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Rules, Standards, and the Attorney-Client Privilege: When the Privilege Is "At-Issue" in the Discovery Rule Context

Kenneth Duvall

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Rules, Standards, and the Attorney-Client Privilege: When the Privilege Is “At-Issue” in the Discovery Rule Context

BY KENNETH DUVALL*

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* Kenneth Duvall graduated from the University of Virginia School of Law and is currently a clerk to the Honorable Alok Ahuja for the Missouri Court of Appeals, Western District. It is to Judge Ahuja that the author owes a debt of gratitude for the idea for this article, as well as for his support throughout the process. (The views presented in this article are solely those of the author and do not necessarily reflect the views of Judge Ahuja or the Missouri Court of Appeals). The author also thanks his professors at the University of Virginia, such as Michael Collins and Anne Coughlin, whose dynamic approaches to the law were contagious enough that writing an article like this seemed more like an enjoyment than a labor. A final thanks goes to the author’s brother, Michael Duvall, as his publications have set a mark for which to aim.

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I. INTRODUCTION

Ask a non-lawyer what the purpose of the judicial system is, and a popular answer would surely be to determine what happened between the parties. However, every attorney knows that the adversarial process is not as straight-forward as that, as many interests must be juggled by the judge as well as by the attorneys in the case.¹ One of the interests that should be protected is the need for a legal mechanism within which clients can freely discuss their problems with their attorneys.² This need is largely satisfied by the attorney-client privilege, which necessarily acts as one of the great impediments to the pure truth-seeking function of the courts.³ Courts have long been willing to sacrifice one avenue to evidence of what happened between the parties in order to facilitate open discourse between client and lawyer so that society can reap the expected benefits of that relationship, ranging from clients that seek judicial (as opposed to extra-judicial) remedies, to clients that are more capable of behaving properly in an increasingly complex regulatory state.⁴ Yet striking the right balance between a robust privilege and a system that discovers the truth has always been, and will always be, difficult.⁵ This problem is inherent in the nature of privilege itself—just glance at the uproar over the psychotherapist-patient privilege

1. See Jack B. Weinstein, *Some Difficulties in Devising Rules for Determining Truth in Judicial Trials*, 66 COLUM. L. REV. 223, 241 (1966).

2. See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (“[W]e have recognized the purpose of the privilege to be to encourage clients to make full disclosure to their attorneys. This rationale for the privilege has long been recognized by the Court.”) (citations and internal quotations marks omitted).

3. See *Swidler & Berlin v. United States*, 524 U.S. 399, 411 (1998) (O’Connor, J., dissenting) (“In light of the heavy burden that they place on the search for truth, evidentiary privileges in litigation are not favored . . .”) (discussing the attorney-client privilege).

4. See, e.g., Ann Naffier, Note, *Attorney-Client Privilege for Nonlawyers? A Study of Board of Immigration Appeals-Accredited Representatives, Privilege, and Confidentiality*, 59 DRAKE L. REV. 583, 584 (2011) (“Society considers informed legal advice important because the assumption is, with such legal advice, clients will more likely obey the law. In this light, the attorney-client privilege is viewed as a way to protect the justice system and ensure people are able to, and will, obey the law.”).

5. See *Swidler & Berlin*, 524 U.S. at 411 (discussing the tension between the search for the truth and the existence of beneficial privileges).

exception from *Tarasoff v. Regents of the University of California*⁶ to see how contentious privileges and their exceptions have been.⁷

The attorney-client privilege, though, seems a particularly vociferous privilege battleground, if only because every lawyer's skin is in the game. In recent decades, the privilege battles have in large part been waged over one particular exception to the privilege—the “at-issue” carve-out.⁸ Under this exception, the holders of the privilege waive it when they place the otherwise privileged communications at issue in the litigation, not through an explicit waiver, but instead through their conduct.⁹ This type of waiver is valid in theory, but disagreement over what actions constitute “putting communications at issue” is rampant.¹⁰ Proponents of a stout privilege, fearing that a liberal interpretation of “at issue” would chill attorney-client communications, claim that communications should only be considered at issue when a party explicitly relies on them.¹¹ This “pro-privilege” faction essentially pushes for a hard and fast rule under which only expressly referenced communications will be put at issue.¹² Their opponents, worried that a rigid privilege allows the holders to tell only the part of the story that helps their side and leave out the rest in the name of “privilege,” contend that communications should be considered at issue even when a party places them there implicitly, or takes an affirmative act in litigation that makes them relevant and vital.¹³ For those in this “pro-evidence” camp, a malleable *standard* that takes into account the needs of the case is preferable to a bright-line rule.¹⁴

This article will examine both sides of this argument in detail, and in order to give shape to the debate, will focus in on a particular scenario where the at-issue dispute comes to a head—the “discovery rule.”¹⁵ When a defendant pleads the statute of limitations, plaintiffs can avoid that defense

6. *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976).

7. K. M. Quinn, *The Impact of Tarasoff on Clinical Practice*, 2 BEHAV. SCI. & L. 319, 322 (1984) (“Both the imposition of a mandated positive duty on clinicians and the specificity of that duty . . . caused an uproar in the professional community.”).

8. See, e.g., Jerold S. Solovy et al., *Protecting Confidential Legal Information: A Handbook for Analyzing Issues Under the Attorney-Client Privilege and the Work Product Doctrine*, at 226, JENNER & BLOCK L.L.P. (2010), http://www.jenner.com/files/tbl_s20Publications/RelatedDocumentsPDFs1252/2934/2010%20Jenner%20&%20Block%20Privilege%20Outline%20final.pdf.

9. See, e.g., *Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft L.L.P.*, 62 A.D.3d 581, 581 (N.Y. App. Div. 2009).

10. See *infra* Part II.

11. See *infra* Part II.B.

12. See *infra* Part II.B.

13. See *infra* Part II.A.

14. See *infra* Part II.A.

15. The fact that this “discovery rule” is called a rule does not play into the rule-standard dichotomy set forth in this article.

by pleading the discovery rule, which allows plaintiffs to toll the running of the statute until the point when they discovered, or should have discovered, that they had a cause of action (or at least an injury that required legal advice).¹⁶ Whenever the discovery rule is live, defendants understandably wish to know whether plaintiffs spoke with their attorneys about their possible cause of action at a time such that their actions will now be time-barred. Should a court wait for the plaintiffs to expressly rely upon their communications with their attorneys in order for the privilege to be waived, or should other actions by the plaintiff short of that amount to a waiver? After laying the groundwork for understanding rules and standards generally, I apply a diverse set of arguments ranging from the doctrinal to the empirical in an attempt to resolve the at-issue dispute, at least within the discovery rule context, with the aim that the solution be generalizable to the larger privilege context.

The small amount of literature devoted to this topic has not provided a working framework in which to understand the tension between the pro-privilege courts and the pro-evidence courts, which is why the rule-standard dichotomy is so necessary. The existing literature is also often focused upon a single slice of the at-issue dispute, whether it be a certain region of the country or a certain type of lawsuit, without concern for the wider debate,¹⁷ which leads this article to suggest why the solution to the at-issue controversy in the discovery rule context could, or could not be, generalized to other areas. Finally, the literature has often simply picked an existing side to the debate, whether the rule or the standard,¹⁸ whereas this piece's ultimate resolution, based upon arguments not utilized before, is one that no court or academic has yet suggested.

Part I of this article sets forth the general framework of rules and standards into which the two sides of the at-issue debate fit. Part II focuses upon an area of the law presently divided between a rule and a standard: whether material protected by the attorney-client privilege is put at issue by invoking the discovery rule. Part III offers a solution to the rule-versus-standard debate, within the context of putting the privilege at issue under the discovery rule.

16. See, e.g., *Doherty v. Admiral's Flagship Condo. Trust*, 951 N.E.2d 936, 940 (Mass. App. Ct. 2011).

17. See, e.g., Kevin Bennardo, *At Issue Waiver of the Attorney-Client Privilege in Illinois: An Exception in Need of a Standard*, 30 N. ILL. U. L. REV. 553 (2010).

18. See, e.g., Laurence A. Steckman & Richard Granofsky, *The Assertion of Attorney-Client Privilege by Counsel in Legal Malpractice Cases: Policy, Privilege, and the Search for Truth in Cases Involving Implied Waivers*, 45 TORT TRIAL & INS. PRAC. L.J. 839 (2010).

II. RULES AND STANDARDS AS A GENERAL MATTER

Oftentimes the most interesting “discoveries” are simply recognizing what was before us all along. So it often is in the law, where someone points out a tendency or truism that suddenly explains that which was previously perplexing, misunderstood, or even hidden. The oscillation in the law between bright-line rules and soft-edged standards has become an object of intense interest in academia.¹⁹ Moreover, courts, while not as conscious of the tension between rules and standards as their academic counterparts, remain, as ever, inevitably subject to the friction between rules, with their allure of universal certainty, and standards, and their attraction of individual justice.²⁰ Like a philosophical dialectic that is destined to be forever unresolved, the debate over rules and standards is not one that can be “settled.” Rather, courts and academics will continue to swing between one and the other as from a pendulum. In a rule-driven regime, standards will tempt judges to rebel with the allure of case-specific justice and tailored remedies, while in a standard-dominated system, rules will entice with the attraction of fairness across the board, certainty for actors, and ease of administration.

A. “TRIGGERS” AND “RESPONSES”

Although the contours of rules versus standards are intuitively apparent to some degree, a more expansive definition to these general concepts is helpful in understanding the particular rule-standard tension that is the subject of this article. Rules are defined by their definiteness, both in terms of their “trigger” and their “response.”²¹ The “trigger” is the event that brings the rule into play, and the “response” is the legal repercussions to the event.²² For instance, a sanction of one day in jail for interrupting the judge while he is speaking is a rule because the trigger, namely, speaking over the judge, and the response, namely, the jail term, are both clear-cut.

Meanwhile, standards are defined by their vagueness, both in terms of their trigger and their response.²³ Thus, to counter the example for the rule above, a standard would read something more like the following: “contempt

19. This fluctuation in the law was perhaps brought to light most effectively by Carol Rose in her 1988 article *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).

20. See e.g., *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 484-86 (1989) (Kennedy, J., concurring); *Briggs v. Merit Sys. Prot. Bd.*, 331 F.3d 1307, 1313 (Fed. Cir. 2003); *State v. Bricker*, 134 P.3d 800, 807 (N.M. Ct. App. 2006).

21. Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985).

22. *Id.* at 381-82.

23. *Id.* at 385-89.

of court shall be punishable at the discretion of the trial judge.”²⁴ Both the actions required to trigger the punishment and the punishment itself are left nebulous.

B. *EX ANTE* AND *EX POST*

Another, and complementary, way by which to distinguish rules and standards is by determining whether the behavior at issue is adjudicated as either conforming to or violating the rule or standard at issue.²⁵ With rules, the authorities decide *ex ante* what the legal consequences of the conduct are, but with standards, the authorities decide *ex post*.²⁶ Common law courts in the past may have spoken of “discovering the law,” such that even when deciding something *ex post*, they claimed to merely reveal the truth that had already existed *ex ante*.²⁷ However, contemporary courts rarely speak in such terms, indicating that the law is not necessarily an ideal that abstractly exists, but instead is something that must be constructed, perhaps even after the fact.²⁸

To show that this explanation of rules and standards is consistent with the above taxonomy of indefinite and definite triggers and sanctions, we need only ask whether the examples cited above, when subject to this *ex ante* and *ex post* explanation, would be categorized in the same manner. A preset sanction of a day in jail for cutting off a judge while she is speaking is a decision as to when and how to punish before there is even an incident, and thus again is considered a rule. Conversely, a preset punishment left to the determination of the court for committing the undefined offense of contempt of court, which loosely includes interrupting a judge, will leave the particulars of the incident precipitating punishment and the punishment itself up in the air until after the incident itself.

24. See, e.g., *Matanuska Elec. Ass’n, Inc. v. Rewire the Bd.*, 36 P.3d 685, 690 n.4 (Alaska 2001) (“This court will reverse a trial judge’s decision regarding contempt only if it is without evidentiary support or is an abuse of discretion.”).

25. Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

26. *Id.* at 568-72, 618-20.

27. Herbert Pope, *The English Common Law in the United States*, 24 HARV. L. REV. 6 (1910).

28. See, e.g., Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws* 85-86 (Mar. 8-9, 1995) (The Tanner Lectures on Human Values at Princeton University), available at <http://www.tannerlectures.utah.edu/lectures/documents/scalia97.pdf>.

III. STANDARDS AND RULES REGARDING "PUTTING COMMUNICATIONS AT-ISSUE"

With a clearer idea of the distinctions between rules and standards, we can now turn to an area of the law that is currently hotly contested by members of both the rule and standard camps. Attorney-client privilege has, over the past three decades, become a subject of intense debate, mostly in the courtroom but also in academia, over whether rules or standards should provide the rules of decision.²⁹ In particular, the issue of putting the privilege at issue has become the subject of stark disagreement.³⁰ When the privilege is considered "put at issue" by a court, the privilege is waived in whole or in part, thus creating the high stakes that have led litigants to ask courts to resolve this issue one way or the other.³¹ Those in the rule camp argue that the privilege is put at issue only when a party explicitly uses privileged material, reasoning that privileges and the exact point at which they are waived should be predictable and within the control of the privilege-holder.³² Meanwhile, those in the standard camp contend that, in some instances, a party can put their privilege at issue by actions short of relying explicitly on privileged material, such as invoking certain claims or defenses that naturally rely upon legal advice or hinge upon material that can only be accessed through breaching the privilege.³³ In order to decide which camp has the better of the arguments, we should begin by canvassing the courts for the various tests, whether standards or rules, in current or recent use.

A. STANDARDS: *HEARN* AND *CLAMSHELL*

There are two major standards in the area of putting the privilege at issue: *Hearn v. Rhay*³⁴ and *Clamshell v. Public Service Company*.³⁵ The *Hearn* test is not only the leading standard, but is also the leading test overall, which is likely due in part to the fact that it appeared on the legal scene before its rivals.

29. See, e.g., Harvard Law Review Association, *Developments in the Law: Privileged Communications*, 98 HARV. L. REV. 1629, 1641-42 (1985).

30. See, e.g., *id.*

31. See, e.g., *Am. Re-Ins. Co. v. U.S. Fid. & Guar. Co.*, 40 A.D.3d 486, 493 (N.Y. App. Div. 2007).

32. See *infra* Part III.B.

33. See *infra* Part III.A.

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

35. *Greater Newburyport Clamshell Alliance v. Pub. Serv. Co.*, 838 F.2d 13, 20 (1st Cir. 1988).

1. *The Hearn Standard*

The leading case in national jurisprudence on the question of putting the attorney-client privilege at issue has been *Hearn v. Rhay*.³⁶ *Hearn* set up a three-part test to determine whether there was an implied waiver:

(1) assertion of the privilege was a result of some affirmative act, such as filing suit [or raising an affirmative defense], 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.³⁷

True to the form of standards, both the trigger, in the form of the privilege-holder's actions, and the result, in the form of the "at issue" waiver determination, are somewhat vague. The triggers of an affirmative act, relevancy, and vitality are all left rather undefined. One example of an affirmative act is given, but there is no exhaustive list.³⁸ Meanwhile, the requirement of relevancy does not seem to add much to the discussion beyond the general requirement of relevancy for any type of evidence, while the meaning of vital seemingly could include very important evidence, evidence that is inaccessible by any other means, etc. Similarly, whether communications will be put at issue is not clear before the litigation; rather, the court's decision whether to consider the privilege waived is made in more of an *ex post* fashion.

Soon after its inception in the Eastern District of Washington, *Hearn* was adopted by many federal and state jurisdictions alike. Courts, whether they agree or disagree with *Hearn*, all instinctively claim *Hearn* as the majority position. This author's tally confirms the conventional wisdom, though the situation is much closer than most courts assume. Among federal courts, the Fifth,³⁹ Seventh,⁴⁰ Ninth,⁴¹ Eleventh,⁴² and Federal⁴³ Circuits

36. *Hearn*, 68 F.R.D. 574.

37. *Id.* at 581.

38. *Id.*

39. *Conkling v. Turner*, 883 F.2d 431, 434 (5th Cir. 1989).

40. *See Lorenz v. Valley Forge Ins. Co.*, 815 F.2d 1095, 1098 (7th Cir. 1987). This is at least the interpretation given to *Lorenz* by *Republic Insurance Co. v. Davis*, 856 S.W.2d 158, 163 n.11 (Tex. 1993).

41. *Home Indem. Co. v. Lane Powell Moss & Miller*, 43 F.3d 1322, 1326 (9th Cir. 1995).

42. *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1419 (11th Cir. 1994).

43. *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1205 (Fed. Cir. 1987).

have adopted a balancing test, and district courts in the Eighth⁴⁴ and Tenth⁴⁵ Circuits have done likewise. Furthermore, state supreme courts in Arizona,⁴⁶ California,⁴⁷ Colorado,⁴⁸ Maryland,⁴⁹ Nebraska,⁵⁰ and Texas⁵¹ have joined the balancing test camp, while appellate courts in Florida,⁵² Indiana,⁵³ New York,⁵⁴ and Tennessee⁵⁵ have also done so. Finally, the Tenth Circuit has predicted that Wyoming will, if given the chance, adopt a standard.⁵⁶

2. *The Clamshell Standard*

Hearn is not the only standard on the scene regarding issue injection with respect to the attorney-client privilege, however. The *Clamshell*⁵⁷ test is significantly different enough to merit its own mention. *Clamshell*'s test has only two elements to *Hearn*'s three, though admittedly, on close inspection, the two elements match up quite closely to two of *Hearn*'s.⁵⁸ The distinction between the two tests, then, is *Hearn*'s prong regarding an affirmative act by the privilege-holder.⁵⁹

44. Union Cnty., Iowa v. Piper Jaffray & Co., 248 F.R.D. 217, 222 (S.D. Iowa 2008).

45. Anchondo v. Anderson, Crenshaw, & Assoc., L.L.C. 256 F.R.D. 661, 671 (D. N.M. 2009); Williams v. Sprint/United Mgmt. Co., 464 F. Supp. 2d 1100, 1104 (D. Kan. 2006).

46. State Farm Mut. Auto. Ins. Co. v. Lee, 13 P.3d 1169, 1182 (Ariz. 2000).

47. S. Cal. Gas Co. v. Pub. Util. Comm'n, 784 P.2d 1373 (Cal. 1990).

48. Mountain States Tel. & Tel. Co. v. DiFede, 780 P.2d 533, 544 (Colo. 1989)

49. Parler & Wobber v. Miles & Stockbridge, P.C., 756 A.2d 526, 541-42 (Md. 2000).

50. State v. Roeder, 636 N.W.2d 870, 876 (Neb. 2001).

51. Republic Ins. Co. v. Davis, 856 S.W.2d 158, 163 n.11 (Tex. 1993).

52. Home Ins. Co. v. Advance Mach. Co., 443 So. 2d 165, 168 (Fla. Dist. Ct. App. 1983).

53. Allstate Ins. Co. v. Clancy, 936 N.E.2d 272, 277 (Ind. Ct. App. 2010).

54. Creditanstalt Inv. Bank AG v. Chadbourne & Parke L.L.P., NO. 106539/01, 2005 WL 3681657, at *2 (N.Y. Nov. 18, 2005).

55. Bryan v. State, 848 S.W.2d 72, 81 (Tenn. Crim. App. 1992).

56. Frontier Refining, Inc. v. Gorman-Rupp Co., 136 F.3d 695, 701 (10th Cir. 1998).

57. Greater Newburyport Clamshell Alliance v. Pub. Serv. Co. of N.H., 838 F.2d 13 (1st Cir. 1988).

58. Prong one of *Clamshell* requires relevance, as does prong two of *Hearn*; prong two of *Clamshell* requires the party seeking to pierce privilege to show why it would be unreasonably difficult to obtain elsewhere, while prong three of *Hearn* and its emphasis upon "vital" evidence has often been interpreted to mean evidence that cannot be obtained otherwise. *Id.* at 18.

59. Johnston v. Comm'r of Internal Revenue, 119 T.C. 27, 35 (2002).

The *Clamshell* test remains the law of the land in its home jurisdiction of the First Circuit,⁶⁰ and has also been adopted in the state of Michigan.⁶¹

B. THE *RHONE* RULE (ANTICIPATORY WAIVER TEST)

If *Hearn* did not take long to establish itself as the leading light of implied waiver jurisprudence, its critics were assailing it soon thereafter. The shot across the bow came from a Harvard Law Review article chastising *Hearn* on two grounds.⁶² “[T]he 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.”⁶³

In the first point, the article contends that the privilege always has the potential for unfairness, as it often protects otherwise relevant material.⁶⁴ For the authors, *Hearn*’s emphasis upon the affirmative acts of the privilege-holder does not ask the right question and thus is a red herring.⁶⁵ Rather, the question should be why the privilege is more unfair in the instant case than in the baseline case, which can only be the case when the privilege-holder invokes his attorney’s advice. In the second point, the author’s claim that *Hearn* is a Pandora’s Box of a rule incapable of leaving the privilege intact at all given that *Hearn* can seemingly trump the privilege whenever relevant evidence can be accessed only via piercing the privilege.⁶⁶ The author cites *United States v. Exxon Corp.*, a case in which the court had seemingly reduced *Hearn* to a relevance inquiry.⁶⁷ As a final salvo, the article criticizes the reliance of courts upon the order of pleading in determining just who has put what at issue, noting that the party to bring the suit will often be considered to have raised an issue and thus will leave itself open to a finding of impliedly waving its privilege.⁶⁸

These attacks in *Hearn* have been recently echoed in academia.⁶⁹ The author, in full-throated agreement with the Harvard article stating that *Hearn*’s balancing approach does not afford enough protection to the privi-

60. *Clamshell*, 838 F.2d at 18.

61. *Howe v. Detroit Free Press, Inc.*, 487 N.W.2d 374, 383 (Mich. 1992).

62. Harvard Law Review Association, *supra* note 29.

63. *Id.* This article also noted that the United States Supreme Court has called for a uniform, concerted effort in protecting the privilege. However, while the federal courts are bound to look to the Supreme Court in applying the federal attorney-client privilege, state courts of course remain free to develop their own version of the privilege.

64. *Id.* at 1642.

65. *Id.*

66. *Id.*

67. *United States v. Exxon Corp.*, 94 F.R.D. 246 (D.D.C. 1981).

68. Harvard Law Review Association, *supra* note 29, at 1642-43.

69. Bennardo, *supra* note 17.

lege because of its focus on the instant case rather than broader interests, urges courts to discard *Hearn* lest the erosion of the privilege lead to a chilling of attorney-client relationships.⁷⁰ Unlike the Harvard article, though, this author had the benefit of coming after the anti-*Hearn* movement as embodied in its greatest rival: *Rhone-Poulenc Rorer Inc. v. Home Indemnity Co.*⁷¹ As a direct adverse reaction to *Hearn*, *Rhone* stated:

Advice is not in issue merely because it is relevant, and does not necessarily become in issue merely because the attorney's advice might affect the client's state of mind in a relevant manner. The advice of counsel is placed in issue where the client asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney client communication.⁷²

Unlike *Hearn* or *Clamshell*, *Rhone* is a clear rule. The trigger and the result, seen as the explicit reliance upon otherwise-privileged communications and the subsequent implied waiver, respectively, are anything but vague. In other words, everyone under this system knows *ex ante* what actions the holder of the privilege must take to waive the privilege.

Many courts have picked up on either the Harvard article, *Rhone*, or their reasoning and required that a party expressly rely upon privilege communications in order for them to be put as issue. Looking at federal courts, the Second,⁷³ Third,⁷⁴ and Sixth Circuits⁷⁵ have joined the *Rhone* bandwagon, while a district court in the District of Columbia has done likewise.⁷⁶ Meanwhile, among state supreme courts, Alabama,⁷⁷ Connecticut,⁷⁸ Louisiana,⁷⁹ New Hampshire,⁸⁰ Nevada,⁸¹ New Mexico,⁸² Ohio,⁸³ and

70. *Id.* at 560-61.

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

72. *Id.* at 863.

73. *In re Cnty. of Erie*, 546 F.3d 222, 228 (2d Cir. 2008).

74. *Rhone-Poulenc Rorer, Inc.*, 32 F.3d at 863.

75. *Ross v. City of Memphis*, 423 F.3d 596, 604 n.4 (6th Cir. 2005).

76. *Elec. Workers v. Trust Fund Advisors, Inc.*, 266 F.R.D. 1, 13 (D.D.C. 2010).

77. *Ex parte State Farm Fire & Cas. Co.*, 794 So. 2d 368, 375 (Ala. 2001).

78. *Metro. Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 730 A.2d 51 (Conn. 1999) (by implication).

79. *Smith v. Kavanaugh, Pierson & Talley*, 513 So. 2d 1138, 1145-46 (La. 1987).

80. *Aranson v. Schroeder*, 671 A.2d 1023, 1030 (N.H. 1995) (by implication).

81. *Wardleigh v. Second Judicial Dist. Court of Nev.*, 891 P.2d 1180, 1187 (Nev. 1995) (by implication).

82. *Pub. Serv. Co. of New Mexico v. Lyons*, 10 P.3d 166, 173 (N.M. 2000).

83. *Jackson v. Greger*, 854 N.E.2d 487, 490 (Ohio 2006).

Rhode Island⁸⁴ have followed suit, while appellate courts in North Carolina,⁸⁵ Pennsylvania,⁸⁶ and Wisconsin⁸⁷ have similarly done so. With the recent shift in some eastern federal circuits, the number of courts that have adopted the *Rhone*-anticipatory waiver rule has nearly drawn even with the *Hearn* camp. The tension between those preferring standards and rules shows no end in sight in this arena.

C. JURISDICTIONS ON THE FENCE

Finally, a few jurisdictions appear to be on the fence of the debate, for various reasons. The state of Washington has applied *Hearn*, but has left the door open to not applying it when confronted with different fact patterns in the future.⁸⁸ Meanwhile, the Southern District of Indiana has conflated *Hearn* and *Rhone*, finding *Lorenz v. Valley Forge Insurance Co.*, a *Hearn* case, and *Rhone* in accord.⁸⁹

D. MISCELLANEOUS TESTS

As it currently stands, *Hearn* and *Rhone*, or tests just like them except in name, dominate the judicial landscape, with *Clamshell* little more than a close relative of *Hearn*. However, a couple now-defunct tests merit mention, as do jurisdictions that have modified one of the dominant tests in order to suit their tastes.

1. *Defunct Tests*

Other tests besides *Hearn* and *Rhone* bear mentioning. The “automatic waiver” rule has been cited by many courts as one of the three great privilege at-issue tests.⁹⁰ Yet the only courts I have found to have actually used the test were district courts in the Second Circuit,⁹¹ and that circuit has now

84. *Mortg. Guar. & Title Co. v. Cunha*, 745 A.2d 156, 160 (R.I. 2000) (by implication).

85. *Banc of Am. Sec., L.L.C. v. Evergreen Int'l Aviation, Inc.*, No. 03 CVS 9138, 2006 WL 401679, at *5 (N.C. Super. Jan. 25, 2006).

86. *Mueller v. Nationwide Mut. Ins. Co.*, 31 Pa. D. & C.4th 23, 41 (Pa. C.P., Allegheny Cnty. 1996).

87. *State v. Hydrite Chem. Co.*, 582 N.W.2d 411, 418 (Wis. Ct. App. 1998).

88. *Pappas v. Holloway*, 787 P.2d 30, 36 (Wash. 1990).

89. *Harter v. Univ. of Indianapolis*, 5 F. Supp. 2d 657, 664 (S.D. Ind. 1998) (adopting *Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*, 32 F.3d 851 (3d Cir. 1994)).

90. *Indep. Prods. Corp. v. Loew's, Inc.*, 22 F.R.D. 266, 277 (S.D.N.Y. 1958).

91. *Id.*

joined the *Rhone* camp.⁹² The reception has also been chilly in academia, and thus this test can be regarded as a dead letter.⁹³

Other courts, such as the Federal Circuit, have generated balancing tests much like *Hearn* or *Clamshell*.⁹⁴ In light of the ascendance of *Hearn* and *Clamshell*, these tests are likely subsumed at this point.⁹⁵

2. *Compromise Tests*

Finally, many courts have attempted to split the difference between *Hearn* and *Rhone*, between standards and rules, by clarifying or modifying *Hearn*. The first and third prongs have been the focus of this effort, as the second prong offers little in cabining *Hearn*'s possible deleterious effect with its open-ended requirement of "relevance." Regarding the first prong, many courts have required an affirmative act that goes beyond simply filing a suit.⁹⁶ Instead, these courts have focused upon the means by which the party goes about arguing and proving its case, finding that prong one of *Hearn* is satisfied when the party decides to rely upon the course of action that will bring its attorney's advice into play.⁹⁷ Turning to the third prong, some courts have seized upon the word "vital" in firming up *Hearn*, taking "vital" to mean material that is potentially outcome determinative, thus making a sort of super-relevance requirement, as well as unavailable by other means.⁹⁸

IV. RULE OR STANDARD IN THE DISCOVERY RULE SETTING?

As can be seen by the approximately even division among courts between a standard and a rule, both sides apparently have cogent arguments in their behalf. As the *Rhone* wave has continued to grow in recent years, defenders of *Hearn* and its truth-seeking function have come to its defense.⁹⁹ Rather than speaking at a high level of generality about the dispute, it would probably be more beneficial to focus in on a particular example of this dispute, suggest a solution for this example, and hope that the result can be generalized to, or distinguished from, other privilege disputes as the con-

92. *In re* Cnty. of Erie, 546 F.3d 222, 228 (2d Cir. 2008).

93. Bennardo, *supra* note 17, at 554.

94. *See, e.g.*, Zenith Radio Corp. v. United States, 764 F.2d 1577 (Fed. Cir. 1985).

95. *See id.* at 1580 (recognizing that its case would be disposed of in the same way whether *Hearn* or the other balancing test was applied).

96. *But see* United States v. Bilzerian, 926 F.2d 1285 (2d Cir. 1991).

97. *See, e.g.*, Pereira v. United Jersey Bank, No. 94 Civ. 1565(LAP), 1997 WL 773716 (S.D.N.Y. Dec. 11, 1997).

98. *See e.g.*, Standard Chartered Bank PLC v. Ayala Int'l Holdings Inc., 111 F.R.D. 76 (S.D.N.Y. 1986).

99. Steckman & Granofsky, *supra* note 18.

text dictates. In the battles over whether the privilege is put at issue, I will now single out the use of the privilege in litigation over whether the statute of limitations applies. Specifically, the invocation of the “discovery rule” presents an interesting case study for the *Hearn-Rhone* dilemma. The discovery rule is used by a party seeking to avoid the effect of a statute of limitations. In order to successfully invoke this rule, parties must show that they were unaware, and should not have been aware, that they could have brought a lawsuit at the time of the action such that the suit would now be time-barred. Often, whether the party knew or should have known about its potential suit hinges upon the advice given it by counsel, thus implicating the privilege. Given the focus of this paper, the worries of the Harvard authors concerning the unlimited scope of *Hearn* are not directly apposite.

A. PLEADING BURDENS AS AN INTUITIVE GUIDE

A sensible first step in delving into the discovery rule field would be to follow in the footsteps of practicing attorneys, which means we can start with the pleadings. As noted above, putting the privilege at issue, even under the generous *Hearn* standard, requires a party to make an affirmative legal action.¹⁰⁰ The pleading requirements of the discovery rule, then, should shed some light upon who is putting what at issue in such litigation.¹⁰¹ The party invoking the privilege in a coercive action is always going to be the plaintiff, who must plead the discovery rule either as a response to the invocation of the statute of limitations by the defendant or in its original petition as a confession and avoidance when the applicability of the statute of limitations can be seen by looking at the face of the petition.¹⁰² Thus, when *Hearn* noted that an affirmative act, such as bringing suit, is relevant to the putting-at-issue inquiry, it was right, at least in this context. The plaintiff must positively say that the statute of limitations does not apply because it did not know about its cause of action until such-and-such time, and accordingly, it is only fair to say that the plaintiff has put its knowledge of its discovery front and center in the litigation.

The classic Harvard article lambasting *Hearn*'s affirmative act requirement singled out the case of *Pitney-Bowes, Inc. v. Mestre*¹⁰³ in an attempt to show that the pleading idiosyncrasies of a case could create absurd

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

101. *But see generally* Richard L. Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 MICH. L. REV. 1605, 1631 (1986) (“[T]hat fairness does not regularly control the allocation of pleading burdens, so that allocation should not be the determinative matter on waiver.”). Assuming *arguendo* that this proposition is true in general, it does not seem to hold in the discovery rule setting, as discussed below, using *Hearn* itself as an example.

102. *Morris v. Enron Oil & Gas Co.*, 948 S.W.2d 858, 868 (Tex. App. 1997).

103. *Pitney-Bowes, Inc. v. Mestre*, 86 F.R.D. 444 (S.D. Fla. 1980).

results under *Hearn*.¹⁰⁴ Pitney-Bowes decided to bring a declaratory judgment action against Mestre to repudiate a contract instead of stopping its payments to Mestre, which would have forced Mestre to become the plaintiff by bringing an action for breach of contract.¹⁰⁵ The court held that Pitney-Bowes had injected the issue of the intent of the parties into the litigation by arguing that it had intended to modify the licensing agreements at issue and, therefore, waived its privilege protecting documents that might reveal its intent.¹⁰⁶ The Harvard article argued that, had Pitney-Bowes decided to let Mestre take the legal initiative and bring suit against it for breach of contract, Mestre would have been the party injecting the issue of the intent of the parties.¹⁰⁷

There are multiple flaws with the writers' argument here. First, on the facts, they assume that, had Mestre brought the analogous coercive lawsuit instead of the declaratory suit, the court would have found Mestre to be injecting the issue.¹⁰⁸ It may well have been the case that, after Mestre had brought the suit and established breach, Pitney-Bowes would have brought up the issue of party intent and the court would have considered them to have injected the issue. When and how the issue was injected was somewhat unclear. Second, and more generally, the authors implied that parties will easily manipulate pleading requirements in order to twist *Hearn* to their benefit.¹⁰⁹ However, it is not so easy for parties to do so in most cases, making the specter of artful pleading somewhat of a boogeyman.

For example, as *Hearn* itself shows, the party bringing the suit does not risk waiver of privilege simply by bringing suit. *Hearn* brought suit against prison officials, who then injected good faith immunity into the litigation.¹¹⁰ Thus, the pleading requirements worked as they were supposed to. Even though *Hearn* took the affirmative action of bringing suit, it was the affirmative action of the other party in injecting the defense that actually made the privileged material vital to the litigation, and thus led to a waiver of the defendant's privilege.¹¹¹ Similarly, if a party wishes to have a court declare that an otherwise valid action against it is now time-barred, that party should be held not to be injecting the discovery rule issue simply because it is now the party bringing the litigation. Whether a typical coercive proceeding or the mirror image declaratory suit, the discovery rule will be injected, if at all, by the party, whether "plaintiff" or "defendant," seeking

104. Harvard Law Review Association, *supra* note 29, at 1642-43.

105. See *Pitney-Bowes*, 86 F.R.D. at 445.

106. *Id.* at 447.

107. Harvard Law Review Association, *supra* note 29, at 1642-43.

108. *Id.*

109. *Id.* at 1643.

110. *Hearn v. Rhay*, 68 F.R.D. 574, 580 (E.D. Wash. 1975).

111. *Id.* at 577.

to circumvent the statute of limitations. Thus, declaratory judgment suits do not normally invert all of the pleading requirements and burdens in an otherwise-coercive action, but instead simply swap the identity of the plaintiff and defendant.

The consternation over *Pitney-Bowes* might be chalked up to the odd nature of declaratory judgment actions, which have caused consternation in many areas of the law beyond the one covered in this article. For instance, the Supreme Court has wrestled with the jurisdictional implications of these actions.¹¹² The Court determined that jurisdiction should not turn upon the pleading strategies or the order of the parties, but instead the underlying controversy. "It is the nature of the controversy, not the method of its presentation or the particular party who presents it, that is determinative."¹¹³ Similarly, a court concerned with the manipulation of *Hearn* by the declaratory judgment action could simply determine *Hearn*'s affirmative action prong as if the action were the analogous coercive action. Thus, in those cases where Party A would be required to inject the issue in a normal coercive suit, but Party B preemptively injects the issue in the declaratory judgment version, the court should wait and see if party A relies on the issue itself, and at that point consider the issue injected into the case by A. Thus, if Party A usually invokes the discovery rule in litigation against Party B in a typical coercive suit as the plaintiff, a court that finds itself hearing a declaratory judgment version of this litigation with Party B as the plaintiff should wait for Party A to invoke the discovery rule before Party A is deemed to place anything at issue. In sum, the nature and flow of pleadings indicate that the results generated by *Hearn* are more in tune with the course of litigation.

B. PROVING A NEGATIVE JURISPRUDENCE AS A CLUE

The case for *Hearn*-like outcomes over *Rhone*-like results becomes stronger when one turns to the jurisprudence surrounding proving a negative. Often, a party finds itself in the difficult situation of having to prove a negative. Although a minority of courts have found that the burden remains upon the party that would normally have the burden when that which must be proved is an affirmative event,¹¹⁴ most courts have found that the party that bears the burden should be the party with the best, or "peculiar," access to the relevant information, which often shifts the burden from plaintiff to

112. See *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 19-20 (1983).

113. *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 244 (1937).

114. See, e.g., *Abhau v. Grassie*, 104 N.E. 120 (Ill. 1914); *Johnson v. Johnson*, 50 S.E.2d 569 (N.C. 1948).

defendant.¹¹⁵ Thus, while a plaintiff normally has to prove the negligence of the defendant, if the plaintiff in a particular case must prove that the defendant did not do something, most courts will put the burden on the defendant to show that he did do that something if the defendant can more easily prove the positive than the plaintiff can prove the negative.¹¹⁶

This quirky area of the law has useful application here. The plaintiff pleading the discovery rule is in a superior position to know when she discovered the cause of action. As such, the plaintiff should not be able to keep her discussions regarding whether she had a cause of action at such-and-such time off of the radar. Instead, to carry her burden of proof, the plaintiff should be required to show that, even when she talked to her attorney at a time after the injury was sustained, she was not advised that there was an actionable legal claim. This “peculiar” situation of proving a negative answers one of the two chief criticisms of the classic Harvard article noted above,¹¹⁷ to wit, that the *Hearn* approach, in the discovery rule situation, targets a type of unfairness more in need of privilege-piercing than the normal litigation situation. If “vital” means evidence both with a high likelihood of determining the case’s outcome and with no means of access save a waiver of the privilege, then evidence of a private discussion between plaintiffs and their attorneys regarding an injury and possible recovery thereof likely fits the bill. Given the objective and subjective prongs that the plaintiffs must meet, perhaps the defendants could defeat the discovery rule by showing the plaintiffs should have known about the injury regardless of whether they did in fact know about the injury. Even under this objective prong, however, communications with attorneys could still be highly probative.

C. SWORD AND SHIELD ANALOGY AND THE OPENED DOOR DOCTRINE

No discussion of privilege would be complete without treatment of the metaphor of a sword and a shield, which is often invoked by courts to explain their treatment of the attorney-client privilege.¹¹⁸ The privilege, they say, is a shield by nature, but it should not be used as a sword.¹¹⁹ This metaphor has often been reduced to a mere platitude, and generally has done little to decide whether *Hearn* or *Rhone* is a better choice.¹²⁰ The

115. See, e.g., *AllState Fin. Co. v. Zimmerman*, 330 F.2d 740, 744 (5th Cir. 1964); *Fulwider v. Trenton Gas, Light & Power Co.*, 116 S.W. 508 (Mo. 1909).

116. See, e.g., *Woerth v. Flagstaff*, 808 P.2d 297 (Ariz. Ct. App. 1990).

117. See Harvard Law Review Association, *supra* note 29.

118. See, e.g., *Jenney v. Airdata Wiman, Inc.*, 846 So. 2d 664, 668 (Fla. Dist. Ct. App. 2003).

119. See *Pub. Serv. Co. of New Mexico v. Lyons*, 10 P.3d 166 (N.M. Ct. App. 2000).

120. Compare *id.* at 174 (*Rhone*), with *Parler v. Miles*, 756 A.2d 526, 542 (*Hearn*).

Rhone courts believe that the privilege is only a sword when privileged material is explicitly invoked. However, relying on explicit invocation of the privileged material does not answer the question of whether privileged material has become a sword against the other party; it only answers the question of whether the sword is in plain sight. Parties can, and surely do, rely upon legal knowledge from their counsel without saying that they are doing so.

The sword and shield analogy is one concerned with the equities of the situation, as it would be unfair for a party to use a legal device meant for defense as an offensive device as well. A doctrine related to the discovery rule, equitable tolling, has been considered in Second Circuit district courts,¹²¹ and its treatment sheds light upon the proper use of the sword and shield analogy. Looking to *WLG-TV Inc. v. Cablevision Systems Corp.*:

[W]here a litigant seeks to avoid a statutory protection which has been established for the benefit of his adversary (e.g. a statute of limitations), by a claim that his adversary is estopped to assert such protection; and where it appears that there is a good faith basis for believing that invasion of the attorney-client privilege would shed light on the validity of such claim of estoppel; the party making such assertion must be deemed to have waived the privilege.¹²²

Thus, when party seeks to defeat a protection (shield) held by the other party, such as a statute of limitations, which is possibly based upon information otherwise protected by the attorney-client privilege, the privilege has become the scabbard for the sword that is the discovery rule. As *WLG* notes, it is not clear whether the privilege is concealing information that would undo the estoppel claim, but it never is until the court can peek behind the privilege curtain.¹²³

Likewise, the discovery rule seems to be a privilege-as-sword situation: clients' lawyers tell them that they have a cause of action; clients may sit on the action for too long; and/or clients may belatedly decide to bring suit. Such indirect reliance is using the privilege as a sword, albeit a veiled one.¹²⁴ Courts should not allow parties to rely on counsel's advice and then

121. *WLG-TV, Inc. v. Cablevision Sys. Corp.*, 879 F. Supp. 229, 234 (E.D.N.Y. 1994).

122. *Id.* (quoting *Connell v. Bernstein-Macaulay*, 407 F. Supp. 423, 423 (S.D.N.Y. 1976)).

123. *Id.* ("The content of WLG's communications with its lawyers *may* establish when WLG acquired knowledge of its antitrust claims . . .") (emphasis added).

124. T. Maxfield Bahner & Michael L. Gallion, *Waiver of Attorney-Client Privilege Via Issue Injection: A Call for Uniformity*, 65 DEF. COUNS. J. 199, 205 (1998).

hide the contents of that advice from the opposing party, at least in situations where there should be a presumption that the party relied upon its counsel's interpretation of the law. Otherwise, courts would be allowing a one-sided story to be told.¹²⁵

Another way to frame this issue would be to view the privilege-holder as "opening the door" to his legal communications, and this takes us to perhaps the most critical point of this article. Under this doctrine, otherwise inadmissible evidence can come in to rebut a false impression created by the other party.¹²⁶

It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths.¹²⁷

The same reasoning should apply to our circumstance: if a plaintiff pleads the discovery rule as a sword to defeat the statute of limitations, the door should be considered open as to all of the relevant facts surrounding the discovery *vel non* of the injury or suit.

D. RECOMMENDATION: RULE OF WAIVER IN SITUATIONS INVOLVING
"LEGAL KNOWLEDGE" OF CLIENTS

In response to the foregoing, the proponents of *Rhone* would likely cite their long-cherished worry that *Hearn* cannot see the forest for the trees, that is, that *Hearn* is too worried about the apparent unfairness in a particular case and gives short shrift to the systematic importance of the attorney-client privilege. This worry is seen in many other areas of the law, such as when defense attorneys worry that allowing in an ill-gotten confession in one case erodes defendants' rights in all other cases. However, perhaps the *Rhone* camp has been painting with too broad of a brush, believing that the attorney-client privilege is always and everywhere deserving of the same protection from courts.¹²⁸ When we look at the privilege in situations where the legal knowledge of the client is at the heart of the case, or at least at the heart of the issue currently being litigated, the privilege seems to deserve less protection than in situations where legal knowledge is not at

125. *Baratta v. Homeland Housewares, L.L.C.*, 242 F.R.D. 641, 643 (S.D. Fla. 2007).

126. *Sivells v. Maryland*, 9 A.3d 123, 139-40 (Md. Ct. Spec. App. 2010).

127. *Washington v. Gefeller*, 458 P.2d 17, 21 (Wash. 1969).

128. *Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*, 32 F.3d 851, 864 (3d Cir. 1994) (arguing that the privilege should not depend on the facts and circumstances of particular cases).

stake, which is most of the time, such as when police would like to know if a defendant confessed to his attorney.

At this point in the article, armed with the clues gained from analyzing pleading rules, the jurisprudence of proving a negative, and the sword/shield metaphor along with the opened door doctrine, all the indications are that the more liberal results generated by *Hearn* are preferable to the stiff *Rhone* rule in the discovery rule context. Yet, the signs pointing to an inclination towards such results seem to call for such results whenever the discovery rule is invoked, end of story. Thus, something about the discovery rule seems to call for a rule, but just not the rule that we currently have. So what exactly is it about the discovery rule and similar situations that cry out for implied waiver?

1. *Something Special About "Legal Knowledge"*

Each time a plaintiff seeks refuge in the discovery rule, the plaintiff makes an issue out of when she realized that she had a cause of action. It is not just that the information is relevant, for that can be said of much that the client tells the attorney or vice versa. Nor is it that the information is possibly outcome determinative, for that can be said of the above example of the confession to the attorney. Nor is it even that the information cannot be accessed in any other way, for again, that could be said of the confession to the attorney. Rather, it is that they inevitably put their legal knowledge at issue as a sword, and thus should not be able to invoke the shield of the privilege at the same time. A defender of *Rhone* might say that this rationale would allow a party to get at all sorts of otherwise privileged material simply because they are important to the disputed legal issue. However, there is a difference between saying that plaintiffs always put their discussions with attorneys at issue when they invoke the discovery rule and saying that plaintiffs always put their discussions with attorneys at issue when they, say, plead the last clear chance doctrine.¹²⁹

When plaintiffs invoke the discovery rule, they unavoidably put their legal knowledge at issue, and whether they want to openly acknowledge it or not, or whether they want to put their discussions with attorneys at issue or not, their conversations with clients are at issue. The lawyers are not simply participants in adversarial proceedings at this point; rather, they are causal agents in creating the moment of discovery, or lack thereof. Therefore, plaintiffs who claim to the court that they did not understand that they had a cause of action at or before "time X" should not be heard to appeal to

129. *McDevitt v. Stacy*, 559 S.E.2d 201, 206 (N.C. Ct. App. 2002) ("Plaintiff also specifically pleads the doctrine of last clear chance in avoidance to the affirmative defense of contributory negligence.").

the attorney-client privilege in the same breath when the plaintiffs had contact with their own attorneys at or before “time X.” The plaintiffs essentially cry ignorance on their own behalf, but in proving such ignorance, they should have to show that opportunities for enlightenment on their part did not actually enlighten them.

The type of information put at issue when the discovery rule is pled is markedly different from other types of information that are also put at issue by other types of arguments and pleadings. For example, when plaintiffs argue that the defendant cannot assert a contributory negligence defense because the defendant had the last clear chance to avoid the accident, there is no issue of legal knowledge, and there is accordingly no justification to pierce the attorney-client privilege. For the majority of pleadings, a party will seek to prove an affirmative, not a negative, and will have its choice of what types of evidence to bring to bear. As such, the other party usually cannot claim that the privilege-holder is necessarily relying on a single piece of evidence, let alone certain evidence that can only be retrieved by piercing the privilege. A party’s understanding of the law is put at issue only in a minority of cases, but it is with these that this article is primarily concerned.

2. *State Farm Mut. Auto. Ins. Co. v. Lee*

There is a reason that the case which broke ground in this area, *Hearn*, involved the assertion of legal knowledge, which in that case was good faith immunity. Courts should explicitly acknowledge that breaching the privilege in cases involving legal knowledge should be treated categorically different from other cases. A case out of the Arizona Supreme Court, *State Farm v. Lee*,¹³⁰ provides the best discussion of the standard and rule struggle in the at issue arena, with the discussion readily translatable to settings such as the discovery rule. In that case, in which plaintiffs sued State Farm for bad faith denial of coverage, the majority sided with a standard and the dissent with a rule.¹³¹ The question before the court was

whether, having alleged that its actions were objectively and subjectively reasonable and in good faith based on its evaluation of the law—an evaluation that included advice of counsel, State Farm may then raise the privilege as a bar to prevent discovery of the information in the possession of its employees and managers when they made the subjective

130. *State Farm Mut. Auto. Ins. Co. v. Lee*, 13 P.3d 1169 (Ariz. 2000).

131. *Id.* at 1171.

determination and concluded that the law permitted them to reject Plaintiffs' claims.¹³²

State Farm did not expressly rely upon its attorney's advice in arguing that its actions were reasonable, but the court noted that it could find issue injection short of that.¹³³ "We do not read the Restatement to require such a magical admission [expressly relying on privileged material], nor to require that the court accept as dispositive the client's assertion that it did not rely on the advice it received."¹³⁴ With that repudiation of the *Rhone* regime, the court went on to state that

[a] litigant cannot assert a defense based on the contention that it acted reasonably because of what it did to educate itself about the law, when its investigation of and knowledge about the law included information it obtained from its lawyer, and then use the privilege to preclude the other party from ascertaining what it actually learned and knew.¹³⁵

The court adamantly denied that it was creating automatic waiver in any bad faith case, as it claimed that a party could argue the reasonableness of its actions without relying, even implicitly, upon legal advice.¹³⁶ Rather, the court held that issue injection occurred in the following circumstance:

[W]hen, as in the present case, the party asserting the privilege claims its conduct was proper and permitted by law and based in whole or in part on its evaluation of the state of the law. In that situation, the party's knowledge about the law is vital, and the advice of counsel is highly relevant to the legal significance of the client's conduct. Add to that the fact that the truth cannot be found absent exploration of that issue¹³⁷

With that wind-up, the court stated its holding: "State Farm has affirmatively injected the legal knowledge of its claims managers into the litigation and put the extent, and thus the sources, of this legal knowledge at issue."¹³⁸

132. *Id.* at 1174-75.

133. *Id.* at 1177.

134. *Id.* at 1181.

135. *Lee*, 13 P.3d at 1181.

136. *Id.* at 1178.

137. *Id.* at 1179.

138. *Id.* at 1182.

Two of the five judges on the court dissented, believing that an express waiver should be required. One of the judges emphasized that the majority's approach essentially required a waiver of privilege each time a defendant argued that it was subjectively reasonable in its actions, such that the privilege would be waived.¹³⁹ The second judge more broadly noted that courts can presume that clients always rely upon their counsel in establishing the elements of their claim.¹⁴⁰

The second dissent, arguing that the majority was opening the door to issue injection in a wide swath of cases, is countered by the majority, which effectively pointed out that, on the facts of the instant case, the party waiving the privilege had not only consulted with its lawyer, but had argued that it had acted subjectively reasonably based upon its legal knowledge, and one of its sources of legal knowledge was its counsel.¹⁴¹ The first dissent, though, is more difficult to answer. Under the majority's analysis, for State Farm to have avoided injecting the issue, it should have defended merely on the objective reasonableness prong.¹⁴² Thus, State Farm faced the choice of defending on both prongs and waiving the privilege or defending only on one prong.¹⁴³ The dissent believed that State Farm should have been able to argue on the subjective prong and still preserve the privilege.¹⁴⁴ Thus, on the one hand, the majority believed that, as soon as State Farm claimed that it subjectively believed its actions were reasonable based upon its evaluation of the law, the privilege was waived because this evaluation evidently included advice from counsel.¹⁴⁵ On the other hand, the dissent believed that State Farm could have defended that its actions were reasonable based upon its evaluation of the law without waiving the privilege.¹⁴⁶ The burning issue of the case becomes: Is the majority correct in that a client's evaluation of the law should be assumed to be based upon lawyers' advice if there is evidence of such a meeting at the relevant time, or is the dissent correct in that there is daylight between an evaluation of the law and an evaluation of the law based upon advice of counsel?

Before generalizing the question from *Lee* to the discovery rule, it is important to note that the burdens of proof in that case differ from the burdens in the discovery rule context in one important aspect. Whereas, the defendant on a good faith immunity defense need only win on the objective or subjective reasonableness prong and thus can avoid waiving the privilege

139. *Id.* at 1185 (Martone, J., dissenting).

140. *Lee*, 13 P.3d at 1187 (McGregor, J., dissenting).

141. *Id.* at 1182 (majority opinion).

142. *Id.*

143. *Id.* at 1182-83.

144. *Id.* at 1186 (Martone, J., dissenting).

145. *Lee*, 13 P.3d at 1183, 1186 (majority opinion) (Martone J., dissenting).

146. *Id.* at 1186 (Martone, J., dissenting).

by avoiding the subjective prong altogether, the plaintiff in the discovery rule setting must prove both objective and subjective diligence. Thus, in applying the majority's analysis in *Lee* to the discovery rule setting, when a defendant can show that a plaintiff met with a lawyer during the relevant time period, the dissent's fear should come true that a plaintiff automatically waives the privilege simply by pleading the discovery rule. Since the subjective element must be in play for the plaintiff to prevail, the plaintiff must argue that it was reasonably diligent in investigating whether it had a cause of action, and a source of this investigation would assumedly be counsel. The defendant need only prove objective (should have) or subjective (actually did) discovery, but the plaintiff must prevail on both and thus puts both in issue.

However, even though the *Lee* dissent might find this result distasteful,¹⁴⁷ the result seems proper. The majority was ultimately correct in that there was no daylight between asserting that one investigated the state of the law and relying upon counsel's advice. Lay parties might investigate the law by themselves, but the possibility that they will turn to lawyers for this advice merits a determination that the communications are at issue. Thus, it is necessarily so that, whenever a party argues that it was unaware of its cause of action, courts should be able to determine whether that party is telling the truth or hiding part of it. The proverbial door to the plaintiff's subjective legal knowledge is being opened, and if the plaintiff has something to hide, it should be put in issue and placed into the light. A party should not be able to argue that it was subjectively reasonable in a good faith claim or subjectively diligent in a discovery rule claim without injecting privileged material, albeit impliedly.

Strangely enough, the logic of this argument continues to lead this author to affirm the *Hearn*-like result, but in such a manner that exceptions should not be made, and thus the best solution seems to be *Hearn* as a rule. When the discovery rule is pleaded, the definitive trigger is pulled, and the equally definitive response should be a waiver of all relevant attorney-client communications, without the need for *ex post* balancing.

E. DISCOVERY RULE AND SIMILAR CASES

Having now covered various reasons for finding that the *Hearn* result is superior to the *Rhone* result, we can turn to the cases on point. The majority of cases dealing with this issue fall into the *Hearn* camp, and stand for the proposition that a simple invocation of the discovery rule puts privi-

147. *Id.* at 1184-87 (Martone, J., & McGregor, J., dissenting).

leged material at issue.¹⁴⁸ As with the larger debate, though, there are courts that have sided with *Rhone* even in discovery rule fact patterns.¹⁴⁹

The busiest area of the nation regarding the application of *Hearn* or *Rhone* to discovery rule litigation has been Illinois. Both state and federal courts have passed upon the question, and all of the decisions have sided with *Hearn*.¹⁵⁰ The case of *Pyramid Controls v. Siemens Industrial Automations* perhaps best captures the prevalent reasoning.¹⁵¹ The court found that “invasion of the attorney-client privilege is necessary because the specific content of those communications is essential to resolving the statute of limitations issue.”¹⁵² However, the case does not define what it meant by “essential.” A later Illinois case suggested scenarios in which the communications are “essential.”¹⁵³ In *Lama v. Preskill*, the court mentioned lawsuits between clients and their attorneys, such as malpractice and *quantum meruit* actions.¹⁵⁴ *Lama* also acknowledges that it can be worthwhile to look to the pleadings in determining whether there was issue injection, as it held that the plaintiff, and not the defendant, injected the discovery rule issue by anticipating the issue in the initial complaint.¹⁵⁵ However, the court indicated it may have come out the other way had the plaintiff kept silent on the issue in the initial pleadings and allowed the defendant to bring up the statute of limitations issue.¹⁵⁶

Some cases, particularly from New York, not only noted the on-going dispute between *Hearn* and *Rhone*, but also distinguished statute of limitations disputes as *sui generis*. These cases did not necessarily involve the discovery rule, but did entail plaintiffs attempting to avoid the statute of limitations through other avoidances. The above-noted *WLIG* decision is perhaps the best-known. “*Rhone-Poulenc* and the cases cited by *WLIG* are examples of cases in which the attorney-client privilege is sought to be vitiated on grounds other than the narrow issue of statute of limitations, which

148. See, e.g., *Memorylink Corp. v. Motorola, Inc.*, No. 08 C 3301, 09 C 7401, 2010 WL 3167277, at *6 (N.D. Ill. Aug. 6, 2010); *Pyramid Controls, Inc. v. Siemens Indus. Automations, Inc.*, 176 F.R.D. 269, 275 (N.D. Ill. 1997); *Russell v. Curtin Matheson Scientific, Inc.*, 493 F. Supp. 456, 458 (S.D. Tex. 1980); *Connell v. Macaulay, Inc.*, 407 F. Supp. 420, 423 (S.D.N.Y. 1976); *Lama v. Preskill*, 818 N.E.2d 443, 450 (Ill. App. Ct. 2d Dist. 2004); *Global Investors Agent Corp. v. Nat'l Fire Ins. Co.*, 927 N.E.2d 480, 489 (Mass. App. Ct. 2010).

149. *Darius v. City of Boston*, 741 N.E.2d 52, 54-55 (Mass. 2001); *Pub. Serv. Co. of New Mexico v. Lyons*, 10 P.3d 166, 173 (N.M. Ct. App. 2000).

150. See e.g., *Pyramid Controls, Inc.*, 176 F.R.D. 269.

151. *Id.*

152. *Id.* at 274.

153. *Lama*, 818 N.E.2d 443.

154. *Id.* at 448-49.

155. *Id.* at 449.

156. *Id.*

is presently before the undersigned.”¹⁵⁷ The narrow grounds of the *WLIG* decision have been noted by many courts citing *WLIG*.¹⁵⁸ Similar is *Connell v. Bernstein-Macaulay, Inc.*, wherein the plaintiffs attempted to avoid the statute of limitations by claiming that they had withheld suit upon defendants’ request so that defendants would have time to put their business back in order.¹⁵⁹ The defendants sought an order for discovery into some of the plaintiffs’ privileged material, and the court granted it, explaining that:

It seems to me that where a litigant seeks to avoid a statutory protection which has been established for the benefit of his adversary (e.g. a statute of limitations), by a claim that his adversary is estopped to assert such protection; and where it appears that there is a good faith basis for believing that invasion of the attorney-client privilege would shed light on the validity of such claim of estoppel; the party making such assertion must be deemed to have waived the privilege.¹⁶⁰

The Fifth Circuit case of *Conkling v. Turner* deals more directly with our issue, though the nomenclature is somewhat different.¹⁶¹ The plaintiff had brought suit under the Racketeer Influenced and Corrupt Organizations Act (RICO), and the defendant responded with a prescription defense, which is a statute of limitations defense that also alleges that the plaintiff knew of the scheme at issue at such time that the statute of limitations would time bar the action.¹⁶² In response, the plaintiff claimed he did in fact not know about the scheme.¹⁶³ Even though the defendant technically brought up the issue of knowledge in the prescription defense, the court found that the plaintiff had put the issue of his knowledge of the scheme at issue, and thus found the privilege waived.¹⁶⁴ It is not clear why the court believed that the plaintiff had put privileged information at issue, though the two possibilities are that he did so by bringing an ostensibly time-barred suit or, more likely, by responding to the prescription defense.

In contrast is *Public Service Company of New Mexico v. Lyons*. There, the plaintiff, as in the New York district court case noted above, invoked

157. *WLIG-TV, Inc. v. Cablevision Sys. Corp.*, 879 F. Supp. 229, 235 (E.D.N.Y. 1994).

158. *See, e.g.*, *Baltimore Scrap Corp. v. David J. Joseph Co.*, Civ. No. L-96-827, 1996 WL 720785, at *25 (D. Md. Nov. 20, 1996).

159. *Connell v. Bernstein-Macaulay, Inc.*, 407 F. Supp. 420, 422 (S.D.N.Y. 1976).

160. *Id.*

161. *Conkling v. Turner*, 883 F.2d 431, 434 (5th Cir. 1989).

162. *Id.* at 432-33.

163. *Id.* at 434.

164. *Id.* at 435.

the discovery rule's equitable cousins.¹⁶⁵ The trial court utilized the *Hearn* approach, but the Court of Appeals of New Mexico disagreed, finding persuasive the academic and judicial critiques of *Hearn*.¹⁶⁶ The court required that the privileged material be put directly at issue—that there was specific reliance upon the attorney-client communications.¹⁶⁷ The court did not apply *Rhone* to the facts of the case, opting for a remand instead.¹⁶⁸ Given the bright-line nature of *Rhone*, we do not need to see *Rhone* applied to see how it works; the plaintiffs either mention the communications by name and put them at issue, or they do not.

All told, these cases indicate that courts continue to be torn between the certainty of a rule, with its easy *ex ante* predictions of what actions by holders will waive their privilege, and the just results generated by the standard in preventing holders from abusing their privilege. This article offers a win-win, rather than a zero-sum, solution. Courts should adopt a rule, but the opposite of the *Rhone* rule, at least in situations like the discovery rule where privilege-holders put their subjective legal knowledge at issue. Pleading the discovery rule, and probably many of its siblings like equitable tolling, and maybe even many of its cousins like good faith immunity, should lead to a presumption, perhaps even irrebuttable, of waiver.

F. FALSE POSITIVES, FALSE NEGATIVES

A complaint that naturally arises under a more liberal discovery regime is a case where it turns out the party invoking the discovery rule was not hiding anything behind the cover of privilege, thus wasting time and resources and also bringing to light otherwise privileged information. These concerns of false positives can be easily dismissed or allayed. After all, there are sure to be instances where discovery may or may not yield what a party expects. That alone cannot be a definitive reason not to conduct the inquiry. When the discovery takes place, the validity of the assertion of the discovery rule will be answered one way or the other, thus justifying the costs. The trial court can allocate the costs dependent upon the result of the discovery if it so desires, or instead leave it always upon the party seeking to use the discovery rule to its benefit or always upon the party seeking to invalidate the assertion of the discovery rule.

Regarding the concern about privileged material being aired for no good reason, there are two answers. First, there is a hindsight bias in saying that the material has been brought to light for no reason. We could not know whether the discovery rule was validly asserted until discovery took

165. Pub. Serv. Co. of N.M. v. Lyons, 10 P.3d 166, 169 (N.M. Ct. App. 2000).

166. *Id.* at 172-76.

167. *Id.* at 173.

168. *Id.* at 176.

place. Second, the materials can simply be examined in discovery by the court via in-camera proceedings. There is no need for the material to see the light of courtroom proceedings until the judge has examined them.

It is the other type of error, the false negative, which truly cannot be cured or mitigated. If a court refuses to broach the privilege and determine whether the party truly could not discover the basis for suit until after the statute had run, then that party will improperly end-run the statute afforded to the other part and no one will ever be the wiser save for the circumventing party.

G. JUST LIKE THE DOCTOR-PATIENT PRIVILEGE

As a counter to the likely response that the attorney-client privilege is being put at risk, why treat the attorney-client privilege in the discovery rule setting any differently from the doctor-patient privilege? Whenever a plaintiff brings a personal injury suit, the doctor-patient privilege is waived, full stop.¹⁶⁹ No inquiry is necessary into whether the plaintiffs will rely upon the communications between patients and their doctors. Instead, courts assume, with much common sense to support their assumption, that the communications are put at issue whether the plaintiff wants them there or not.¹⁷⁰

A party should not be permitted to assert a mental or physical condition in seeking damages or in seeking to absolve himself from liability and at the same time assert the privilege in order to prevent the other party from ascertaining the truth of the claim and the nature and extent of the injury or condition.¹⁷¹

Similarly, when plaintiffs generally bring their suits and put their state of mind as to their discovery of their injury and need for legal advice at issue, these plaintiffs should not be heard to say that they can also keep their privilege inviolate. Just imagine the inequities of allowing tort plaintiffs to bring their negligence claims against other drivers and prove damages with a particular expert while at the same time claiming that their post-accident consultation with their normal doctor is off-limits because of privilege. This illustrates the unfairness of allowing the discovery rule plaintiffs

169. David L. Lillebaug, *Ex Parte Interviews with 'Two-Hatted' Witnesses*, 21 TORT & INS. L.J. 441, 444 (1986) ("In most jurisdictions, the [doctor-patient] privilege is waived when the patient files a lawsuit which places his health in controversy.")

170. See, e.g., *Roberts v. Ostrum*, 996 P.2d 883, (Mont. 1999); *Wagner v. Thomas J. Obert Enters.*, 396 N.W.2d 223, 228 (Minn. 1986); *Mull v. String*, 448 So. 2d 952, 954 (Ala. 1984).

171. *Koump v. Smith*, 250 N.E.2d 857, 861 (N.Y. 1969).

to have their cake by arguing that they were not aware they had a lawsuit on their hands at “time x,” and eat the same cake by claiming that their communications with a lawyer around “time x” are off-limits. As a final note on the similarity between the two privileges here, personal injury plaintiffs are not heard to complain that they will be dissuaded from obtaining medical care because the privilege might be waived is later brought, which brings us to a final argument against a liberal waiver test.

H. WHAT CHILL IN THE AIR?

Finally, the ever-present fear of chilled attorney-client communications must be confronted.¹⁷² The Harvard article, as well as the recent piece in Illinois, both stressed that any erosion of the privilege could damage full and frank communication between lawyers and their clients, which is simply too high a price to pay. The first response is that a rule requiring parties to place relevant communications at issue when pleading the discovery rule negates the attorney-client privilege only to the extent that is fair and necessary, leaving the privilege intact otherwise. As such, the privilege is not under any full-scale assault, and attorney-client communications in general are quite safe under the specific recommendation of this article. Moreover, these worries about “chilling” often go unproven, as such predictions are often no more than armchair philosophy. For instance, were the fears borne out of *Miranda v. Arizona*¹⁷³ chilling suspect-police communications to the point that the criminal justice system would be in jeopardy? Taking a casual look at the landscape, many would say no.¹⁷⁴ Even when statistical tools have been brought to bear to settle the issue, there is no clear evidence that the fears of chilling have come to pass.¹⁷⁵ The area of *Tarasoff* is similar, as

172. Harvard Law Review Association, *supra* note 29, at 1636; Bennardo, *supra* note 17, at 560.

173. *Miranda v. Arizona*, 384 U.S. 436 (1966).

174. See, e.g., Gerald M. Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1418 (1985) (“Although the incidence of crime surged skyward after 1966, concern over police interrogation, both in terms of its effectiveness and its fairness, largely vanished.”); George C. Thomas III, *The End of the Road for Miranda v. Arizona?: On the History and Future of Rules for Police Interrogation*, 37 AM. CRIM. L. REV. 1, 12 (2000) (“As *Miranda* aged, an irony developed: at least some police and the prosecutors came to view *Miranda* favorably.”).

175. Compare Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda’s Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1132 (1998) (“The clearance rate data collected in this study—coupled with the other evidence concerning *Miranda*’s effect—strongly suggest that *Miranda* has seriously harmed society by hampering the ability of the police to solve crimes.”), with Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 460 (1987) (“The failure to turn up evidence of at least some negative impact provides a striking demonstration of the paucity of

the tumult caused by the decision seems to have been unjustified.¹⁷⁶ There do not appear to be any empirical studies validating the fears of those citing a chilling effect via the erosion of that privilege.¹⁷⁷

Furthermore, even if we should engage in armchair predictions, the possibility of a chilling effect under the discovery rule seems slight. When considering the communications that are actually being put at issue under this article's recommendation and thus might be chilled, it would seem that potential plaintiffs are not going to avoid talking to their attorneys in the first place about a possible injury or lawsuit on their hands simply because the defendants might later be able to discover and admit into evidence these initial plaintiff-attorney conversations. This seems apparent not only because potential plaintiffs will necessarily communicate with some attorney in order to pursue possible litigation unless they decide to proceed *pro se* in rare examples, but also because clients are unlikely to know about the possible waiver of the privilege due to the discovery rule until after they have fully and frankly communicated with their attorney. Furthermore, even if plaintiffs were fully cognizant of the risks of putting their communications at issue, they would still do so, given that, if they are to recover at all for their injury, they must at least receive the opinion of an attorney on the matter in the first place. All in all, this minimal intrusion into the privilege seems to be outweighed by the gains in finding the truth within the discovery rule context.¹⁷⁸

V. CONCLUSION

The instinct to curtail the standard embodied in *Hearn* was predictable, given the ever-present worries about the erosion of the privilege by choos-

such evidence and in effect strongly reinforces the prevailing wisdom that *Miranda* has not posed a significant barrier to effective police work.”).

176. See, e.g., Elisia Klinka, *It's Been a Privilege: Advising Patients of the Tarasoff Duty and Its Legal Consequences for the Federal Psychotherapist-Patient Privilege*, 78 *FORDHAM L. REV.* 863, 896 & n.250 (2009).

177. See Steckman & Granofsky, *supra* note 18, at 883-84; Daniel Northrop, Note, *The Attorney-Client Privilege and Information Disclosed to an Attorney with the Intention That the Attorney Draft a Document to Be Released to Third Parties: Public Policy Calls for at Least the Strictest Application of the Attorney-Client Privilege*, 78 *FORDHAM L. REV.* 1481, 1503 n.168 (2009).

178. See generally 4 JOHN HENRY WIGMORE, *A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* § 2291, at 3204 (1904) (“[T]he privilege remains an anomaly. Its benefits are all indirect and speculative; its obstruction is plain and concrete.”); cf. Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 *NW. U. L. REV.* 500, 547 (1996) (“Indeed, the end result of the empirical exercise, with its vanishingly small evidence of harmful effects, serves only to reinforce the conventional view [that *Miranda* has not been a serious obstacle to effective law enforcement].”).

ing an elastic standard over a firm rule. However, at least within the context of the discovery rule, the erosion of the privilege should not be a cause for worry, but for relief. The evidence cited in this article points toward attorney-client communications invariably being put at issue: the privilege-holders are the burden-bearers and offensive-minded party when pleading the discovery rule to get around the statute of limitations defense; they are the least-cost avoiders and best-situated party in discovering the relevant information as to whether they discussed their injuries with their attorneys; and they are opening the door to their subjective legal knowledge by their affirmative act of pleading the discovery rule confession and avoidance. At the end of the day, holders of the attorney-client privilege pleading the discovery rule seem just like holders of the doctor-patient privilege suing in tort — if the latter must impliedly waive, so should the former. As for the arguments pointing in the other direction in favor of a rule, chief among them a chill in attorney-client communications, they can be exposed as phantom fears lacking substantiation just like other worries about chilled discourse that have never come to pass, or at least have never been proven to do so.

The end result of a rule demanding that the privilege should yield ought not be surprising to someone that acknowledges the oscillation in the law between rules and standard. Pre-*Hearn*, many courts were likely unhappy with the stiff rule presented by the privilege. With the advent of *Hearn*, courts gravitated to the new standard, only to have the privilege strike back as the rule embodied in *Rhone*. Now, with this area of the law hanging in the balance between the two, perhaps the right move is to recognize that a consistent application of the superior test, *Hearn*, will yield nothing less than the hard-and-fast rule that any party pleading the discovery rule must divulge its communications with its attorney regarding the timing of the discovery of the lawsuit so long as the other party has a good faith basis in believing that breaching the privilege, and only breaching the privilege, will resolve the issue, though perhaps with the opportunity for the defendant to rebut that presumptive rule with a showing that the plaintiff does not have a good faith basis to believe that breaching the privilege is the only way to access the defendant's legal knowledge. In the end, the pendulum should swing back towards a rule, but just not the rule that has been offered up to this point by courts. To wit, parties pleading the discovery rule should be automatically considered to have put their relevant communications at issue. In fact, anytime a party makes a pleading that puts their subjective legal knowledge at issue, there should be a presumption of waiver, which would generalize the result of this debate from the discovery rule context into many others, such as good faith immunity defenses, certain estoppel defenses, and statutory compliance defenses. Whether this rule, applied in the discovery rule and other settings, would eventually sof-

ten into a standard due to the usual tensions between rules and standards, is a topic for another day.