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**Evidence - At-Issue Waiver of Attorney-Client Privilege and Public Service Co. of New Mexico v. Lyons: A Party Must Use Privileged Materials Offensively in Order to Waive the Privilege**

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# EVIDENCE—At-Issue Waiver of Attorney-Client Privilege and *Public Service Co. of New Mexico v. Lyons*: A Party Must Use Privileged Materials Offensively in Order to Waive the Privilege

## I. INTRODUCTION

In *Public Service Co. of New Mexico v. Lyons*,<sup>1</sup> the New Mexico Court of Appeals held that, to waive attorney-client privilege under the at-issue waiver doctrine,<sup>2</sup> a party must make offensive or direct use of the privileged materials.<sup>3</sup> New Mexico courts had not previously decided how to approach waiver when a party places privileged matters at issue in litigation.<sup>4</sup> In choosing the most restrictive waiver approach,<sup>5</sup> the *Lyons* court underscored New Mexico's distinctive approach to privileges<sup>6</sup> and emphasized the policy behind attorney-client privilege.<sup>7</sup> This Note recounts the general development of privilege doctrine, discusses the unique nature of judicial rulemaking in New Mexico, examines the *Lyons* court's rationale, and explores the implications of the court's decision.

## II. STATEMENT OF THE CASE

Plaintiff-appellant Public Service Co. of New Mexico (PNM), a public utility, is a part-owner of the Palo Verde Nuclear Generating Station in Arizona.<sup>8</sup> PNM created a trust, with plaintiff-appellant Mellon Bank as trustee, as part of a plan to generate \$500 million toward the future cost of decommissioning the plant.<sup>9</sup> The

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1. 129 N.M. 487, 10 P.3d 166 (Ct. App. 2000).

2. The *Lyons* court adopted the following definition of "at-issue waiver" (also called "implied waiver," "offensive-use waiver," "issue-injection waiver," and "affirmative-use waiver"): "A person who places privileged matters 'at-issue' in the litigation can be said to have implicitly consented to disclosure." *Id.* at 492, 10 P.3d at 171.

3. *Id.* at 494-95, 10 P.3d at 173-74. Judge Apodaca wrote for the court, and Judges Bosson and Armijo concurred.

4. *See id.*

5. *See id.*

6. *See id.* at 491, 10 P.3d at 170.

7. *Id.* at 495, 10 P.3d at 174.

8. *Id.* at 489, 10 P.3d at 168. PNM and six other utilities built Palo Verde in the 1970s and 1980s, with construction completed in 1988. Dennis Domrzalski, *Paying for Palo Verde*, ALBUQUERQUE TRIB., Aug. 27, 1997, at D1. The utilities borrowed money for the construction, in effect taking out mortgages on the plant. *Id.* The plant was intended to serve the utilities' power needs and to sell power across the West. Dan Vukelich, *Company Pushes to Open PNM's Lines*, ALBUQUERQUE TRIB., Oct. 15, 1998, at B1. But almost as soon as Palo Verde was operational, the utilities discovered that market conditions had changed and that the West was flooded with cheap hydroelectric power from the Pacific Northwest. *Id.* "Suddenly, Palo Verde was unable to pay for itself and became a drag on PNM's profit picture." *Id.* PNM customers' bills already include charges for the investment in Palo Verde. Thom McGhee, *PNM Hands Regulators a Big Bill*, ALBUQUERQUE J., June 1, 2000, at A1. When New Mexico deregulates its electricity market, PNM wants state regulators to let it collect from ratepayers \$700 million in "stranded" costs—the value of investments PNM does not expect to recoup in a deregulated, competitive market. *See id.* (Originally set to begin in 2002, deregulation is currently set to start in 2007. Rosalie Rayburn, *Electric Deregulation Delayed 5 Years*, ALBUQUERQUE J., March 9, 2001, at B4.) Most of the stranded costs are associated with the company's investment in Palo Verde. McGhee, *supra*. In addition, the plant has a set lifetime, and PNM must help pay to decommission the plant when that time expires and return the plant site to its original condition. *See id.* Customer bills already include decommissioning charges, and PNM has asked regulators to let it collect more decommissioning costs from customers. *Id.* The investment plan that led to the case about which this Note is written was an additional means of raising money for decommissioning Palo Verde.

9. *See Lyons* at 489, 10 P.3d at 168.

trust was invested in a corporate-owned life insurance program,<sup>10</sup> and in 1987 and 1988, the trust bought 1729 life insurance policies.<sup>11</sup> The plaintiffs said they discovered in 1997 that their investment would not perform to expectations, and in 1998 they sued the insurance, accounting, and financial-planning firms involved in setting up and monitoring the investment.<sup>12</sup> The complaint alleged numerous theories of recovery, including fraud.<sup>13</sup> In their answer, the defendants raised expiration of the statute of limitations as an affirmative defense. In return, the plaintiffs alleged equitable tolling<sup>14</sup> based on prior ignorance of the basis of the claims.<sup>15</sup>

The defendants moved to compel production of documents relevant to the plaintiffs' assertion that they did not discover the alleged improper conduct until 1997.<sup>16</sup> The defendants said a plaintiff who claims equitable tolling puts at issue, and thus waives protection for, communications that may shed light on whether the plaintiff is telling the truth about prior ignorance.<sup>17</sup> The trial court granted the defendants' motion and characterized any documents pertaining to the plaintiffs' knowledge as relevant and vital to the disposition of the equitable tolling issue.<sup>18</sup> The trial court appointed a special master to review the documents listed on the plaintiffs' privilege log and to tell the court what documents satisfied the court's definition of relevance.<sup>19</sup>

The plaintiffs applied for interlocutory appeal from that order, and the appeals court granted the application.<sup>20</sup> The trial court stayed any order requiring production

10. *Id.* Such programs, known as COLI programs, are designed to provide tax-free money to pay for corporate obligations. *Id.* In this instance, the insurance companies invested a portion of the premiums in securities that were supposed to generate the decommissioning costs. The rest of the premium paid for the policies and benefits to employees. Tom McGhee, *PNM Workers' Life Insurance Went to Palo Verde Cleanup*, ALBUQUERQUE J., Sept. 7, 2000, at A1.

11. *Lyons*, 129 N.M. at 489, 10 P.3d at 168.

12. *See id.* at 490, 10 P.3d at 169.

13. *Id.* Other counts included deceptive insurance practices, unfair trade practices, breach of contract, breach of fiduciary duty, negligence, negligent misrepresentation, and promissory estoppel. *Id.* The defendants removed the case to federal court, then moved to dismiss, alleging failure to plead fraud with particularity as required by federal and state rules of civil procedure. The plaintiffs successfully moved to have the case sent back to state court. There, the defendants renewed their motion to dismiss and lost. The defendants then answered the complaint.

14. Under the doctrine of equitable tolling, the statute of limitations will not bar a claim if the plaintiff, despite diligent efforts, did not discover the injury until after the limitations period had expired. BLACK'S LAW DICTIONARY 560 (7th ed. 1999). "Equitable tolling is invoked when the prospective plaintiff simply does not have and cannot with due diligence obtain information essential to bringing a suit." *Wolin v. Smith Barney, Inc.*, 83 F.3d 847, 852 (7th Cir. 1996).

15. *See Lyons*, 129 N.M. at 490, 10 P.3d at 169.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* Uncertain whether the underlying order was subject to the collateral-order doctrine, the plaintiffs also petitioned for a writ of error. The collateral order doctrine allows appeal from an interlocutory order that conclusively determines an important issue that is completely separate from the merits of the action and is effectively unreviewable on appeal from a final judgment. *See Johnson v. Jones*, 51 U.S. 304, 310 (1995). New Mexico applies the collateral order doctrine through writs of error issued pursuant to N.M. R. CIV. P. 12-503. *See Carrillo v. Rostro*, 114 N.M. 607, 616, 845 P.2d 130, 139 (1992). The appeals court granted the writ in addition to granting the application for interlocutory appeal and consolidated the appeals without resolving the appropriate procedure for seeking appellate review of the trial court's order.

The appeals court further noted that, as a general matter, it reviews discovery orders for abuse of

pending disposition of the interlocutory appeal.<sup>21</sup>

In the appeal, the *Lyons* court held that a plaintiff waives attorney-client privilege under the at-issue waiver doctrine only when he or she makes offensive or direct use of the privileged materials.<sup>22</sup> The court did not apply this approach, but rather remanded for the trial court to do so.<sup>23</sup>

### III. BACKGROUND

#### A. *Privileges and the General Duty to Testify*

Privileges run counter to the maxim that the public has a right to everyone's evidence.<sup>24</sup> When considering privileges, "we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional."<sup>25</sup> Exceptions to the general duty may be justified by "a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."<sup>26</sup> Privileges so justified include those between priest and penitent, physician and patient, and attorney and client.<sup>27</sup>

#### B. *The History and Value of the Attorney-Client Privilege*

The attorney-client privilege is the oldest of all evidentiary privileges, having been recognized in English cases as early as 1577.<sup>28</sup> Historically, the privilege was viewed as protecting the bond of trust between attorney and client and upholding the honor of the lawyer.<sup>29</sup> To compel disclosure of client secrets would force an act of betrayal.<sup>30</sup> Without the privilege, lawyers might warn clients that the law provided no protection for what they were about to say, and lawyers would thus be cast as adversaries to their own clients.<sup>31</sup>

While these ideals behind the privilege remain valid, the modern rationale is more utilitarian.<sup>32</sup> "The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyers being fully

discretion. *Lyons*, 129 N.M. at 490, 10 P.3d at 169 (citing *Hartman v. Texaco*, 123 N.M. 220, 225, 937 P.2d 979, 983 (Ct. App. 1997)). In the *PNM* appeal, however, the issue required review of the trial court's construction of law regarding privileges, and as such presented a legal question that the appeals court reviewed de novo. *Id.* at 490-91, 10 P.3d at 169-70 (citing *N.M. Right to Choose/NARAL v. Johnson*, 127 N.M. 654, 656, 986 P.2d 450, 452 (1999)).

21. *Lyons*, 129 N.M. at 490, 10 P.3d at 169. After the appeals court docketed the appeal, the special master provided the trial court with a list of documents believed to satisfy the court's criteria for production. *Id.*

22. *Id.* at 494, 10 P.3d at 173.

23. *Id.* at 497, 10 P.3d at 176. The defendants then petitioned the New Mexico Supreme Court for writs of certiorari. The parties settled while the petitions were pending, see *McGhee*, *supra* note 10, and the petitions for certiorari were dismissed, 39 *N.M. B. Bull.* 37 at 9 (Sept. 14, 2000).

24. *United States v. Bryan*, 339 U.S. 323, 331 (1950).

25. *Id.*

26. *Trammel v. United States*, 445 U.S. 40, 50 (1980) (citing *Elkins v. United States*, 364 U.S. 206, 234 (1960)).

27. *Id.*

28. 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *FEDERAL EVIDENCE* § 181 (2d ed. 1994) (citing *Berd v. Lovelace*, 21 Eng. Rep. 33 (1577)).

29. MUELLER & KIRKPATRICK, *supra* note 28.

30. *Id.*

31. *Id.*

32. *Id.*

informed by the client."<sup>33</sup> The New Mexico Supreme Court has recognized that the "whole purpose" of the attorney-client privilege "is to facilitate full and free disclosure to one's counsel in order to insure adequate advice and proper defense."<sup>34</sup> Without the privilege, therefore, attorneys might lack the information necessary to provide effective legal representation.<sup>35</sup> Clients might be deterred from seeking legal assistance in the first place, or at least might be deterred from speaking candidly about facts relevant to the case.<sup>36</sup>

The attorney-client privilege is not without negatives. Detractors criticize the privilege as an obstacle to truth and even a shelter for the guilty.<sup>37</sup> It certainly comes at a cost to the truth-finding process.<sup>38</sup> Still, the trade-off has typically been deemed worthwhile. "The social good derived from the proper performance of the functions of lawyers acting for their clients is believed to outweigh the harm that may come from the suppression of the evidence in specific cases."<sup>39</sup>

### C. *New Mexico's Special Approach to Privileges*

New Mexico has over the years seen a quest for balance between legislative and judicial power in determining rules of procedure.<sup>40</sup> A significant external influence on New Mexico procedural law came in the 1920s with the work of Roscoe Pound,

33. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The purpose of the privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Id.*

34. *State v. Valdez*, 95 N.M. 70, 73, 618 P.2d 1234, 1237 (1980).

35. MUELLER & KIRKPATRICK, *supra* note 28. The American Bar Association has incorporated this notion into its Model Rules of Professional Conduct: "The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance." MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt (1983).

36. MUELLER & KIRKPATRICK, *supra* note 28.

37. *Id.* Jeremy Bentham argued that attorney-client privilege protects only the guilty. See 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 301-04 (John Stuart Mill ed., Hunt & Clarke 1827). Bentham reasoned that disclosure of communications by an innocent client would not be damaging, and that disclosure by guilty clients would mean only "[t]hat a guilty person will not in general be able to derive quite so much assistance from his law adviser, in the way of concerting a false defense, as he may do at present." *Id.* Bentham's argument ignores the possibility of innocent clients who are victims of incriminating circumstances that they would not want disclosed. MUELLER & KIRKPATRICK, *supra* note 28.

Certain well-settled exceptions to the attorney-client privilege may address objections to the attorney-client privilege without undermining its value. For example, "[t]he 'crime-fraud' exception holds that clients are not entitled to the privilege to protect communications made in contemplation or furtherance of a crime or fraud." JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 503.30 (Joseph M. McLaughlin, ed., LEXIS Publishing, 2d ed. 2000) (1975). Exceptions are also recognized for communications relevant to a breach of duty by the attorney to the client and for communications relevant to attested documents to which the attorney is an attesting witness. *Id.* Exceptions may also be recognized for certain communications by a deceased client and for communications relevant to matters of common interest between joint clients. *Id.*

38. MUELLER & KIRKPATRICK, *supra* note 28.

39. *United States v. United Shoe Mach. Corp.*, 89 F.Supp. 357, 358 (D. Mass. 1950) (quoting from MODEL EVID. CODE § 210 cmt. a. (Proposed Final Draft 1942)). "[T]he loss of evidence admittedly caused by the privilege is justified in part by the fact that without the privilege, the client may not have made such communications in the first place." *Swidler & Berlin v. United States*, 524 U.S. 399, 408 (1998). "As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice." *Fisher v. United States*, 425 U.S. 391, 403 (1976).

40. Michael B. Browde & Mario E. Occhialino, *Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Constraints*, 15 N.M. L. REV. 407, 411 (1985).

the American jurist and educator whose articles urged that the judiciary take a dominant role in procedural rule-making.<sup>41</sup> Before Pound, most jurisdictions, including New Mexico, operated under the assumption that the legislature had authority over procedure and that courts acted "only interstitially" at the invitation of legislatures to fill in the details.<sup>42</sup> In 1933, the New Mexico Legislature adopted a statute that embodied Pound's views.<sup>43</sup> The statute explicitly authorized the New Mexico Supreme Court to promulgate rules of pleading, practice, and procedure.<sup>44</sup> The motivation was convenience and efficiency, "rather than a perception that constitutional doctrines were implicated."<sup>45</sup>

The doctrine of exclusive judicial rule-making power as rooted in constitutional separation of powers was developed<sup>46</sup> in the mid-1970s in *State ex rel. Anaya v. McBride*<sup>47</sup> and *Ammerman v. Hubbard Broadcasting*.<sup>48</sup> *McBride* held that under the New Mexico Constitution the legislature lacks power to prescribe by statute rules of evidence and procedure.<sup>49</sup> *Ammerman* held that, because rule-making power was conferred exclusively on the judiciary by the New Mexico Constitution and Rule 501 of the New Mexico Rules of Evidence,<sup>50</sup> a journalist privilege created by statute was invalid.<sup>51</sup>

Despite the holdings in *McBride* and *Ammerman* that procedural rule-making is an exclusive function of the judiciary, later decisions vacillated between that view and a view of shared legislative and judicial power.<sup>52</sup> A pattern emerged preserving the exclusive-judicial-function rationale in two categories of cases: those involving statutes that purport to regulate "essential functions" of the judiciary and those involving testimonial privileges.<sup>53</sup>

The supreme court has since reaffirmed its declaration that only the court through its rule-making power has the authority to create testimonial privileges.<sup>54</sup> In *State*

41. *Id.* at 421.

42. *Id.*

43. *Id.* at 425.

44. Browde & Occhialino, *supra* note 40, at 426 (citing Act of Mar. 13, 1933, ch. 84, 1933 N.M. Laws 148).

45. *Id.*

46. *Id.*

47. 88 N.M. 244, 539 P.2d 1006 (1975).

48. 89 N.M. 307, 551 P.2d 1354 (1976).

49. *Anaya*, 88 N.M. at 246, 539 P.2d at 1008 ("Our constitutional power under N.M. Const. art. III § 1 and art. VI § 3 of superintending control over all inferior courts carries with it the inherent power to regulate all...procedure affecting the judicial branch.... Under the Constitution, the legislature lacks the power to prescribe by statute rules of practice and procedure.").

50. The rule states,

Except as otherwise required by Constitution, and except as provided in these rules or in other rules adopted by the supreme court, no person has a privilege to: A. refuse to be a witness; or B. refuse to disclose any matter; or C. refuse to produce any object or writing; or D. prevent another from being a witness or disclosing any matter or producing any object or writing.

N.M. R. EVID. 11-501.

51. The court found that rules of evidence are, "by reason of the function they serve in the judicial process...very largely, if not entirely, procedural." *Ammerman*, 89 N.M. at 310, 551 P.2d at 1357. The court then said the New Mexico Constitution vests in the New Mexico Supreme Court the exclusive power to promulgate rules of procedure. *See id.* at 311, 551 P.2d at 1358 (citing, e.g., *Anaya*, 88 N.M. at 246, 539 P.2d at 1008). The court later promulgated a journalist privilege. *See* N.M. R. EVID. 11-514.

52. Browde & Occhialino, *supra* note 40, at 447.

53. *Id.*

54. *Id.* at 455.

*ex rel. Attorney General v. First Judicial District Court*,<sup>55</sup> for example, the court denied privileges purportedly created by federal law and by common law evidentiary principles.<sup>56</sup> The court did recognize an executive privilege inherent in the separation of powers passage of the New Mexico Constitution.<sup>57</sup>

While New Mexico permits only privileges inherent in the state or federal constitutions or created by the court in the Rules of Evidence,<sup>58</sup> federal courts have a flexible standard.<sup>59</sup> The federal rule requires courts to treat privileges on a case-by-case basis.<sup>60</sup> The standard "set[s] forth the means for evolution of federal privilege law."<sup>61</sup> In addition, "[t]he Supreme Court has made it clear that Rule 501 also authorizes the federal courts to establish new privileges in response to changing conditions."<sup>62</sup> In short, New Mexico takes a rigid approach to privileges: Neither the legislature nor the common law can create them. Courts may recognize only those inherent in the state or federal constitutions or stated in the Rules of Evidence.

#### D. Waiver of the Attorney-Client Privilege

Despite the perceived value of the attorney-client privilege, it is possible to waive the privilege.<sup>63</sup> Typically, the privilege is waived if the client voluntarily discloses or consents to disclosure of the privileged communication.<sup>64</sup> The rationale behind

55. 96 N.M. 254, 629 P.2d 330 (1981).

56. *Id.* at 261, 629 P.2d at 337.

57. The passage states,

The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted.

N.M. CONST. art. III, § 1.

The court found that "[i]nherent in the successful functioning of an independent executive is the valid need for protection of communications between its members." *First Judicial*, 96 N.M. at 258, 629 P.2d at 334. The court found the executive privilege not to be absolute, but rather a privilege to be balanced against other interests protected by law. *Id.* Such a balancing approach would not later prove to apply to the attorney-client privilege in *Lyons*.

58. Browde & Occhialino, *supra* note 40, at 457.

59. WEINSTEIN & BERGER, *supra* note 37, § 501.01. The rule itself states,

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

FED. R. EVID. 501.

60. WEINSTEIN & BERGER, *supra* note 37, § 501.02.

61. *Id.*

62. *Id.* Rule 501 "did not freeze the law governing the privileges of witnesses in federal trials at a particular point in our history, but rather directed federal courts to continue the evolutionary development of testimonial privileges." *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996) (internal quotation marks omitted).

63. "Waiver follows from any conduct by the client that would make it unfair for him thereafter to assert the privilege." 2 MICHAEL M. MARTIN ET AL., FEDERAL RULES OF EVIDENCE MANUAL 717 (7th ed. 1998).

64. "A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if the person or person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication." N.M. R. EVID. 11-511. "In contrast to a waiver of the Fifth Amendment right against self-incrimination, where a litigant must knowingly intend to give up the protection before a waiver will occur, the attorney-client privilege may be waived without the client's knowledge or intent." Jennifer A. Hardgrove, Note, *Scope of Waiver of Attorney-Client Privilege*:

the doctrine of waiver is that, if clients disclose privileged information to third parties, they most likely would have disclosed it to their attorneys even without the protection of the privilege.<sup>65</sup> Therefore, one of the reasons for the privilege's existence—to motivate clients to disclose essential facts to their attorneys—no longer applies.<sup>66</sup>

Clearly, explicit voluntary disclosure waives the privilege. For example, a defendant may waive the privilege as to certain communications with his attorney by suing the attorney for malpractice regarding those communications.<sup>67</sup>

### 1. At-issue Waiver

The client may also impliedly waive the privilege by acting in a manner inconsistent with maintaining confidentiality.<sup>68</sup> Here enters the doctrine of at-issue waiver. Courts typically employ one of three general approaches to at-issue waiver.<sup>69</sup> One is the "automatic waiver" rule, which provides that a litigant automatically waives the privilege upon asserting a claim, counterclaim, or affirmative defense that raises as an issue a matter to which otherwise privileged material is relevant.<sup>70</sup>

Another at-issue waiver approach traces its origins<sup>71</sup> to *Hearn v. Rhay*,<sup>72</sup> in which a federal district court created a three-part balancing test: The attorney-client privilege is impliedly waived when

- (1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense.<sup>73</sup>

A third approach provides "that a litigant waives the attorney-client privilege if, and only if, the litigant directly puts the attorney's advice at issue in the litigation."<sup>74</sup> The advice of counsel is placed at 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."<sup>75</sup>

*Articulating a Standard That Will Afford Guidance to Courts*, 1998 U. ILL. L. REV. 643, 651 (1998).

65. Hardgrove, *supra* note 64, at 652.

66. *Id.*

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

68. Hardgrove, *supra* note 64, at 654.

69. *Frontier Refining, Inc. v. Gorman-Rupp Co.*, 136 F.3d 695, 699 (10th Cir. 1998).

70. *Id.* (citing *Independent Prods. Corp. v. Loew's, Inc.*, 22 F.R.D. 266, 276-77 (S.D.N.Y. 1958) as origin of the "automatic waiver" rule).

71. Alan M. Klinger & James L. Bernard, *An Update to a Comprehensive Survey of the Attorney-Client Privilege and Work Product Doctrine by the Honorable Alvin K. Hellerstein, U.S.D.J., S.D.N.Y.*, S.E. 99 AMERICAN LAW INSTITUTE-AMERICAN BAR ASSOCIATION CONTINUING LEGAL EDUCATION COURSE OF STUDY 191 (April 13, 2000).

72. 68 F.R.D. 574 (E.D. Wash. 1975).

73. *Id.* at 581.

74. *Frontier Refining*, 136 F.3d at 699-700 (citing *Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*, 32 F.3d 851, 863-64 (3d Cir. 1994)).

75. *Rhone-Poulenc*, 32 F.3d at 863. In adopting this approach, the *Rhone-Poulenc* court minced no words regarding its distaste for opinions applying the *Hearn* test:

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

## 2. At-issue Waiver in New Mexico

### a. Court of Appeals

Before *Lyons*, the New Mexico Court of Appeals had addressed at-issue waiver in *Skaggs v. Conoco, Inc.*<sup>76</sup> There, the plaintiffs contended the defendants had waived the attorney-client privilege for certain documents by asserting affirmative defenses, including laches,<sup>77</sup> that placed the contents of the documents at issue.<sup>78</sup> The *Skaggs* plaintiffs relied on *Conkling v. Turner*,<sup>79</sup> a Fifth Circuit case. In *Conkling*, the plaintiff sought to evade application of the statute of limitations but refused to let his attorneys be deposed concerning when he knew or should have known of facts giving rise to his claim.<sup>80</sup> The *Conkling* court relied on the *Hearn*<sup>81</sup> test in finding waiver.<sup>82</sup>

The New Mexico court in *Skaggs* did *not* find waiver, but it was not clear whether the court used *Conkling* and *Hearn* for guidance. On the one hand, it stated that "a party does not waive a claim of attorney-client privilege simply because he or she has asserted an affirmative defense; rather there must be some 'offensive use' of the privileged information for waiver to occur."<sup>83</sup> Yet the *Skaggs* court then quoted *Conkling* and found no waiver "under the facts presented here,"<sup>84</sup> perhaps indicating it was using the *Hearn*, fact-intensive balancing test. The court continued: "[W]e fail to see how the defense of laches implicates the title opinions sought by Plaintiffs since Defendants have not been shown to have relied upon those opinions to prove their defense of laches."<sup>85</sup> There, perhaps, the *Skaggs* court indicated it was indeed requiring an "offensive use" as previously stated. The *Skaggs* court concluded by

is not the standard for determining whether or not evidence should be protected from disclosure as privileged, and that remains the case even if one might conclude the facts to be disclosed are vital, highly probative, directly relevant or even go to the heart of an issue.

As the attorney client privilege is intended to assure a client that he or she can consult with counsel in confidence, finding that confidentiality may be waived depending on the relevance of the communication completely undermines the interest to be served. Clients will face the greatest risk of disclosure for what may be the most important matters. Furthermore, because the definition of what may be relevant and discoverable from those consultations may depend on the facts and circumstances of as yet unfiled litigation, the client will have no sense of whether the communication may be relevant to some future issue, and will have no sense of certainty or assurance that the communication will remain confidential.

*Rhone-Poulenc*, 32 F.3d at 864.

76. 125 N.M. 97, 957 P.2d 526 (1998).

77. Laches is an "equitable doctrine by which a court denies relief to a claimant who has unreasonably delayed or been negligent in asserting the claim, when that delay or negligence has prejudiced the party against whom relief is sought." BLACK'S LAW DICTIONARY 879 (7th ed. 1999). With laches, a party that behaves "more like Rip Van Winkle than 'the early bird'... must live with the consequences." *Lake Caryonah Improvement Ass'n v. Pulte Home Corp.*, 903 F.2d 505, 510 (7th Cir. 1990).

78. *See Skaggs*, 125 N.M. at 102, 957 P.2d at 531.

79. 883 F.2d 431 (5th Cir. 1989).

80. *See id.* at 433-34.

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

82. *See Conkling*, 883 F.2d at 434.

83. *Skaggs*, 125 N.M. at 102, 957 P.2d at 531 (citing *Marathon Oil Co. v. Moye*, 893 S.W.2d 585, 590-92 (Tex. App. 1994)).

84. *Id.*

85. *Id.*

favorably citing an early comment to the *Restatement (Third) of the Law Governing Lawyers*:

Whether an adversary may obtain discovery of materials that otherwise are privileged depends not merely upon what the client pleads but upon the way in which the client will likely prove the assertion. If, for example, the client proposes to prove the allegation [or defense] in ways that do not involve any privileged communication, the exception does not apply.<sup>86</sup>

In other words, the *Skaggs* court left open the question of how directly one must use privileged information in order to waive the privilege.

#### b. Supreme Court

Nor has the state's top court directly stated a standard for at-issue waiver of the attorney-client privilege. In *Hartman v. El Paso Natural Gas Co.*,<sup>87</sup> the New Mexico Supreme Court found waiver of the attorney-client privilege, but because the defendant had inadvertently produced allegedly protected documents, not because of any affirmative defenses the defendant had put forth.<sup>88</sup> The court did find that "[t]he modern trend seems to be towards a case by case determination of waiver based on a consideration of all circumstances."<sup>89</sup> Again, however, the court appeared to be speaking not of waiver in general or of at-issue waiver, but only of waiver through inadvertent disclosure. "The 'inadvertence' of the production is considered as one factor in determining whether there has been a waiver,"<sup>90</sup> the court wrote. In short, previous New Mexico court rulings left unresolved the standard for at-issue waiver of attorney-client privilege.

### IV. ANALYSIS OF THE *LYONS* COURT'S RATIONALE

#### A. *How the Court Reached Its Holding*

In *Lyons*, the court of appeals examined New Mexico's special approach to privileges.<sup>91</sup> First, the court noted that only the judiciary, and not the legislature,

86. *Id.* (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 130 cmt. c., at 231 (Tentative Draft No. 2, 1989)). The comment is not present in the most recent draft, Proposed Final Draft No. 1, 1996.

87. 107 N.M. 679, 763 P.2d 1144 (1988).

88. *Id.* at 681, 763 P.2d at 1146.

89. *Id.* at 687, 763 P.2d at 1152 (quoting *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 329 (N.D. Cal. 1985)).

90. *Id.* The *Hartman* court went on to examine the defendant's conduct according to factors relevant only to inadvertent disclosure. *Id.*

Waiver through inadvertent disclosure is itself subject to several approaches. Under the "lenient" approach, the attorney-client privilege exists for the benefit of the client and cannot be waived except by intentional relinquishment. *Gray v. Bicknell*, 86 F.3d 1472, 1483 (1996). In effect, mere inadvertent production does not waive the privilege. *Id.* (citing *Georgetown Manor, Inc. v. Ethan Allen, Inc.*, 753 F. Supp. 936, 938 (S.D. Fla. 1991)). Under the "middle-of-the-road" approach used in *Hartman*, the court performs a balancing test, taking into consideration such factors as the reasonableness of the precautions taken to prevent inadvertent disclosure and whether justice would be served by relieving the party of its error. *See Gray*, 86 F.3d at 1483-84. Under the "strict" approach, any document produced, intentionally or otherwise, loses its privileged status with the possible exception of situations in which all precautions were taken. *Id.* at 1483.

91. *Lyons*, 129 N.M. at 491, 10 P.3d at 170.

may create privileges in New Mexico.<sup>92</sup> The court further noted that, while Federal Rule of Evidence 501 authorizes lower federal courts to expand privileges, the parallel New Mexico Rule of Evidence allows no such expansion.<sup>93</sup> Thus, the court found itself bound by the privilege rules expressly stated in the New Mexico Rules of Evidence.<sup>94</sup> In those rules, no stated exception to the attorney-client privilege applied to the case at hand.<sup>95</sup> The court found, however, the rule allowing for waiver of any kind of privilege through voluntary disclosure.<sup>96</sup> The court determined that such waiver was consistent with general principles of privilege waiver.<sup>97</sup> Yet the court was mindful that New Mexico is "rule-bound" concerning recognition of privileges.<sup>98</sup> The court thus concluded that it must not "engage in the type of ad hoc judicial waiver analysis engaged in by other courts that are free to apply the common law.... Our courts must adhere closely to waiver as defined in Rule 11-511."<sup>99</sup>

The *Lyons* court went on to examine the three general approaches to at-issue waiver.<sup>100</sup> The *Lyons* court found the automatic-waiver approach simple to apply but noted it has been criticized as too rigid.<sup>101</sup> The court next considered the *Hearn*<sup>102</sup> balancing test, which has been adopted by most jurisdictions.<sup>103</sup> The *Lyons* court found the *Hearn* test to be ostensibly fair yet ultimately unfair, partly because a test of opponent "need" imposes no limits or certainty.<sup>104</sup> The court also agreed with the Fifth Circuit's analysis in *Rhone-Poulenc Rorer, Inc. v. Home Indemnity Co.*<sup>105</sup> That court argued that including relevance in the waiver analysis undermines the very point of the privilege: frank attorney-client communication.<sup>106</sup> The court viewed favorably the *Rhone-Poulenc* approach, whereby a party waives attorney-client privilege when the party "seeks to limit its liability by describing that advice and by asserting that he relied on that advice."<sup>107</sup> The *Rhone-Poulenc* approach also

92. *Id.* (citing *Ammerman v. Hubbard Broad., Inc.*, 89 N.M. 307, 551 P.2d 1354 (1976)).

93. *Lyons*, 129 N.M. at 491, 10 P.3d at 170. New Mexico Rule of Evidence 11-501 omits the "common law" language in the federal rule. The New Mexico Supreme Court held that this fact "manifests the abrogation and inapplicability of the common law evidentiary privileges." *State ex rel. Attorney Gen. v. First Judicial Dist. Court*, 96 N.M. 254, 260, 629 P.2d 330, 336 (1981).

94. *See Lyons*, 129 N.M. at 491, 10 P.3d at 170.

95. *Id.*

96. *Id.* (citing N.M. R. EVID. 11-511).

97. *Id.*

98. *See id.*

99. *Id.* at 491-92, 10 P.3d at 170-71.

100. *See Pub. Serv. Co. of New Mexico v. Lyons*, 129 N.M. 487, 492, 10 P.3d 166, 171 (Ct. App. 2000).

101. *See id.* ("This approach has been severely criticized as too rigid and has been adopted in only a handful of cases.").

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

103. *See Lyons*, 129 N.M. at 492-93, 10 P.3d at 171-72.

104. *See id.* at 492, 10 P.3d at 172. Note that this contrasts with the balancing approach the New Mexico Supreme Court used in *State ex rel. Attorney Gen. v. First Judicial Dist. Court*, 96 N.M. 254, 629 P.2d 330 (1981) when applying the executive privilege. *See supra* note 57.

105. 32 F.3d 851 (3d Cir. 1994).

106. *Lyons*, 129 N.M. at 494, 10 P.3d at 173 ("As the attorney client privilege is intended to assure a client that he or she can consult with counsel in confidence, finding that confidentiality may be waived depending on the relevance of the communication completely undermines the interest to be served.") (quoting *Rhone-Poulenc*, 32 F.3d at 864).

107. *Id.* (quoting *Rhone-Poulenc*, 32 F.3d at 863).

recognizes waiver where direct use is anticipated because the holder of the privilege must use the materials at some point in order to prevail.<sup>108</sup>

In adopting the *Rhone-Poulenc* approach, the *Lyons* court stated that its ruling dovetailed with New Mexico's rule-bound, rather than ad hoc, development of privilege rules.<sup>109</sup> The *Lyons* court further said its ruling is consistent with the purpose of the attorney-client privilege: "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."<sup>110</sup> This "venerable privilege," the court said, must not be placed in harm's way "even at the expense of a zealous pursuit of truth."<sup>111</sup>

Finally, the court concluded that New Mexico case law supported its holding.<sup>112</sup> The court noted that, while both sides in the appeal relied on *Skaggs v. Conoco, Inc.*,<sup>113</sup> the *Skaggs* court did not review at-issue waiver in great depth.<sup>114</sup> Despite the *Skaggs* court's citation to *Conkling*<sup>115</sup> and that opinion's reliance on *Hearn*,<sup>116</sup> the *Lyons* court inferred from the *Skaggs* decision a preference for the *Rhone-Poulenc* approach.<sup>117</sup> The court noted that *Hearn* is a fact-intensive test and said *Skaggs* did not suggest that the trial court below had engaged in such analysis.<sup>118</sup> In addition, the *Lyons* court said, the *Skaggs* court mentioned *Conkling* only because that was the case on which the plaintiffs were relying.<sup>119</sup> Furthermore, the *Lyons* court said, the facts of *Conkling* involved a use of privileged matters that would have triggered waiver under even the most restrictive approach.<sup>120</sup> Instead, the *Lyons* court found a preference for the *Rhone-Poulenc* approach in *Skaggs*' use of the language from the *Restatement (Third) of the Law Governing Lawyers* and in *Skaggs*' reference to waiver requiring "offensive use" of privileged materials.<sup>121</sup>

The *Lyons* court also considered *Hartman v. El Paso Natural Gas Co.*<sup>122</sup> and quickly distinguished the case as confined to waiver through inadvertent disclosure.<sup>123</sup> "[O]ur Supreme Court in *Hartman* did not specifically or expressly address the issue" of at-issue waiver, the *Lyons* court found in concluding that "*Hartman* does not support adoption of the *Hearn* approach."<sup>124</sup> The *Lyons* court

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108. *Id.*

109. *See id.*

110. *See id.* at 495, 10 P.3d at 174 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

111. *Id.*

112. *See Pub. Serv. Co. of New Mexico v. Lyons*, 129 N.M. 487, 495-96, 10 P.3d 166, 174-75 (Ct. App. 2000).

113. 125 N.M. 97, 957 P.2d 526 (1998).

114. *Lyons*, 129 N.M. at 495, 10 P.3d at 174.

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

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

117. *Lyons*, 129 N.M. at 495, 10 P.3d at 174.

118. *Id.*

119. *Id.*

120. *Id.* at 495-96, 10 P.3d at 174-75.

121. *Id.* at 496, 10 P.3d at 175. *See also supra* notes 86, 89.

122. 107 N.M. 679, 763 P.2d 1144 (1988).

123. *Lyons*, 129 N.M. at 496, 10 P.3d at 175.

124. *Id.*

limited its holding to at-issue waiver theory and did not address claims unique to work-product protection.<sup>125</sup>

### B. Apples and Oranges

The *Lyons* court asked itself in light of *First Judicial*,<sup>126</sup> "If we are rule-bound concerning the recognition of specific privileges and waiver, should our courts engage in the type of ad hoc judicial waiver analysis engaged in by other courts that are free to apply the common law?"<sup>127</sup> In answering "no," the court may have mixed apples and oranges and narrowed its analysis unnecessarily.

Whether one has waived a privilege is not the same question as whether one may create a privilege. New Mexico clearly is rule-bound concerning the latter, but the waiver analysis may more properly be viewed as construction of an existing rule. The New Mexico rules, after all, already specifically provide for waiver through disclosure.<sup>128</sup> What they do not do is define disclosure.<sup>129</sup>

Applying New Mexico's rule-bound privilege-recognition approach to the question of whether one has waived an already-recognized privilege is thus a non sequitur. Adopting a narrow definition of at-issue waiver is neither consistent nor inconsistent with New Mexico's unique approach to rule-making. They are different inquiries.

## V. IMPLICATIONS

### A. Stating a Rule Benefits All

In light of the ambiguity of *Skaggs*, the *Lyons* court may have benefited practitioners most by stating clearly a rule for at-issue waiver in New Mexico. For as the United States Supreme Court has recognized, "[a]n uncertain privilege...is little better than no privilege at all."<sup>130</sup> Attorneys and their clients may now more confidently assess whether the attorney-client privilege remains intact.

### B. Privilege as a Weapon

The *Lyons* rule might so strongly protect the attorney-client privilege that it encourages parties to use the privilege as a weapon. After all, if a privileged communication cannot be introduced, "a client could present the justification of legal advice in an inaccurate, incomplete, and self-serving way."<sup>131</sup>

125. *Id.* at 496-97, 10 P.3d at 175-76.

126. *State ex rel. Attorney Gen. v. First Judicial Dist. Court*, 96 N.M. 254, 629 P.2d 330 (1981).

127. *Lyons*, 129 N.M. at 491-92, 10 P.3d at 170-71.

128. *See* N.M. R. EVID. 11-511.

129. *Id.*

130. *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

131. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 130 cmt. b. (Proposed Final Draft No. 1, 1996). *See also* *Hearn v. Rhay*, 68 F.R.D. 574, 582 (1975) (When attorney-client communications inhere in the controversy itself, "[t]o allow assertion of the privilege...would pervert its essential purpose and transform it into a potential tool for concealment."); 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) (The "rigid approach" of the *Rhone-Poulenc* test adopted by the *Lyons* court "can actually facilitate abuse of the privilege.")

The *Lyons* rule might thus have created a virtual immunity from a statute of limitations defense. Claims such as equitable tolling that attempt to overcome a statute of limitations defense do not necessarily involve reliance on counsel's advice, but reliance on counsel often underlies such claims.<sup>132</sup> Now, with the attorney-client privilege preserved under *Lyons*, plaintiffs who plead equitable tolling may say they failed to discover the basis for their claim while declining to reveal just how they failed to do so.<sup>133</sup> So long as they do not affirmatively rely on attorney-client communication, that information remains secret.<sup>134</sup>

Similarly, a fraud defendant might argue that her actions were based on a good-faith belief that she was complying with the law. This defense, like an equitable tolling claim, often involves an underlying reliance on counsel's advice.<sup>135</sup> Yet, after *Lyons*, this defendant may avoid the waiver problem by failing to explain the source of her belief.<sup>136</sup>

As one court summarized the problem, a plaintiff should not be permitted "to thrust his lack of knowledge into the litigation as a foundation or condition necessary to sustain his claim...while simultaneously retaining the lawyer-client privilege to frustrate proof of knowledge....Such tactic or situation would repudiate the sword-shield maxim."<sup>137</sup>

The *Lyons* court argues that its holding will have the opposite effect:

The restrictive approach we adopt is consistent with the long-held view that the attorney-client privilege should act as a shield and not a sword. Confusion in the "at-issue" case law arises because some courts believe that parties are using a privilege as a sword when they refuse to disclose matters relevant to issues or claims that they have injected into the litigation. This belief explains why the *Hearn* ad hoc balancing test has resulted in an expansive use of waiver. By adopting the *Rhone* approach requiring offensive or direct use of privileged information, we believe the 'shield/sword' metaphor is more accurately applied.<sup>138</sup>

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132. See Bahner & Gallion, *supra* note 131, at 205.

133. See generally *id.* at 205-06 ("[I]f the privilege is applied, the parties asserting the claim or defense could preclude access to communications central to their mental state. Because a client's mental state often results from counsel's advice, shielding these communications can work an equal injustice in some cases.")

134. The court's rule, then, allows a party to avoid waiver by pleading very carefully. The rule thus permits a critical issue to turn on the "art" of pleading, a concept shunned in modern pleading. The federal and state rules of civil procedure "reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome; the purpose of pleading is to facilitate a proper decision on the merits." *Hambaugh v. Peoples*, 75 N.M. 144, 153, 401 P.2d 777, 782 (1965) (quoting *Conley v. Gibson*, 355 U.S. 41, 48 (1957)). Yet the *Lyons* rule might prove to be a trap for the unwary litigant who pleads too much.

135. Bahner & Gallion, *supra* note 131, at 205.

136. Such a situation arose in a *Hearn* jurisdiction in *United States v. Bilzerian*, 926 F.2d 1285 (2d Cir. 1991). There, a fraud defendant contended his testimony regarding his good-faith attempt to comply with the law would not have disclosed the content or even the existence of privileged communications with counsel. *Id.* at 1291. In finding at-issue waiver, the court said such testimony would necessarily have put the basis for his understanding of the law at issue, and that his conversations with counsel regarding the legality of his behavior would have been directly relevant in determining the extent of his knowledge. See *id.* at 1292.

137. *League v. Vanice*, 374 N.W.2d 849, 856 (Neb. 1985).

138. *Pub. Serv. Co. of New Mexico v. Lyons*, 129 N.M. 487, 495, 10 P.3d 166, 174 (Ct. App. 2000) (internal citation omitted).

The court does not say *how* the metaphor is more accurately applied, but rather goes on to discuss again the purpose of the attorney-client privilege.<sup>139</sup>

Indeed, how the metaphor may thus be more accurately applied is unclear. Suppose, as in the statute of limitations example, the plaintiff pleads equitable tolling and declines to reveal how he failed to discover the basis for his claim. The defendant might now, through interrogatory, ask how the plaintiff failed to discover the basis for his claim. Presumably, the plaintiff may decline to answer the interrogatory, citing the attorney-client privilege. The defendant has hit a dead end. The *Rhone-Poulenc* approach has not given the plaintiff a metaphorical shield, as suggested by *Lyons*, nor is one needed, because the *Rhone-Poulenc* approach has deprived the defendant of a sword.

### C. *Flaws in the Alternative*

Had the *Lyons* court ruled otherwise, it might have opened a door that could not be closed. Were the *Hearn* balancing test adopted, the privilege could be waived anytime a party's knowledge or understanding was an important element of a claim or defense and a privileged communication was possibly vital or relevant to that knowledge. Privileged communications could be made subject to discovery in negligence cases where the state of the defendant's expertise is in question; in contract cases where a party's understanding of the contract is at issue; in fraud cases where the plaintiff's reliance on the fraud is at issue; in criminal cases where the defendant's intent, or even the truth of her defense, is critical. The *Hearn* exceptions, therefore, could swallow the privilege, and a privilege that "purports to be certain but results in widely varying applications by the courts[] is little better than no privilege at all."<sup>140</sup>

## VI. CONCLUSION

In *Lyons*, the New Mexico Court of Appeals held that, to waive attorney-client privilege under the at-issue waiver doctrine, a party must make offensive or direct use of the privileged materials. In adopting this rule, the court strongly protected the use and purpose of the privilege, thereby promoting competent legal counsel for individuals and society's interest in such counsel. The court also, however, provided opportunity for parties to unfairly use the privilege as a weapon.

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139. *See id.*

140. *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).