

**THE ASSERTION OF ATTORNEY CLIENT PRIVILEGE BY COUNSEL
IN LEGAL MALPRACTICE CASES – POLICY, PRIVILEGE AND THE
SEARCH FOR TRUTH IN CASES INVOLVING IMPLIED WAIVERS**

Waiver of attorney-client privilege frequently arises as an issue in legal malpractice cases. Discovery of privileged communications between client and counsel may show that attorneys other than the malpractice defendant played a substantial role in bringing about the client's loss. To obtain client/counsel communications relevant to the issue of malpractice causation, defense counsel often argue plaintiff's conduct amounts to an "implied waiver," that is, that some conduct of the privilege holder is legally equivalent to his or her conscious act to forego the protection the privilege affords. In analyzing whether a waiver has occurred, courts frequently balance important policies, specifically, our legal system's fundamental interest in finding out the "truth" about litigated events against its powerful interest in protecting counsel-client communications, via privileges, thought by many courts and commentators to facilitate optimally effective client representation.¹ The Supreme Court has addressed the policies underlying privileges and the legal system's truth-finding function on a number of occasions.²

¹ See *infra* Part IV. See especially *Developments in the Law--Privileged Communications*, 98 Harv. L. Rev. 1450, 1454 (1985)(hereinafter "*Developments*") (privileges subordinate the goal of truth seeking to other societal interests, impeding the realization of a central objective of the legal system to advance other, often less immediate goals); Kenneth L. Rothenberg, *Evidence: Attorney-Client Privilege & Work Product Doctrine*, 76 Denv. U. L. Rev. 825, 826 (1999)("Although the attorney-client privilege may serve as a "roadblock to the truth" . . . society has subordinated the search for truth to a preferred value of full, confident, candid, confidential legal representation of a client."); W. William Hodes, *Seeking the Truth Versus Telling the Truth at the Boundaries of the Law: Misdirection, Lying, and "Lying with an Explanation,"* 44 S. Tx. L. Rev. 53 (2002).

² See, e.g., *Jaffee v. Redmond*, 518 U.S. 1, 17-18 (1996) ("Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the . . . [client's] interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege. . ." noting that if the purpose of the privilege is to be served, participants in the confidential conversation 'must be able to predict with some degree of certainty whether particular discussion will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying application by the courts , is little better than no privilege at all. . . ." (citation omitted)); *Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981)(corporation privilege promotes free exchange of information which promotes broader public interests in the observance of law and administration of justice; sound legal advice or advocacy serves public ends and depends on the lawyer's being fully informed by the client); *U.S. v. Nixon*, 418 U.S. 683, 709-713 (1974) (president's privilege -- integrity of the judicial system and public confidence in same depend on full disclosure; privileges stand in derogation of the search for truth). *But see Jaffee* 518 U.S. 1,

There has been an explosion of legal malpractice cases in recent times,³ for a variety of reasons,⁴ and recent empirical studies on how different interpretations of attorney client privilege are likely to affect communicative conduct,⁵ make review of this subject particularly timely.⁶ Because legal malpractice cases frequently involve several lawyers or firms providing serial representations, this article refers to such cases as “serial representation cases.”⁷

17-20 (Scalia, J. and Rehnquist, C.J. dissenting) (privilege impairs search for the truth, suggesting absence of privilege would not deter most people from being truthful for fear of disclosure in later litigation).

³ See Katerina P. Lewinbuk, *Transformation of the Ethical Boundaries of the Attorney-Client Privilege in Response to the Growing Complexity of the Modern Business World*, 42 Willamette L. Rev. 79, 84-85 (Seton Hall L. Rev. 2004) (“[I]t has recently become increasingly common for an institutional client to sue its own lawyer if the client does not prevail in a lawsuit, resulting in a recent dramatic climb in legal malpractice litigation. . . there have been three major peaks in legal malpractice litigation. . . the number of published decisions on malpractice in the 1970s was four times higher than in the 1960s. . . Moreover, in the 1970s, the number of reported decisions on legal malpractice equaled the number of all published malpractice decisions during the entire prior history of our country's jurisprudence. . . In the 1980s, the number of published legal malpractice decisions was three times higher than in the previous decade. . . This most recent peak in legal malpractice litigation continues into the new millennium, already demonstrating a 155% percent increase over the previous decade”) (notes omitted).

⁴ *Id.* at 85 (noting that potential explanations include sociological factors, the general growth in the total number of attorneys, the increase of consumerism, greater expectations on the clients' part, and higher education among clients – “A statistical study of malpractice suits by area of law shows that attorneys with specialized practices and higher income levels are more likely to become a target of lawsuits by their own clients than are other attorneys. . .”) (notes omitted).

⁵ See, e.g., Herbert S. Wander, *Association of Corporate Counsel Survey: is the Attorney-Client Privilege Under Attack*, SK084 ALI-ABA 191, 196-197 (May 15, 2005) (available on Westlaw)(assumptions underlying corporate attorney client privilege supported by empirical data -- absent privilege, corporate clients would be less candid with their attorneys -- there would be a “chill” in the flow of candor of information from clients to counsel); Stephanie A. Martz, *Member Survey: Attorney-Client Privilege is Under Attack*, 29-JUL Champion 6 (July 1995) (available on Westlaw) (more communication/candor where no waiver). Cf. Fred C. Zacharias, *Rethinking Confidentiality*, 74 Iowa L. Rev. 351, 358 (1989)(assumptions underlying attorney client privilege not supported by empirical studies); Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 St. John's L. Rev. 191 (1989) (empirical studies do not strongly support privilege, in corporate context); Comment, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 Yale L.J. 1226 (1962) (arguments for strict privileges not supported by data).

⁶ Empirical studies are discussed *infra* in Part V(B).

⁷ Lewinbuk, *supra* note 3 at 85 (“application of this [implied waiver] rule. . . is questionable in instances in which a group of attorneys represented a client in the underlying litigation, but only one of them is accused of malpractice. . . The challenge. . . arises when the accused attorney claims that the client has also waived the attorney-client privilege between herself and other lawyers involved in the underlying matter and, as a result, the accused attorney is entitled to the production of documents reflecting those inter-lawyer communications. . . Similar situations have emerged in lawsuits all over the country. . .”) (notes omitted).

Section I explores justifications that have been proffered for the attorney client privilege, the most common formulations of its elements, and the various theories of waiver courts have applied in serial representation and other cases. Section I discusses *Hearn v. Rhay*,⁸ which sets forth the leading test on implied waiver (the “*Hearn Test*”), and two cases on which courts have focused, *Jakobleff v. Cerrato, Sweeney and Cohn* (“*Jakobleff*”),⁹ in which the court refused to find an “implied waiver,” and *Pappas v. Holloway (Pappas)*,¹⁰ in which “implied waiver” was found. Section II discusses serial representation cases following *Jakobleff*, many distinguishing *Pappas*, and Section III, serial representation cases following *Pappas*, largely distinguishing *Jakobleff*. These sections identify questions on which courts tend to focus and rules and principles courts recurrently apply in their analyses of implied waiver arguments.

Section IV discusses academic and case criticism of the *Hearn Test*, specifically, that its reliance on the concept of “fairness” leads to *ad hoc* results, case confusion, uncertainty, and the likelihood of manipulation of privileges. The authors conclude that, in practice, the language of “fairness” is largely a short-hand; what courts are actually doing is simply inquiring into the causation of malpractice damages. Although critics have argued outcomes of privilege motions are “ad hoc,” outcomes are, by and large, well-reasoned efforts to assure that defendants will be able to adduce evidence showing another attorney caused or exacerbated malpractice injury.

Section V addresses *Hearn* critic arguments that our legal system would be better without an implied waiver doctrine and empirical studies that have tried to determine the extent to which different interpretations of the attorney client privilege foster more (and more candid) client/counsel communication. This section distinguishes “better representation” within a legal

⁸ 68 F.R.D. 574 (E.D.Wash. 1975).

⁹ 97 A.D.2d 834, 468 N.Y.S.2d 895 (2d Dep’t 1983).

system from a “better legal system,” arguing the former cannot be defined without reference to ends of the system itself, including the search for truth, and that the latter should not be defined merely in terms of conditions that optimize client chances of obtaining litigation ends, as apologists for elimination of privilege sometimes appear to assume.

A “better legal system,” this section suggests, is one whose structures, rules and procedures tend to consistently generate “just” outcomes; outcomes are “just” when courts apply rules which enable the fact-finder to accurately determine the truth about material events, when the rules by which such assessments are made are themselves fair (and do not unreasonably compromise other values our legal system recognizes as valid), and where such rules are reasonably “resilient” against efforts by zealous advocates to abuse them. This article concludes that the *Hearn* Test satisfies the above conditions, that implied waiver critics have not made a cogent case for rejecting the majority test and that injustices in individual cases that all sides agree would inevitably attend elimination of implied waiver from privilege adjudication, justifies continued application of the *Hearn* Test.

I. Privilege, Policy, Implicit Waiver and the Leading Cases

A. *Privilege and Policy*

Commentators Mallen and Smith, in their leading treatise “Legal Malpractice,” state the rationale supporting the attorney client privilege as follows:

The basic purpose of the privilege is to protect clients from the exposure of communications made to their attorneys, which were intended to be confidential. The policy is meant to encourage full and candid disclosure of all pertinent information to the attorney. Confidentiality must be maintained to enable clients to fully trust their attorneys with their most private secrets. Often, frank and candid disclosure by the client is essential for effective representation, such as in

¹⁰ 114 Wash.2d 198, 787 P.2d 30 (1990).

criminal defenses. Full disclosure is encouraged though others may be injured because they are thereby precluded from learning pertinent facts.¹¹

Federal courts, generally, have relied on either Professor Wigmore's or Judge Wyzanski's interpretation of the attorney-client privilege. Under Professor Wigmore's interpretation:

- (1) [w]here legal advice of any kind is sought;
- (2) from a professional legal advisor in his capacity as such;
- (3) the communications relating to that purpose;
- (4) made in confidence;
- (5) by the client;
- (6) are at his instance permanently protected;
- (7) from disclosure by himself or by the legal advisor,
- (8) except the protection may be waived.¹²

Under Judge Wyzanski's interpretation, the privilege applies only if:

- (1) the asserted holder of the privilege is or sought to become a client;

¹¹ RONALD E. MALLIN and JEFFREY M. SMITH, LEGAL MALPRACTICE (hereinafter "LEGAL MALPRACTICE"), Vol. 5, Section 33.29 at 179 (5th Ed. 2000). The theory underlying the attorney client privilege is that if full and frank communication between attorneys and their clients is encouraged, a broader public interest in the observance of law and administration of justice will result. *See* 8 Wigmore, Evidence § 2290 et seq. (McNaughton rev. 1961 & Supp.2002). Originally, the attorney client privilege was meant to protect attorneys, not clients. *See* Patricia E. Salkin and Allyson Phillips, *Eliminating Political Maneuvering: A Light at the End of the Tunnel for the Government Attorney-Client Privilege*, 39 Ind. L. Rev. 561, 562 (2006) ("the attorney-client privilege. . . was created for the purpose of protecting the oath and honor of the attorney. . . As a result, in its earliest form, the privilege could only be waived by the attorney. . . Over time, the policy reasons for the privilege have changed. . .") (notes omitted). Salkin and Phillips observe that, in the government setting, if government officials believe their communications may be disclosed, they will avoid discussing sensitive matters, potentially leading to legal violations and increased incidences of corruption, or people being unwilling to serve in public office. *Id.* at 565

¹² *See* Arcuri v. Trump Taj Mahal Associates, 154 F.R.D. 97, 101 (D.N.J. 1994)(quoting 8 Wigmore on Evidence § 2292 at 554 (McNaughton rev. 1961). Professor Wigmore's views on privilege have been severely criticized. *See, e.g.*, Edward J. Imwinkelried, *Questioning the Behavioral Assumption Underlying Wigmorean Absolutism in the Law of Evidentiary Privileges*, 65 U. Pitt. L. Rev. 145, 148-149 (2004)(Wigmore's insistence that the party opposing the privilege not be permitted to defeat the privilege by an ad hoc, case-specific showing of need for the privileged information based on the assumption that absolute confidentiality is necessary to encourage clients to consult with attorneys, arguing assumption is contradicted by empirical studies. *Id.* at 157-160 (discussing studies)).

- (2) the person to whom the communication was made
 - (a) is a member of the bar of a 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 on law or
 - (ii) legal services or
 - (iii) assistance in some legal proceeding, and
 - (d) not for the purpose of committing a crime or tort; and
- (4) the privilege has been
 - (a) claimed and
 - (b) not waived by the client.¹³

B. Implied Waiver – Competing Tests, including the Majority “Hearn” Test

Cases involving waiver of the attorney-client privilege may be broken into two broad categories, cases involving claims of an actual, or express, waiver, and cases involving conduct arguably constituting an implied subject matter waiver.¹⁴ “Actual waiver” occurs when

¹³ *Arcuri*, 154 F.R.D. at 101-102 (quoting Judge Wyzanski, observing that this statement of privilege is the “most frequently cited articulation” of the privilege, *citing* U.S. v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D.Mass.1950) and *In re Grand Jury Investigation*, 599 F.2d 1224 (3d Cir.1979)).

¹⁴ *See generally* T. Maxfield Bahner and Michael L. Gallion, *Waiver of Attorney-Client Privilege Via Issue Injection: a Call For Uniformity*, 65 Def. Couns. J. 199, 200-201 (April, 1998) (“Two general categories of waiver of the attorney-client privilege have developed: (1) actual (express) waiver, and (2) implied subject matter waiver.”); Rothenberg, *supra* note 1 at 827 (citing Bahner and Gallion). *See generally* U.S. v. Ballard, 779 F.2d 287, 292 (5th Cir. 1986)(filing suit against lawyer not a waiver of privilege for all subsequent proceedings), *cert. denied*, 475 U.S. 1109 (1986); *Zenith Radio Corp. v. U.S.*, 764 F.2d 1577, 1580 (Fed.Cir.1985) (same). The institution of suit against an attorney does not waive the privilege even as to matters that are raised in both the malpractice suit and the third

confidential communications are disclosed to a third party outside the attorney-client relationship.¹⁵ “Implied subject matter waiver” occurs when confidential communications are disclosed or injected as part of a claim or defense in litigation.¹⁶ Implied subject matter waiver may be further broken into subcategories of (1) issue injection and (2) selective disclosure.¹⁷ Issue injection occurs when a litigant puts the substance of a confidential communication “in issue” (or “at issue”) in a particular litigation,¹⁸ and selective disclosure occurs when a litigant discloses a portion of the confidential communication, invoking privilege to shield the rest of it.¹⁹

Three main tests have emerged for issue injection waiver: (1) the automatic waiver rule, (2) the balancing test, and (3) the “*Hearn Test*,” which derives from *Hearn v. Rhay*.²⁰

Under the automatic waiver rule, a litigant injects an issue into a litigation, automatically waiving the attorney client privilege, by asserting a claim, counterclaim or affirmative defense

party suit. *Ballard*, 779 F.2d at 291-92. The revelation of confidential communications, not institution of suit, determines whether a party waives the attorney-client privilege. Thus, if a complaint against an attorney, or the attorney's response or testimony in the malpractice case, reveals confidential client communications, the client waives the privilege as to the subject matter of the disclosed communications. *See, e.g., Laughner v. U.S.*, 373 F.2d 326, 327 (5th Cir.1967) (privilege waived where client "demanded and obtained" factual inquiry into claim that attorney failed to render effective assistance).

¹⁵ Bahner and Gallion, *supra* note 14 at 200-2001.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ 68 F.R.D. 574 (E.D.Wash. 1975). *See infra* Part II, discussing *Hearn*. *See generally* Steven Plitt, *The Elastic Contours of Attorney-Client Privilege and Waiver in the Context of Insurance Company Bad Faith: There's a Chill in the Air*, 34 Seton Hall L. Rev. 513, 534-541 (2004).

that raises as an issue a matter to which otherwise privileged material is relevant.²¹ Many courts have rejected this approach because of its rigidity and harshness in application.²²

Under the second approach, the balancing test, disclosure of confidential information is required if a communication or some part of it is “vital” or “necessary” to defendant’s case, but only after defendant has shown he has exhausted every reasonable source of information.²³ Approaches to privilege which rely on the necessity of information have been criticized as being inconsistent with concepts of absolute privilege and the idea of reasonable limitation of waiver.²⁴

A third approach, referred to as the “anticipatory waiver approach,” has gained limited approval.²⁵ It provides that privilege is waived when party claims or defenses compel them “inevitably to draw upon a privileged communication at trial in order to prevail.”²⁶ The *Hearn* Test, described below, is the majority approach.²⁷ The federal circuits are split on which approach is appropriate.²⁸

²¹ See *Indep. Prod. Corp. v. Loew's Inc.*, 22 F.R.D. 266, 276-77 (S.D.N.Y.1958).

²² See, e.g., *Frontier Refining Inc. v. Gorman-Rupp Co.*, 136 F.3d 695, 701-702 (10th Cir. 1998); *Remington Arms Co. v. Liberty Mut. Ins. Co.*, 142 F.R.D. 408, 414 (D.Del.1992); *Fed. Deposit Ins. Corp. v. Wise*, 139 F.R.D. 168, 171(D.Colo.1991); *Greater Newbury Port Clam Shell Alliance v. Pub. Serv. Co.*, 838 F.2d 13, 19-20 (1st Cir. 1988); *Afro-Lecan, Inc. v. United States*, 820 F.2d 1198, 1205 (Fed. Cir. 1987); *Zenith Radio Corp. v. United States*, 764 F.2d 1577, 1580 (Fed.Cir.1985) (“privileges involve subtle and sensitive questions and ordinarily should not be breached without a more penetrating analysis than the automatic waiver rule involves.”).

²³ See, e.g., *Black Panther Party v. Smith*, 661 F.2d 1243, 1266-68 (C.A.D.C.1981), *vacated and remanded sub nom. Moore v. Black Panther Party*, 458 U.S. 1118, 102 S.Ct. 3505, 73 L.Ed.2d 1381 (1982) (balancing need for discovery against importance of privilege).

²⁴ See generally *Casey Nix, In re Sealed Case: The Attorney-Client Privilege – Till Death Do us Part?*, 43 Vill. L. Rev. 285, 318 (1998)(balancing test undermines element of certainty necessary for the effectiveness of the privilege, chilling attorney-client communications). See also *infra* Part IV (discussing case and commentator criticism of *Hearn* Test reliance on need for information).

²⁵ Rothenberg, *supra* note 1, at 828.

²⁶ *Smith v. Cavanaugh Pierson Talley*, 513 So. 2d 1138, 1145 (La. 1987)).

²⁷ See *infra* notes 29-33. A number of cases and commentators have read the *Hearn* Test, itself, as a form of balancing test. See, e.g., *Howe v. Detroit Free Press, Inc.*, 440 Mich. 203, 487 N.W.2d 374 (1992); Jane C. Moore, Note, *Evidence-at-Issue Waiver of Attorney-Client Privilege and Public Service Co of New Mexico v. Lyons: A Party Must Use Privileged Materials Offensively in Order to Waive the Privilege*, 31 N.M. L. Rev. 623, 635 (2001);

C. *Hearn v. Rhay*

In *Hearn*,²⁹ the United States District Court for Eastern Washington developed a test to determine whether the facts in a given case support an implied waiver of the attorney-client privilege. Plaintiff, an inmate at the Washington State Penitentiary, sued prison officials in their official capacity for alleged civil rights violations. Defendants raised the affirmative defense of qualified immunity from suit on the grounds they acted in good faith and on advice of their legal counsel. When plaintiff sought disclosure of communications between defendants and their attorneys, defendants refused to comply, arguing the communications were protected under the attorney-client privilege. Plaintiff responded that the attorney-client privilege did not cover the communications, or, alternatively, that defendants waived the privilege when their counsel asserted a good faith affirmative defense.

The trial court held defendants were required to disclose the communications.

It held that where the following three conditions are satisfied, an implied waiver of the attorney-client privilege should be found: (1) assertion of the privilege was the result of some affirmative act, such as filing suit, by the asserting party;³⁰ (2) through this affirmative act, the asserting party put the protected information “at issue” by making it relevant to the case;³¹ and (3) application of the privilege would have denied the opposing party access to information vital

Anthony J. Golowski II and Anthony M. Rainone, *Implied Waiver of the Attorney-Client Privilege: Another Consequence of Bad Faith Claims*, 4 No. 11 Ins. Coverage L. Bull. 3 (Dec. 2005)(available on Westlaw).

²⁸ See Rothenberg, *supra* note 1 at 832 (“[T]he D.C. Circuit follows a balancing test, weighing the need for the privileged information versus the need for protection of the confidential information to analyze implied waiver... Both the Eighth and First Circuits apply some type of balancing test as well... A majority of federal circuits, including the Second... Fifth... Seventh... Ninth... and Eleventh... favor the *Hearn* test. The Third Circuit follows the anticipatory waiver test. . . .”) (notes omitted).

²⁹ *Hearn v. Rhay*, 68 F.R.D.574 (E.D. Wash. 1975).

³⁰ *Id.* at 581.

³¹ *Id.*

to his defense.³² Thus, where these three conditions exist, a court should find that the person asserting a privilege has impliedly waived it through his or her own affirmative conduct.³³

D. Jakobleff v. Cerrato, Sweeney and Cohn

In *Jakobleff*, plaintiff sued former attorneys for damages resulting from their alleged negligence in securing a divorce settlement. The attorney defendants impleaded the attorney plaintiff retained to prosecute the legal malpractice claim alleging the malpractice lawyer failed to mitigate plaintiff's damages by not pursuing possible remedial actions against plaintiff's ex-husband. The waiver issue arose when the defendant divorce lawyers sought to depose the subsequently retained malpractice plaintiff attorney. The court first observed that a waiver could be found in two situations: (1) where a client places the subject matter of the privileged communication "in issue" or (2) "where invasion of the privilege is required to determine the validity of the client's claim or defense and application of the privilege would deprive the adversary of vital information."³⁴

The trial court held the communications at issue were protected by the privilege, a holding affirmed on appeal:

By bringing an action against her former attorneys for legal malpractice, plaintiff has placed her damages in issue, and defendants may both raise the defense of plaintiff's failure to mitigate damages and assert a third-party claim for contribution against the present attorney for those damages for which the former attorneys may be liable to plaintiff. However, it simply cannot be said that plaintiff has placed her privileged communications with her present attorney in issue, or that discovery of such communications is required to enable defendants to assert a defense or to prosecute their third-party claim. To conclude otherwise would render the privilege illusory in all legal malpractice actions: the former attorney could, merely by virtue of asserting a third-party claim for contribution

³² *Id.*

³³ *Id.*

³⁴ 97 A.D.2d at 835, 468 N.Y.S.2d at 895.

*against the present attorney, effectively invade the privilege in every case.*³⁵
(Emphasis added).

Although the divorce lawyers' interposition of mitigation and contribution defenses placed plaintiff's malpractice *damages* "at issue," assertion of these defenses did not place *the privileged communications themselves* "at issue," because they did not implicate the malpractice itself, but, rather, only its consequences. In other words, damages may have been mitigated or exacerbated by the later-retained attorneys' conduct or inaction, but the later-retained attorney's conduct could not have been part of the alleged malpractice in the divorce proceeding. Finding a waiver in such circumstances would, the *Jakobleff* Court concluded, render the privilege "illusory" in all legal malpractice actions. Malpractice defendants could, in many cases, assert a contribution or mitigation claim, or other affirmative defense, so that the privilege issue would turn on defendant's "artful pleading."³⁶

Jakobleff contributes three critical distinctions to legal malpractice analysis; first, the distinction between placing plaintiff's *damages* in issue and placing plaintiff's *communications with counsel* in issue, second, the distinction between the *act of malpractice* and the *consequences of malpractice*, and third, the distinction between plaintiff's theory of *causation of injury* and the malpractice defendant's *pleading of defenses*. The *Jakobleff* Court, however, was

³⁵ *Id.*

³⁶ *See generally* Chase Manhattan Bank v. Drysdale Sec. Corp., 587 F. Supp. 57, 59 (S.D.N.Y.1984)(party could not justify breaching privilege by reason of its own pleading of an affirmative defense since doing so would give a skilled-pleader adversary ability to render privilege a nullity); Resolution Trust Corp. v. Massachusetts Mut. Life Ins. Co., 200 F.R.D. 183, 192-193 (W.D.N.Y. 2001)(same, relying on *Chase* and, also *Tribune Co. v. Purciogliotti*, 1997 WL 10924, at *7-8 (S.D.N.Y.1997) (affirmative defenses inadequate to justify waiver, holding plaintiff's claims adjuster, to whom law firm delegated discretion to settle claims, was the person that would have been misled by alleged misrepresentations and concluding that because plaintiff's allegations directly implicated the adjuster's knowledge, the adjuster was required to produce notes written by him (or his attorneys), but not other documents that might have been useful, but not essential)).

not faced with facts which suggested that the later-retained attorney's own conduct was at least one proximate cause of plaintiff's malpractice-caused injury.

E. Pappas v. Holloway

Contrast *Pappas*,³⁷ in which the facts suggested the later-retained attorney's conduct might have been at least one proximate cause of the malpractice injury. *Pappas* focused heavily on the temporal sequence of representations to determine whether implied waiver was proper – however, it was not the sequence in and of itself that was critical, but the fact that, on the facts, examination of the sequence made clear which attorney could possibly have played a substantial role in bringing about the malpractice event. *Pappas* expressly distinguished *Jakobleff* and, in particular, responded to its concern that privilege not be rendered “illusory” by the way a court analyzed the privilege.

The *Pappas* litigation began, like many malpractice cases, with the attorney trying to compel the client to pay legal fees.³⁸ The client-defendants, the Holloways, had been sued in the underlying action for selling infected cattle. During the course of the underlying litigation, they were represented by four different attorneys, including plaintiff Pappas, who withdrew as counsel prior to trial. After a finding of liability against them at trial, the Holloways' insurer settled. The Holloways then refused to pay Pappas, Pappas sued for his fees and the Holloways counterclaimed for malpractice. Pappas then brought third-party claims against the attorneys who represented the Holloways subsequent to his representation of them, including the underlying case trial attorney. Pappas sought notes and correspondence regarding the cattle litigation from

³⁷ Pappas v. Holloway, 114 Wash.2d 198, 787 P.2d 30 (1990).

³⁸ 114 Wash.2d at 200, 787 P.2d at 32.

the third-party defendant attorneys who, in turn, argued the documents were privileged, and Pappas moved to compel.

The *Pappas* Court held the Holloways had placed their communications with the later-retained attorneys "at issue" when they counterclaimed against Pappas for malpractice.³⁹ Pappas argued his legal advice was not the proximate cause of the Holloway's damages and that any damages suffered were caused by the inadequate representation of the third-party defendant attorneys which he impleaded. The *Pappas* Court distinguished cases where malpractice could not be attributed to attorneys because they were hired *after* the events allegedly constituting the malpractice.⁴⁰ Under this reasoning, the *Pappas* Court distinguished *Jakobleff*:

We agree with the concerns raised in *Jakobleff* regarding the danger of making illusory the attorney-client privilege in legal malpractice actions. However, we find *Jakobleff* distinguishable . . . plaintiff's present attorney in *Jakobleff* did not participate in the underlying litigation which gave rise to the malpractice claim against the defendants. Nor did the defendants' third-party complaint against plaintiff's present attorney allege involvement in securing a proper settlement in the underlying divorce proceedings. Instead, plaintiff's present attorney was impleaded on the damage issue only. Consequently, any communications between this attorney and plaintiff, which would have taken place after the underlying divorce became final, *would have no effect* upon the malpractice issue raised in plaintiff's complaint. This is significantly different from the case before us wherein Pappas has alleged the same cause of action against the third-party defendants as the Holloways have alleged against him. Communications between the Holloways and third-party defendants . . . are relevant not only to the issue of damages and contribution, but are also relevant to the malpractice issue raised by the Holloways in their counterclaim. For this reason, we find *Jakobleff* inapposite.⁴¹ (Emphasis added).

Thus, the *Pappas* court concluded:

³⁹ 114 Wash.2d at 206, 787 P.2d at 35.

⁴⁰ 114 Wash.2d at 204, 787 P.2d at 34-35 (distinguishing *Miller v. Superior Court*, 111 Cal.App.3d 390, 168 Cal.Rptr. 589 (1980)(post-malpractice communications), *Dyson v. Hempe*, 140 Wis.2d 792, 413 N.W.2d 379 (1987)(same) and *Lohman v. Superior Court*, 81 Cal.App.3d 90, 146 Cal.Rptr. 171 (1978) (same)).

⁴¹ 114 Wash.2d at 206, 787 P.2d at 35-36. The italicized language "would have no effect" is critical, showing that the key is causation of malpractice injury. The temporal sequence of events is significant because, in *Pappas*, it determined which attorney could have caused the injury at issue.

[T]he Holloways cannot counterclaim against Pappas for malpractice and at the same time conceal from him communications which have a direct bearing on this issue simply because the attorney-client privilege protects them. To do so would in effect enable them to use as a sword the protection which the Legislature awarded them as a shield. . . .⁴²

The *Pappas* Court, relying on *Hearn*,⁴³ concluded an implied waiver occurred:

[T]he record supports an implied waiver of the attorney-client privilege as to all the attorneys who were involved in defending the Holloways in the underlying litigation. First, the Holloways counterclaimed against Pappas for malpractice. This affirmative act was the catalyst which caused Pappas to file his third-party complaints against the other attorneys involved. Second, the Holloways' counterclaim itself caused malpractice to become an issue in this litigation. Pappas' claims against third-party defendants are virtually identical to the claims made against him by the Holloways . . . to allow the Holloways to block Pappas' request for communications . . . would effectively deny him an adequate defense. In order for the Holloways to prove Pappas committed malpractice, they will have to show, among other things, that Pappas had a duty to exercise the care and skill of a reasonably prudent attorney and that Pappas failed to meet this duty. . . . Contrary to the Holloways' claim that the only information relevant to this issue is what actually happened, this inquiry will involve examining decisions made at various stages of the underlying litigation. This will necessarily involve information communicated between these attorneys and the Holloways. This is particularly true given that Pappas was not the attorney who actually tried the case, nor did he have any part in its eventual settlement.⁴⁴

F. Conclusions

In *Jakobleff*, the malpractice lawyer's conduct was not "at issue" because it could not have been a proximate cause of plaintiff's injury. The alleged malpractice was a factually and analytically distinct event in which the later-retained attorney's conduct played no part. In *Pappas*, because the later-retained lawyers' conduct could have been a proximate cause of plaintiff's malpractice-caused injury, the privileged communication was "at issue" because it was

⁴² 114 Wash.2d at 208, 787 P.2d at 36.

⁴³ 68 F.R.D. 574 (D.C. Wash. 1975).

⁴⁴ 114 Wash.2d at 209, 787 P.2d at 37.

relevant to malpractice liability and, also, to the quantum of potential damages. If disclosure were not required in *Pappas*, the privilege would have been converted into a weapon.

Permitting discovery of communications in cases like *Pappas* does not render privilege “illusory” in *all* malpractice cases, the concern in *Jakobleff*, because waiver would, per the *Pappas* Court, only be found where the later-retained lawyer’s conduct could be a proximate cause of plaintiff’s malpractice-caused injury. In all other cases, including cases asserting mitigation-type defenses, as in *Jakobleff*, privilege remains a shield. Notably, one district court has summarized a number of the policies underlying the implied waiver decisions in the context of impleader of current counsel in malpractice cases, i.e., the situation in *Jakobleff*, focusing on both the negative aspects of impleader,⁴⁵ and what it referred to as “countervailing policies.”⁴⁶

II. The No Waiver Cases – Jakobleff and its Progeny

A. *Introduction*

Cases applying *Jakobleff* have focused on three questions: (1) whether the communication sought to be discovered took place at or about the time of the litigation in which the malpractice is alleged to have occurred, (2) whether the communication could have been part

⁴⁵ *Mirch v. Frank*, 295 F.Supp.2d 1180, 1184 (D.Nev. 2003) (“First, the attorney accused of malpractice can use impleader as a nefarious litigation tactic by spreading chaos in the opposing camp and creating a conflict of interest that would force the client’s current counsel to withdraw or be disqualified. . . . Second, such an action would interfere with the attorney-client confidences of the client. . . . Third, the use of impleader in this circumstance could interfere with the ability of the client to pursue such a malpractice claim as a successor attorney, wary of a potential impleader claim for malpractice brought by the former attorney, might not act in the best interests of the client in pursuing the claim. . . . This might have a chilling effect on malpractice claims. . . . Fourth, the attorney’s duty runs to the client, and not the former attorney, and to subject the successor attorney to a suit by the former attorney would force the successor attorney to confront “potential conflicts of interest in trying to serve two masters.” (Citations omitted.”).

⁴⁶ *Id.* at 1185 (“First, a successor counsel could escape liability if a former attorney was prohibited from using impleader to hold the successor attorney accountable for malpractice. . . . Second, it would be unfair to allow the client to sue former counsel for malpractice and yet, at the same time, claim attorney-client privilege with the successor counsel, thereby limiting former counsel’s access to relevant evidence. . . . Third, the successor counsel’s “position of trust with and influence over the client . . . could create a situation ripe for mischief and manipulation” if the successor counsel fails to disclose his own negligence to the client. . . . Finally, disallowing the use of impleader could dull the successor counsel’s incentives to act as carefully and diligently for the client since the successor counsel would be less likely to face malpractice liability after replacing former counsel.” (Citations omitted)).

of the alleged malpractice and (3) whether the content of such communication is really relevant to the question of liability raised by the malpractice pleading, rather than the extent of damages.

Cases have generally reflected at least three important underlying policies: (1) that the attorney-client privilege, meant to be a shield, should not be used as a sword to defeat the attorney accused of malpractice from defending the claim,⁴⁷ (2) that the malpractice defendant should not, by artful pleading of defenses, be able to determine whether privilege should be invaded (rather, courts should focus on whether the later-retained attorney's conduct could have been part of the malpractice event which proximately caused some or part of plaintiff's claim), and (3) whether the content of the otherwise protected communications is reasonably available from other sources,⁴⁸ possibly at other stages of litigation.⁴⁹

Jakobleff's progeny heavily rely on a distinction between evidence probative of the extent of damages and evidence probative of the cause of damages.⁵⁰ Privilege will be invaded where

⁴⁷ See, e.g., *Parler & Wobber v. Miles & Stockbridge*, 359 Md. 671, 693, 756 A.2d 526, 538 (Md.App. 2000) ("the client cannot use the advice of a professional as sword to prove the client's case against former counsel while at the same time asserting the privilege as a shield to prevent disclosing harmful information.').

⁴⁸ See *Allen v. West Point-Pepperell Inc.*, 848 F. Supp. 423, 430 (S.D.N.Y.1994)(declining to disregard the privilege where counsel's advice had no bearing on the resolution of an unreasonable delay defense -- issue in adjudicating laches allegation was not what legal advice attorney gave plaintiffs or what plaintiffs said to counsel, but what facts plaintiffs knew regarding alleged fraud, when they became aware of same, and their state of mind).

⁴⁹ In *Standard Chartered Bank PLC*, 111 F.R.D. 76 (S.D.N.Y. 1986), plaintiff ("SCB") sued defendant ("Ayala") for breach of contract and fraud regarding Ayala's guaranty of loans SCB made to Behring International Inc. ("Behring"). Ayala counterclaimed, alleging SCB made misrepresentations to Ayala regarding SCB's loans to Behring, arguing Ayala bought its interest in Behring based on SCB's agreement that SCB would not declare Behring in default of the outstanding SCB-Behring loan agreements and would allow a gradual repayment. SCB sought all communications between Ayala and its attorneys concerning Ayala's acquisition of Behring. SCB argued Ayala waived privilege by alleging reliance on SCB's oral representations. The Court held that what is relevant to the counterclaims was not what counsel said to Ayala or what Ayala said to counsel, but what Ayala knew or should reasonably have been expected to know prior to acquiring the Behring stock. *Id.* at 81-82. Although it would be "convenient" for SCB to learn the substance of Ayala's communications with its attorneys and might reveal some of what Ayala knew, other means of obtaining the information were available, given Ayala would have to disclose what it knew in discovery.

⁵⁰ See *Resolution Trust Corp. v. Massachusetts Mut. Life Ins. Co.*, 200 F.R.D. 183, 192 (W.D.N.Y. 2001).

the evidence relates to the causation of the malpractice injury, but not merely the quantum of alleged damages.

B. Arkwright Mut. Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.

Arkwright Mut. Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.,⁵¹ illustrates how the Serial Representation Cases focus on the distinction between vital information and convenient information, their worry that artful pleading of affirmative defenses could be used to manipulate the privilege, and the rule that implied waiver must be carefully limited to only the most exigent circumstances. *Arkwright* involved a clean up of environmental contamination at a General Electric Company ("GE") facility. Defendant National Union Fire Insurance Company ("National Union") moved to compel production of documents prepared by the accounting firm for Arkwright, Matson, Driscoll & Damico ("Matson Driscoll"), in connection with its adjustment of GE's claim.⁵² National Union also moved to compel either identification or production of documents pertaining to alleged fraudulent billing for clean-up services by EmTech Environmental Services, Inc. ("EmTech"), at the GE site.⁵³ These documents were then in the possession of law firm Podvey, Sachs, Meanor, Catenacci, Hildner & Coccoziello ("Podvey Sachs"), Arkwright's counsel in prior litigation brought by Arkwright and GE against EmTech.

National Union sought the claims file for Arkwright's subrogation investigation, then in the possession of the law firm that conducted that investigation, Jones Gregg Creehan & Gerace ("Jones Gregg") and, also, production of Arkwright's underwriting file for the GE policy and portions of a GE consultant's claim file.⁵⁴

⁵¹ 1994 WL 510043 (S.D.N.Y. Sept. 16, 1994).

⁵² 1994 WL 510043 at *2.

⁵³ *Id.*

⁵⁴ *Id.*

Arkwright argued that bringing suit for insurance coverage did not effect a waiver of privilege and that defendant's claims that plaintiff failed to mitigate damages and adjust a claim in good faith were not "affirmative acts" that put counsel's conduct "in issue," waiving privilege.⁵⁵ The court, after commenting that numerous cases had narrowly construed *Hearn*,⁵⁶ observed that "at issue" waiver occurs where a party puts the content of an attorney-client communication at issue by asserting a claim or defense which it intends to prove through disclosure of that communication.⁵⁷ It also noted if a defendant could justify invading privilege by virtue of pleading of affirmative defenses, the skilled pleader could always render privilege a nullity.⁵⁸ For that reason, it concluded, privilege should only be invaded where necessary:

Even where a party's state of knowledge is particularly at issue, such as in a case involving claims of laches or justifiable reliance, waiver of the privilege should not be implied because the relevant question is not what legal advice was given or what information was conveyed to counsel, but what facts the party knew and when. . . the discovering party should simply inquire directly of the other party as to its knowledge of relevant facts, which must be disclosed. . . . Invasion of the privilege may, however, be warranted where the specific content of legal advice received must be shown to prove a claim or a defense.⁵⁹

The court rejected National Union's argument that invasion of the privilege was necessary to evaluate whether Arkwright adjusted the GE claim in good faith.⁶⁰ That question

⁵⁵ 1994 WL 510043, at *11-14.

⁵⁶ *Id.* at *11.

⁵⁷ *Id.* at *12.

⁵⁸ The *Arkwright* court, 1994 WL 510043, at *11, cited *North River Ins. Co. v. Philadelphia Reinsurance Corp.*, 797 F. Supp. 363, 370-371 (D.N.J.1992)(placing the broad question of reinsurance coverage in issue did not make it "fair game" for discovery), *Chase Manhattan Bank N.A. v. Drysdale Sec. Corp.*, 587 F. Supp. 57, 59 (S.D.N.Y.1984)("It cannot be possible for [a defendant] to justify breaching [plaintiff's] privilege by reason of its own pleading of an affirmative defense. That would give an adversary who is a skillful pleader the ability to tender the privilege a nullity.").

⁵⁹ 1994 WL 510043, at *12.

⁶⁰ *Id.* at *12-13.

did not turn on counsel's advice because reinsurers are not permitted to second guess good faith liability determinations made by reinsureds or a reinsured's good faith decision to waive defenses.⁶¹ Thus, the court rejected the waiver argument:

I am unconvinced that the "at issue" doctrine justifies waiver of the attorney-client privilege in the present case. Regardless of whose burden it ultimately will be at trial to prove the good faith adjustment of the GE claim or the reasonableness of the EmTech settlement, National Union has not demonstrated that the content of legal advice received by Arkwright in any of the contested documents is directly relevant to either Arkwright's claims or National Union's defenses. Arkwright has not placed its good faith adjustment of the underlying GE claim at issue simply by suing for indemnity . . . Arkwright has not made specific allegations that make an issue of its counsel's conduct. Finally, National Union has not shown that Arkwright intends to prove its damages or its good faith adjustment of the GE claim through disclosure of the contested documents. *Although the protected communications here may well contain some factual information that would be useful to National Union, National Union has not shown that such information is not available through depositions and interrogatories.*⁶² (Emphasis added).

The court rejected contrary authority, including *Metro Wastewater Reclamation Dist. v. Continental Casualty Co.*,⁶³ which held that because certain attorney-client communications would shed light on relevant issues, the attorney-client privilege had been waived.⁶⁴ In the court's view, that case's "broad construction" of the "at issue" waiver doctrine would render "discovery privilege meaningless."⁶⁵ Privilege under *Arkwright* applies only where the content of legal advice *must* be shown to prove a claim or a defense and this occurs *only* where the content of the communication is "directly relevant" to claims or defenses.⁶⁶

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at *14 (citing 142 F.R.D. 471 (D.Colo.1992)).

⁶⁴ 1994 WL 510043, at *14.

⁶⁵ *Id.*

⁶⁶ *Id.* at *13.

Restated, unless the communication's content is highly probative of a claim or defense *and* that content cannot be obtained by any reasonable, alternative means, the interest in protecting the privilege supercedes the convenience of the litigant in marshalling his or her proof through disclosure of protected communications.⁶⁷ Prototypical cases in which waiver would be found, the court suggested, would be cases in which a party raised direct reliance on an attorney's legal advice as to legality of a transaction and that advice could not be shown in any way other than disclosure of the communication.⁶⁸

C. *H & D Steel Service, Inc. v. Weston, Hurd, Fallon, Paisley & Howley*

H & D Steel Service, Inc. v. Weston, Hurd, Fallon, Paisley & Howley,⁶⁹ focuses on what the term "vital" actually means, how that concept inter-relates to the possibility of disclosure during different stages of litigation, and how the courts relate the concept of "vital information" to the malpractice injury through causal language, e.g., conduct "remote from" or "tangential to" a legal injury. Plaintiff H & D Steel Service, Inc. ("H&D") was held in contempt for failing to produce documents to defendant law firm Weston, Hurd, Fallon, Paisley & Howley ("Weston") in a malpractice action H&D filed against Weston.⁷⁰

H&D had retained Weston to protect its rights as a creditor in dealing with its customer, Transue & Williams Stamping Company ("T&W"). H&D had brokered goods to T&W, on credit, and H&D had hired Weston to secure the debt if T&W defaulted. Weston prepared legal

⁶⁷ *Id.* at *12-14.

⁶⁸ *Id.* at *12. Determining the quality of "reliance" has proved complicated. *See generally* In Resolution Trust Corp. v. Massachusetts Mut. Life Ins. Co., 200 F.R.D. 183, 193 (W.D.N.Y. 2001).

⁶⁹ 1998 WL 413772 (Ohio App. 1998).

⁷⁰ *Id.*, at *1.

documents for that purpose.⁷¹ T&W filed for bankruptcy at which time H&D was owed about \$1.6 million. In an adversary proceeding, T&W alleged H&D's security interests were defective and sought to set aside its debt to H&D. H&D discharged Weston and retained law firm Benesch, Friedlander, Coplan and Aronoff (BFCA), which eventually compromised the debt and negotiated a settlement between H&D and T&W.⁷²

H&D filed a legal malpractice action against Weston alleging it negligently prepared the security documents, preventing it from realizing the full value of its claim against T&W.⁷³ Weston sought compensation for unpaid legal services and sought BFCA's file, including a letter from BFCA to H&D that discussed the settlement between H&D and T&W and which had set forth BFCA's opinion as to the merits of the adversary proceeding and recommended strategy.⁷⁴ H&D refused to produce the letter, claiming it was privileged, and Weston moved to compel. Weston's motion was granted. When H&D refused to produce the letter, the court found it in contempt.⁷⁵

On appeal, H&D denied that its malpractice action put the subject communication at issue and that its communications with BFCA were relevant to its malpractice claim against Weston. H&D also denied that the information at issue was "vital" to Weston's defense and that a waiver should be implied.⁷⁶ The appellate court observed H&D's malpractice claim was framed on a negligence theory, i.e., but for Weston's negligence in preparing documents, it

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at *2.

would not have suffered monetary loss, notwithstanding T&W's bankruptcy. The question was whether the information at issue was vital enough to pierce the privileged and that question depended on how the content of the communication related to Weston's defense and H&D's liability theory. The court wrote:

[W]e fail to see how the requested information is vital to Weston Hurd's defense. *"Vital" information necessarily implies that the information is unavailable from any other source.* . . . While it claims that the requested information is vital to its understanding of the reasonableness of the settlement, *Weston Hurd has not demonstrated that this information could not be obtained from any other source.* In fact, at the time Weston Hurd filed its motion to compel, *no witnesses had yet been deposed and discovery had only minimally been undertaken.*⁷⁷ (Emphasis added).

In the above quote, the court defined "vital information" as implying that the information at issue is not unavailable from any other source or at any other point in a litigation. However, the word "vital" was also used to identify information that could support a viable defense – information a court perceives cannot support such a defense is not "vital" in a different sense:

The former attorney in *Pappas* was discharged while the matter was pending. Successor counsel entered the case in midcourse and took the case to trial, which resulted in an unfavorable judgment and ultimately settled. Thus, whether the former attorney violated the standard of care could not have been determined without resort to the records of successor counsel. While on their face the cases appear similar, they are not so. It is true that Weston Hurd was discharged during the adversary proceeding, but it is not the adversary proceeding on which the legal malpractice action is based. On the contrary, it is Weston Hurd's involvement prior to this proceeding of which H&D Steel complains. Thus, Weston Hurd's alleged negligence was already complete at the time of the adversary proceeding. BFC's subsequent involvement as successor counsel did not in any way encroach upon the legal services rendered by Weston Hurd. *Thus, the information sought is not vital to Weston Hurd's defense, as was the information sought in Pappas.*⁷⁸(Emphasis added).

Turning to *Jakobleff*, the court held:

⁷⁷ *Id.* at *4.

⁷⁸ *Id.*, at *5.

The instant case is more analogous to *Jakobleff*. . . a case distinguished by the *Pappas* court. . . The *Jakobleff* court held that disclosure of communications between plaintiff and successor counsel were not necessary in order for former counsel to successfully assert a defense. The court reasoned that successor counsel was involved, as in this case, on the question of damages only -- an issue that could only have arisen after the professional responsibilities of former counsel had ended. As such, the privileged communication was unrelated to the alleged malpractice of former counsel, as it is in this case.⁷⁹

Although Weston alluded to alleged illegal activities as possible factors in BFCS' decision to compromise the T&W debt in the adversary proceeding, the court held that even if such factors were relevant, they were either "tangential to" or "remote from" the precise legal questions arising from plaintiff's malpractice theory,⁸⁰ which was tied to events which preceded the adversary proceeding. Factors that might have contributed to some aspect of the negotiation of the settlement, it concluded, would not be central to whether Weston acted as a reasonably prudent attorney, prior to the adversary proceeding.⁸¹ Even if BFCA document information might have effected Weston's strategy, it bore little relation to Weston's ability to defend the malpractice charges against it.⁸²

Thus, per *Weston Hurd*, where a court perceives information being sought is "tangential" to the malpractice (where it could not be at least one proximate cause of malpractice injury) or where alternative, non-privileged sources allow access to information, privilege is respected.⁸³

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ Because H&D would need to attack the "reasonableness" of settlement through an expert, the court concluded that Weston, at a later point in the litigation, could uncover the operative facts upon which H&D's expert's opinion would be based, eliminating the need to invade the privilege. *Id.*

D. *Fischel v. Van Straaten Galleries*

Fischel v. Van Straaten Galleries,⁸⁴ distinguishes pleadings which put damages “at issue” from pleadings which put *the cause of damages at issue*, and mere convenience, which does not justify invading the privilege, from information vital to the defense of the case, which does. Law firm Fischel & Kahn (“F&K”) sued its former client Van Straaten Galleries (“VSG”) for attorneys' fees and VSG counter-claimed for malpractice, alleging F&K was negligent in drafting certain contractual limitation of liability language.⁸⁵ After F&K had drafted the language, but before the litigation in which the limitation clause was at issue, VSG replaced F&K with law firm Pope & John (“P&J”).⁸⁶ F&K sought to discover communication between VSG and attorneys who subsequently represented VSG in the underlying action, including P&J, which were not parties or counsel in the malpractice action.⁸⁷

F&K argued the documents were critical to its defense of the malpractice action because it could not otherwise determine the extent to which VSG’s loss resulted from P&J’s alleged malpractice. F&K argued VSG waived privilege as to its communications with P&J by suing for malpractice. The trial court ordered disclosure of certain documents under a theory of implied waiver; F&K refused to produce and was held in contempt.⁸⁸ The intermediate appellate court affirmed,⁸⁹ but the Illinois Supreme Court reversed.

⁸⁴ 189 Ill.2d 579, 727 N.E.2d 240, 244 Ill.Dec.941 (Ill. 2000).

⁸⁵ 189 Ill.2d at 580, 727 N.E.2d at 241, 244 Ill.Dec. at 942.

⁸⁶ 189 Ill.2d at 581-582, 727 N.E.2d at 241-242, 244 Ill.Dec. at 941.

⁸⁷ 189 Ill.2d at 582-583, 727 N.E.2d at 242, 244 Ill.Dec. at 943.

⁸⁸ 189 Ill.2d at 582-583, 727 N.E.2d at 242, 244 Ill.Dec. at 943.

⁸⁹ 189 Ill.2d at 583-584, 727 N.E.2d at 242-243, 244 Ill.Dec. at 943-944.

On appeal, F&K argued *Pappas* was controlling, but the Court found *Jakobleff* apposite.⁹⁰ Although filing the malpractice claim waived the privilege as to F&K, it concluded, VSG’s conduct did not waive the privilege as to P&J. As in *Jakobleff*, as later-hired attorneys, P&J could not have been involved in the alleged malpractice against VSG. There was no question which attorney might be liable for the malpractice because F&K’s alleged negligence was complete before P&J was retained. Thus, *Pappas* was inapposite. F&K’s affirmative defenses, the court found, were analogous to the third-party claim for contribution in *Jakobleff*.⁹¹ If F&K could invade the privilege by simply filing defenses, the privilege would be illusory.⁹²

Although the filing was sufficient to put *damages* at issue, it did not put *the cause* of VSG’s damages “at issue,”⁹³ and that was the basis of the court’s refusal to permit privilege to be compromised. The *Fishel* Court also relied on *Miller v. Superior Court*,⁹⁴ which held that an attorney defendant could not discover communications with attorneys hired after his representation ended lest it: “create an intolerable burden on the attorney client privilege, making it very difficult for the parties to the relationship to openly discuss matters which might eventually lead to litigation.”⁹⁵ The *Miller* court had reconciled *Merritt v. Superior Court*,⁹⁶ and

⁹⁰ 189 Ill.2d at 586-590, 727 N.E.2d at 244-246, 244-266, Ill.Dec. at 944.

⁹¹ 189 Ill.2d at 586, 727 N.E.2d at 244, 244 Ill.Dec. at 945.

⁹² 189 Ill.2d at 586-587, 727 N.E.2d at 244-245, 244 Ill.Dec. at 945-946.

⁹³ *Id.*

⁹⁴ 111 Cal.App.3d 390, 168 Cal.Rptr. 589, 590 (1980).

⁹⁵ *Fishel*, 727 N.E.2d at 244 (citing *Miller*, 111 Cal.App.3d at 394-95, 168 Cal.Rptr. at 591).

⁹⁶ 9 Cal.App.3d 721, 88 Cal.Rptr. 377 (1970). *Merritt* was a bad-faith case in which the insured argued the insurer’s counsel had so “confused” the underlying plaintiff’s counsel, that settlement became impossible. The insurer sought to discover plaintiff’s communications with his then attorney during preparation of the underlying action. The *Merritt* Court upheld disclosure, concluding plaintiff placed “in issue” the “decisions, conclusions and mental state of his then attorney by alleging his confusion led to the failure to settle.” 111 Cal.App.3d at 394. Because plaintiff had “intended to prove his case by reference to the mental state of his counsel, the defendant was entitled to inquire into communications related to that state.” *Id.*

Lohman v. Superior Court,⁹⁷ distinguishing cases where plaintiff puts in issue counsel's own state of mind from cases in which only plaintiff's knowledge is placed in issue.⁹⁸ The case before the *Fishel* Court was fundamentally about damages:

That van Straaten's damages are subject to dispute by the parties does not mean that van Straaten has waived its attorney-client privilege regarding communications between it and Pope & John that might touch on that question. If raising the issue of damages in a legal malpractice action automatically resulted in the waiver of the attorney-client privilege with respect to subsequently retained counsel, then the privilege would be unjustifiably curtailed. *See Schlumberger Ltd. v. Superior Court*, 115 Cal.App.3d 386, 393, 171 Cal.Rptr. 413, 417 (1981).⁹⁹

Nondisclosure of VSG's communications with P&J would not prevent F&K from challenging VSG's evidence on the damage issue:

Nondisclosure of van Straaten's communications with Pope & John about the course and conduct of the Mesirow litigation will not prevent Fischel & Kahn

⁹⁷ 81 Cal.App.3d 90, 146 Cal.Rptr. 171 (1978). In *Lohman*, defendant pleaded a limitations affirmative defense and argued that because plaintiff was aware of defendant's role when the complaint was filed, plaintiff could not claim relation-back to the initial complaint. Defendant sought information from plaintiff's counsel concerning his communications with her, attempting to show when the plaintiff became aware of defendant's involvement. The court held such discovery would be improper not because what plaintiff *knew* was privileged, *but because what she may have told her attorney was*.

⁹⁸ Although Miller's knowledge was in issue, this did not waive privilege as to communications with attorneys she consulted after the alleged malpractice. Privilege is not waived, the *Miller* Court concluded, merely because disclosure of counsel's communications might help establish plaintiff's state of mind; doing so would impair the attorney-client relationship. Under *Miller*, where plaintiff's state of mind, but not the attorney's state of mind, is in issue, the policies supporting the privilege supercede the policies supporting the truth-finding process.

⁹⁹ *Id.* at 244-45. In *Schlumberger*, petitioner sued law firm Kindel & Anderson (K&A) for failing to properly obtain certain security interests. Petitioner retained different law firms to represent it in a bankruptcy in connection with those security interests. After a settlement, petitioner claimed K&A's negligence caused its losses. K&A, however, argued petitioner's injuries were caused by its decision to enter into an inadequate settlement, effectively, a failure to properly mitigate caused by its later hired lawyers. K&A cross-claimed against petitioner's bankruptcy lawyers, alleging their negligence caused petitioner's loss. K&A sought correspondence between petitioner and bankruptcy counsel, but the Court refused to require production: "Communications between a client and an attorney representing the client in a malpractice action against a former attorney are privileged and not subject to discovery, and the privilege is not waived by tendering an issue on which the requested information may be relevant." 115 Cal.App.3d at 394, 171 Cal.Rptr. at 418. The key language was "may be relevant." The fact that the defense being raised "might be" bolstered by disclosure of a privileged communications was not enough to place the communication "at issue." Neither *Jakobleff*, which inquired as to whether the communications were "required to determine the validity of the client's claim" or would "deprive the adversary of vital information," nor the *Schlumberger* Court, which focused on whether the information sought to be disclosed was "vital" or "necessary," found the mere possibility that a party's position would be furthered by production a sufficient basis to overcome the privilege.

from challenging van Straaten's evidence on the issue of damages. Evidence regarding the client's damages resulting from the law firm's alleged negligence would, in the present context, be readily available to either party. Thus, we cannot conclude here, as the court did in *Pappas*, that the requested information is vital to the lawyer's defense of the malpractice action. . . . we believe that the better approach is set forth in *Jakobleff* and *Miller*.¹⁰⁰

F&K argued that it needed to review all the documents to address the issue of damages, but the court rejected the argument:

[W]e disagree with Fischel & Kahn's assertion that, without reviewing all the documents surrounding the Mesirow litigation and its settlement, it is impossible to determine whether and to what extent van Straaten's alleged loss resulted from Fischel & Kahn's alleged malpractice, if any, or some other source. Here, the privileged documents present one alternative means, though perhaps the most convenient, in which this information may be obtained. Mere convenience, however, should not justify waiver of the attorney-client privilege.¹⁰¹

III. Cases in which Implied Waiver has been Found -- Pappas and its Progeny

A. *Introduction*

In Serial Representation Cases, it may be difficult to separate damages caused in one action from damages caused in another. Where any part of the damages plaintiff alleges can be traced to an attorney's conduct, a court may find implied waiver, if the malpractice defendant convinces the court that the information is vital to its defense and that another attorney caused the injury.

B. *Rutgard v. Haynes*

In *Rutgard v. Haynes*,¹⁰² for example, privilege was waived because the court determined that a later hired attorney's conduct could have been a proximate cause of one component of damages arising from an inter-related series of law suits. The court found that because the

¹⁰⁰ 727 N.E.2d at 245-246.

¹⁰¹ *Id.*

¹⁰² 185 F.R.D. 596 (S.D. Cal. 1999).

malpractice damages that plaintiff alleged arose from two different actions, the content of the communication(s) was relevant to both causation and damages even though the conduct of the later hired attorney occurred after the alleged malpractice.

Rutgard involved a particularly complicated series of intertwined litigations. The problems began when plaintiff Rutgard, represented by attorney Haynes, lost an antitrust case filed against certain of his former employees (the “Antitrust Action”). The employees then sued Rutgard (and Haynes) for malicious prosecution and Rutgard retained attorney Royce, to defend him in that action (the “Malicious Prosecution Action”). A criminal action was then filed against Rutgard (the “Criminal Action”), and Rutgard hired Haynes to represent him in the Criminal Action. Rutgard then retained Royce, to sue Haynes for professional malpractice alleging Haynes committed malpractice in the Antitrust Action (the “Malpractice Action”).

Haynes, as defendant in the Malpractice Action, moved to compel production of documents from Royce, then acting as plaintiff’s malpractice counsel. Haynes argued that Rutgard waived the attorney client privilege in the Malicious Prosecution Action by communicating with Royce, who acted as his malicious prosecution counsel.

The Court, relying on *Pappas*, observed it had previously held Plaintiff can waive the attorney client privilege: “when a client sues one lawyer for malpractice, the attorney-client privilege is waived as to all attorneys involved in the underlying litigation for which that attorney has been sued.”¹⁰³ Plaintiff’s malpractice claim against Haynes sought monies Plaintiff paid to Royce to defend and settle the Malicious Prosecution Action. Haynes argued that because Plaintiff placed both the fees and settlement monies “in issue,” the Antitrust and Malicious Prosecution Action files in Royce’s possession had to be produced.

¹⁰³ *Id.* at 597-598.

The Court noted that Royce became Plaintiff's counsel *after* the alleged malpractice had occurred in the Antitrust Action and it framed the issue as follows:

[T]his Court must consider whether Plaintiff has waived the attorney-client privilege as to communication between himself and Royce during the malicious prosecution case by virtue of now attempting to recover damages from Defendant Haynes for Royce's attorney's fees, and the settlement payment Plaintiff paid to terminate the malicious prosecution case.¹⁰⁴

The *Rutgard* Court then stated that a party does not place otherwise privileged attorney-client communications "at issue" merely by seeking an award of attorney fees as damages, citing *Jakobleff* and *Fischel*.¹⁰⁵ Had Plaintiff merely sought attorney's fees incurred during the Malicious Prosecution Action, the court explained, it would have been likely to have found Plaintiff had not waived the attorney-client privilege and would, possibly, have just ordered production of time sheets or other records to allow defendant some discovery as to the "reasonableness" of fees being sought.¹⁰⁶ However, because Plaintiff was not just trying to recover fees incurred in the Malicious Prosecution Action, but monies paid to settle it, plaintiff's pleading put the "reasonableness" of the *settlement amount* "in issue," as well as its fees.¹⁰⁷

Citing *Pappas* and *Fischel*, the *Rutgard* Court explained that although no waiver occurs where (1) the attorney is retained *after* the acts constituting the alleged malpractice and (2) no issues of proximate cause could arise as to who committed the alleged malpractice (in the Antitrust Action), a waiver had, nonetheless, occurred. Royce, by settling the Malicious Prosecution Action, brought his own conduct into question because, if he negligently settled the

¹⁰⁴ *Id.* at 598.

¹⁰⁵ *Id.* at 599.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

Malicious Prosecution Action, it might be a proximate cause of at least one part of plaintiff's damages arising from that settlement:

[B]y claiming damages here for the settlement Plaintiff paid in the malicious prosecution action, the "underlying action" during which "issues of proximate cause can arise as to who committed the malpractice" must include both the antitrust case and the malicious prosecution case. Consequently, Defendant here reasonably raises the affirmative defense of contributory negligence, alleging that Plaintiff's counsel in the malicious prosecution action, Mr. Royce, could have contributed to Plaintiff's settlement damages by committing negligence in the conduct of his defense of Rutgard in that action.¹⁰⁸

The Court concluded that Plaintiff put "in issue" Royce's actions defending him and recommending settlement, waiving privilege in the Malpractice Action.¹⁰⁹ The same result, it concluded, followed from consideration of the *Hearn* test:

Plaintiff has asserted the privilege here *after* filing suit against Defendant and claiming damages in the amount of the settlement he paid in the malicious prosecution suit. *Second*, Defendant has shown that the protected information may be *relevant to the element of causation* and to his affirmative defense of contributory negligence, *as well as on the issue of the reasonableness of the damages claimed. Defendant needs access to materials from the entire malicious prosecution case to defend against the allegation that his alleged negligence during the handling of the prior antitrust suit was in fact the proximate cause of the settlement elected to be paid by Plaintiff in the malicious prosecution suit. Third, application of the attorney-client privilege would deny Defendant access to the relevant information available regarding this aspect of his defense herein.* This Court finds that Plaintiff waived the attorney-client privilege with regard to communications between himself and Mr. Royce concerning Royce's defense of the malicious prosecution suit.¹¹⁰ (Emphasis added).

In the *Jakobleff*-controlled cases discussed in Part II, the question was whether the later-retained attorney's conduct could proximately have caused the malpractice-injury. Courts distinguished the chain of injury-causing events from their consequences and, if the content of

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 600.

the communication was relevant only to the extent of damages, but not the causation/liability issue, there would be no disclosure.¹¹¹ In *Rutgard*, the court could not wholly separate the damages caused by Haynes' malpractice in losing the Antitrust Action from the damages Royce was accused of causing in reaching the settlement in the Malicious Prosecution Action. Plaintiff's own pleading of the amount of the settlement in Malicious Prosecution Action, not Royce's responsive pleading, had placed Royce's conduct in the later action "in issue" because it could have been a "cause" of at least one part of the damages Plaintiff sought.

Restated, the *Rutgard* Court found a waiver occurred despite the fact Royce's conduct occurred *after* the events underlying the Antitrust Action malpractice -- Royce's conduct *could be viewed as one proximate cause of that part of* the client's damages arising from the settlement of the Malicious Prosecution Action. The concerns expressed in *Jakobleff* were avoided because defendant had not artfully pleaded defenses to circumvent the privilege; rather, the claims Plaintiff chose to plead resulted in a waiver which was necessary to permit Haynes to defend himself -- that is, to obtain vital information.

C. *IMO Industries, Inc. v. Anderson Kill & Olick, P.C.*

In *IMO Industries, Inc. v. Anderson Kill & Olick, P.C.*,¹¹² a client sued its former counsel for malpractice arising from an insurance coverage litigation. Former counsel was alleged to have negligently drafted a joint stipulation in an action filed in California (the "California

¹¹¹ *But see Goldberg v. Hirschberg*, 10 Misc.3d 292, 299-300, 806 N.Y.S.2d 333, 338-339 (Sup. Ct. N.Y. Co. 2005) (where plaintiffs alleged defendants caused them to become targets of government investigations and claimed legal fees incurred as damages, scope of investigations was vital to defense; privilege was impliedly waived as to any subject related to the reasonableness of plaintiff's reliance on law firm's advice -- plaintiff had a substantial need for the information and could not obtain same by other means without undue hardship: "This Court cannot in all fairness permit plaintiffs to hold defendants wholly responsible for their predicament and then allow plaintiffs attorneys to deny defendants the opportunity to examine possibly exonerating documents," distinguishing *Jakobleff*, noting there was evidence that plaintiffs relied on defendants' legal opinion).

¹¹² 192 Misc.2d 605, 746 N.Y.S.2d 572 (Sup. Ct. N.Y. Co. 2002).

Action”). The case arose when Long Island Lighting Company (“LILCO”) sued a predecessor of IMO Industries, Inc. (“IMO”) for selling it a defective generator, resulting in a large verdict. International Insurance Co. (“International”) provided IMO an excess layer of insurance, and IMO requested that International participate in settling the litigation. International paid half, but then sought to recover its payment from IMO, which was represented by the law firm Anderson Kill & Okick, P.C. (“Anderson”).

Specifically, Anderson helped draft the Joint Stipulation which included a provision for recovery of settlement payments from the insured if non-coverage were proved. The Judge found IMO had no coverage and required IMO to show cause why it should not reimburse International's defense and settlement costs under the Joint Stipulation. The court rejected IMO's arguments and IMO then terminated Anderson. IMO then retained law firm Farella Braun & Martell, LLP (“Farella”) to represent it in the California Action, beginning in 1995. IMO, by Farella, settled the California Action in 1997, at which time Farella's representation of IMO in that action ended. IMO then sued Anderson, alleging it negligently drafted the Joint Stipulation, under which it was required to indemnify payments made by International.

Anderson sought communications, after March 1995, between IMO employees and Farella, and, also, communications between the employees and IMO's general counsel. It argued these documents were necessary to prove the Joint Stipulation was competently drafted and that IMO would have lost or unfavorably settled the California Action, anyway. Anderson further argued the documents might clarify how IMO's settlement was formulated, as the amount paid in settlement was the damage the malpractice action sought to recover. Finally, Anderson argued the documents might show exactly when it had stopped representing IMO, a fact relevant to a

limitations defense Anderson asserted.¹¹³ Although IMO argued bringing the malpractice action did not waive the privilege, Anderson responded that IMO was using the privilege as a sword, first putting the California Action at issue, then refusing to produce documents which would disclose what happened in that suit.¹¹⁴ IMO relied on *Jakobleff* and *Fischel*, but the California Action judge distinguished them, following *Pappas*:

IMO seeks to extend the reasoning in *Jakobleff* to communications with Farella, where the representation of defendant and Farella is alleged to have been concurrent. However, the evil envisaged by the Appellate Division, Second Department in *Jakobleff* is not present here. The California Action is ended, and there is no danger that Anderson Kill will invade IMO's ability to communicate freely with its present attorney. . . . IMO relies upon the attorney-client privilege in seeking to prevent inquiry by Anderson Kill into whether the only possible cause of IMO's injury was the November 1994 Joint Stipulation. *IMO reads too narrowly the scope of inquiry in a legal malpractice case. IMO has the burden of proving that its loss is causally related to the alleged act of malpractice, and Anderson Kill should be permitted disclosure on that question. . . . disclosure is sought only with respect to the subject matter IMO has put in issue. . . .* The waiver in this case is clearer still, because IMO claims that Farella and Anderson Kill *concurrently* represented it in the California Action, the outcome of which is the basis for IMO's alleged harm.¹¹⁵ (Emphasis added).

IMO clarifies a number of distinctions made earlier in *Jakobleff* and *Pappas*.

First, where multiple law firms represent the malpractice plaintiff in the same action, albeit at different stages of litigation, disclosure of communications between plaintiff and the later-retained law firm will not be precluded if the later-representation has ended and disclosure will not impair communications between plaintiff and the already dismissed, later-retained attorney (or, presumably, current counsel). Because disclosure of IMO's communications with Farella would not impair counsel's representation of IMO in the malpractice action, one of the

¹¹³ 192 Misc.2d at 608, 746 N.Y.S.2d at 574.

¹¹⁴ 192 Misc.2d at 608, 746 N.Y.S.2d at 574-75.

¹¹⁵ 192 Misc.2d at 610, 746 N.Y.S.2d at 576.

issues that worried the *Jakobleff* Court, i.e., impairment of current representation, would be inapplicable.

Second, because Anderson and Farella both represented IMO in the California Action, Farella's settlement of that action, in which the Joint Stipulation had been drafted by Anderson, could, conceivably, have been a proximate cause of IMO's malpractice injury, i.e., the amount paid to settle the California Action. The court did find privilege waived because Farella's conduct could have been causally tied to the damages at issue, a result similar to that in *Rutgard*. There, errors in the settlement of the Malicious Prosecution Action could have proximately caused damages plaintiff sought in the Malpractice Action, even though the attorney settling the Malicious Prosecution Action was not the attorney alleged to have committed the Antitrust Action malpractice. If IMO's settlement, effected by Farella, was improper, it could have been a proximate cause of IMO's damages in the malpractice action even though the client, IMO, did not allege malpractice against Farella in any action.

IMO interprets *Jakobleff* as standing for the proposition that privilege will not be waived unless the communications at issue are relevant to causation – the sequence of representations is, therefore, only one factor in causal analysis. The *IMO* Court also distinguished *Fischel & Kahn, Ltd. v. Van Straten Gallery, Inc.*,¹¹⁶ as follows:

The law firms' representation [in *Fischel & Kahn*] of the client overlapped, albeit in different matters. . . . *Fischel & Kahn* is distinguishable from the present action because IMO claims not only that the representation by Anderson Kill and Farella overlapped, but that they simultaneously represented IMO in the California Action.¹¹⁷

Instead, the *IMO* Court relied on *Pappas*:

¹¹⁶ 189 Ill.2d 579, 244 Ill.Dec. 941, 727 N.E.2d 240 (2000).

¹¹⁷ 192 Misc.2d at 611, 746 N.Y.S.2d at 576-577.

In *Pappas* . . . [t]he Court held that the Holloways waived the attorney-client privilege with respect to the other attorneys, stating that "the Holloways cannot counterclaim against Pappas for malpractice and at the same time conceal from him communications having a direct bearing on this issue." . . . The Court went on to say that "[t]he nature of a malpractice claim necessitates inquiry into the actions taken during the course of the litigation in question." . . . I agree. Therefore, IMO shall produce documents regarding the California Action that it has withheld on the grounds of attorney-client privilege. To the extent that the withheld material also are communications regarding IMO's other lawsuits or communications with IMO's attorney in the present action, the documents may be redacted. Not only are the lawsuits other than the California Action not the subject of this litigation, so the attorney-client privilege is not waived, the material is not relevant.¹¹⁸

The *IMO* Court, therefore, made clear that its analysis was a function of the "nature of the malpractice claim." In both *Rutgard* and *IMO*, the temporal sequence of representation was just one factor the court considered in determining whether the communications at issue might be relevant to an assessment of causation and damages. Neither case involved attorney conduct alleged to have been part of the initial malpractice event. However, the later hired attorney's conduct could have caused part of the *damages* the malpractice complaint alleged, not just affected the amount of damages.

D. Simmons Foods, Inc. v. Willis

In *Simmons Foods, Inc. v. Willis*,¹¹⁹ creditor Simmons was supposed to receive payments from a Chapter 11 debtor's receivable accounts and sued bankruptcy counsel, Willis, alleging negligence. Snyder represented Simmons in both the bankruptcy and legal malpractice actions. Willis served Snyder with a deposition subpoena requiring him to produce the entire bankruptcy file and Snyder moved to quash. Willis argued the substance of plaintiff's confidential communications with counsel Snyder were relevant and "at issue" with respect to proximate

¹¹⁸ 192 Misc.2d at 611-612, 746 N.Y.S.2d at 576-577.

¹¹⁹ 191 F.R.D. 625 (D. Ka. 2000).

cause and that Snyder's negligent conduct contributed to plaintiff's damages. Citing *Rutgard* and applying *Hearn*, the court concluded no waiver occurred:

The fact that the communications may be "relevant," "at issue" or "substantially useful," however, is not sufficient to satisfy the standard articulated in *Hearn*, 68 F.R.D. at 581. According to *Hearn*, *the confidential communications must be at issue* as a result of an affirmative act by Plaintiff. . . Although there is no clear-cut definition of "affirmative act" in the implied waiver context, asserting a claim of legal malpractice against former counsel has been construed to affirmatively place relevant attorney-client privileged communications at issue. . . . Some courts have extended the concept of implied waiver to relevant attorney-client privileged communications between a client and other retained counsel. See *Pappas v. Holloway*, 114 Wash.2d 198, 787 P.2d 30 (Wash.1990) (recognizing the implied waiver concept in the context of a third-party malpractice claim against former client's other attorneys) (emphasis added.) See also, *Rutgard v. Haynes*, 185 F.R.D. 596, 599-600 (S.D.Cal.1999) (holding plaintiff waived attorney-client privilege between himself and subsequently retained attorney by putting "in issue" reasonableness of attorney's actions in recommending settlement.) *Although the facts are different than those before the Court, the analysis used by the courts is instructive.*¹²⁰ (Some emphasis added).

The *Simmons* Court found the issue presented similar to that in *Pappas*. In both cases, the discovery being sought dealt with the specific negligent act or omission originally alleged and the party bringing the negligence claim was the "catalyst" for introduction of a "comparative fault" defense. *Simmons* alleged it was damaged as a result of Willis' negligent conduct. Willis alleged it was Snyder who breached a duty to plaintiff that resulted in injury and damage, thereby raising the defense of comparative negligence.

As in *Pappas*, the *Simmons* Court found Willis entitled to defend the negligence charge on proximate cause grounds, plaintiff having been the "catalyst" and having placing the disputed communications "at issue." Citing *Hearn*, the *Simmons* Court held: (1) plaintiff "interposed" the privilege (by filing a negligence suit for damages); (2) plaintiff placed the protected information "at issue" (by making proximate cause relevant to the case); and (3) application of the privilege

¹²⁰ *Id.* at 635.

would deny Willis access to information vital to asserting a proximate cause defense to the negligence allegations.¹²¹ Thus, an implied waiver had occurred.¹²²

E. Conclusions

Each of the above-discussed cases involved a careful examination of the complaint's theory of causation and, also, each component of damages arising from defendant's alleged acts.

The courts permitted the malpractice defendant to discover communications relevant *to the causation of all malpractice damages* regardless of whether the attorney's conduct occurred after an episode of malpractice by another attorney, if the court determined it might have given rise to a different malpractice-caused injury. The temporal sequence of representations is, however, a critical element in such analysis, a point commentators have noted:

[T]iming of the multiple counsel representation is essential to the determination of which privileged communications in possession of other attorneys are relevant to the defendant attorney's defense and, thus, subject to potential discovery. . . . In order to determine which counsel possesses privileged communications *that could be relevant to establishing a proximate cause*, it is important to examine each lawyer's role in the underlying matter. . . . A few courts have distinguished between "subsequent" and "concurrent" representations. The relevant question is whether the lawyer sued for malpractice worked together with other counsel, and thus "concurrently" represented the client. Or, were the lawyers retained at different times, potentially even for different matters and therefore providing "subsequent" representations? The courts have properly held that if different counsel were retained subsequent to the other lawyer's alleged act of malpractice, there would be no issue of *proximate causation* as to who committed malpractice and, therefore, the privileged communications in subsequent lawyer's possession could not be helpful to the defense against malpractice. . . . Accordingly, the courts have ruled that by suing a lawyer for malpractice a client does not automatically waive the privilege as to the subsequently retained counsel. . . . However, *if a team of lawyers represented a client concurrently, i.e. prior to any alleged malpractice acts, then the issue of proximate cause could arise*, and thus the privileged documents could be essential to the defendant attorney's defense. . . . As a result,

¹²¹ 68 F.R.D. at 581.

¹²² See also *Parler & Wobber v. Miles & Stockbridge*, 359 Md. 671, 756 A.2d 526 (Md. App. 2000)(relying on *Hearn* and *Pappas*, holding privilege not waived merely because client sues former counsel and that *Hearn's* balancing test would be an appropriate tool to balance former client's right to contribution against later counsel's concern to protect the attorney-client privilege, on remand).

by suing his attorney for malpractice, the client waives the privilege against confidential communications in the concurrent counsel's possession relevant to the defendant lawyer's defense against malpractice.”) (notes omitted) (emphasis added).¹²³

Viewed broadly, courts are reluctant to permit defendants to exploit the implied waiver doctrine where they appear to be attempting to obtain a tactical advantage in the way they respond to a malpractice complaint. They are less reluctant to find an implied waiver where any part of plaintiff’s malpractice damages may have been caused by an attorney’s representation,¹²⁴ even if that representation post-dated the events giving rise to damages or a component of damages.¹²⁵

¹²³ See Lewinbuk, *supra* note 2 at 96-97

¹²⁴ *Id.* See generally *Connell v. Bernstein-Macaulay, Inc.*, 407 F. Supp. 420, 423 (S.D.N.Y.1976)(where a good faith basis existed for believing invasion of privilege would shed light on the validity of an estoppel argument precluding assertion of statutory protection, privilege waived). But see *U.S. v. Bilzerian*, 926 F.2d 1285 (2d Cir. 1991)(where defendant sought a ruling allowing him to testify as to his belief in the lawfulness of his activities based on communications with his attorney, but to not be cross-examined on the subject, trial court found that if defendant testified regarding his good faith beliefs regarding the legality of his actions, he could be cross-examined as to the basis for his belief, including about his communications with attorney -- such testimony would have put his knowledge of the law in issue: “[a] defendant may not use the privilege to prejudice his opponent's case or to disclose some selected communications for self-serving purposes. Thus, the privilege may implicitly be waived when defendant asserts a claim that in fairness requires examination of protected communications.”).

¹²⁵ In *Kidder, Peabody & Co., Inc. v. IAG Intern. Acceptance Group, N.V.*, 1997 WL 272405 (S.D.N.Y. May 21, 1997), the court relied on *Hearn*, *Jakobleff*, and *Bilzerian*, in analyzing plaintiff’s assertion of a good faith defense to counterclaims which defendant argued resulted in a waiver of privilege co-extensive with the counterclaims as to which good faith was asserted. 1997 WL 272405, at * 5. It concluded plaintiff’s reasons for filing suit, obtaining an attachment and consenting to its vacatur were relevant and that privileged documents or other communications that would tend to bear on those subjects had to be disclosed. It rejected plaintiff’s efforts to temporally limit the extent of waiver, requiring production of all relevant materials. *Id.* See *Goetz v. Volpe*, 11 Misc.3d 632, 635-636, 812 N.Y.S.2d 294, 296-297 (Sup. Ct. N.Y. Co. 2006.)(where the third-party malpractice defendant law firm's “representation overlaps and is simultaneous to another firm's representation of that client in the same matter, New York courts have found the client's communications with the non-defendant law firm lose its privilege as to the defendant law firm”) (citation omitted).

IV. Academic and Case Criticism of *Hearn*

A. *Academic Criticism of the Hearn Test of Implied Waiver*

The *Hearn* Test has been the subject of substantial academic criticism.¹²⁶ Because the attorney client privilege is an “absolute” privilege, commentators have argued that any rule which finds an implied waiver based on the “need” for information or “fairness” considerations is anathema. One of the most frequently cited academic criticisms of *Hearn* is set forth in a 1985 Harvard Law Review article *Developments in the Law--Privileged Communication*.¹²⁷

Discussing the implied waiver doctrine, the authors write:

The *Hearn* test includes three criteria for the application of a placing-at-issue-waiver: the privilege-holder must, (1) through some *affirmative* act, make an assertion that (2) renders *relevant* to the action (3) privileged matter that is *vital* to the opposing party's defense. . . Only the third element of this three-step test limits the application of the rule of waiver. The first and second elements do little to limit the application of the waiver because every affirmative pleading will make new material relevant to the action. But the third element's focus on the opposing party's need for the privileged information is inappropriate to the waiver of absolute, as distinguished from qualified, privileges. *Absolute privileges, such as the attorney-client...privileges, should not depend upon case-by-case balancing of the harm to the relationship against an opposing litigant's need for the information. These privileges have been instituted on the basis of a system-wide balancing of costs and benefits. Once all the technical requirements of a privilege have been met, courts should not impose their own sense of the equities, because trial judges may tend to give decisive weight to the needs of the parties before them, without adequately considering the full, system-side benefits of a privilege.*¹²⁸ (Emphasis added).

¹²⁶ So, too, has the scope of the attorney client privilege, generally. See Nix, *supra* note 21 at 286 (exact scope of attorney-client privilege has recently become the focus of heated scholarly debate)

¹²⁷ 98 Harv. L. Rev. 1450 (1985)(first cited *supra* note 1).

¹²⁸ *Id.* at 1640 (notes omitted). See also Nix, *supra* note 21 at 290-292 ("utilitarian" justification assumes privilege is vital to encouraging full and frank communication between attorneys and clients and that clients will be more amenable to open discussion if they are assured conversation will not be subject to disclosure -- the lawyer will more likely obtain information necessary to properly defend or promote the client's case, allowing the adversarial system of justice to function more effectively -- exclusion of otherwise obtainable evidence is justified because system as a whole benefits); David A. Nelson, Comment, Attorney-Client Privilege and Procedural Safeguards: Are They Worth the Costs?, 86 Nw. U. L. Rev. 368, 384 n.127 (1992) ("While the privilege may suppress important evidence, it has been determined that the need to allow the attorney to provide sound legal advice generally . . . outweighs any disadvantage of withholding evidence in a particular case.")(notes omitted).

A case-by-case balancing test should be considered particularly inappropriate with respect to the attorney-client privilege, in light of the Supreme Court's emphasis on the role of certainty in "encourag[ing] full and frank communications between attorneys and their clients." *A rule of waiver that turns on the opponent's need for information would subject the privilege to the hazards of fortune: the continued existence of one's privilege would depend not on how one has used or abused the privilege, but rather on who one's adversary happens to be. One adversary might have ample access to information while another would not.*¹²⁹ (Emphasis added).

"Absolute privileges," say the authors, are "privileges that can be nullified only by the privilege holder's waiver," whereas "qualified privileges" can be revoked "whenever the circumstances of the case are such that the need for the information outweighs the harm that disclosure would cause to the protected relationship."¹³⁰ Defined in this way, *Hearn* fails *a priori*; need-based or fairness based nullification of privilege are eliminated by definition.

The commentators oppose allowing anyone (other than the privilege holder) or any system to determine when privilege is waived: "Unlike the doctrine of express waiver, which allocates control of the privilege between the parties to the communication, the doctrine of implied waiver allocates control of the privilege between the judicial system and the party holding the privilege."¹³¹ Because absolute privileges reflect a system-wide balancing of costs and benefits, but case by case balancing involves judges imposing their own sense of the equities, outcomes will not result from system-wide considerations, but individual needs of litigants, as seem fair to judges.¹³²

¹²⁹ *Developments, supra* note 1 at 1641 (notes omitted). *See also* Nix, *supra* note 21 at 315 (information loss argument ignores one of the strongest justifications for the privilege, that "the costs resulting from the loss of relevant facts in court are justified by the societal interest in encouraging clients to be candid with their attorneys.").

¹³⁰ *Id.* at 1640, n.51.

¹³¹ *Id.* at 1630.

¹³² *See* Upjohn Co. v. U.S., 449 U.S. 383, 389 (1981) (privilege promotes free exchange of information which promotes broader public interests in the observance of law and administration of justice; sound legal advice or

B. *Case Criticism of the Hearn Test*

A minority of courts have rejected the *Hearn* Test concluding it has been applied in a confusing and inconsistent manner,¹³³ criticizing its post-hoc reliance on “hazy concepts” of what appears to be “relevant” or “fair,” and, generally, urging, like the commentators in *Developments*, that the problems discussed in Section IV undermine the protections afforded by the American legal system as a whole.

In *Rhone-Poulenc Rorer, Inc. v. Aetna Casualty & Surety Ins.*,¹³⁴ for example, the Third Circuit held that attorney advice is not put “in issue” merely because it is “relevant” or *might* affect the client's state of mind.¹³⁵ Only the client can put counsel’s advice in issue when he asserts a claim or defense and then attempts to prove it by disclosing an attorney client communication.¹³⁶ Having the client take *affirmative* steps to waive the privilege, it reasoned,

advocacy serves public ends and depends on the lawyer’s being fully informed by the client – intent of the privilege is full disclosure); In re Circle K Corp., 1996 WL 529399, *6 (Bankr. S.D.N.Y.) (no waiver where issue was plaintiffs' knowledge of the facts, not the law, and defendants could find out same in discovery, refusing to permit privilege to be circumvented merely because the communications might shed light on issue, citing *Rhone* for the proposition that relevance is not the standard for determining whether evidence should be protected from disclosure); Union Carbide v. Dow Chem. Co., 619 F. Supp. 1036, 1046 (D. Del. 1985) (need to permit attorney to provide sound legal advice generally outweighs any disadvantage of withholding evidence in particular cases); In re Shargel, 742 F.2d 61, 62 (2d Cir. 1984) (fullest disclosure enables attorneys to act more “effectively, justly, and expeditiously” (quoting 2 Jack B. Weinstein & Margaret A. Berger, Evidence § 503(02) (1982))); U.S. v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950) (“[t]he social good derived from the proper performance of the functions of lawyers acting for their clients is believed to outweigh the harm that may come from the suppression of the evidence in specific cases” (quoting Model Code of Evidence Rule 210 cmt. (1942))).

¹³³ See, e.g., *Service Company of New Mexico v. Lyons*, 129 N.M. 487, 493-494, 10 P.3d 166, 172-173 (New Mexico App. 2000)(*Hearn* has been applied in a “confusing and uneven manner” leading to criticism, citing cases and academic criticism, especially, *Developments*, *supra* note 1 at 1639-43 (*Hearn*’s third prong, that information be vital, only prong with limiting force, but need for information anathema to concept of absolute privilege -- *Hearn*’s case-by-case balancing contrary to need for certainty, arguing *Hearn* fails to target a type of unfairness distinguishable from the unfairness generated by every assertion of privilege and its application cannot be rationally limited).

¹³⁴ 32 F.3d 851, 863-864 (3d Cir. 1994).

¹³⁵ *Id.* at 863.

¹³⁶ *Id.* (citing *North River Ins. Co. v. Philadelphia Reinsurance Corp.*, 797 F. Supp. 363, 370 (D.N.J. 1992); *Pittston Co. v. Allianz Ins. Co.*, 143 F.R.D. 66, 71 (D.N.J. 1992)). See *Standard Chartered Bank PLC v. Ayala Holdings (U.S.), Inc.*, 111 F.R.D. 76, 82 (S.D.N.Y.1986)(Grubin, Mag. J.)(implied waiver renders privilege “a

engenders predictability while encouraging clients to consult counsel – “free from the apprehension that the communications will be disclosed without their consent.”¹³⁷ No waiver, it held, should occur merely because a client's state of mind might be an issue:

Some decisions have extended the finding of waiver of the privilege to cases in which the client's state of mind may be in issue in the litigation. . . These decisions [*Hearn* and others] are of dubious validity. 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. As the attorney client privilege is intended to assure a client that he or she can consult with counsel in confidence, finding that confidentiality may be waived depending on the relevance of the communication completely undermines the interest to be served. Clients will face the greatest risk of disclosure for what may be the most important matters. Furthermore, because the definition of what may be relevant and discoverable from those consultations may depend on the facts and circumstances of as yet unfiled litigation, the client will have no sense of whether the communication may be relevant to some future issue, and will have no sense of certainty or assurance that the communication will remain confidential. . . *While the attorney's advice may be relevant to the matters in issue, the privilege applies as the interests it is intended to protect are still served by confidentiality.*¹³⁸ (Emphasis added).

Restated, making waiver depend on concepts like “relevance” or “essential need,” undermines privilege's purpose to assure optimal encouragement of open and unconstrained

nullity in all the vast commercial litigation in which fraud or reliance is an issue," but that the defendant still must "disclose its thoughts and knowledge, whether or not acquired from conversations with its attorneys"); *Paramount Comm., Inc. v. Donaghy*, 858 F.Supp. 391, 395 (S.D.N.Y.1994) (Sweet, J.) (waiver should properly be found only when "the attorney-client relationship was relied upon, in some fashion, affirmatively to support the asserting party's claims, or the[re] was evidence that the attorneys themselves independently took actions or made decisions relevant to the case"); *Laborers Local 17 Health Benefit Fund v. Phillip Morris, Inc.*, No. 97 Civ. 4550, 1998 U.S. Dist. Lexis 11156, at *15 n. 4 (S.D.N.Y. July 22, 1998) (Dolinger, Mag. J.) (assertion of a fraud theory or other legal claim implicating plaintiff's knowledge insufficient to trigger a broad waiver of the plaintiff's attorney-client privilege" but the facts known by the plaintiff's trustees may be discovered even if they first learned from counsel)

¹³⁷ 32 F.3d at 863-864.

¹³⁸ 32 F.3d at 864. Cases and commentators have criticized *Hearn* on the basis of *Rhone's* analysis *See, e.g.*, *Johnson Matthey, Inc. v. Research Corp.*, 2002 WL 1728566, *4 (S.D.N.Y. July 24, 2003)(noting criticism of *Hearn* Test, citing *Rhone*); *Golowski II* and *Rainone*, *supra* note 27 at 3 (discussing *Rhone's* conclusion that *Hearn's* progeny is of "dubious" validity, noting recent expansion of implied waiver has resulted from failure to heed *Rhone's* criticisms).

attorney-client communication.¹³⁹ Requiring an affirmative act of waiver, places the decision to waive privilege in the hands of the client, encouraging and protecting free communication.¹⁴⁰

The position taken in *Rhone* contrasts positions taken by other courts.¹⁴¹

In *Public Serv. Co. of New Mexico v. Lyons*,¹⁴² another leading case criticizing the *Hearn* Test and citing *Rhone*, the court determined that the law of implied waiver was being applied in a confusing and uneven manner.¹⁴³

¹³⁹ Courts routinely distinguish bare relevance and essential need. *See, e.g.,* TIG Ins. Co. v. Yules & Yules, 1999 WL 1029712 (S.D.N.Y. Nov. 12, 1999) (although disclosure of plaintiff's communications with subsequent counsel would be helpful in demonstrating plaintiff (or successor counsel) acted unreasonably in not pressing stronger arguments against limitations defense in subrogation action, defendants could make same arguments based on the facts of the subrogation case, without breaching the privilege). In *Raphael v. Clune White & Nelson*, 146 A.D.2d 762, 537 N.Y.S.2d 246 (2d Dep't 1989), plaintiff sued former counsel for malpractice in handling his New York-filed injury action, which was dismissed on forum non conveniens grounds, and recommenced suit in England, using English counsel, settled, and then sued in New York, claiming he had to accept a "grossly inadequate" settlement in England because of his "destitute financial condition," caused by former counsel's improper commencement of the action in the wrong forum. Defendants sought correspondence between plaintiff and the English attorneys, arguing the correspondence was placed "in issue" by plaintiff's allegation that he settled because defendants caused his "destitute" condition – the court held that no disclosure was required because defendants did not need to pierce the privilege to assert defenses. 146 A.D.2d at 763, 537 N.Y.S.2d at 246.

¹⁴⁰ *Rhone* has been limited to its facts. *See generally* *Harding v. Dana Transport, Inc.*, 914 F.Supp. 1084, 1096 (D.N.J. 1996)(defendants' reliance on *Rhone* was misplaced, noting subsequent authority limited that case to the "unique facts," that *Rhone* did not involve advice of counsel being raised as an affirmative defense, nor were there any acts evincing a clear intent to waive the attorney-client privilege by placing at issue reliance on the advice of counsel); *See also* *WLG-TV, Inc. v. Cablevision Sys. Corp.*, 879 F. Supp. 229, 235 (E.D.N.Y. 1994)(distinguishing *Rhone*, describing it as a "garden variety" case in which only the knowledge of a party was at issue, and observing that something more than "mere relevance" is at stake when a plaintiff seeks to overcome a limitation bar by interjecting equitable doctrines, noting the Second Circuit follows *Hearn*, and reasoning that because WLG raised equitable doctrines to avoid a limitations defense, it impliedly waived privilege).

¹⁴¹ *See generally* *Pereira v. United Jersey Bank*, 1997 WL 773716, *3-5 (S.D.N.Y. Dec. 11, 1997)("[T]o the extent that *Hearn*, as interpreted by *Rhone-Poulenc*, stands for the proposition that the mere act of placing a party's state of mind at issue supports a finding of waiver, the law in this circuit does not support such a result. . . . On the other hand, to the extent that *Rhone-Poulenc* requires a party to overtly and explicitly rely upon the advice of counsel in order to trigger *Hearn*, the law in this circuit does not support such a result. . . . Rather, between these extreme positions of mere assertion and overt reliance, *Hearn* is triggered " 'even if the privilege holder does not attempt to make use of the privileged information. . . the privilege [may be waived] if [the privilege holder] makes factual assertions the truth of which can only be assessed by examination of the privileged communication.' " *Liberty*, 1997 WL 471053, at *3 (quoting *In re Kidder Peabody Secs. Litig.*, 168 F.R.D. at 470. . . a finding of waiver . . . would require a finding of waiver in virtually every litigation, for in almost all actions a party either "affirmatively place [[s] its knowledge or intent at issue" or "rel[ies] upon ... statutes" and thereby puts "its obligations under the law directly in issue." As set forth above, the law in this circuit requires something more; namely, that a party make " 'factual assertions the truth of which can only be assessed by examination of the privileged communication.' " " . . .) (citations omitted)).

Perhaps the strongest academic criticism is found in . . . [*Developments*] . . . The law review strongly proposes that the opposing party's need for the information is anathema to the concept of an absolute privilege. The article is also critical because *Hearn*'s case-by-case balancing approach runs counter to the United States Supreme Court's emphasis on the need for certainty. *Id.* We consider noteworthy the following summation of criticism in the article: "the faults in the *Hearn* approach are (1) that it does not succeed in targeting a type of unfairness that is distinguishable from the unavoidable unfairness generated by every assertion of privilege and (2) that its application cannot be limited." *Id.*; see also Richard L. Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 Mich. L.Rev. 1605, 1632-33 (1986) (waiver should only be recognized where party has attempted to garble the truth by injecting privileged material itself into the case).¹⁴⁴

The *Public Service* Court relied on *Rhone*:

We agree with the reservations forcefully discussed in *Rhone*. It follows from the rationale found in *Rhone* and the academic criticism of the *Hearn* approach that the third approach discussed by the Tenth Circuit in *Frontier Refining* merits serious consideration. That approach is to recognize waiver only where a party "seeks to limit its liability by describing that advice and by asserting that he relied on that advice." *Rhone* 32 F.3d at 863. The *Rhone* approach, which also recognizes waiver where direct use is anticipated because the holder of the privilege must use the materials at some point in order to prevail, is followed by a minority of courts. . . . We therefore side with the minority of jurisdictions that require offensive or direct use of privileged materials before the party will be deemed to have waived its attorney-client privileges. . . . Our rules reflect a careful, methodical, approach to the development of the rules governing privileges – one that involves public participation and discourages ad hoc judicial intervention. . . . application of the *Hearn*-type test would undermine the "full and frank" communications at the heart of the attorney-client privilege and would be contrary to the certainty that the rules themselves are intended to provide.¹⁴⁵

The Court concluded that the approach it was adopting would accurately reflect the often-used sword/shield metaphor:

¹⁴² 129 N.M. 487, 10 P.3d 166 (Ct. App. Mexico 2000).

¹⁴³ 10 P.2d at 172 (citing *West Point-Pepperell*, 848 F.Supp. at 429 ("Expansive interpretation of 'at issue' waiver under *Hearn* and its progeny has recently been the subject of significant legal and academic criticism.")).

¹⁴⁴ 10 P.2d at 172.

¹⁴⁵ *Id.* at 173.

The restrictive approach we adopt is consistent with the long-held view that the attorney-client privilege should act as a shield and not a sword. Confusion in the "at-issue" case law arises because some courts believe that parties are using a privilege as a sword when they refuse to disclose matters relevant to issues or claims that they have injected into the litigation. This belief explains why the Hearn ad hoc balancing test has resulted in an expansive use of waiver. By adopting the *Rhone* approach requiring offensive or direct use of privileged information, we believe the 'shield/sword' metaphor is more accurately applied.¹⁴⁶

Public Service has also been the subject of substantial case discussion, as well as commentary, with respect to its reliance on *Rhone*.¹⁴⁷

In *Allen v. West Point-Pepperell*,¹⁴⁸ another often cited case, the court criticized *Hearn* and implied waiver for generating *ad hoc* determinations,¹⁴⁹ undermining privileges while increasing litigation costs,¹⁵⁰ and generating conflicting case outcomes.¹⁵¹

¹⁴⁶ *Id.* at 173-174. See also *Shargel v. U.S.*, 742 F.2d 61, 62-63 (2d Cir. 1984) (theory underlying the privilege is that by encouraging clients to make the fullest disclosure, attorneys will more effectively and justly represent clients with the benefits outweighing the risks posed by revelation of communications in court, noting privilege spares attorneys the need to make "Hobson's choices," protecting the system of justice).

¹⁴⁷ See, e.g., *Lama v. Preskill*, 353 Ill.App.3d 300, 309-310, 818 N.E.2d 443, 452, 288 Ill.Dec.755, 764 Ill.App.2004)(Bowman, J. dissenting)(citing criticism of *Hearn*, including *Rhone*, *Public Service*, and *Developments*, agreeing that "relevance" is not the standard for determining whether evidence should be protected, even if the facts at issue go to the heart of an issue, and arguing *Hearn* Test should not be adopted).

¹⁴⁸ 848 F.Supp. 423, 429 (S.D.N.Y. 1994).

¹⁴⁹ *Allen*, 848 F. Supp. at 428 ("Expansive interpretation of 'at issue' waiver under *Hearn* and its progeny has recently been the subject of significant legal and academic criticism. See, e.g., *Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 115 F.R.D. 308, 311-12 (N.D.Cal.1987) (stating that expansive language for determining implied waiver leads to ad hoc determinations that ignore the system-wide role of the attorney-client privilege and undermines the confidence that parties can place in that privilege); *Zenith Radio Corp. v. United States*, 764 F.2d 1577, 1580 (Fed.Cir.1985) (party does not waive privilege merely by bringing suit).").

¹⁵⁰ See *Allen*, 848 F. Supp. at 429 (citing "Marcus, The Perils of the privilege: Waiver and the Litigator, 84 Mich.L.Rev. 1605 (1986) (liberal implied waiver rules increase litigation costs and judicial time spent on discovery disputes, favor the wealthiest litigants, and undermine the values served by the privilege rules); *Developments-Privileged Communications*, 98 Harv.L.Rev. 1450, 1637-43 (1985) (identifying the same policy concerns); *Remington Arms, supra*, at 142 F.R.D. 412-414 (noting inconsistency in courts' application of implied waiver tests derived from *Hearn* due to competing policy concerns relating to the attorney-client privilege).").

¹⁵¹ *Allen*, 848 F. Supp. at 429.

C. *Responses to Academic and Case Criticism of Hearn*

Summarizing, *Hearn* critics first argue that case by case determinations of privilege under a test relying on “fairness,” “relevance” or “need” leads to *ad hoc* results, case confusion, and the undermining of certainty and predictability, raising litigation costs. Second, they argue current law fosters manipulation by plaintiff, defendant, or both, particularly with respect to the question of which party places the communication “at issue.”¹⁵² Third, hind-sight determinations under the *Hearn* Test undermine full and honest communication, the basis of our legal system.¹⁵³

First, with respect to the argument that a test relying on concepts of “fairness,” “relevance” or “need” leads to *ad hoc* results, case confusion, and the undermining of certainty and predictability, it is unclear that case “confusion” is traceable to any of these concepts. In the legal malpractice context, for example, it is likely that the factual complexity of cases in which attorneys participate in inter-locking and overlapping representations creates analytical difficulties. The problems result not from judicial efforts to determine what is “fair” in an emotional sense, as critics suggest, but from courts’ careful efforts to determine which conduct (and which attorney) is responsible for plaintiff’s alleged injuries. Although the term “fairness” suggests some sort of non-specific, emotive and visceral response by courts, as the legal

¹⁵² See generally *Developments, supra* note 1 at 1632 (“Most assertions of an evidentiary privilege are ‘strategic’ in the sense that the asserting party considers how using the privilege may affect his lawsuit. . . implied waiver has been used to prevent the sort of strategic manipulation of privileges that enables privilege-holders to obtain advantages never considered part of the legitimate costs of a system of privilege.”).

¹⁵³ See generally *Pereira v. United Jersey Bank*, 1997 WL 773716, *3 (S.D.N.Y. Dec. 11, 1997) (“precise limits of the *Hearn* doctrine continue to perplex both courts and commentators. . . As a number of courts have recognized, *Hearn* is problematic insofar as there are very few instances in which the *Hearn* factors, taken at face value, do not apply and, therefore, a large majority of claims of privilege would be subject to waiver, citing *Rhone and Allen*); See *Bank Brussels Lambert v. Fiddler, Gonzalez & Rodriguez*, 2003 WL 21277139, *2 (S.D.N.Y. June 2, 2003) (same).

malpractice cases show, courts are really just doing what they always do – assess who caused the damage, whether the conduct or omission constitutes a legal wrong and how injury may be quantified. In practice, therefore, “fairness” is just legal short-hand for the ordinary analytical concepts of causation and reliance, used every day by courts and counsel.

Although critics urge that outcomes of privilege determinations are “ad hoc,” there is considerably more going on than a coin toss. Court analyses are not a function of whim, but of efforts to understand the precise claims being made, the importance of the communication as a means of proving the claim, and the likelihood such communication or information might be produced from other sources.

The Arizona Supreme Court has explained why it believes the interpretation of privilege embodied in *Rhone* (and its rejection of the *Hearn* Test) is problematic:

Rhone-Poulenc held that there is an implied waiver only if the party expressly advances the defense that he relied on advice of counsel; it rejects cases such as *League* and *Hearn* as "of dubious validity" because of their use of a "checklist of factors" and the fairness test. *Id.* at 863- 64. It is, of course, late in Arizona's day to reject WIGMORE's fairness test, which we first adopted almost forty years ago in *Throop*, which is incorporated in the *Hearn* doctrine and which Arizona has consistently applied in our cases since *Throop*. It is that doctrine that the trial judge, having been cited to *Hearn*, followed and applied in the present case. Nor do we believe we would adopt the restrictive test of . . . *Rhone-Poulenc* even if today we were writing on a clean slate. *It simply makes a mockery of the law to allow a litigant to claim on the one hand that it acted reasonably because it made a legal evaluation from which it concluded that the law permitted it to act in a certain manner, while at the same time allowing that litigant to withhold from its adversary and the factfinder information it received from counsel on that very subject and that therefore was included in its evaluation. The sword and shield metaphor would truly apply were we to allow a party to raise the privilege in that situation.* (Emphasis added).¹⁵⁴

Public Service, too, has been the subject of substantial case criticism, focusing on its use of the “sword and shield” metaphor, and reliance on *Rhone*:

¹⁵⁴ *State Farm Mut. Auto. Ins. Co. v. Lee*, 199 Ariz. 53, 64-65, 13 P.3d 1169, 1181-1182 (Ariz. 2000).

The [Public Service] court does not say how the [sword and shield] metaphor is more accurately applied, but rather goes on to discuss again the purpose of the attorney-client privilege. Indeed, how the metaphor may thus be more accurately applied is unclear. Suppose, as in the statute of limitations example, the plaintiff pleads equitable tolling and declines to reveal how he failed to discover the basis for his claim. The defendant might now, through interrogatory, ask how the plaintiff failed to discover the basis for his claim. Presumably, the plaintiff may decline to answer the interrogatory, citing the attorney-client privilege. *The defendant has hit a dead end. The Rhone-Poulenc approach has not given the plaintiff a metaphorical shield, as suggested by Lyons, nor is one needed, because the Rhone-Poulenc approach has deprived the defendant of a sword.*¹⁵⁵ (Emphasis added).

Second, although litigants will obviously attempt to manipulate privileges and waiver rules, as they do every rule, there is nothing inherent in the concepts of “fairness” or “relevance” which should cause courts to eschew their use.¹⁵⁶ Plaintiffs, in fashioning their damage claims can, of course, be viewed as “manipulating” later privilege determinations, just as defendants, in pleading affirmative defenses, can also be viewed as “manipulating.”¹⁵⁷ A rule which precludes “manipulation” by refusing to tolerate implied waiver, however, purchases non-manipulation at the cost of unfair outcomes, a cost which, on a systemic basis, may be too high.¹⁵⁸

¹⁵⁵ Moore, *supra* note 23 at 636 (2001)(although the *Public Service* Court strongly protected use and purpose of the privilege and, thereby, promoting competent legal counsel for individuals and society's interest in such counsel, it simultaneously created the opportunity for parties to unfairly use the privilege, as a weapon).

¹⁵⁶ These concepts do not foster manipulation any more than a rule relying on “abuse” of the privilege -- “abuse” is, itself, an inherently normative concept.

¹⁵⁷ In re Sealed Case, 676 F.2d 793, 807 (D.C.Cir. 1982)(“Where society has subordinated its interest in the search for truth in favor of allowing certain information to remain confidential, it need not allow that confidentiality to be used as a tool for manipulation of the truth-seeking process.”).

¹⁵⁸ In *Developments*, the commentators argue judicial consideration of “how one has used or abused the privilege” should be the determining factor in privilege analysis. See *Developments, supra* note 1 at 1630-1631. However, there is no reason to believe that judicial determination of how a privilege has been “abused” would be less idiosyncratic and less based on “fairness” considerations than one based on need for information. One of the policies underlying the implied waiver rule is avoidance of the manipulation of privileges by privilege holders: “Fairness” becomes an important concern during litigation when one party would suffer prejudice from his opponent’s abuse of the privilege. Most commonly, such prejudice occurs in three types of situations: (1) the strategic introduction into evidence of only part of a larger class of privileged material, which will be termed “partial disclosure,” (2) the strategic timing of the decision to rely upon privileged evidence, as in pre-trial disclosure, and (3) the pleading of claims that place at issue the subject matter of privileged communications. In response to such

Which rule is to be preferred, therefore – a rule which permits judges to consider need-based considerations, which allows litigants to obtain information vital to the search for truth but permits the privilege to be invaded, in at least some cases, or a rule that, *arguendo*, fosters more (and more candid) communication between counsel and client,¹⁵⁹ but precludes disclosure of information, even where it is vital to fair outcomes, and unavailable from other sources?

Hearn Test critics have argued that the privilege must be preserved, even if the search for truth suffers:

Without such stability concerning to the privilege, how could an attorney and a client be able to predict, years later, whether their communications intended to remain privileged -- might be deemed by a later court to be "relevant" or "vital" regarding subsequent litigation. *We believe the Hearn approach places this venerable privilege in harm's way, something we cannot countenance, and even at the expense of a zealous pursuit of truth.*¹⁶⁰

Why should absolute protection of the attorney client privilege supercede the zealous pursuit of truth? What are the systemic benefits that attend absolute protection of the privilege and how are such benefits to be weighed against the cost of unfair litigation outcomes?

strategic manipulation of privileges, courts have invoked the doctrine waiver to ensure the full and timely disclosure of any communications that one party seeks to use against the other.” *Id.*

¹⁵⁹ *Developments, supra* note 1 at 1473 (“Wigmore, as well as most courts and commentators, considers only systemic harms in the balancing test established by the fourth condition [‘The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation’ *Id.* at 1472]. . . [T]he traditional justification ignores specific injury to those actually before the court; the protection of any particular relationship or the preservation of any particular confidence is not valued as an end in itself. Instead, proponents of this rationale evaluate privileges solely by weighing the benefits of their encouragement of privileges solely by weighing the benefits of their encouragement of communications within the relevant class of relation against the cost of the obstruction to truth-seeking.” (notes omitted)).

¹⁶⁰ *Public Service Co. of New Mexico v. Lyons*, 129 N.M. 487, 494-95, 10 P.2d 166, 173-74 (New Mexico App. 2000).

V. The American Legal System, the Search for Truth and Implied Waiver

A. *Is the Goal of the Adversarial System Really a “Search for Truth”*

Permitting defendants accused of wrongdoing to access information vital to the vindication of their rights is a crucial component of the American legal system.¹⁶¹ Whether in the context of the government’s efforts to deprive a defendant of liberty or civil plaintiff’s efforts to deprive a defendant of property, every defendant’s rights are protected by a system whose ultimate goal is to reasonably determine whether the case against the defendant has been proven. Our adversarial system aims to determine what occurred, or, at least what the fact-finder has reasonable grounds to believe occurred, through a fair adjudication of evidence.

The truth-finding function of the legal system has been repeatedly identified as its primary purpose. In *U.S. v. Nixon*,¹⁶² in the criminal context, Chief Justice Burger explained:

The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the frame work of the rules of evidence. . . . exceptions to the demand for every man’s evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth. . . . the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts.¹⁶³

¹⁶¹ See *Portuondo v. Agard*, 529 U.S. 61, 77, 120 S.Ct. 1119, 1129 (2000) (Ginsberg, J. and Souter, J., dissenting) (“A trial ideally is a search for the truth”).

¹⁶² *U.S. v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090 (1974) (Burger, C.J.).

¹⁶³ 418 U.S. at 709-713, 94 S.Ct. at 3108-3110 (“we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution”). See *Jaffee v. Redmond*, 518 U.S. 1, 19-20, 116 S.Ct. 1932, 1996 (Scalia, J. and Rehnquist, C.J. dissenting) (majority ignores traditional judicial preference for the truth, suggesting assumption that a person would actually be deterred from seeking psychological counseling (or from being completely truthful in the course of such counseling), because of fear of later disclosure of same in a litigation, is ill-founded, but not citing empirical studies).

Truth is a paramount objective of our legal system.¹⁶⁴ Justices O’Conner, Scalia and Thomas, in an often cited dissent in *Swidler & Berlin v. U.S.*,¹⁶⁵ observed:

Given that the complete exclusion of relevant evidence from a criminal trial or investigation may distort the record, mislead the factfinder, *and undermine the central truth-seeking function of the courts.* . . . *When the privilege is asserted in the criminal context, and a showing is made that the communications at issue contain necessary factual information not otherwise available, courts should be permitted to assess whether interests in fairness and accuracy outweigh the justifications for the privilege.*”) (Emphasis added).¹⁶⁶

Other well known academics and practitioners, arguing to the contrary, have questioned whether the law is a search for truth at all. Professor Alan Dershowitz, in his book on the O.J. Simpson trial, for example, writes:

[A] criminal trial is anything but a pure search for truth. When defense attorneys represent guilty clients – as most do, most of the time – their responsibility is to try, by all fair and ethical means, to prevent the truth about their client’s guilt from emerging.¹⁶⁷

Professor Dershowitz’s colleague on the O.J. Simpson case, the late Johnnie Cochran, had this to say about the search for truth:

¹⁶⁴ See Dean Kenneth W. Starr, *Truth and Truth-Telling*, 30 Tex. Tech. L. Rev. 901, 903-904 (1999)(“ Most of our rules of procedure, our rules of evidence, even many of our rules of substantive law are designed to facilitate the search for truth. . . Testimonial privileges constitute the only exception to this rule – and it is a limited exception. . . We tolerate such impediments to truth-seeking only in exceptionally important circumstances. . . And the courts invariably construe and apply these privileges strictly, for they operate, in the Supreme Court’s phrase, in derogation of the truth. . . Privileges, then, are a significant but tightly cabined exception to the norm that our system seeks the truth. . . Truth is simply indispensable to the fair and impartial administration of justice.”). See also Akhil Reed Amar, *Against Exclusion (Except to Protect Truth or Prevent Privacy Violations)*, 20 Harv. J. L. & Pub. Pol’y, 457, 466 (1997)(“When truth is excluded from trials, there will be two types of systemic errors: wrongful, erroneous convictions and erroneous acquittals. The rules hurt innocent defendants while helping the guilty ones. And I have a hard time explaining to my mother or my brother why that makes sense.”).

¹⁶⁵ 524 U.S. 399, 413-414 (1998).

¹⁶⁶ *Id.*

¹⁶⁷ Alan M. Dershowitz, *Reasonable Doubts: The O.J. Simpson Case and the Criminal Justice System* 166 (1996), quoted in W. William Hodes, *Seeking the Truth Versus Telling the Truth at the Boundaries of the Law: Misdirection, Lying, and “Lying with an Explanation,”* 44 S. Tx. L. Rev. 53, 79 n.13 (2002). See generally David J. Fried, *Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds*, 64 N.C. L. Rev. 443, n.269 (1986)(“The premise that the purpose of a trial is to discovery the ‘truth’ is highly questionable. . . “).

A trial really isn't so much the search for truth. The great Clarence Darrow . . . once said that a courtroom is not a place where truth and innocence inevitably triumph. It is only an arena where contending lawyers fight not for justice, but to win.¹⁶⁸

The issue, however, is not what the defense attorney is doing to best represent his client, including trying to obscure the truth; it is what end(s) the system seeks even with defense counsel, within the rules, attempting to suggest the prosecuting party has not met its burden.

Waiver critics argue even if there might be individual instances of unfairness as a result of a truly absolute attorney client privilege, adjudicative mechanisms and/or the system as a whole, would be made better due to increased, more candid client-counsel communication.¹⁶⁹ Therefore, they argue, our system of justice would be a better one, by virtue of an absolute privilege.¹⁷⁰ The arguments are largely *a priori*.

Few serious empirical studies have been conducted to try to determine if they are actually correct but those that have been conducted do not support elimination of the implied waiver doctrine.

¹⁶⁸ Akhil Reed Amar and Johnie L. Cochran, Jr., *Do Criminal Defendants have too Many Rights?*, 33 Am. Crim. L. Rev. 1193, 1203 (1996) (statements of Johnie Cochran).

¹⁶⁹ *See, e.g.*, *Jaffee v. Redmond*, 518 U.S. 1, 17-18 (“Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the . . . [client's] interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege. . .” noting that if the purpose of the privilege is to be served, the participants in the confidential conversation ‘must be able to predict with some degree of certainty whether particular discussion will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying application by the courts , is little better than no privilege at all. . . .’ (Citation omitted)(dealing with psychologist/patient privilege); *In re Sealed Case*, 124 F.3d 230, 235, 240 (D.C. Cir. 1997) (Tatel, J. dissenting) (balancing test makes application of privilege contingent on a judge's later finding that the evidentiary need for disclosure outweighs the interests of the client, arguing clients will be less forthcoming in their communications with their counsel because they will not know whether such communications will be protected).

B. Empirical Evidence and the Policies Supporting Attorney Client Privilege

Preliminarily, commentators have long decried the dearth of empirical studies addressing the attorney client privilege, particularly given the enthusiastic support apologists for competing interpretations have demonstrated:

Eminent commentators thus have called for empirical research testing the benefits of strict confidentiality and the validity of its justifications. . . . The academic community has, however, uniformly ignored the call. The scholarly inaction stems, perhaps, from a 'feeling' that the issues are more theoretical than real. . . . Academia's refusal to question and test the operation of the rules in those cases is shortsighted. At a minimum, it makes the bar look bad. . . . In contrast, basing rules or exceptions on empirically provable contentions can forestall the public perception that ethical regulations merely protect the guild.¹⁷¹

To similar effect:

[S]cholars have also noted the lack of empirical evidence establishing its practical effectiveness. . . . Yet no new studies have been conducted in response. Most commentators continue simply to assert the essential nature of strict confidentiality to our legal system. . . . Perhaps implicit in the persistent reliance on intuition instead of hard data is the notion that factual information is difficult to interpret.¹⁷²

Empirical studies do not suggest a system without an implied waiver doctrine would be better than one with such a rule, a point some *Hearn* critics concede.¹⁷³ *Hearn* critics concede

¹⁷⁰ See Zacharias, *supra* note 5 at 358 (noting that pro-absolute privilege apologists argue that by encouraging clients to communicate information they would otherwise withhold from their lawyers, confidentiality enhances the quality of legal representation and thus helps produce accurate legal verdicts).

¹⁷¹ Zacharias, *supra* note 5 at 353-354 (“[T]he tradition of strict confidentiality has helped teach lawyers and clients to rationalize amoral representation. Lawyers must close their eyes to information that might prevent harm to others or that violates the lawyers' own ethical and political beliefs. Rules encouraging this persona inevitably affect lawyers' individuality and desire to consider ethics in other aspects of their practice.”); Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 Cal. L. Rev. 1061, 1062 (1978)(privilege employed more to veil wrongdoing than serve policy of open communication).

¹⁷² Zacharias, *supra* note 5 at 376; Alexander, *supra* note 5 at 197 (“Most literature relating to the attorney-client privilege in the corporate context has been limited to doctrinal analysis.”).

¹⁷³ See Zacharias, *supra* note 5 at 353-354. See also *id.* at 364-366 (empirical evidence suggests clients would not use lawyers significantly less if more exceptions to absolute confidentiality existed; clients would not disclose

that their argument's central premise, that clients will not use attorneys unless they know there is [an absolute] privilege or that clients will be substantially less honest in speaking with their attorneys if they believe their communications may be discovered in a future litigation, is not strongly supported by empirical surveys. In *Developments*, for example, the authors state "scant empirical evidence" supports the position that disallowing implied waivers encourages communication, but they argue critics of an absolute interpretation of privilege cannot do much better -- "no solid empirical data exists to support the estimates of either critics or proponents as to either costs or benefits of privileges."¹⁷⁴ The authors then cite commentary questioning whether any data could be obtained that would justify privileges under utilitarian or "privacy" theories, suggesting privileges are unexplainable under either theory.¹⁷⁵

The empirical data, however, is less equivocal than *Developments* suggest.

In a study published by the Yale Law Journal in 1962 (the "Yale Study"),¹⁷⁶ the study's authors received responses to questionnaires of 108 laypersons, solicited from various parts of the eastern half of the country, and 50 attorneys, practicing in Atlanta, Chicago, Detroit, New Haven, and New York, chosen at random through Martindale Hubbell Law Directory.¹⁷⁷ The

substantially less information in absence of absolute secrecy); Alexander, *supra* note 5 (factual premise on which privilege is based, at least in the corporate context, i.e., that privilege is necessary to foster candid communications that lead to well-informed legal advice, is largely a matter of faith, supported by minimal empirical evidence, *id.* at 194; most literature relating to the privilege in the corporate context has been limited to doctrinal analysis, *id.* at 194, concluding that the goals of the privilege can be achieved without applying the absolute privilege applicable in the case of an individual client, *id.* at 201, suggesting corporation's privilege for lower-level communications should yield when a particularized showing of compelling need for the information outweighs corporation's interest in confidentiality. *Id.* at 202).

¹⁷⁴ See *Developments*, *supra* note 1 at 1474-1476.

¹⁷⁵ See *Developments*, *supra* note 1 at 1479, n. 47 (citing E. GREEN & C. NESSON, PROBLEMS, CASES, AND MATERIALS ON EVIDENCE 522, 526 (1983)).

¹⁷⁶ Comment, *supra* note 5 at 1227, n.6 (survey actually conducted in November and December, 1961).

¹⁷⁷ *Id.* at 1227, n.6.

Yale Study data indicated 50.9% of laypersons believed they would be less likely to make full disclosure to a lawyer in the absence of privilege,¹⁷⁸ but one third said they assumed a judge could order an attorney to reveal their statements.¹⁷⁹ The authors concluded that most laypersons would continue to use their attorneys notwithstanding a belief that their confidential communications might be disclosed during litigation, at least under some circumstances:

One justification for the attorney-client privilege is that in order to foster the socially authorized tasks attorneys perform, open and full client disclosure is desirable, and would sometimes be deterred without the privilege. This seems to assume a knowledge of the privileged communications rule which our study shows most people lack.¹⁸⁰

In the 1980s, Professor Zacharias surveyed 105 laypersons and 63 responding attorneys in Tompkins County, New York, an area which the author described the geographically based survey pool as “rural and university oriented.”¹⁸¹ The survey, generally referred to as “The Tompkins County Study,” found that about half the responders indicated they would withhold some information if there were no privilege protecting their communications,¹⁸² their responses indicated they would continue to consult with counsel if there were limited protections offered.¹⁸³ Professor Zacharias concluded that the evidence from his study did not support the necessity of an absolute privilege.¹⁸⁴

¹⁷⁸ *Id.* at 1236 n. 59. *See also id.* at 1235, n. 53.

¹⁷⁹ *Id.* at 1262.

¹⁸⁰ *Id.* at 1236.

¹⁸¹ *See Zacharias, supra* note 5 at 379-380.

¹⁸² *Id.* at 386.

¹⁸³ *Id.* at 394.

¹⁸⁴ *Id.* at 396.

In a study of the corporate attorney client privilege conducted in the 1980s, Professor Alexander interviewed more than 182 randomly selected in-house-attorneys, outside counsel, and corporate executives, all practicing in New York City (the “Alexander Study”).¹⁸⁵ Professor Alexander concluded, that, despite the widely shared view among lawyers that the attorney-client privilege encourages candor,¹⁸⁶ responses indicated privilege is not always a key factor in determining candor in client communications.¹⁸⁷ He noted that 46% of the clients he surveyed cited “trust and confidence” in the particular attorney as the most important factor influencing candor in their own attorney client communications.¹⁸⁸ Curtailing the privilege, he concluded, would not stop corporate clients from communicating with counsel or affect the frequency of such communication.¹⁸⁹ “The empirical findings show that an absolute privilege is simply not necessary to further the goals of the privilege in the corporate context.”¹⁹⁰ “[B]reaking with the tradition of absolute privilege would have little or no effect on the candor of lower-level attorney-client communications, and would not deter, in most instances, the frequency of communication between attorneys and corporate employees.”¹⁹¹

A 1995 survey of 12,500 members of the National Association of Criminal Defense Lawyers (the “NACDL Study”), with 365 outside counsel responding found that 95% of responding attorneys said “candor” and “compliance” were the two most important public

¹⁸⁵ Alexander, *supra* note 5 at 193, 202-206 (describing detail of survey methodology).

¹⁸⁶ *Id.* at 247-248.

¹⁸⁷ *Id.* at 263-267.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 225, 263, 248-49.

¹⁹⁰ *Id.* at 384.

¹⁹¹ *Id.* at 415.

interests served by the privilege; 96% responded that the privilege (and work-product doctrine) were important in facilitating their representation.¹⁹²

A 2005 survey of the corporate attorney client privilege conducted by the Association of Corporate Counsel (“ACC Study”) following the Enron, WorldCom, Adelphia, and market timing and late trading mutual fund prosecutions and litigations, found a very high correlation between the privilege and candor in communication among corporate counsel and clients.¹⁹³ The ACC Study was of 719 in-house and outside counsel. The study found, for example, that responding lawyers believed that 93% of senior-level employees and 68% of lower-tier employees are aware of and rely on the attorney client privilege when consulting with them.¹⁹⁴ It found that surveyed attorneys believe that absent privilege, clients would be less candid, with 95% of the surveyed attorneys believing there would be a “chill” in the flow or candor of information from clients.¹⁹⁵ The ACC determined that 96% of surveyed attorneys believed that work product and attorney client privilege facilitate the delivery of legal services.¹⁹⁶

The NACDL and ACC are obviously politically sensitive attorney interest organizations.

The prior studies, all based on random selections and/or geographically-based data sets, rather than interest group membership surveys, challenge the assumptions underlying the arguments for an absolute privilege, i.e., that substantially more (and substantially more candid) communication will occur between counsel and client, to the benefit of the justice system, if the

¹⁹² See also Martz, *supra* note 5.

¹⁹³ See Wander, *supra* note 5 at 196-197.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

implicit waiver doctrine is eliminated.¹⁹⁷ The empirical data culled from non-interest-group member pools does not obviously support the critics' central premise; therefore, their arguments do not provide a sound basis for rejecting *Hearn*.¹⁹⁸

Some commentators, however, have argued that empirical results should be irrelevant to determination of privilege issues:

From my perspective, the critical issue in assessing the attorney-client privilege and the obligation of confidentiality is not at all empirical. It is whether a client should be entitled to 'rely on his attorney without question or doubt'. . . and whether he should 'know as well as he is likely ever to know the future that giving the truth to his attorney will not hurt him.' . . . Forsaking more consequential justifications for the attorney-client privilege and the duty of confidentiality, I would favor these venerable legal and ethical institutions even if it could be demonstrated that most clients would tell their lawyers the truth without them.¹⁹⁹

C. *Privilege, Waiver and the Search for Truth*

Critics of the implied waiver doctrine urge that if our adversarial system is to function effectively, its rules must assure attorneys can provide their clients with the best possible representation; this requires rules that assure attorneys will obtain optimal (and optimally candid)

¹⁹⁷ See Zacharias, *supra* note 5 at 384-385 (although clients generally accepted that lawyers have a higher legal obligation to preserve confidences than accountants and social workers, only half of the clients surveyed were more likely to give information to attorneys and few were prepared to trust lawyers over priests, doctors, psychologists, or psychiatrists, calling into question "the central role the legal profession attributes to strict rules in encouraging potential clients to use lawyers and confide in them. Evidently, guaranteeing confidentiality by rule or statute is no substitute for providing quality assistance in needed services."). *Id.* at 386 (survey answers suggest strict confidentiality rules not essential to maintaining an adversary system -- clients never told of confidentiality "may be as ready to provide information as clients who were informed.").

¹⁹⁸ See Zacharias, *supra* note 5 at 358 (utilitarian rationale of attorney-client confidentiality rests on a three-step syllogism. first, for the adversary system to function, citizens need lawyers to resolve their disputes and lawyers need to be able to represent their clients effectively; second, attorneys can be effective only if they are provided with all of the relevant facts; third, clients may not employ attorneys, or at least not provide them with adequate information, unless they are assured that the relationship will remain confidential – empirically challenging syllogism premises); Alexander, *supra* note 5, at 217-218 (discussing non-instrumental privacy rationale and candor arguments, empirically challenging syllogism premises); Imwinkelried, *supra* note 12 at 153-154 (arguing empirical studies do not support the assumption that consulting and confiding behavior requires that privilege be absolute. *Id.* at 157-159 (discussing results of Yale, Zacharias and Alexander empirical studies)).

¹⁹⁹ Albert W. Alschuler, *The Search for Truth Continued, the Privilege Retained: A Response to Judge Frankel*, 54 U. Colo. L. Rev. 67, 73-74 (1982).

communication about relevant events, from their clients. Supporters of implied waiver have tended to focus on a different issue, namely, our legal system's primary objective. They maintain our legal system's goal is to provide a context in which all litigants are assured they will be able to argue positions, with access to all vital information, including, in some cases, once privileged information, at least under some conditions.

The attitude one expresses toward the implied waiver doctrine, and privileges, generally, will reflect one's views about the type of legal system one believes would best serve society, including one's fears about abuses that might result from adoption of a particular rule or interpretation. Criminal defense attorneys, as reflected in the NACDL study, may, for example, fear overly-zealous prosecutors will unfairly pry into client confidences, compromising privacy rights and constitutional guarantees against self-incrimination, undermining counsel's ability to effectively represent clients, so that zealots can bring to bear the full weight of the government, unfairly, on the individual defendant. Commentators, however, have challenged the extent to which this conception of legal representation actually represents the practice of law:

As for the romance, in contexts like this our image tends to be of the heroic, selfless lawyer standing between a hostile world and helpless, dependent client. This approximates only the occasional situation in the real world. Far more often the beneficiaries of the privilege are corporate clients and the rich – people who can afford lawyers to confide in. This is not say that disclosure of the truth is process for scourging the rich. It is to say that our gropings toward sound policy are difficult enough without strewing fantasies along the way to distort our vision.²⁰⁰

Critics of the implied waiver doctrine may, much like its supporters, believe one salutary end of our legal system is the discovery of the truth about the material events underlying a litigation or prosecution. What they may not believe is that the discovery of truth, in individual

²⁰⁰ Judge Frankel, *The Search for Truth Continued, More Disclosure, Less Privilege*, 54 U. Colo. L. Rev. 51, 62 (1982).

cases, is more important than preventing the potential abuse of citizens, by a very powerful government. Because the attorney client privilege is unquestionably part of a just society's armament against the possibility of government oppression of individual liberties, recognition of the possibility of implied waiver is, for them, one step down a very slippery slope.

As with most deeply-felt debates about fundamental issues, there is some "truth" on both sides. Worries about governmental over-reaching are legitimate concerns and should be a concern to every citizen with a sense of political history. One commentator recently summarized why the debate about the role of privileges has been intractable:

The rules of privilege . . . bar courts and judges from considering admittedly probative, and potentially crucial, evidence in order to pursue extrinsic policies not directly related to accurate fact-finding. . . This must be astounding to the uninitiated -- what could possibly be more important than the accurate determination of facts, surely a condition of the right to a fair trial? Yet rules of privilege exist. Inherent in their existence is a moral-political determination that the relevant extrinsic value is more important than a fair trial, and an instrumental assumption that the exclusion of evidence would be effective in preserving that extrinsic value. Here, our problems begin. Is there any principled way to compare the value of a fair trial with an extrinsic value . . . Difficult moral and philosophical questions have to be answered. Is there any satisfactory way of finding out if, and to what extent, the assurance of evidential privilege is effective in encouraging, for example, a client to be more forthcoming with his or her lawyer? Complex psychological phenomena must be explored. The astute reader will already see that any answer to the first (moral-political) question will be arbitrary, and that any answer to the second (instrumental question) will be highly speculative. The shape of our rules of privilege exemplify this, and consequently suffer from a lack of logical coherence. It would have been far easier if all the rules of privilege were abolished . . . the moral determination being that nothing is worth jeopardizing a fair trial. This has not been the position for any of the major common law jurisdictions. . . . The line-drawing exercise here is fraught with illogical compromises more commonly seen in political, rather than judicial, decision-making.²⁰¹

The "extrinsic value" to which the above commentator refers is the benefit privileges bring about within the system, via increased candor in client communications with counsel,

²⁰¹ Michael Hor, *Evidential Privilege: Sacrifice in the Search for Truth*, Sing. J. Legal Studies 410, 410-411 (Dec. 2001)(discussing the law of Singapore and how implied waiver is treated in other countries).

namely “better representation.”²⁰² Empirical studies, of course, have their limitations.²⁰³ Even if an absolute interpretation of privilege resulted in increased client/counsel communication, contra the studies, and even if increased communication resulted in “better representation,” such “better representation” would not necessarily result in a “better” system of justice.

Implied waiver critics seem to assume an absolute interpretation of the attorney client privilege results in a “better system.” The theory seems to be that where counsel receives optimal information, he or she will be better able to devise and implement strategies to forward client interests. Because an absolute privilege will, under this theory, provide counsel with more and more candid information, it fosters “better representation,” in the sense of increasing the attorney’s ability to succeed in obtaining client goals.

A just legal system, however, is not necessarily one whose rules permits counsel the best chance of prevailing, regardless of the truth, and the concept of “best representation” within a legal system, is not equivalent to representation which happens to create for the client the best chance of “winning.” The point is easily illustrated. Assume a large percentage of corporations are engaging in illegal conduct, with substantial, negative effects on the American economy and that an absolute interpretation of the attorney client privilege would facilitate company avoidance

²⁰² Commentators, have noted England, Australia, Canada and Ireland have shifted from absolute to qualified privileges without injury to the health of their professions -- the experience of these countries, they argue, supports most of the empirical studies on privileges, discussed above. *See* Imwinkelried, *supra* note 12 at 174-180 (“The available empirical data undercuts the assumption that the average layperson is as obsessed by a fear of subsequent judicially compelled disclosure as Wigmore supposed. If that assumption is false, the recognition of privileges does not come cost free. Quite to the contrary, it comes at the price of miscarriages of justice; in many, if not most cases, the wooden application of an absolute privilege will suppress probative evidence that would have come into existence even absent the privilege.”).

²⁰³ The studies generally recognize their own limitations. *See, e.g.,* Zacharias, *supra* note 5 at 377 (although the question whether the beneficial effects of strict confidentiality are outweighed by countervailing negative effects is normative, it is important to try to reconcile the theory of confidentiality with reality, concluding the studies discussed suggest justifications commonly offered for strict confidentiality are open to question, but urging the need for additional empirical studies).

of criminal penalties and civil damages in class suits, to the detriment of an enormous number of Americans.²⁰⁴ It is likely an absolute interpretation of the attorney client privilege would facilitate “better representation,” at least in terms of accomplishing client litigation objectives.

However, it would effectively undermine the legal system’s ability to protect injured parties by assuring information vital to determining the truth about relevant events would be hidden. An “absolute” interpretation of the attorney client privilege plainly imposes such costs on the legal system and, indeed, effects how society perceives the ability of the legal system to reach just ends:

Strict rules help engrain the hired gun mentality in the professional ethos. In practice, lawyers and laymen alike come to view the profession as amoral 'tools' of the client, meriting the right to earn a living, but little else. . . . To the extent strict rules cause lawyers to engage in 'moral escapism' . . . confidentiality also helps foster the public notion that lawyers lack integrity. . . . The image of the conspiratorial lawyer helps explain why society considers the profession unsavory. . . . Clients and observers of the legal profession naturally come to look upon lawyers as 'dissemblers, distorters who subordinate truth to winning, and as technicians who answer to but one command, that of their client.'²⁰⁵

To similar effect, another commentator writes:

Lawyers themselves are recognizing that the public perception that lawyers twist words to meet their own goals and pay little attention to the truth, strikes at the very heart of the profession – as well as at the heart of the system of justice.

²⁰⁴ This thesis is consistent with the radically different in outcomes in the empirical studies of corporate privilege conducted by Professor Alexander and ACC, discussed above.

²⁰⁵ Zacharias, *supra* note 5 at 375 (notes omitted). *See also* Simon, *Ethical Discretion in Lawyering*, 101 Harv. L. Rev. 1083, 1142 (1988) (arguments in favor of [absolute] confidentiality reflect perverse priorities showing “greater solicitude for the withholding client than for the opposing party who will be harmed by nondisclosure”). *But see* Salkin and Phillips, *supra* note 11 at 609-610 (quoting comments of American Bar Association President Michael Greco in a speech to the American Council of Trial Lawyers in defense of the attorney-client privilege on April 8, 2006, as follows: “Threats to the privilege. . . represent just one front in a growing governmental assault on the independence of the legal profession itself, and on the ability of lawyers effectively to counsel clients. A wide range of government policies and practices are now combining – either coincidentally or by design – to attempt to marginalize and diminish the lawyer’s role in society as trusted advisor, counselor, and defender of rights. . . . Erosion of the lawyer-client relationship will lead to the diminishment of the lawyer’s role in society because clients will no longer entrust confidences with and seek counsel from their lawyers. And such diminishment will lead to a less effective, less respected, and greatly reduced lawyer’s role in society not only in particular client matters, but more broadly.” The Greco address is available at <http://www.abanet.org/op/greco/memos/triallawyersaddress.shtml>.

Lawyers serve our system of justice, and if lawyers are dishonest, then there is a perception that the system, too, must be dishonest.²⁰⁶

Although it is impossible to assess what affect what broad societal perception of this view might have on individual conduct, it is reasonable to believe the cost is substantial.

Defense counsel advocates of absolute privilege make two fundamental errors. First, they mistake what they are trying to doing, within the system, which is often obscuring the truth, with what the system is trying to do, i.e., trying to find out what actually occurred. Second, where counsel knows a represented party violated the law, he or she may perceive representation is “better” if a rule increases the opportunity for a defense outcome, regardless of what clients have done. This is error because a legal system which cannot bring truth to light not only permits an injustice in one case, but encourages those inclined to wrongdoing to engage in continuing, wrongful conduct, to the detriment of future victims and legal system, itself.

CONCLUSION

Adjudications are “just” when litigation outcomes reflect accurate assessments of what actually occurred; however, just results must be reached by fair and reasonable procedures. Fair and reasonable procedures show respect for the confidentiality of communications between counsel and client and should be designed to make abuse difficult. The elements of the *Hearn* Test show a fair and reasonable respect for the confidentiality of communications and its component elements are plainly intended to avoid abuse, as the Section II and III cases show. Unfair outcomes are a very high price to pay for a system which cherishes truth and demands fair adjudicative procedures to protect litigants’ rights. The injustices that, all sides agree, would

²⁰⁶ Hodes, *supra* note 1 at 74. *But see* Developments, *supra* note 1 at 1474-1477 (“Although critics may justifiably claim that proponents of privileges fail to establish their assumptions empirically, the critics themselves fail to realize that the costs that privileges purportedly impose on the correct disposal of litigation are just as empirically uncertain as their asserted benefits. . . the magnitude of the cost a privilege imposes on truth-seeking

inevitably result from elimination of implied waiver from our legal system provide a powerful rationale for continued application of the *Hearn* Test.

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depends on exactly the same empirically unverified factor that determines the benefit gained by a privilege: namely, the extent to which people would communicate in the absence of the privilege.” (note omitted) (emphasis added)).