

OPINION AND ORDER FINDING “AT ISSUE” WAIVER

INTRODUCTION

This case requires us to determine whether a plaintiff, by injecting an issue that goes to the heart of the litigation, waives the attorney client privilege on all advice relating to that issue. We conclude that it does and hereby vacate the judgment of the district court and remand for a new trial.

FACTS AND PROCEDURE

To avoid adverse tax effects that would lessen his family’s inheritance, Charlie Client, a multimillionaire, hired Andrea Attorney for estate planning advice. Ms. Attorney advised Mr. Client to form the Acorn Family Limited Partnership [hereinafter AFLP], into which he subsequently transferred his assets. Mr. Client wanted to purchase life insurance with money he had in an IRA. Ms. Attorney told him that was not possible, but that the tax rules allowed a profit sharing plan [hereinafter Plan] to purchase life insurance. Additionally, Ms. Attorney told Mr. Client that, generally, assets held in a Plan were exempt from creditor’s claims. Ms. Attorney recommended that Mr. Client establish a Plan, sponsored by AFLP, and place the money from the IRA into the Plan to purchase life insurance.

Subsequently, Mr. Client and Ms. Attorney met Jack Lupole, a CPA, lawyer, and Mr. Client’s long-time tax advisor. Ms. Attorney informed them that in order to comply with ERISA and tax requirements, AFLP, as the sponsoring entity, would need to have a valid business purpose, hire employees, make annual Plan contributions, and allocate contributions amongst employees. Furthermore, except under limited circumstances, distributions could not be taken

from the Plan. Ms. Attorney drafted the initial documents for formation of the Plan and turned management of the Plan over to the two men. None of Ms. Attorney's advice was memorialized in writing. Mr. Client and Mr. Lupole ignored Ms. Attorney's advice concerning the Plan's operations: AFLP failed to undertake a valid business or trade, failed to hire any employees, and failed to contribute to the Plan. Mr. Client treated the Plan as his personal checking account, taking regular distributions from the Plan.

Several years later, a group of creditors sued Mr. Client for millions of dollars when a business deal failed. Mr. Client filed bankruptcy, but, to his surprise, the creditors and bankruptcy trustee prevailed. The Plan was subject to creditor claims because ALFP had failed to comply with ERISA and tax requirements. Mr. Client paid \$10 million to his creditors, and then sued Ms. Attorney for legal malpractice, claiming she failed to give him proper advice concerning the Plan's operations.

During discovery, Ms. Attorney requested production of all written communications between Mr. Client and Mr. Lupole relating to the Plan. The district court denied the request on grounds of attorney-client privilege. A privilege log reflected that Mr. Client and Mr. Lupole exchanged a number of e-mails and letters regarding the Plan's operations. Furthermore, Ms. Attorney attempted to depose Mr. Client and Mr. Lupole but the court precluded any inquiries regarding communications concerning the Plan's operations. A jury found Ms. Attorney liable for legal malpractice, awarding Mr. Client \$10 million in damages. Ms. Attorney appealed the trial court's rulings precluding discovery of Mr. Client and Mr. Lupole's written and oral communications concerning the Plan's operations.

LEGAL ANALYSIS

This case is a matter of first impression in this jurisdiction. Additionally, unlike some states, the legislature has not yet promulgated any statutory waivers of the attorney client privilege. We therefore look to “other state-court decisions, well-reasoned decisions from other jurisdictions, and any other available authority to determine [] applicable state law.” *Frontier Refining, Inc. v. Gorman-Rupp Co., Inc.*, 136 F.3d 695, 700 (10th Cir. 1998) (citation omitted). “Whether a privilege exists is largely a question of law, which we therefore review de novo.” *Twin City Fire Ins. Co. v Burke*, 63 P.3d 282, 285 (Ariz. 2003). “Likewise, ‘[w]hether a party has waived the attorney-client privilege is a mixed question of law and fact which we review de novo.’” *Id.*, (citation omitted).

Although the purpose of the attorney-client privilege “is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice,” *Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981), this privilege is not absolute. Rather, the privilege is subject to the recognition that “testimonial exclusionary rules and privileges contravene the fundamental principle that ‘the public . . . has a right to every man's evidence.’” *Trammel v. U.S.*, 445 U.S. 40, 50 (1980) (citations omitted). Consequently, “[b]ecause the privilege obstructs the search for the truth and because its benefits are, at best, ‘indirect and speculative,’ it must be ‘strictly confined within the narrowest possible limits consistent with the logic of its principle.’” *In re Grand Jury Investigation*, 599 F.2d 1224, 1235 (3d Cir. 1979) (citations omitted). “[W]e adhere to a strong [public] policy of encouraging disclosure, with an eye toward ascertaining that truth which is essential to the proper disposition of a lawsuit.” *Waste Mgmt., Inc. v. Int’l Surplus Lines Ins.*

Co., 579 N.E.2d 322, 327 (Ill. 1991). We emphasize that it is “the privilege, not the duty to disclose, that is the exception.” *Id.*

Consistent with this general approach, courts since the 1800s have recognized that clients can “waive[] the attorney-client privilege by putting the lawyer's performance at issue during the course of litigation.” *Bittaker v. Woodford*, 331 F.3d 715, 718 (9th Cir. 2003) (en banc). “Under the “at issue” doctrine, where a party places legal advice or other privileged facts or communication at issue, it is deemed to have waived the privilege with respect to such facts or communications and can be compelled to produce them.” *Am. Re-Ins. Co. v. U.S. Fid. & Guar. Co.*, 837 N.Y.S.2d 616, 622 (App. Div. 1st Dept. 2007). As is shown in our case, however, a determination of whether an “at issue” waiver has occurred can be “a vexing exercise for a court.” *Trudeau v. N.Y. State Consumer Prot. Bd.*, 237 F.R.D. 325, 340 (N.D.N.Y. 2006).

“While the precise reach of the [at issue] theory can be a subject of some controversy, courts typically employ some version of one of several general approaches.” *Johnston v. Comm’r*, 119 T.C. 27, 35 (2002) (collecting cases and approaches). *See also Frontier*, 136 F.3d at 699-700 (same); *Zenith Radio Corp. v. U.S.*, 764 F.2d 1577, 1579 (Fed. Cir. 1985) (same). The first approach is the “automatic waiver” rule under which a party, by asserting a claim or defense to which otherwise privileged matter is relevant, automatically waives the privilege. *See e.g. Indep. Prods. Corp. v. Loew’s Inc.*, 22 F.R.D. 266, 276-277 (S.D.N.Y. 1958). This approach ignores the fact that privileges and waivers thereof “involve subtle and sensitive questions that should not be summarily ignored without a more penetrating analysis.” *Zenith Radio*, 764 F.2d at 1580. We believe that “application of this rule precludes any consideration of the relative interests involved, [and] we are persuaded that its adoption would lead to needlessly harsh

results.” *Fed. Deposit Ins. Corp. v. Wise*, 139 F.R.D. 168, 171 (D. Colo. 1991). We therefore decline to adopt this approach.

A second, ad hoc, approach applies a loose “balancing” test that weighs the need for discovery against the need to protect the secrecy of the communication. *See e.g. Black Panther Party v. Smith*, 661 F.2d 1243, 1265-1268 (D.C. Cir.1981). We reject such an indeterminate standard as a suitable test for waiver because of “its lack of concreteness,” *Wise*, 139 F.R.D. at 171, and because “[t]hose jurisdictions which have applied a balancing formulation have not consistently utilized or adequately articulated the appropriate standard.” *Id.*

A third, more restrictive approach, and the one advocated by our dissenting colleague, is known as the “anticipatory waiver” test, which requires offensive use where waiver is affected *only if* a litigant directly injects an attorney's advice into issue. *See e.g. Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*, 32 F.3d at 851, 863-864 (3d Cir. 1994); *see also Pub. Serv. Co. of N.M. v. Lyons*, 10 P.3d 166, 171 (N.M. App. 2000). Under this approach, waivers are limited to circumstances in which the “privilege-holder injects the privileged material itself into the case.” *Aranson v. Schroeder*, 671 A.2d 1023, 1030 (N.H. 1995) (citation omitted). While the Court acknowledges the significance of the attorney-client privilege, “the *Rhone-Poulenc* test draws a bright-line rule that leaves no room for or consideration of fairness or equity, thus potentially facilitating abuse of the privilege it seeks to protect.” *Union County, IA v. Piper Jaffray & Co., Inc.*, 248 F.R.D. 217, 222 (S.D. Iowa 2008), *appeal dismissed*, 525 F.3d 643 (8th Cir. 2008). We therefore decline to adopt this approach.

The final approach, which has been adopted by a majority of jurisdictions, is the tripartite test first enunciated in the seminal case of *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wash.

1975). *See, e.g.*, Paul R. Rice, *Attorney-Client Privilege in the U.S.*, vol. 2, § 9:51, 335-340 (2d ed., West 2007) (collecting cases); *See also Wise*, 139 F.R.D. at 171-173 (citing cases). This position has been adopted by the Restatement (Third) of Law Governing Lawyers [hereinafter Restatement], § 80(1) (2000); *id.*, cmt. B; *id.*, reporters note to cmt. B.

The *Hearn* test establishes three requirements for finding an implied waiver:

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

68 F.R.D. at 581.

We find that the majority approach, which we hereby adopt, not only “avoids the extremes of an over-inclusive automatic-waiver rule or an indeterminate, ad hoc balancing approach,” Restatement, § 80, reporters note to cmt. B, but also “recognizes the importance of the attorney-client relationship, [and] [] permits a balancing of that interest against the interests of fundamental fairness.” *Union County*, 248 F.R.D. at 222. Moreover, “[t]he reasonableness of the *Hearn* approach is particularly evident where, as here, a defendant has no alternative means of defending a claim brought by the party asserting the privilege.” *Id.*

The first prong of the *Hearn* tripartite analysis requires that assertion of the privilege be the result of some affirmative act by the asserting party. *Hearn*, 68 F.R.D. at 581. Mr. Client’s assertion of privilege is a consequence of his decision to bring an action against Ms. Attorney alleging legal malpractice. We therefore find that the first prong of the test has been satisfied. Here, we agree with the dissent that waiver of the privilege does not just disappear by virtue of filing or defending a lawsuit. *See, e.g., Remington Arms Co. v. Liberty Mut. Ins. Co.*, 142

F.R.D. 408, 414 (D. Del. 1992). Rather, given the facts of our case, the assertion of the privilege is the consequence of Mr. Client's actions.

The second prong of the *Hearn* test requires a determination of whether the asserting party put the protected information at issue by making it relevant to the case. *Hearn*, 68 F.R.D. at 581. By filing suit, Mr. Client has placed the protected information at issue by making it relevant to the question of whether he was communicating with other attorneys concerning the same subject matter. Here, Mr. Lupole concurrently represented Mr. Client in this matter, which goes to the fundamental issue of whether Ms. Attorney actually committed malpractice and is material to Ms. Attorney's defense of the malpractice allegation. This satisfies the second prong of *Hearn*.

The third and final prong of the *Hearn* test requires a determination "whether application of the privilege would deny the opposing party access to information vital to its defense." *Id.* We emphasize that "vital" information necessarily implies that the information is unavailable *from any other source*. *Frontier*, 136 F.3d at 701. Here, application of the privilege would unfairly deny Ms. Attorney access to information "vital" to her defense where the factual grounds for defending the claim are unobtainable from other sources. Indeed, Mr. Client and Mr. Lupole's privileged communications are the *only source* of information concerning the Plan's operations. Such a selective use of the privilege would impermissibly "garble" the truth. *U.S. v. St. Pierre*, 132 F.2d 837, 840 (2d Cir. 1942) (L. Hand, J.), *cert. denied as moot*, 319 U.S. 41 (1943). Ms. Attorney maintains that she only drafted the Plan's documents and that Mr. Client and Mr. Lupole were responsible for daily operations and ensuring compliance with ERISA and tax requirements. Information that would prove Mr. Client and Mr. Lupole

communicated about the Plan's operations would break the causal connection of the alleged malpractice. Consequently, the final prong of the *Hearn* test is satisfied. Because all three prongs are satisfied under *Hearn*, we find that Mr. Client has impliedly waived the attorney-client privilege with respect to his communications with Mr. Lupole concerning the Plan's operations.

Similarly, other courts addressing this issue have also found a waiver of privilege with respect to legal advice contemporaneously received from any other lawyers on the subject. *See, e.g., Pappas v. Holloway*, 787 P.2d 30, 33-37 (Wash. 1990); *Zabin v. Picciotto*, 896 N.E.2d 937, 955 (Mass. App. Ct. 2008); *Rutgard v. Haynes*, 185 F.R.D. 596, 597-600 (S.D. Cal. 1999); *Bieter Co. v. Blomquist*, 156 F.R.D. 173, 176-179 (D. Minn. 1994). Additionally, the Restatement states, "[w]aiver extends to *all* communications relevant to the issue asserted by the client." Restatement, § 80, cmt. B (emphasis added). We adopt the Restatement's position and join other jurisdictions in holding that when (as the present case) a client sues a former attorney for malpractice, the attorney-client privilege is waived as to *all* communications involved in the underlying litigation in which the malpractice allegedly occurred.

We recognize that there has been substantial criticism of the standard articulated in *Hearn* by commentators, academics, courts, and our esteemed colleague in dissent. *Hearn* is criticized because the test focuses on the need of the party seeking information rather than the policy that the privilege serves. *See e.g. Rhone*, 32 F.3d at 864 (cases like *Hearn* that have allowed the opposing party discovery of confidential attorney-client communications in order to test the client's contentions "are of dubious validity"); *see also* Note, *Dev. in the Law-Privileged Communic'ns*, 98 Harv. L. Rev. 1450, 1640-42 (1985); *Lyons*, 10 P.3d at 173; *Aranson*, 671

A.2d at 1030. However, the implied waiver doctrine is based on “considerations of forensic fairness.” Restatement, § 80, cmt. B. Not allowing introduction of the communication would enable a client to “present the justification of legal advice in an inaccurate, incomplete, and self-serving way.” *Id.* The doctrine “is often expressed in terms of preventing a party from using the privilege as both a shield and a sword.” *Bittaker*, 331 F.3d at 719. *Accord*, *U.S. v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir.1991).

Hearn is additionally criticized for focusing on the opposing party’s need for the privileged information despite the “Supreme Court’s emphasis [in *Upjohn*, 499 U.S. at 393] on the role of certainty in encouraging the full and frank communication between attorneys and their clients.” 98 Harv. L. Rev. at 1641. We note, however, that in the same opinion, the Court stated that no bright-line rule governs the applicability of the attorney-client privilege and that courts should determine the applicability of the privilege on a “case-by-case” basis. *Upjohn*, 499 U.S. at 396-97.

Finally, *Hearn* is criticized because it does not target the type of “unfairness that is distinguishable from the unavoidable unfairness generated by every assertion of privilege, and its application cannot be limited.” 98 Harv. L. Rev. at 1641-42. We disagree that *Hearn* is a slippery slope. We note that several courts have effectively managed to use a *Hearn* analysis without finding an implied waiver of the attorney-client privilege. *See e.g., In re Buspirone Antitrust Litig.*, 208 F.R.D. 516, 520-521 (S.D.N.Y. 2002) (waiver not found where intent no longer “at issue”); *Standard Chartered Bank PLC v. Ayala Intern. Holdings (U.S.) Inc.*, 111 F.R.D. 76, 80-81 (S.D.N.Y. 1986) (failed 2d and 3d *Hearn* prongs); *Home Indem. Co. v. Lane Powell Moss and Miller*, 43 F.3d 1322, 1325 - 1327 (9th Cir. 1995) (failed 3d *Hearn* prong).

Additionally, in *Pappas*, 787 P.2d at 35, the Washington Supreme Court clearly distinguished those cases where the attorney client communications sought occurred only *after* “the underlying litigation which gave rise to the malpractice claim.” We adopt the same distinction as espoused in *Pappas*.

In a further effort to address some of our dissenting colleague’s concern regarding a broad application of the implied waiver doctrine, we hereby adopt the guidelines established by the Ninth Circuit. *See Bittaker*, 331 F.3d at 720-723. Specifically, courts finding an implied waiver under the *Hearn*’s analysis are “not [to] order disclosure of the materials categorically; rather, the court [should] direct[] the party holding the privilege to produce the privileged materials *if* it wishes to go forward with its claims implicating them.” *Id.* at 720 (emphasis in original). Thus, the privilege holder may preserve the confidentiality of the privileged communications by choosing to abandon the claim that gives rise to the waiver condition. *Id.* at 721. Additionally, courts “must impose a waiver no broader than needed to ensure the fairness of the proceedings before it.” *Id.* at 720. The “fairness principle” of the implied waiver doctrine requires that the scope of the waiver be “closely tailored . . . to the needs of the opposing party.” *Id.* Courts should therefore fashion an appropriate protective order. *Id.*

CONCLUSION

For the above-stated reasons, we hold that under a *Hearn* analysis, Ms. Attorney is permitted discovery of the confidential information subject to a narrowly tailored protective order. To hold otherwise would unfairly allow Mr. Client to use the privilege as “both a sword and a shield.” *Bittaker*, 331 F.3d at 719.