

## 2009 Levit Essay Contest Hypothetical

You are the law clerk to the chief judge of a state appellate court,<sup>1</sup> reviewing a trial court's ruling barring, on attorney-client privilege grounds, discovery of any communications between Charlie Client and his tax attorney, Jack Lupole. The matter will be decided by a three-judge court. You have been asked to write the opinion for the two-judge majority in this case of first impression. You may decide the case any way you want. You should anticipate a strong dissent from the other judge, so you should address the arguments and key authority that will be asserted against your position. The following facts are undisputed:

Charlie Client was a successful orthopedic surgeon who was nearing retirement. Although Charlie did well as a surgeon, he really cleaned up in the stock market, amassing millions from successful start-up companies. As Charlie pondered old age and his eventual demise, he realized that he wanted to pay Uncle Sam as little as possible in taxes so that his children and grandchildren could share as much of his fortune as possible.

Charlie hired Andrea Attorney for estate planning advice. On Andrea's advice, Charlie formed the Acorn Family Limited Partnership, into which he transferred his assets. His wife acquired an interest in the partnership at a discount.

Charlie asked Andrea if he could use money in an IRA to purchase life insurance for the benefit of his children and grandchildren. Andrea said that an IRA could not be used for that purpose, but that the tax rules did allow a profit sharing plan to purchase life insurance. Andrea also told Charlie that assets held in a profit sharing plan were generally exempt from the claims of creditors. Andrea recommended that Charlie establish a profit sharing plan that was sponsored by the Acorn Family Limited Partnership and that the money in the IRA be put into the profit sharing plan in order to purchase the life insurance.

Charlie and Andrea subsequently met with Charlie's long-time tax advisor, Jack Lupole, a CPA and a lawyer. At the meeting, Andrea explained to Charlie and Jack that the profit sharing plan would need to be operated in a manner that satisfied ERISA and Internal Revenue Service requirements. Andrea told Charlie and Jack that the sponsoring entity, the Acorn Family Limited Partnership, would need to have a valid business purpose, hire employees, make annual contributions to the profit sharing plan, and allocate those contributions among the employees. Andrea also told Charlie and Jack that distributions could not be taken from the profit sharing plan except under very limited circumstances.

Finally, Andrea told Charlie and Jack that she would prepare the profit sharing plan documents, but that Charlie and Jack would be responsible for managing the day-to-day operations of the plan in order to make sure that the profit sharing plan complied with ERISA and tax requirements. None of Andrea's advice to Charlie or Jack was set forth in writing.

Andrea drafted the profit sharing plan documents and turned the plan over to Charlie and Jack. After the money from Charlie's IRA was put into the profit sharing plan and the life insurance policy was purchased, Charlie and Jack ignored Andrea's advice concerning plan operations. The Acorn Family Limited Partnership never undertook a valid trade or business, never hired any employees, and never made any contributions to the profit sharing plan. In addition, Charlie treated the profit sharing plan as his personal checking account and regularly took distributions from the profit sharing plan.

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<sup>1</sup> *Your state is a fictional state with no law on point. Look to other jurisdictions for persuasive authority.*

Several years later, Charlie's luck ran out. Charlie had executed personal guarantees in connection with a sure fire business deal, and a group of creditors sued Charlie for millions when the business went up in smoke. To avoid liability to these creditors, Charlie decided to file bankruptcy. To Charlie's surprise, the creditors and the bankruptcy trustee prevailed on their claim that the profit sharing plan was subject to creditor claims because Acorn had no business purpose, had never hired any employees and had never made any contributions, and because Charlie had used the profit sharing plan as a personal checking account. Charlie was required to pay \$10 million to the creditors.

After paying the creditors, Charlie sued Andrea for malpractice, claiming that Andrea did not give him proper advice concerning the manner in which the profit sharing plan should be operated. During discovery in the lawsuit, Andrea requested the production of all written communications between Charlie and Jack relating to the profit sharing plan. The trial court denied Andrea's request on attorney-client privilege grounds. A privilege log provided by Charlie reflected that a number of e-mails and letters were exchanged between Charlie and Jack concerning the operation of the profit sharing plan. Andrea also deposed Charlie and Jack but was precluded by the court on attorney-client privilege grounds from inquiring about any communications between Charlie and Jack concerning the profit sharing plan.

The case proceeded to trial and a jury found Andrea liable for legal malpractice, awarding Charlie damages of \$10 million. On appeal, Andrea challenges the trial court's rulings that precluded her from discovering the written and oral communications between Charlie and Jack concerning the profit sharing plan.

The court will consider the "at issue" doctrine, which addresses whether a plaintiff, by injecting an issue into the litigation that goes to the heart of the litigation, waives the attorney client privilege on all advice relating to that issue. Your judge has asked you to look at *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975), for one treatment of the issue.