsuit.²⁵⁹ When the USDA refused to produce the OGC memorandum on attorney-client

253. See, e.g., *Synalloy Corp. v. Gray*, 142 F.R.D. 266, 270 (D. Del. 1992) (stating that by seeking to rescind an agreement due to no meeting of the minds, a defendant waived its right to prevent disclosure of communications that might show the parties' intent in entering the agreements); *Pitney-Bowes, Inc. v. Mestre*, 86 F.R.D. 444, 447 (S.D. Fla. 1980) (reasoning that by alleging it intended to modify some patent licensing agreements, a party placed its contracting intent at issue); *IMC Chems., Inc. v. Niro Inc.*, No. Civ. A. 98-2348- JTM, 2000 WL 1466495, at *23 (D. Kan. July 19, 2000) ("[P]laintiff intends to offer extrinsic evidence about its interpretation of the contract. Such reliance places the protected information at issue."); *Medtronic, Inc. v. Intermedics, Inc.*, 162 F.R.D. 133, 135 (D. Minn. 1995) ("To the extent Intermedics intends to offer extrinsic evidence to bolster its interpretation of the document, it has waived the privilege attached to [its] interpretation of the document."); *MBIA Ins. Corp. v. Patriarch Partners VIII, LLC*, No. 09 Civ. 3255, 2012 WL 2568972, at *8 (S.D.N.Y. July 3, 2012) ("MBIA has stated that its witnesses will testify concerning their 'intent and interpretation of the contracts.' Accordingly, the waiver shall be enforced against all documents that concern those subject matters."); *Terry v. Bacon*, 269 P.3d 188, 192 (Utah Ct. App. 2011) (agreeing with the trial court that "by contesting their consent to the settlement agreement, the [plaintiffs] put their former attorney's conduct at issue and waived the attorney-client privilege as to that question").

254. 85 Fed. Cl. 810 (Fed. Cl. 2009).

255. *Id.* at 812.

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

privilege grounds, he moved to compel its production.²⁶⁰ In connection with the parties' briefing, the court ordered the USDA to state whether (a) it intended to rely on parol evidence to support its interpretation of the resolution agreement; and (b) if so, whether that evidence would involve communications with OGC lawyers.²⁶¹ The USDA responded that "it could not foreclose the possibility" that it would rely on parol evidence in its defense, some of which "might derive from the OGC attorneys who helped negotiate and draft the [r]esolution [a]greement."²⁶²

That response caused the *Stovall* court to analyze whether the USDA had "implicitly waived" its attorney-client privilege by reserving its right to offer parol evidence—including evidence from the OGC—to advance its interpretation of the resolution agreement.²⁶³ Indeed, numerous courts reason that if a party reserves the right to use parol evidence to support its interpretation of a contract, it may not assert the privilege to block the discovery of communications with its lawyer that "form the extrinsic context for the agreement, particularly those that occurred in negotiating or interpreting the agreement."²⁶⁴ Fairness compels a court to find an implied waiver of the privilege in these circumstances.²⁶⁵ That was the situation at hand:

[The USDA] . . . could not "foreclose the possibility" that it would rely on extrinsic evidence to support its interpretation of the agreement. It further indicated that if such evidence were offered, it "would relate to the contracting parties' intention at the time of contract formation" and that two of the individuals "possessing knowledge of the parties' intent during negotiations" were the "attorneys with the USDA Office of General Counsel who participated in the negotiation and drafting of the agreement." Accordingly, when asked, [the USDA] indicated that it might rely upon evidence taken from the OGC attorneys, thereby . . . opening the door for [Stovall] to conduct discovery regarding the views held by the OGC attorneys during the drafting and negotiation of the [r]esolution [a]greement. As such, while the attorney-client privilege appears to cover the OGC Memorandum, it has been impliedly waived here. To rule otherwise would be to allow [the USDA] to use the privilege as a sword and shield—to rely potentially upon parol evidence from its attorneys to influence the interpretation of the contract, while denying [Stovall] access to privileged material that

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.* at 815.

264. *Stovall*, 85 Fed. Cl. at 816 (footnote omitted).

265. *Id.*

might be used to rebut that evidence. Fairness does not permit such a result.²⁶⁶

In addition to concluding that Stovall was entitled to obtain the OGC memorandum, the court ordered the USDA to produce documents written by its staff that referred to the OGC memorandum and that referred to communications with OGC lawyers regarding the resolution agreement's implementation.²⁶⁷ According to the *Stovall* court, these documents were within the scope of the USDA's subject matter waiver of its attorney-client privilege.²⁶⁸

In analyzing the decision in *Stovall*, it is fair to ask why the court allowed Stovall to obtain the USDA's privileged materials when the USDA had not affirmatively stated that it intended to call OGC lawyers as witnesses at trial, but said only that it would not rule out the possibility. In fact, the court anticipated that argument (the USDA never made it).²⁶⁹ From the court's perspective, a "wait-and-see approach" risked having to reopen discovery at an inopportune time—perhaps even during trial.²⁷⁰ Furthermore, having given the USDA the opportunity to disavow the use of extrinsic evidence provided by its lawyers—which the USDA declined to do—the court had to allow discovery into the drafting and negotiation of the resolution agreement.²⁷¹ Indeed, under the circumstances, it would have been unfair to deny Stovall the chance to conduct such discovery.²⁷² The court certainly could not allow the USDA to blindside Stovall with extrinsic evidence at trial.

B. *Employment Litigation*

Turning now to employment litigation, it is true in this context as elsewhere that a defendant that defends against a plaintiff's theories on the basis that it is not liable because it relied on the advice of counsel places its lawyer's advice at issue and therefore loses its attorney-client privilege covering related communications.²⁷³ But two categories of cases stand out for presenting at-issue exception challenges: (1) Fair

266. *Id.* at 816–17.

267. *Id.* at 817.

268. *Id.*

269. *Id.* at 817 n.8.

270. *Id.*

271. *Id.*

272. *See id.* (citing three cases and a treatise).

273. *See, e.g.,* *Carson v. Lake Cty., Ind.*, Cause No. 2:14-cv-117-PRC, 2016 WL 1567253, slip op. at *6–9 (N.D. Ind. Apr. 19, 2016) (involving a lawyer's advice regarding the defendant's compliance with the Age Discrimination in Employment Act (ADEA) in terminating the plaintiffs' employment).

Labor Standards Act (FLSA) cases in which the defendant-employer asserts an affirmative defense that it acted in good faith in classifying employees as exempt so that it would not have to pay them the statutory minimum wage or overtime wages, or in arguing that it should not be liable for liquidated damages if it is found to have violated the FLSA;²⁷⁴ and (2) discrimination and harassment cases where the defendant-employer asserts a *Faragher-Ellerth* affirmative defense, the name being derived from two Supreme Court cases.²⁷⁵

1. The At-Issue Exception in FLSA Cases

In FLSA cases, an employer may attempt to avoid liability by asserting that it acted “in good faith in conformity with and in reliance on” federal administrative regulations, orders, rulings, approvals, interpretations, practices, or enforcement policies.²⁷⁶ Once found to have violated the FLSA, an employer may assert its good faith in resisting liquidated damages.²⁷⁷ An employer may attempt to establish its good faith by asserting its reliance on advice of counsel,²⁷⁸ plainly putting its lawyer’s advice at issue.²⁷⁹ In other cases, however, an employer may

274. See *Scott v. Chipotle Mex. Grill, Inc.*, 67 F. Supp. 3d 607, 612–14 (S.D.N.Y. 2014) (explaining the good faith defense in both contexts). See also 29 U.S.C. § 259(a) (2012) (“[N]o employer shall be subject to any liability or punishment for or on account of the failure . . . to pay minimum wages or overtime compensation under the [FLSA] . . . if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged.”); 29 U.S.C. § 260 (2012) (“In any action . . . under the [FLSA] . . . if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA] . . . the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.”).

275. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

276. 29 U.S.C. § 259(a) (2012).

277. 29 U.S.C. § 260 (2012).

278. See *Featsent v. City of Youngstown*, 70 F.3d 900, 906–07 (6th Cir. 1995) (“Presumably, the duty of the [City’s] attorney was not only to represent the City’s interest, but also to ascertain and follow the dictates of the law, including the FLSA. There is no evidence that . . . the City’s attorney advised the City that the Agreement’s method of calculating overtime compensation violated the FLSA. From its attorney’s silence, the City was entitled to the reasonable belief that the Agreement did not violate . . . the FLSA.”); see also *Perez v. Mountaire Farms*, 650 F.3d 350, 375–76 (4th Cir. 2011) (crediting the defendant with good faith based on its reliance on the advice of a lawyer employed by a trade group).

279. See, e.g., *Foster v. City of N.Y.*, 14 Civ. 4142 (PGG) (JCF), 14 Civ. 9220 (PGG) (JCF), 2016 WL 524639, at *4 (S.D.N.Y. Feb. 5, 2016) (explaining that the city’s

put its lawyer's advice at issue without meaning to do so, or while trying to avoid doing so.²⁸⁰ *Edwards v. KB Home*²⁸¹ is an interesting case in point.

The *Edwards* plaintiffs alleged that KB Home incorrectly classified them as exempt outside sales employees who were not entitled to overtime wages.²⁸² KB Home asserted that it correctly classified the plaintiffs, but further contended that if its classification decision was mistaken, it was made in the good faith belief it was lawful.²⁸³ The plaintiffs argued that KB Home's assertion of its good faith defense waived its attorney-client privilege covering communications with its lawyers that would illuminate the information KB Home had when it crafted and later applied its classification scheme.²⁸⁴ KB Home countered that it based its good faith defense not on the advice of its lawyers, but on "other employees' understanding of Department of Labor (DOL) opinion letters."²⁸⁵

The court acknowledged that if KB Home employees determined that the company's classification scheme was lawful based solely on their analysis of the DOL opinion letters, KB Home's privilege would remain intact.²⁸⁶ But the court doubted that KB Home would have formulated its classification scheme without the benefit of related legal advice.²⁸⁷ In fact, when pressed, KB Home conceded that its employees involved in the classification decision *did* consult with counsel regarding that decision and the DOL opinion letters, but it reiterated that it was not relying on advice of counsel in asserting its good faith defenses.²⁸⁸

KB Home's line-drawing caused the *Edwards* court to ask whether KB Home could "parse its defense to rely solely on its own nonlawyers' understanding of the FLSA's outside sales exemption and thus maintain

stated reliance on the advice of counsel in formulating its FLSA compliance policies waived the privilege regarding related communications).

280. See, e.g., *Hicks v. T.L. Cannon Mgmt. Corp.*, No. 13-cv-6455W, 2015 WL 5167225, at *5 (W.D.N.Y. Sept. 3, 2015) (rejecting the defendant's assurance that it would limit its good faith defense to one in which its state of mind did not incorporate legal advice); *Scott v. Chipotle Mex. Grill, Inc.*, 67 F. Supp. 3d 607, 614–17 (S.D.N.Y. 2014) (reasoning that Chipotle could not plead around the good faith requirements of its statutory defenses by avoiding mention of the advice of counsel).

281. No. 3:11-cv-00240, 2015 WL 4430998 (S.D. Tex. July 18, 2015).

282. *Id.* at *1.

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.* at *2.

287. *Id.* (citing *Wang v. Hearst Corp.*, No. 12 CV 793(HB), 2012 WL 6621717, at *2 (S.D.N.Y. Dec. 19, 2012)).

288. *Id.* at *1–2.

as privileged the attorney communications on the same topic[.]”²⁸⁹ The court concluded that KB Home could not:

Two basic aspects of the good faith defenses compel the [c]ourt to conclude that KB Home is drawing too fine a line: the defenses require a *good faith* belief about the *lawfulness* of a classification decision. Communications from lawyers—whose very job is to advise the company on the lawfulness of its policies—concerning the company’s classification decision necessarily influence the reasonableness of any belief the company has about the lawfulness of its policy. Otherwise, why seek legal advice (which isn’t cheap) at all? And as a psychological matter, it seems very difficult, if not impossible, for a witness to compartmentalize his reliance on what he may have independently understood regarding the law and what he was told by attorneys.²⁹⁰

The court did not know the substance of KB Home’s communications with its lawyers regarding the FLSA’s outside sales exemption, but it figured they would be “highly probative” of KB Home’s good faith belief in the lawfulness of its policy.²⁹¹ The court further reasoned that recognizing KB Home’s distinction between a good faith defense that relies on the advice of counsel from one that does not—even though in the latter instance such advice was given—would effectively bench the at-issue exception to the privilege in FLSA cases.²⁹²

The court held that KB Home had waived its attorney-client privilege by asserting as a defense its good faith belief in the lawfulness of its decisions.²⁹³ That waiver was limited, however, and affected only communications about KB Home’s classification decision.²⁹⁴

The *Edwards* court did not specify which at-issue test it was applying, but it had to be either the *County of Erie* or *Hearn* test, because if it had applied the *Rhone-Poulenc* test the outcome would have been different, as *McKee v. PetSmart, Inc.*²⁹⁵ illustrates.

The plaintiffs in *McKee* were PetSmart operations managers.²⁹⁶ They sued PetSmart in a Delaware federal court under the FLSA. They alleged that PetSmart misclassified its operations managers as exempt employees and consequently failed to pay them overtime wages.²⁹⁷ The

289. *Id.* at *2.

290. *Id.*

291. *Edwards*, 2015 WL 4430998, at *2.

292. *Id.* at *3 (offering a hypothetical to explain the court’s reasoning).

293. *Id.*

294. *Id.*

295. 71 F. Supp. 3d 439 (D. Del. 2014).

296. *Id.* at 440.

297. *Id.*

plaintiffs deposed Shane Burris, PetSmart's director of compensation, on the company's affirmative good faith defense.²⁹⁸ Burris testified that he alone was responsible for deciding whether employees were exempt, and that he based those decisions on store visits and on conversations with various people, including members of PetSmart's legal department.²⁹⁹ When the plaintiffs' lawyer asked Burris whether he relied on legal advice in making his classification decisions, PetSmart's lawyer objected on attorney-client privilege grounds and instructed Burris not to answer.³⁰⁰

The plaintiffs filed a motion to compel, and argued that PetSmart could not assert a good faith defense while simultaneously arguing that the attorney-client privilege shielded from discovery documents and testimony regarding its state of mind in determining whether its operations managers were exempt employees.³⁰¹ In response, PetSmart argued that it was not relying on advice of counsel as part of its good faith defense and, consequently, the plaintiffs could not force it to surrender its privilege.³⁰²

Citing *Rhone-Poulenc*, the *McKee* court concluded that PetSmart had not waived its attorney-client privilege by asserting its good faith affirmative defense because it had not relied on privileged communications or testimony to support that defense.³⁰³ Contrary to the plaintiffs' claims, the court explained, a party does not lose its privilege when its state of mind is placed at issue in litigation.³⁰⁴ Unlike the cases from other jurisdictions the plaintiffs cited to support their arguments, here the defendant's privileged communications were not the only window into the factual heart of its defense.³⁰⁵ To the contrary, Burris testified in his deposition that in addition to talking to PetSmart's in-house lawyers, he visited stores and conferred with finance, human resources, and field operations personnel to learn about the operations manager role.³⁰⁶ Regardless, the court was bound by Third Circuit precedent in the form of *Rhone-Poulenc*, which supported PetSmart's position—not the plaintiffs'.³⁰⁷

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.* at 441.

302. *Id.*

303. *Id.* at 441–42 (citing *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 863 (3d Cir. 1994)).

304. *Id.* at 442 (quoting *Rhone-Poulenc*, 32 F.3d at 864).

305. *McKee*, 71 F. Supp. 3d at 443.

306. *Id.*

307. *Id.* (quoting *Rhone-Poulenc*, 32 F.3d at 864).

The contrasting decisions in *Edwards* and *McKee* brightly highlight the importance of the at-issue test a court employs. In jurisdictions where the law is unsettled, lawyers on both sides must recognize the critical need for persuasive advocacy on this point.

2. Cases Involving a *Faragher-Ellerth* Defense

In discrimination and sexual harassment cases, where the alleged offender is a supervisor and no tangible employment action has been taken against the employee-plaintiff, the employer-defendant may assert a *Faragher-Ellerth* affirmative defense.³⁰⁸ To prevail on this defense, the employer must show that (1) it exercised reasonable care to prevent and promptly correct any discriminatory or harassing behavior; and (2) the employee unreasonably failed either to take advantage of any corrective or preventive opportunities provided by the employer or to otherwise avoid harm.³⁰⁹ Courts frequently hold that an employer's assertion of a *Faragher-Ellerth* affirmative defense waives its attorney-client privilege with respect to any pre-suit investigation into the plaintiff's complaints and remedial efforts taken in response.³¹⁰ These courts reason that an employer's assertion of this defense places its lawyer's advice at issue.³¹¹ It is possible, however, for a defendant to raise a *Faragher-Ellerth* defense that is not based on its investigation of the plaintiff's claims, and retain its privilege.³¹²

308. *EEOC v. Outback Steakhouse of Fla., Inc.*, 251 F.R.D. 603, 611 (D. Colo. 2008).

309. *See Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013) (simplifying the *Faragher-Ellerth* elements).

310. *Outback Steakhouse*, 251 F.R.D. at 611; *see, e.g., Koumoulis v. Indep. Fin. Mktg. Grp., Inc.*, 29 F. Supp. 3d 142, 148 (E.D.N.Y. 2014); *Koss v. Palmer Water Dep't*, 977 F. Supp. 2d 28, 29–30 (D. Mass. 2013); *Musa-Muaremi v. Florists' Transworld Delivery, Inc.*, 270 F.R.D. 312, 317–18 (N.D. Ill. 2010); *Walker v. Cty. of Contra Costa*, 227 F.R.D. 529, 535 (N.D. Cal. 2005).

311. *See, e.g., Weinberg v. William Blair & Co., LLC*, No. 12 CV 9846, 2014 WL 2699714, at *1 (N.D. Ill. June 13, 2014) (discussing the at-issue exception and stating that because William Blair asserted a *Faragher-Ellerth* defense, “information pertinent to the reasonableness and adequacy of its investigation and response to [the plaintiff's] claims [was] discoverable”).

312. *See, e.g., Robinson v. Vineyard Vines, LLC*, 15 Civ. 4972 (VB)(JCM), 2016 WL 845283, at *5–6 (S.D.N.Y. Mar. 4, 2016) (enforcing the defendants' privilege where they were merely asserting as a defense (1) the existence of anti-harassment policies, and (2) the plaintiff's failure to take advantage of them, and never meant to assert a *Faragher-Ellerth* defense as to any investigation into the plaintiff's claims); *Mendez v. St. Alphonsus Reg'l Med. Ctr.*, No. 1:12-cv-26-EJL-CWD, 2014 WL 3406015, at *4 (D. Idaho July 10, 2014) (stating that the attorney-client privilege and work product immunity are not waived if the defendant does not rely on an investigation in support of its *Faragher-Ellerth* defense, and finding no waiver); *Crutcher-Sanchez v. Cty. of Dakota, Neb.*, No. 8:09CV288, 2011 WL 612061, at *10 (D. Neb. Feb. 10, 2011) (“It

In summary, a defendant that asserts a *Faragher-Ellerth* affirmative defense based on the reasonableness of its investigation into the plaintiff's allegations of discrimination or harassment should assume that it will put its lawyers' advice at issue and thus surrender its attorney-client privilege at least to some degree. Thinking ahead, an employer that uses outside counsel to conduct such an investigation should retain different lawyers to defend it in subsequent litigation to avoid the argument that its trial counsel should be disqualified because they are likely to be necessary witnesses by virtue of their investigative activities.³¹³ An employer should also want separate trial counsel in case alleged deficiencies in the investigation create a conflict of interest between it and the investigating lawyers.³¹⁴

C. *Insurance Bad Faith Litigation*

However frequently the at-issue exception ambushes unwary lawyers and parties in contract and employment litigation, no area of the law is as uncertain from an attorney-client privilege standpoint as insurance bad faith litigation. Insurers have seen their attorney-client privilege steadily eroded by courts applying at-issue doctrine.³¹⁵

By way of background, insurance policies include an implied duty of good faith and fair dealing.³¹⁶ An insurer that breaches this duty commits the tort of bad faith.³¹⁷ Indeed, an insurer's duty of good faith and its liability for bad faith refer to the same obligation.³¹⁸

In the liability insurance context, bad faith claims typically arise out of an insurance company's allegedly unreasonable failure to settle a covered suit against its insured within its policy limits followed by a

does not appear the defendants rely on the adequacy of the investigation as an affirmative defense. . . . The defendants did not waive privilege . . . by generally alleging they may rely on the *Ellerth/Faragher* defense to vicarious liability. . . .").

313. See MODEL RULES OF PROF'L CONDUCT r. 3.7(a) (AM. BAR ASS'N 2016) (stating that a lawyer "shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness," subject to three exceptions).

314. See *id.* at r. 1.7(a)(2) (discussing material limitation conflicts).

315. See, e.g., *Hege v. Aegon USA, LLC*, C/A Nos. 8:10-cv-1578-GRA, 7:10-cv-1630-GRA, 7:10-cv-1631-GRA, 1:10-cv-1635-GRA, 2011 WL 1791883, at *4-5 (D.S.C. May 10, 2011) (applying South Carolina law and finding that the insurer had placed its lawyers' advice at issue).

316. ROBERT H. JERRY, II & DOUGLAS R. RICHMOND, *UNDERSTANDING INSURANCE LAW* 157 (5th ed. 2012).

317. *Maxwell v. Hartford Union High Sch. Dist.*, 814 N.W.2d 484, 497 (Wis. 2012).

318. *Brown v. Patel*, 157 P.3d 117, 121 n.5 (Okla. 2007); *United States Fid. & Guar. Ins. Co. v. United States Sports Specialty Ass'n*, 270 P.3d 464, 470 (Utah 2012); *Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc.*, 169 P.3d 1, 8 n.11 (Wash. 2007).

judgment against the insured exceeding those limits.³¹⁹ Depending on the jurisdiction, “reasonableness” may be measured against a negligence standard, or a court may require something more on the insurer’s part, such as dishonesty, malice, oppression, or recklessness.³²⁰ Bad faith liability in first-party insurance—that is, all types of insurance except liability insurance—generally requires a plaintiff to establish (1) that the insurer’s conduct in delaying or refusing payment of a claim was unreasonable, and (2) that the insurer either knew or recklessly disregarded the fact that it had no reasonable basis for denying or delaying the payment of benefits.³²¹ Other courts modify the second prong so that the test is whether the insurer knew or reasonably should have known that it was acting unreasonably in handling or paying the claim at issue.³²²

In deciding whether to settle or pay claims, insurers regularly consult with coverage counsel to evaluate their contractual obligations or duties.³²³ If the insurer is later sued for bad faith, the question is whether the insurer’s defense strategy in the bad faith case puts its privileged communications with coverage counsel in the underlying action at issue. An insurer that asserts advice of counsel as a defense to a bad faith claim clearly puts privileged communications at issue,³²⁴ but most cases are not so clear cut, and courts in those cases have reached disparate results.³²⁵

319. See, e.g., *Mid-America Bank & Tr. Co. v. Com. Union Ins. Co.*, 587 N.E.2d 81, 82–84 (Ill. App. Ct. 1992) (failing to settle for \$30,000 under a policy with liability limits of \$50,000, followed by a plaintiff’s verdict of over \$911,000).

320. *JERRY & RICHMOND*, *supra* note 316, at 166–68.

321. See, e.g., *Mohney v. Am. Gen. Life Ins. Co.*, 116 A.3d 1123, 1131 (Pa. Super. Ct. 2015) (reciting these elements and noting further that “[b]ad faith claims are fact specific”); *Town of Ira v. Vt. League of Cities & Towns—Prop. & Cas. Intermunicipal Fund, Inc.*, 109 A.3d 893, 901 (Vt. 2014) (quoting *Bushey v. Allstate Ins. Co.*, 670 A.2d 807, 809 (Vt. 1995)); *Sonnett v. First Am. Title Ins. Co.*, 309 P.3d 799, 806 (Wyo. 2013) (quoting *Matlack v. Mountain W. Farm Bureau Mut. Ins. Co.*, 44 P.3d 73, 81 (Wyo. 2002)).

322. See, e.g., *Gardner v. Hartford Ins. Accident & Indem. Co.*, 659 N.W.2d 198, 206 (Iowa 2003); *May v. Ticor Title Ins.*, 422 S.W.3d 93, 102 (Tex. App. 2014).

323. An insurer generally cannot be held liable for bad faith where coverage for an occurrence or a loss was fairly debatable. *Desert Mountain Props. L.P. v. Liberty Mut. Fire Ins. Co.*, 236 P.3d 421, 442 (Ariz. Ct. App. 2010); *Wacker-Ciocco v. Gov’t Emps. Ins. Co.*, 110 A.3d 962, 967 (N.J. Super. Ct. App. Div. 2015); *Murphy v. Patriot Ins. Co.*, 106 A.3d 911, 917 (Vt. 2014).

324. Assertion of an advice of counsel defense does not put all of an insurer’s privileged communications at issue. See, e.g., *Ex parte Nationwide Mut. Ins. Co.*, 990 So. 2d 355, 364 (Ala. 2008) (“Nationwide’s assertion of the advice-of-counsel defense and its production of privileged documents supporting that defense did not waive the attorney-client privilege as to communications between Nationwide and its counsel occurring after Nationwide denied coverage, because those documents were not placed at issue by the assertion of the defense.”); *Bertelsen v. Allstate Ins. Co.*, 796 N.W.2d 685,

*State Farm Mutual Automobile Insurance Co. v. Lee*³²⁶ is a leading case on the at-issue exception in insurance bad faith litigation. *Lee* was a class action in which State Farm insureds with multiple State Farm policies disputed the company's refusal to permit the stacking of uninsured and underinsured motorist coverages.³²⁷ In discovery, State Farm acknowledged that it sought and received legal advice as to whether it should pay the plaintiffs' claims.³²⁸ State Farm denied that it was asserting an advice of counsel defense, and withheld its correspondence with counsel regarding its denial of stacking claims as privileged.³²⁹ The plaintiffs moved to compel discovery, asserting that

703 (S.D. 2011) (cautioning that "a client only waives the privilege to the extent necessary to reveal the advice of counsel he placed at issue").

325. *Compare* *Smith v. Scottsdale Ins. Co.*, 621 F. App'x 743, 746 (4th Cir. 2015) (concluding that Scottsdale did not lose its privilege because it asserted no claims or defenses based on counsel's advice in the underlying case; it maintained that its actions were based on its own case evaluation and the insured's unwillingness to consent to a settlement, rather than discrimination against the plaintiffs), *and* *Griffith v. Allstate Ins. Co.*, 90 F. Supp. 3d 344, 347–48 (M.D. Pa. 2014) (concluding that the at-issue exception did not apply because Allstate did not plead reliance on advice of counsel), *and* *Everest Indem. Ins. Co. v. Rea*, 342 P.3d 417, 420 (Ariz. Ct. App. 2015) (explaining that Everest's subjective good faith belief and consultations with counsel before entering into a settlement agreement did not trigger the at-issue exception where Everest did not assert as a defense its dependence on advice of counsel in forming its subjective beliefs regarding the appropriate course of conduct), *and* *Metro. Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 730 A.2d 51, 61 (Conn. 1999) ("Compliance with contract terms is generally an element in all contractual actions, yet reliance upon legal advice within the process of adhering to contract terms does not automatically place the actual legal advice at issue. . . . [E]ven though . . . the plaintiff's senior officials may have stated in depositions that advice of counsel was a significant motivating factor in [their] decisions to settle . . . the privileged documents are not at issue because the plaintiff is not relying on the privileged communications to prove that those settlements were reasonable.") (citation omitted), *with* *Ingram v. Great Am. Ins. Co.*, 112 F. Supp. 3d 934, 938–39 (D. Ariz. 2015) (determining that the defendants' decisions incorporating their lawyers' advice and their assertion of a subjective good faith defense put their lawyers' advice at issue), *and* *Tackett v. State Farm Fire & Cas. Co.*, 653 A.2d 254, 260 (Del. 1995) ("[W]here, as here, an insurer makes factual representations which implicitly rely upon legal advice as justification for non-payment of claims, the insurer cannot shield itself from disclosure of the complete advice of counsel relevant to the handling of the claim."), *and* *Boone v. Vanliner Ins. Co.*, 744 N.E.2d 154, 158 (Ohio 2001) (holding that in a bad faith action, "the insured is entitled to discover claims file materials containing attorney-client communications related to the issue of coverage that were created prior to the denial of coverage"), *and* *Cedell v. Farmers Ins. Co.*, 295 P.3d 239, 246 (Wash. 2013) (starting "from the presumption that there is no attorney-client privilege relevant between the insured and the insurer in the claims adjusting process, and that the attorney-client and work product privileges are generally not relevant," although it is possible for the insurer to overcome that presumption).

326. 13 P.3d 1169 (Ariz. 2000).

327. *Id.* at 1171.

328. *Id.* at 1172.

329. *Id.*

State Farm had implicitly waived the privilege by injecting the “subjective good faith beliefs and mental state of its claims people as an issue in the case.”³³⁰ The trial court agreed.³³¹

State Farm appealed to the Arizona Court of Appeals, which applied the *Hearn* test, and found that State Farm had not impliedly waived its privilege because it had never put its lawyers’ advice at issue.³³² The case then made its way to the Arizona Supreme Court.

The Arizona Supreme Court noted that it had adopted the *Hearn* test in prior cases but disagreed that its application supported the lower appellate court’s conclusion.³³³ The court then moved on, in “this unusual case,” to the proper characterization of State Farm’s defense.³³⁴ The court decided that State Farm characterized its position best:

State Farm asserts that its conduct was objectively reasonable *and* subjectively reasonable and in good faith because of what its policies, the statute and the case law actually said (not what State Farm’s lawyers said they said), *and because of what its personnel actually knew and did* (not what State Farm’s lawyers told them to do).³³⁵

State Farm had its employees evaluate the law on stacking, including cases, policy provisions, and statutes.³³⁶ As part of that evaluation, State Farm employees were advised by counsel.³³⁷ State Farm admitted that its employees received legal advice, but asserted that its ultimate decisions were those of its employees; it did not decide whether to pay or deny a claim because of its lawyers’ advice.³³⁸ The *Lee* court agreed with the trial court that based on these admitted facts, State Farm made advice of counsel a part of its defense.³³⁹

Next, the court noted that an insurer’s mere denial of the allegations in a complaint or petition does not effect a waiver, nor does an insurer waive its attorney-client privilege by asserting that it treated its insured in good faith.³⁴⁰ On the other hand, an insurer’s express reliance on advice of counsel as a defense is an implied waiver of the attorney-client privilege under any test.³⁴¹ But what of the vast middle ground?

330. *Id.*

331. *Id.* at 1172–73.

332. *Id.* at 1173–74.

333. *Id.* at 1174.

334. *Id.*

335. *Id.*

336. *Lee*, 13 P.3d at 1174.

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.* at 1175.

341. *Id.*

The court reasoned that “a litigant’s affirmative disavowal of express reliance on [a] privileged communication is not enough to prevent a finding of waiver.”³⁴² A litigant cannot argue that it acted reasonably because it educated itself on the law when its investigation and knowledge of the law includes legal advice, and then invoke the attorney-client privilege to prevent its adversary from discovering what it learned.³⁴³ At some point, fairness preempts the privilege.³⁴⁴ The court determined that the proper focus was whether the litigant asserting the privilege “ha[d] interjected the issue into the litigation and whether the claim of privilege, if upheld, would deny the inquiring party access to proof needed fairly to resist the client’s own evidence on that very issue.”³⁴⁵ Thus:

The party that would assert the privilege has not waived [it] unless it has asserted some claim or defense, such as the reasonableness of its evaluation of the law, which necessarily includes the information received from counsel. In that situation, the party claiming the privilege has interjected the issue of advice of counsel into the litigation to the extent that recognition of the privilege would deny the opposing party access to proof without which it would be impossible for the factfinder to fairly determine the very issue raised by that party. *We believe such a point is reached when, as in the present case, the party asserting the privilege claims its conduct was proper and permitted by law and based in whole or in part on its evaluation of the state of the law.* In that situation, the party’s knowledge about the law is vital, and the advice of counsel is highly relevant to the legal significance of the client’s conduct. Add to that the fact that the truth cannot be found absent exploration of that issue, and the conditions [for implied waiver] are met.³⁴⁶

State Farm’s claims managers could not testify that they surveyed the law and thus believed that their actions were legal, but deny the plaintiffs the opportunity to probe the foundation for those assertions.³⁴⁷ By affirmatively injecting its claims managers’ legal knowledge into the litigation, State Farm placed the sources of that knowledge at issue and impliedly waived its attorney-client privilege.³⁴⁸

342. *Id.* at 1177.

343. *Id.*

344. *Id.* at 1178–79.

345. *Id.* at 1179 (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 80 cmt. b (AM. LAW INST. 2000)).

346. *Lee*, 13 P.3d at 1179 (emphasis added) (footnote omitted).

347. *Id.* at 1182.

348. *Id.*

State Farm contended that it was the *plaintiffs* who had injected the subjective belief of its claims staff into the case by alleging that State Farm had deliberately misinterpreted the law to suit itself.³⁴⁹ But that argument ignored the basis of the court's decision:

It is true that [the] [p]laintiffs raised the subjective bad faith of State Farm's employees, but it is not State Farm's denial of that allegation that waives the privilege. Nor does State Farm's affirmative assertion of good faith waive the privilege. It is, rather, State Farm's affirmative assertion that its actions were reasonable because of its evaluation of the law, based on its interpretation of the policies, statutes, and case law, and because of what its personnel actually knew and did.

But what its personnel did . . . was to consult counsel and obtain counsel's views of the meaning of the policies, statutes, and case law. Having asserted that its actions were reasonable because of what it knew about the applicable law, State Farm has put in issue the information it obtained from counsel.³⁵⁰

While acknowledging that it would be difficult for State Farm to meet the plaintiffs' allegations without asserting that it studied relevant law, the *Lee* court reasoned that State Farm could simply deny that it acted unlawfully and defend its conduct as being objectively reasonable.³⁵¹ The plaintiffs would then have to prove that it acted unreasonably.³⁵² Even so, State Farm was in some ways caught "between Scylla and Charybdis."³⁵³

There is much not to like about *Lee*. Although *Lee* supposedly holds that to waive the attorney-client privilege "a party must make an affirmative claim that its conduct was based on its understanding of the advice of counsel—it is not sufficient that the party consult with counsel and receive advice,"³⁵⁴ in fact, State Farm was found to have waived the privilege because its claims managers consulted with counsel and thereafter factored the lawyers' advice into their decisions. If you accept the *Lee* position that an affirmative act for at-issue exception purposes requires more than seeking and receiving legal advice, then asserting a subjective good faith defense ought not qualify as an affirmative act

349. *Id.*

350. *Id.* at 1180–81.

351. *Id.* at 1182 (citing *United States v. Bilzerian*, 926 F.2d 1285, 1292–93 (2d Cir. 1991)).

352. *Id.*

353. *Id.* at 1183.

354. *Everest Indem. Ins. Co. v. Rea*, 342 P.3d 417, 419 (Ariz. Ct. App. 2015) (citing *Lee*, 13 P.3d at 1177).

either, because there is no point in consulting a lawyer if you are not going to at least listen to her advice in charting a course of action. There also appears to be little difference between an insurer arguing that it did not act in bad faith because it acted in conformity with applicable law, which does not put its lawyers' advice at issue,³⁵⁵ or defending based on objective reasonableness having consulted with a lawyer to evaluate the reasonableness of its position, which again preserves its privilege,³⁵⁶ and defending based on its subjective good faith belief in the legality of its actions, which places its lawyers' advice at issue and abrogates its privilege.

Lee further points out the serious problem with the *Hearn* or *County of Erie* tests for the at-issue exception any time a party asserts a claim or defense involving its subjective good faith: to assert the claim or defense, the party must be prepared to surrender its attorney-client privilege. Alternatively, to protect its privilege, it must forgo the claim or defense. Regardless of whether you describe this as placing the party between Scylla and Charbydis, between the devil and the deep blue sea, between a rock and a hard place, or on the horns of a dilemma, it unwisely and unnecessarily erodes the privilege. It certainly upsets the longstanding principle that recognizing the privilege is positive because it encourages parties to seek early legal assistance.³⁵⁷

To be sure, the plaintiff trying to overcome a subjective good faith defense will argue that the defendant's rejection of its lawyer's advice would be evidence of a lack of good faith and that it can learn as much only if it can pierce the defendant's privilege. In other words, a defendant asserting a subjective good faith defense has put its lawyer's advice at issue. But that argument assumes too much. A defendant's rejection of its lawyer's advice does not necessarily evidence bad faith; it might also evidence the defendant's reasonable belief that its lawyer was wrong or that other legitimate factors reduce the weight it should assign to its lawyer's advice. Furthermore, the plaintiff does not need to invade the defendant's privilege to defeat a subjective good faith defense. The same evidence the plaintiff will offer to try to overcome the defendant's objective reasonableness defense will, if it is sufficient for that purpose, also disprove subjective good faith. After all, the fact finder is bound to conclude that the defendant cannot have subjectively believed that it

355. *Allstate Ins. Co. v. Clancy*, 936 N.E.2d 272, 278 (Ind. Ct. App. 2010), *vacated on other grounds*, 950 N.E.2d 1201 (Ind. 2011), *appeal dismissed per mediated settlement*, 945 N.E.2d 149 (Ind. 2011).

356. *Nguyen v. Am. Commerce Ins. Co.*, No. 1 CA-CV 12-0862, 2014 WL 1381384, at *5 (Ariz. Ct. App. Apr. 8, 2014).

357. See *supra* note 26 and accompanying text.

acted in good faith in the face of evidence sufficient to prove that its conduct was objectively unreasonable.

Finally, for now, a further consequence of applying either the *Hearn* or *County of Erie* test when a party's subjective good faith forms part of a claim or defense is to shift control of the privilege from the client to a third party—pointedly, an adversary in litigation. That stands attorney-client privilege law on its head.

The uncertainty of the attorney-client privilege in bad faith litigation is illustrated by comparing the decision in *Lee* to the decision in *Botkin v. Donegal Mutual Insurance Co.*³⁵⁸ The *Botkin* court applied the *Hearn* test on facts reasonably similar to those in *Lee*, yet reached a polar opposite conclusion.

The Botkins sued Donegal after the insurer denied their claim for damage to two antique cars.³⁵⁹ In deciding whether to deny the claims, Donegal sought coverage advice from Craig Roswell and David Lampton of the Niles, Barton & Wilmer law firm (collectively Niles Barton).³⁶⁰ The Botkins sought to discover communications between Niles Barton and Donegal on the theory that Donegal had placed at issue the advice it received from Niles Barton.³⁶¹ Specifically, the Botkins argued that Donegal placed Niles Barton's advice at issue during the deposition of one of its claims handlers, Stacey Callahan.³⁶² When Callahan was asked whether Niles Barton's advice "ha[d] anything to do with Donegal's decision to deny coverage," she answered that "[t]he Niles Barton firm had given us the coverage analysis, and based on their analysis—partially based on their analysis, we denied coverage."³⁶³ When later asked whether she agreed with Donegal's denial of coverage, she testified that she relied on the superior experience of her supervisors and managers in making that determination, and that the coverage analysis from Niles Barton supplied additional support for the denial.³⁶⁴

Applying the *Hearn* test,³⁶⁵ the *Botkin* court agreed with Donegal that the insurer had not affirmatively placed its lawyers' advice at issue.³⁶⁶ Donegal had neither pled an advice of counsel defense nor made Niles Barton's advice an element of any other defense.³⁶⁷

358. No. 5:10cv00077, 2011 WL 2447939 (W.D. Va. June 15, 2011).

359. *See id.* at *3 (discussing the Botkins' loss).

360. *Id.* at *4.

361. *Id.* at *5.

362. *Id.*

363. *Id.*

364. *Id.*

365. *Id.* at *4.

366. *Id.* at *6–7.

367. *Id.* at *6.

Callahan's elicited deposition testimony that Niles Barton's advice "factored into Donegal's decision to deny coverage" did not show that Donegal had injected its lawyers' advice into the litigation.³⁶⁸ Donegal's mere reliance on Niles Barton's advice did not implicate the at-issue exception.³⁶⁹ It would be pointless for an insurer to retain coverage counsel if it did not intend to rely on their opinion.³⁷⁰ Moreover, to hold otherwise would be to discourage insurers from seeking coverage advice.³⁷¹

The court observed that Donegal had not tried to use the attorney-client privilege as both a shield and a sword.³⁷² Its reliance on Niles Barton's coverage opinion was not enough to show that it had put its lawyers' advice at issue.³⁷³ Thus, the first element of the *Hearn* test—i.e., the assertion of the privilege was the result of some affirmative act by the asserting party—had not been met.³⁷⁴

Although it was applying the *Hearn* test, the *Botkin* court was not persuaded by the second element, which requires, for the at-issue exception to apply, that the asserting party through its affirmative act make the privileged communications relevant to the case.³⁷⁵ Relying on *Rhone-Poulenc*, the court reasoned that while Callahan's testimony might have made Niles Barton's advice relevant to the case, relevance was not the standard for deciding whether the attorney-client privilege protects communications against disclosure.³⁷⁶ "If relevance were the standard, the interest served by the attorney-client privilege—ensuring a client that he or she can consult with counsel in confidence—would be completely undermined."³⁷⁷

The court concluded that application of the *Hearn* factors did not "establish implied waiver in this case."³⁷⁸ It therefore held that the *Botkins* could not penetrate Donegal's attorney-client privilege and, simultaneously, that Donegal was prohibited from mentioning Niles Barton's coverage opinion at trial.³⁷⁹

368. *Botkin*, 2011 WL 2447939, at *6.

369. *Id.*

370. *Id.*

371. *See id.* (reasoning that "if reliance always gave rise to waiver [of the attorney-client privilege] in this circumstance, no one would seek coverage counsel's advice").

372. *Id.* at *7.

373. *Id.*

374. *Id.*

375. *Id.* at *4 (citing *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975)).

376. *Id.* at *7 (quoting *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 864 (3d Cir. 1994)).

377. *Id.* (citing *Rhone-Poulenc*, 32 F.3d at 864).

378. *Botkin*, 2011 WL 2447939, at *7.

379. *Id.*

D. The Use of Privileged Documents in Deposition Preparation

Finally, regardless of the type of litigation, lawyers may use privileged documents in preparing clients—or, in the case of organizational clients, corporate representatives or other key employees—to testify in depositions as fact witnesses. Concern often surfaces where the deponent, in preparing to testify, reviews attorney-client privileged documents to refresh her memory. The concern, of course, is that the deponent’s review of privileged materials to refresh her recollection before testifying puts those materials at issue and thereby exposes them to discovery.

State courts are split on this subject. In *State ex rel. Polytech, Inc. v. Voorhees*,³⁸⁰ for example, the Missouri Supreme Court held that a witness’s use of a privileged document to refresh her recollection before testifying (as compared to using them while testifying) did not abrogate the attorney-client privilege.³⁸¹ In contrast, in *Las Vegas Development Associates, LLC v. Eighth Judicial District Court*,³⁸² the Nevada Supreme Court concluded that when a witness uses a privileged document to refresh her recollection before giving a deposition, the opposing party is entitled to have the document produced at the deposition under a Nevada statute addressing witnesses’ use of documents to refresh their recollection either before or while testifying at hearings.³⁸³

There is significant confusion surrounding the issue in federal courts. This confusion is attributable to the overlap or interplay between the common law at-issue exception to the privilege and Federal Rule of Evidence 612. Rule 612 provides that if a witness refreshes her memory with a document *while* testifying, an adversary may inspect the document on the spot, cross-examine the witness on it, and introduce into evidence any portion of the document that relates to the witness’s testimony.³⁸⁴ If a witness uses a document to refresh her testimony *before* testifying, Rule 612 affords an opponent the same options if the district court “decides that justice requires” as much.³⁸⁵ Although the opposing party’s options are phrased in terms of a witness’s testimony at a “hearing,”³⁸⁶ Rule 612 unquestionably applies to witnesses’ use of documents to

380. 895 S.W.2d 13 (Mo. 1995).

381. *Id.* at 15.

382. 325 P.3d 1259 (Nev. 2014).

383. *Id.* at 1265.

384. FED. R. EVID. 612(a)(1) & (b).

385. FED. R. EVID. 612(a)(2) & (b).

386. FED. R. EVID. 612(b).

refresh their memories in preparation for depositions.³⁸⁷ Indeed, numerous Rule 612 cases focus on witnesses' use of documents to refresh their memories before giving depositions.³⁸⁸

For Rule 612 to apply, a witness must use a document to refresh her recollection.³⁸⁹ A witness's review of a document for some other purpose does not implicate the rule.³⁹⁰ For that matter, a witness's review of a document to refresh her recollection for a reason other than testifying does not entitle an adversary to see or use the document under Rule 612.³⁹¹ Furthermore, even if a witness reviews a document to refresh her memory for the purpose of testifying, the document is exposed under Rule 612 only if she used the document to refresh her memory on a subject relevant to the case.³⁹²

Where a witness reviews a document to refresh her memory and it does not have that effect, the adversary is not entitled to the document under Rule 612.³⁹³ Courts often explain this result by reference to witnesses' reliance on disputed documents.³⁹⁴ That is, unless a document

387. See *Hiskett v. Wal-Mart Stores, Inc.*, 180 F.R.D. 403, 406 (D. Kan. 1998) (citing FED. R. CIV. P. 30(c)); *Sauer v. Burlington N. R.R. Co.*, 169 F.R.D. 120, 123 n.2 (D. Minn. 1996) (citing FED. R. CIV. P. 30(c)).

388. See, e.g., *Hiskett*, 180 F.R.D. at 407–08 (reasoning that a witness who reviewed a document during a break in a deposition had reviewed the document “before testifying” rather than “while testifying” for purposes of deciding whether disclosure of the document was mandatory or discretionary).

389. FED. R. EVID. 612(a); see also *Sporck v. Peil*, 759 F.2d 312, 317 (3d Cir. 1985) (instructing that “if the witness is not using the document to refresh his memory, that document has no relevance to any attempt to test the credibility and memory of the witness”).

390. See *In re Kellogg, Brown & Root, Inc.*, 796 F.3d 137, 144 (D.C. Cir. 2015) (quoting FED. R. CIV. P. 612(a); see also 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 612.04(2)(b)(i) (2d ed. 1997)); *Fed. Trade Comm'n v. Directv, Inc.*, Case No. 15-cv-01129-HSG (MEJ), 2015 WL 7775274, at *5 (N.D. Cal. Dec. 3, 2015) (quoting FED. R. CIV. P. 612(a)).

391. See *In re Managed Care Litig.*, 415 F. Supp. 2d 1378, 1380 (S.D. Fla. 2006) (citing *Sporck*, 759 F.2d at 317).

392. See, e.g., *United States EEOC v. Cont'l Airlines, Inc.*, 395 F. Supp. 2d 738, 745 (N.D. Ill. 2005) (“So, while Mr. Graden’s review of the investigative notebook may have impacted his testimony, the testimony at issue does not involve substantive issues in this case.”).

393. See FED. R. EVID. 612 advisory committee notes (1972 Proposed Rules) (explaining that Rule 612 is not a pretext “for wholesale exploration of an opposing party’s files” and is meant to apply “only to those writings which may fairly be said in fact to have an impact upon the testimony of the witness”). But see *Hiskett*, 180 F.R.D. at 407 (stating in dicta that “[a]ctual refreshment of recollection” is unnecessary under Rule 612).

394. See, e.g., *Suss v. MSX Int’l Eng’g Servs., Inc.*, 212 F.R.D. 159, 165 (S.D.N.Y. 2002) (“Even were the [c]ourt to allow disclosure . . . this would not be an appropriate case because [the] movants have failed to demonstrate that the witnesses relied on the documents in question. ‘Relied upon’ means more than simply reviewing.”).

has some “demonstrated impact” on a witness’s testimony, “the witness cannot be deemed to have relied on the document,” and Rule 612 does not permit its disclosure as a result.³⁹⁵ “Reliance” may also be another way to explain the conclusion that a document is discoverable under Rule 612 only where the subject the witness is refreshing her memory on is relevant to the case.³⁹⁶

If a witness used a document to refresh her memory before testifying and the subject on which she refreshed herself is relevant to the case, disclosure of the document is still not automatic; rather, the party must produce the document only if the district court “decides that justice requires” it.³⁹⁷ This is a discretionary call on the district court’s part.³⁹⁸ If a court in its discretion orders a document’s disclosure, it must, at the disclosing party’s request, redact any unrelated information.³⁹⁹ Disclosure of a privileged document does not allow an adversary to inquire into confidential discussions the lawyer and witness may have had about the topics to which the document relates—those discussions remain privileged.⁴⁰⁰

So how should a court exercise its discretion under Rule 612 when a witness reviews an attorney-client privileged document to refresh her memory for purposes of testifying at a deposition on a subject relevant to the case? The answer is that a court should find that the privilege has been lost only if there was some waiver or applicable exception apart from the rule, such as where the subject document was shared with someone outside the privileged relationship.⁴⁰¹ A witness’s review of his own privileged documents should not expose them to an adversary.⁴⁰² After all, Rule 612 does not purport to change attorney-client privilege law in general.⁴⁰³

But how courts *should* exercise their discretion and how they *actually do so* are very different matters. In practice, courts’ application of Rule 612 to attorney-client privileged documents is unpredictable. While some courts carefully guard the privilege and take the approach

395. *Id.*

396. *See id.* (“‘Relied upon’ means more than simply reviewing.”).

397. *See* FED. R. EVID. 612(a)(2).

398. *Coryn Grp. II, LLC v. O.C. Seacrets, Inc.*, 265 F.R.D. 235, 240 (D. Md. 2010); *see In re Managed Care Litig.*, 415 F. Supp. 2d 1378, 1380 (S.D. Fla. 2006).

399. FED. R. EVID. 612(b).

400. *Estate of Jaquez ex rel. Pub. Adm’r of Bronx Cty. v. City of N.Y.*, No. 10 Civ. 2881(KBF), 2014 WL 5369091, at *2 (S.D.N.Y. Oct. 10, 2014).

401. *See Suss v. MSX Int’l Eng’g Servs., Inc.*, 212 F.R.D. 159, 164 (S.D.N.Y. 2002).

402. *See id.*; *see, e.g., Teleglobe USA, Inc. v. BCE Inc. (In re Teleglobe Commc’ns Corp.)*, 392 B.R. 561, 586–87 (Bankr. D. Del. 2008) (upholding the privilege).

403. *Suss*, 212 F.R.D. at 164.

recommended above,⁴⁰⁴ others freely hold that Rule 612 abrogates the attorney-client privilege.⁴⁰⁵ Still other courts attempt to balance these two approaches by applying a “functional analysis.”⁴⁰⁶ Using functional analysis, a document must have sufficient impact on a witness’s testimony before a court will order its disclosure under Rule 612.⁴⁰⁷

The principle that a party cannot place an opponent’s privileged communications at issue by its own pleading of claims or defenses⁴⁰⁸ extends to the use of privileged documents in deposition preparation, as *In re Kellogg, Brown & Root, Inc.*⁴⁰⁹ illustrates. In that case, plaintiff Harry Barko sued Kellogg, Brown & Root (KBR) under the False Claims Act for allegedly inflating costs and accepting kickbacks while administering military contracts in Iraq.⁴¹⁰ KBR conducted an internal investigation of Barko’s allegations. Invoking Federal Rule of Civil Procedure 30(b)(6), Barko sought to depose a KBR corporate representative regarding the internal investigation.⁴¹¹ KBR produced Christopher Heinrich as its corporate representative, subject to its claim of attorney-client privilege.⁴¹²

In the deposition, Barko’s lawyer asked Heinrich what he had done to prepare for his testimony, and Heinrich answered that he had reviewed privileged documents related to the internal investigation known to the parties and to the court as the “COBC documents.”⁴¹³ KBR’s lawyer

404. See, e.g., *In re Managed Care Litig.*, 415 F. Supp. 2d 1378, 1381 (S.D. Fla. 2006); *Suss*, 212 F.R.D. at 164–65; *In re Teleglobe*, 392 B.R. at 587.

405. See, e.g., *Thomas v. Euro RSCG Life*, 264 F.R.D. 120, 122 (S.D.N.Y. 2010) (stating that the plaintiff waived the attorney-client privilege covering some notes when she used the notes to prepare for her deposition testimony); *Ehrlich v. Howe*, 848 F. Supp. 482, 493 (S.D.N.Y. 1994) (explaining that when confronted with a conflict between disclosure of a document under Rule 612 and protection under the attorney-client privilege, the weight of authority holds that the privilege is waived) (quoting *S & A Painting Co. v. O.W.B. Corp.*, 103 F.R.D. 407, 408 (W.D. Pa. 1984) (collecting cases)).

406. See, e.g., *Calandra v. Sodexo, Inc.*, No. 3:06CV49 (WWE), 2007 WL 1245317, at *4 (D. Conn. Apr. 27, 2007) (choosing to apply the “functional analysis test” because it “recognizes both the special protection [that] must be afforded to privileged documents and the existence of circumstances where review of privileged documents is necessary in order to conduct an effective examination of the witness”).

407. See, e.g., *id.* (enforcing the privilege where the plaintiff’s notes “had minimal impact on his testimony”); *Hiskett v. Wal-Mart Stores, Inc.*, 180 F.R.D. 403, 408 (D. Kan. 1998) (“Applying the discretionary standard accorded by [Rule 612], the court finds that the interests of justice require no production. The review of the document by [the] plaintiff had minimal impact upon her testimony.”).

408. See *supra* note 8 and accompanying text.

409. 796 F.3d 137 (D.C. Cir. 2015).

410. *Id.* at 140 (quoting an earlier decision in the case).

411. *Id.* at 141.

412. *Id.*

413. *Id.*

repeatedly instructed Heinrich not to answer questions about the contents of the internal investigation and he complied.⁴¹⁴ Barko thereafter moved to compel production of the COBC documents under Rule 612.⁴¹⁵ The district court conducted a balancing test and concluded “‘fairness considerations support[ed] disclosure’ based on [a] ‘context-specific determination about the fairness of the proceedings and whether withholding the documents [was] consistent with the purposes of attorney-client privilege.’”⁴¹⁶ KBR then petitioned the U.S. Court of Appeals for the District of Columbia Circuit for a writ of mandamus.⁴¹⁷

The *In re Kellogg, Brown & Root* court concluded that the district court had clearly erred.⁴¹⁸ The court reasoned that the district court’s balancing test would allow an opponent to pierce a party’s attorney-client privilege covering an internal investigation merely by noticing a deposition on the topic of the investigation’s privileged nature.⁴¹⁹ As the court explained, “Barko noticed the deposition to cover the topic of the COBC investigation itself, as distinguished from the events that were the subject of the investigation.”⁴²⁰ As KBR’s corporate representative, Heinrich had to read the COBC documents to adequately prepare for the deposition.⁴²¹

Barko could not defeat KBR’s privilege by putting the COBC investigation at issue in the deposition and then demanding to see the privileged documents that Heinrich used to refresh his memory before testifying.⁴²² To so weaken the attorney-client privilege would be unreasonable, and would potentially disrupt established internal investigation practices and understandings.⁴²³

The decision in *In re Kellogg, Brown & Root* should hearten observers who are concerned about erosion of the attorney-client privilege—particularly in connection with internal investigations. But it is no panacea; among other things, the opinion is heavily focused on the privilege in internal investigations and further involved the preparation of a corporate representative—both features that another court might seize on to distinguish the case. In short, a party’s ability to preserve the

414. *Id.*

415. *Id.* at 142–43.

416. *Id.* at 143–44 (quoting the district court).

417. *Id.* at 143.

418. *Id.* at 144–45.

419. *In re Kellogg, Brown & Root*, 796 F.3d at 144.

420. *Id.*

421. *Id.*

422. *Id.* at 145 (quoting *Koch v. Cox*, 489 F.3d 384, 391 (D.C. Cir. 2007)).

423. *Id.* (quoting FED. R. EVID. 501 and *In re Kellogg, Brown & Root, Inc.*, 756 F.3d 754, 763 (D.C. Cir. 2014)).

attorney-client privilege when her lawyer uses privileged materials to prepare her to testify remains uncertain. As a result, lawyers should generally avoid using privileged materials to refresh clients' memories before they testify. In the case of corporate clients, the same advice applies to the testimony of corporate representatives and employees. If it is necessary to use a privileged document to refresh a witness's memory, it may be possible to redact portions of the document before showing it to the witness, thereby minimizing any potential harm resulting from its disclosure.⁴²⁴

For lawyers taking depositions who hope to discover privileged documents used by witnesses to refresh their memories, it is important to lay the foundation for doing so. This requires them to establish that (1) the witness used the document to refresh her memory; (2) the witness used the document for purposes of testifying; and (3) the document actually influenced the witness's testimony.⁴²⁵ The failure of any one of these elements is fatal. Then, after laying the foundation, the lawyer still must persuade a federal court, anyway, that justice requires the document's disclosure.⁴²⁶

V. CONCLUSION

The attorney-client relationship is vital to the justice system. As vital as it is, though, the privilege is not absolute. On the theory that the attorney-client privilege is intended for use as a shield and not as a sword, it may be lost to the at-issue exception if a litigant asserts a claim or defense that requires inquiry into the litigant's privileged communications with its lawyer to fairly rebut or refute. To be sure, the at-issue exception is not the only exception to the privilege; indeed, the privilege is riddled with exceptions and it may be easily waived. But the at-issue exception represents "the most frightening type" of attorney-client privilege forfeiture "because the law does not clearly warn clients of its risk and because lawyers may not realize its effect in time to avoid disaster."⁴²⁷

Courts typically use one of three tests to decide whether a party has placed its lawyer's advice at issue, thus triggering the at-issue exception and exposing otherwise privileged communications to discovery by an adversary. But only one of these—the *Rhone Poulenc* test—provides

424. John S. Applegate, *Preparing for Rule 612*, LITIG., Spring 1993, at 17, 21.

425. *N. Natural Gas Co. v. Approx. 9117.53 Acres*, 289 F.R.D. 644, 650 (D. Kan. 2013).

426. *Hanover Ins. Co. v. Plaquemines Parish Gov't*, 304 F.R.D. 494, 500 (E.D. La. 2015).

427. SPAHN, *supra* note 14, at 773.

certainty and predictability when evaluating the possible application of the at-issue exception. Only the *Rhone-Poulenc* test respects the principle that courts determining whether the attorney-client privilege is intact or whether it has somehow been lost should begin their analysis with a presumption in favor of preserving the privilege.⁴²⁸ Until more courts adopt this test, the at-issue exception will continue to ensnare lawyers and litigants in circumstances where they least expect it. And while some practice areas or types of litigation are more frightening than others, and any claim or defense based in whole or part on a party's subjective good faith creates special cause for alarm, all lawyers need to better understand the at-issue exception to the attorney-client privilege.

428. Bertelsen v. Allstate Ins. Co., 796 N.W.2d 685, 703 (S.D. 2011).