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## At Issue Waiver of the Attorney-Client Privilege in Illinois: An Exception in Need of a Standard

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# At Issue Waiver of the Attorney-Client Privilege in Illinois: An Exception in Need of a Standard

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The attorney-client privilege, “a hallmark of Anglo-American jurisprudence for almost 400 years,”<sup>1</sup> is one of the oldest and most revered privileges in American law, but it is not without its exceptions. One such exception is “at issue” waiver of the privilege.<sup>2</sup>

In Illinois the attorney-client privilege is codified by Supreme Court Rule 201(b)(2): “All matters that are privileged against disclosure on the trial, including privileged communications between a party or his agent and the attorney for the party, are privileged against disclosure through any discovery procedure.”<sup>3</sup> The purpose of the privilege is “to encourage and promote full and frank consultation between a client and legal advisor by removing the fear of compelled disclosure of information.”<sup>4</sup> It is the attorney-client privilege, not the duty to disclose, that is the exception, and therefore the privilege is to be strictly confined to its narrowest possible limits.<sup>5</sup> As

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1. See *Mitchell v. Superior Court of Fresno County*, 691 P.2d 642, 645 (Cal. 1984).

2. At issue waiver is often referred to in other jurisdictions as “implied waiver” or even occasionally as “in issue waiver,” see *Rockwell Int’l Corp. v. Superior Court*, 32 Cal. Rptr. 2d 153, 161 n.5 (Cal. Ct. App. 1994), but Illinois courts generally refer to the doctrine as “at issue waiver,” see, e.g., *Waste Mgmt., Inc. v. Int’l Surplus Lines Ins. Co.*, 579 N.E.2d 322, 331 (Ill. 1991).

3. ILL. SUP. CT. R. 201(b)(2).

4. *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 432 N.E.2d 250, 256 (Ill. 1982).

5. See *id.* at 257.

with any privilege, the attorney-client privilege hampers the truth-seeking function of law and therefore is not to be applied nonchalantly.

## I. APPLICATION OF AT ISSUE WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE

### A. A SHORT HISTORY

Although it can trace its origins in American law to the Gilded Age,<sup>6</sup> at issue waiver of the attorney-client privilege is a still-developing facet of evidentiary law to which courts around the country have taken differing approaches. Generally, at issue waiver of the attorney client privilege occurs when a party pleads a claim or defense that places at issue the subject matter of privileged material over which she has control.

The split in authority occurs over the meaning of placing a communication at issue. Four lines of decisions have formed: (1) the automatic waiver rule, (2) the balancing test, (3) the *Hearn* test, and (4) the anticipatory waiver test.<sup>7</sup>

Neither of the first two tests is presently regarded as viable.<sup>8</sup> Under the automatic waiver approach, a litigant who asserts a claim, counterclaim, or affirmative defense injecting an issue into the forefront of the litigation, automatically waives all corresponding privileges.<sup>9</sup> Although consistent, automatic waiver results in unwarranted waivers. The second approach, the balancing test, weighs the need for the discovery against the need to protect the secrecy of the information.<sup>10</sup> While sensitive to subtleties in particular cases, application of the balancing test leads to inconsistent results. Because of their respective shortcomings, neither of these two approaches is favored.<sup>11</sup>

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6. See *Hunt v. Blackburn*, 128 U.S. 464, 470-71 (1888).

7. See T. Maxfield Bahner & Michael L. Gallion, *Waiver of Attorney-client Privilege via Issue Injection: A Call for Uniformity*, 65 DEF. COUNS. J. 199, 201-05 (1998) (advocating for the adoption of the *Hearn* test).

8. See *id.* at 201-02; see also *FDIC v. Wise*, 139 F.R.D. 168, 171 (D. Colo. 1991) (stating that the automatic waiver approach is "too rigid" while the balancing test suffers from "lack of concreteness").

9. See Bahner & Gallion, *supra* note 7, at 201; see also *Indep. Prods. Corp. v. Loew's, Inc.*, 22 F.R.D. 266, 277 (S.D.N.Y. 1958) ("Plaintiffs in this civil action have initiated the action and forced defendants into court. If plaintiffs had not brought the action, they would not have been called on to testify. Even now, plaintiffs need not testify if they discontinue the action. They have freedom and reasonable choice of action.").

10. See Bahner & Gallion, *supra* note 7, at 202; see also *Zenith Radio Corp. v. United States*, 764 F.2d 1577, 1579-81 (Fed. Cir. 1985) (describing and applying—without adopting—the balancing test).

11. See Bahner & Gallion, *supra* note 7, at 201-02.

## B. THE HEARN TEST

The test for at issue waiver that took hold in the mid-1970s is the *Hearn* test, which takes its name from the decision in which its genesis may be found, *Hearn v. Rhay*.<sup>12</sup> The *Hearn* test has been distilled into a three-prong inquiry:

If (i) assertion of the privilege is the result of some affirmative act, such as filing suit, by the asserting party, (ii) through the affirmative action, the asserting party has placed the protected information at issue by making it relevant to the case, and (iii) application of the privilege would deny the opposing party access to information vital to its defense, the court should find that the asserting party has impliedly waived the privilege through its own affirmative conduct.<sup>13</sup>

Under the third prong, courts deem information to be “vital” only if it is not available from any other source.<sup>14</sup>

Although widely adopted and followed because it retains most of the flexibility of the balancing test while (at least superficially) injecting predictability into the process with its three-pronged approach, uneven application of the *Hearn* test over the past thirty years has given rise to increasing criticism of the test from the bench and academics alike. Because every affirmative pleading will make new material relevant to the action, the first two factors of the *Hearn* test have been derided as mere window dressing—factors that do not actually limit the finding of waiver.<sup>15</sup> And the third factor of the *Hearn* test has been criticized because it balances the attorney-client privilege—an absolute privilege that has been recognized after weighing the system-wide costs and benefits of the privilege against the opposing party’s need for the information in an individual case.<sup>16</sup>

## C. THE ANTICIPATORY WAIVER TEST

Under the fourth approach, the anticipatory waiver test, a party waives the attorney-client privilege when she places the advice of counsel at issue by (i) asserting a claim or defense and (ii) then seeking to prove that claim

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12. 68 F.R.D. 574 (E.D. Wash. 1975).

13. *FDIC v. Wise*, 139 F.R.D. 168, 171 (D. Colo. 1991).

14. *See, e.g., Frontier Ref. Inc. v. Gorman-Rupp Co.*, 136 F.3d 695, 701 (10th Cir. 1998).

15. *See Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1629, 1640 (1985).

16. *See id.*

or defense by disclosing or describing an attorney-client communication.<sup>17</sup> This test abides by the maxim that a privilege is to be used as a “shield,” not as a “sword.”<sup>18</sup>

## II. AT ISSUE WAIVER IN ILLINOIS

### A. CASE LAW IN SEARCH OF A RUDDER

Illinois cases dealing with at issue waiver fail to address which approach is to be used to determine when a communication is sufficiently placed at issue so as to waive the attorney-client privilege. As illustrated below, Illinois case law on at issue waiver lacks definitive guidance.

The Illinois Supreme Court wrote on at issue waiver in *Waste Management, Inc. v. International Surplus Lines Insurance Co.*<sup>19</sup> The supreme court stated that it “agree[d] that defense counsel’s litigation files in the underlying cases are relevant and at issue in the present declaratory judgment action.”<sup>20</sup> However, because the court found that the attorney-client privilege did not apply in that case for other reasons, its comments on at issue waiver are dicta. Although the supreme court did not discuss the tests, its reference to relevance suggests a *Hearn*-like approach to at issue waiver; however, as a statement of dicta that fails to reference *Hearn* or any of the tests, the comment does not provide sturdy footing for further analysis.<sup>21</sup>

The Illinois Supreme Court fielded the issue again in *Fischel & Kahn, Ltd. v. Van Straaten Gallery, Inc.*<sup>22</sup> The defendant had counterclaimed against Fischel & Kahn for legal malpractice surrounding the defense and settlement of a prior litigation. Fischel & Kahn claimed that the malpractice counterclaim waived the defendant’s attorney-client privilege with respect

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

18. See *United States v. Rylander*, 460 U.S. 752, 758 (1983) (privilege against self-incrimination); *MacGreal v. Taylor*, 167 U.S. 688, 701 (1897) (privilege of infancy).

19. 579 N.E.2d 322 (Ill. 1991).

20. *Id.* at 327.

21. Illinois federal courts have not come to a consensus regarding at issue waiver of the attorney client privilege. Compare, e.g., *Pyramid Controls, Inc. v. Siemens Indus. Automations, Inc.*, 176 F.R.D. 269, 272 (N.D. Ill. 1997) (referring to *Hearn* as “the seminal case” on at issue waiver), with *Dexia Credit Local v. Rogan*, 231 F.R.D. 268, 275-76 (N.D. Ill. 2004) (discrediting *Pyramid Controls* and applying the *Rhone-Poulenc* anticipatory waiver test in an Illinois diversity case), and *Grochocinski v. Mayer Brown Rowe & Maw LLP*, 251 F.R.D. 316, 324 (N.D. Ill. 2008) (following *Dexia* in an Illinois diversity case: “[I]t is not sufficient that a party merely deny an allegation, or that the documents are relevant to the claim.”). See also *Kordek v. United Agri Prod., Inc.*, 2007 WL 1118435, \*4-5 (N.D. Ill. Apr. 16, 2007) (applying the reasoning of *Pyramid Controls* in an Illinois diversity case and finding *Dexia* and similarly-decided cases to be unfaithful to *Lama*, discussed *infra*).

22. 727 N.E.2d 240 (Ill. 2000).

to the previous litigation, including the defendant's subsequent representation by another law firm, Pope & John.<sup>23</sup> The court distinguished the case before it from another case—a case which relied on *Hearn*—by saying that the material sought by Fischel & Kahn was not vital to its defense of the malpractice action.<sup>24</sup> Because the privileged material represented only the most convenient means—not the *only* means—to determine whether and to what extent the defendant's loss resulted from malpractice, the court held that the attorney-client privilege was not waived by the initiation of the malpractice suit.<sup>25</sup>

The Illinois Second District Appellate Court found implied waiver of the attorney-client privilege in *Lama v. Preskill*.<sup>26</sup> The circuit court below had imposed a contempt order against the defendant and her attorney when they refused to produce documents they claimed were protected by the attorney-client privilege.<sup>27</sup> The plaintiff sued for medical malpractice; the defendant doctor asserted that the statute of limitations had run because the plaintiff had discovered her injury more than two years prior.

The basis for the defendant's assertion was a visit by the plaintiff's husband to an attorney directly after the surgery at issue, which, according to the defendant, demonstrated that the plaintiff knew of her injury immediately following the surgery.<sup>28</sup> The plaintiff had anticipated that the statute of limitations would be raised as a defense (because the surgery at issue had occurred more than two years prior to the filing of the complaint) and therefore included in the complaint that the statute of limitations had been tolled by the discovery rule because she did not discover the injury until some time after the surgery occurred.<sup>29</sup>

The defendant asserted that the plaintiff placed the privileged communications at issue by pleading the tolling of the statute of limitations in her complaint.<sup>30</sup> The plaintiff argued that she had not placed the privileged communications at issue because she was not relying on the communications in any offensive way, but rather it was the defendant that put the privileged communications in the forefront of the litigation by asserting the affirmative defense of untimeliness.<sup>31</sup>

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23. *Id.* at 243.

24. *Id.* at 245.

25. *Id.* at 246 (“Mere convenience, however, should not justify waiver of the attorney-client privilege.”).

26. 818 N.E.2d 443 (Ill. App. Ct. 2004).

27. *See id.* at 445.

28. *See id.* at 446.

29. *See id.* at 449.

30. *See id.* at 448.

31. *See Lama*, 818 N.E.2d at 448.

Quoting the *Pyramid Controls* federal court opinion,<sup>32</sup> the Second District Appellate Court stated that at issue waiver occurs “where a party voluntarily injects either a factual or legal issue into the case, the truthful resolution of which requires an examination of the confidential communications.”<sup>33</sup> The *Lama* court found that the plaintiff had voluntarily injected into the case the factual and legal issues of when she learned of her injury by raising the issue of whether she knew or should have known of her injury prior to the end of the limitations period in her complaint.<sup>34</sup> Therefore, the court held that the plaintiff had waived her attorney-client privilege regarding communications between her husband (who was acting as her agent) and the consulted attorney.<sup>35</sup>

In dissent, Judge Bowman disagreed with the majority’s analogizing to *Pyramid Controls* specifically because *Pyramid Controls* applied the *Hearn* test.<sup>36</sup> Judge Bowman noted the strong criticism levied against the *Hearn* test by commentators and courts, especially “for focusing on the opposing party’s need for the privileged information despite the Supreme Court’s emphasis on the role of certainty in encouraging the full and frank communication between attorneys and their clients.”<sup>37</sup> Judge Bowman stated that application of the *Hearn* test would lead courts to find waiver too freely, “in virtually every case where the statute of limitations is pleaded as a defense and the client relies on the discovery rule to overcome the limitations period, the opposing party may discover confidential communications between the client and the attorney merely to test the client’s credibility.”<sup>38</sup> Judge Bowman recommended that Illinois should follow several states in finding at issue waiver only “when the party asserting the privilege has injected the privileged material into the case, such that the information is actually required for resolution of the issue,” thereby calling for “offensive or direct use of privileged materials before the party will be deemed to have waived its attorney-client privilege.”<sup>39</sup> Although Judge Bowman’s dissent provides a cogent and coherent discussion of the tests and a clear recommendation, the majority decision fails to address the same (and does not even mention *Hearn*) and is therefore of limited utility in divining the governing standard.

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32. See *Pyramid Controls, Inc. v. Siemens Indus. Automations, Inc.*, 176 F.R.D. 269, 272 (N.D. Ill. 1997).

33. *Lama*, 818 N.E.2d at 448 (quoting *Pyramid Controls*, 176 F.R.D. at 272).

34. See *id.* at 449.

35. See *id.*

36. See *id.* at 452 (Bowman, J., dissenting).

37. *Id.*

38. *Lama*, 818 N.E.2d at 452 (Bowman, J., dissenting) (citing *Darius v. City of Boston*, 741 N.E.2d 52, 58 (Mass. 2001)).

39. *Id.* at 452-53 (citing *Aranson v. Schroeder*, 671 A.2d 1023, 1030 (N.H. 1995); *Pub. Serv. Co. of N.M. v. Lyons*, 10 P.3d 166, 173 (N.M. Ct. App. 2000)).

The Second District Court of Appeals backed off of its *Lama* decision three years later in *In re Estate of Wright*.<sup>40</sup> In *In re Estate of Wright*, the court stated that Judge Bowman's *Lama* dissent was "well-reasoned" and that "[g]iven the controversy surrounding the rule adopted in *Lama*" the holding of *Lama* is to be confined to the facts of that case.<sup>41</sup> Although the *In re Estate of Wright* court noted the "substantial criticism" brought against the *Hearn* test, it did not explicitly reject that approach or elucidate a test to be applied.<sup>42</sup>

Two years before *Lama*, the First District Appellate Court took up a related issue in *Shapo v. Tires 'n Tracks, Inc.*, where the defendant argued that the settlement agreement entered into on its behalf was void because its counsel lacked authority to bind it.<sup>43</sup> The defendant then attempted to block the plaintiff's efforts to subpoena its former counsel to inquire into their authority to settle on behalf of the defendant.<sup>44</sup> The court found that the defendant waived its attorney-client privilege regarding the circumstances surrounding the settlement agreement when it asserted that the agreement was void based on its attorneys' lack of authority.<sup>45</sup> Regardless of which test is employed, the attorneys' conduct was placed "at issue," and thus this finding of waiver—while proper—sheds little light on the standard to apply.

The only clues found in *Shapo* is the court's statement that the attorney-client privilege "may be waived as to a communication put 'at issue' by a party who is a holder of the privilege" without explaining what it means to place a communication "at issue."<sup>46</sup> The court stated that, for example, the privilege is waived when a client sues her former attorney for malpractice or when an attorney sues her client for fees (but this example is erroneous under the court's own standard because the attorney is not the holder of the privilege).<sup>47</sup>

In *Western States Insurance Co. v. O'Hara*,<sup>48</sup> the Fourth District Court of Appeals found that the plaintiff-insurance company had waived its attorney-client privilege regarding a settlement by seeking a declaratory judgment that the settlement had been made in good faith. However, in so finding, the court distinguished between communications "relevant" to the dis-

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40. 881 N.E.2d 362 (Ill. App. Ct. 2007).

41. *Id.* at 367.

42. *Id.*

43. 782 N.E.2d 813, 816 (Ill. App. Ct. 2002).

44. *Id.* at 816-17.

45. *See id.* at 819-20.

46. *Id.* at 819.

47. *See id.*

48. 828 N.E.2d 842 (Ill. App. Ct. 2005).



pute from those placed “at issue”—perhaps (although not explicitly) indicating discontent with the *Hearn* test.<sup>49</sup>

Illinois courts have consistently found implied waiver of the attorney-client privilege when a client sues an attorney for malpractice.<sup>50</sup> That waiver is not limited to the malpractice action; once waiver has occurred, the previously-privileged communications are discoverable by third-parties in other actions.<sup>51</sup> Similar to malpractice actions, the attorney-client privilege is waived by a client in a criminal action when the client asserts ineffective assistance of counsel in an attempt to obtain post-conviction relief.<sup>52</sup> This waiver is sensible because the client, by calling the attorney’s performance into question, has placed privileged communications at issue but does little to define which test to employ.

#### B. A TEST FOR ALL SEASONS

Consistent application of at issue waiver in Illinois has suffered for want of a definitive test. Lacking measured guidance, courts have too often weighed the equities in the individual case in determining waiver of an absolute privilege. Consistent application of law is always important, but it is particularly paramount in the field of privilege. Uncertainty in waiver chills clients’ communications with their legal advisors, thereby depreciating the effectiveness and efficiency of counsel.

Illinois’ lack of a definitive test does bless it with the benefit of the hindsight of other jurisdictions’ experiments—and follies—with at issue waiver. Although many courts jumped at the three-pronged *Hearn* test at its conception, borrowed wisdom counsels against its adoption in Illinois. The *Hearn* test, with its central inquiry dependent on relevance, is misfocused:

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49. *Id.* at 851.

50. *See In re Marriage of Bielawski*, 764 N.E.2d 1254, 1263 (Ill. App. Ct. 2002) (“When a client sues her attorney for malpractice, waiver is applicable to earlier communications between the now-adversarial parties.”); *SPSS, Inc. v. Carnahan-Walsh*, 641 N.E.2d 984, 988 (Ill. App. Ct. 1994) (“[A]ny expectation of confidentiality regarding the alleged communication [the plaintiff’s former attorney] had with the dissenters regarding the value of the stock was waived when [the plaintiff] sued [its former attorney] not just in this appraisal action, but when it filed a legal malpractice claim against [the attorney].”).

51. *See Marriage of Bielawski*, 764 N.E.2d at 1263-64.

52. *See People v. O’Banner*, 575 N.E.2d 1261, 1270 (Ill. App. Ct. 1991) (“Where a defendant has asserted ineffective assistance of counsel and thereby put in issue the substance of communications between herself and her attorney, the defendant has waived the attorney-client privilege, and it is not error for the trial court to allow counsel to testify as to conversations with the defendant.”); *see also People v. Romero*, 470 N.E.2d 1080, 1082 (Ill. App. Ct. 1984) (“By questioning his attorney’s handling of the case and putting into issue the substance of the conversations between himself and his attorney, defendant waived the attorney-client privilege, and the trial court did not err in allowing counsel to testify as to his conversations with defendant.”).

These decisions [following *Hearn*] are of dubious validity. While the opinions dress up their analysis with a checklist of factors, they appear to rest on a conclusion that the information sought is relevant and should in fairness be disclosed. Relevance is not the standard for determining whether or not evidence should be protected from disclosure . . . .<sup>53</sup>

As one court recently recognized: “Nowhere in the *Hearn* test is found the essential element of reliance on privileged advice in the assertion of the claim or defense in order to effect a waiver.”<sup>54</sup>

Rather than focus on relevancy and fairness like the *Hearn* test, the anticipatory waiver test requires a litigant to choose to actually place a privileged communication at issue for at issue waiver to occur.<sup>55</sup> By focusing on relevancy and fairness, the *Hearn* test seeks to remedy the “problem” caused by the truth-suppressing effect of the attorney-client privilege. The anticipatory waiver test, on the other hand, seeks to address the problem created by one party selectively relying on a privileged communication while attempting to shield other privileged communications—thereby “garbling” the truth.<sup>56</sup> It is only in this “truth-garbling” scenario, rather than the truth-suppressing scenario (a scenario inherent with all privileges), that waiver of the privilege should be found.

### III. CONCLUSION

Illinois courts should, consistent with Judge Bowman’s dissent in *Lama*, adopt the anticipatory waiver approach to deciding issues of at issue waiver of the attorney-client privilege.<sup>57</sup> This test finds waiver only where a privilege-holder attempts to offensively use privileged information to defeat a claim or defense. The privilege-holder therefore rightly acts as master of the privilege and controls its invocation or waiver. A lesser threshold of protection would compromise the privilege too gravely. Although privileges are not to be created cavalierly, when they are found they should not be waived lightly.

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

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

55. *See supra* Part II.A-B.

56. *See, e.g.*, *Wardleigh v. Second Judicial Dist. Court*, 891 P.2d 1180, 1186 (Nev. 1995).

57. Although Judge Bowman did not recommend the anticipatory waiver approach by name, it is consistent with his advice. *See Lama v. Preskill*, 818 N.E.2d 443, 452-53 (Ill App. Ct. 2004) (Bowman, J., dissenting).