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The Attorney-Client Privilege in Malpractice Claims

Introduction

I closed part of a deal selling my client's membership interest in a limited liability company and the buyer just told my client that I committed malpractice concerning that aspect of the sale as I allegedly helped my client breach his fiduciary duty. How do I respond to my client's questions about whether he can tell the buyer our legal position so that buyer can understand that my client and I did nothing wrong?

I just missed a deadline for filing an appeal concerning an issue in a lawsuit that I am defending, and my client sent me an email threatening a malpractice claim. Can I talk to my partner about the issues raised in my client's email?

These situations and many more like them are the type of scenarios an attorney never wants to encounter in her practice and hopes she never has to explain to her partners. Despite our profession's quest for infallibility, we are all human and make mistakes. The questions of: (1) when we or our clients can disclose attorney-client communications to respond to a third-party's assertion of a potential malpractice claim, and (2) whether we can talk to our partners about potential malpractice claims are of paramount concern for the practitioner who wants to satisfy her professional ethical obligations. By looking at the current status of Illinois' attorney-client privilege as well as the attorney-client privilege in other states, this article will provide the answers to these questions.

Since at least *Monier v. Chamberlin*[1] and certainly continuing through *Consolidation Coal Company v. Bucyrus-Erie Company*,[2] Illinois courts have disfavored attorneys' privilege assertions seeking to protect documents and statements from disclosure. While this remains a general principle of Illinois law, recent changes in the common law indicate possible developments ahead in Illinois' attorney-client privilege.

This article will first set forth the general principles of Illinois' attorney-client privilege, and then discuss the recent common law changes. Finally, this article will apply these changes in case law to practical questions and demonstrate some developments in Illinois practice concerning the attorney-client privilege.

The Attorney-Client Privilege in Illinois

The general rule concerning discovery is stated in Illinois Supreme Court Rule 201(b)(1)'s heading: "Full disclosure required."[3] This means that parties must produce every document, statement, or other piece of potential evidence requested during litigation unless a party can establish that the requested material falls within a narrowly-defined exception such as the attorney-client privilege. Supreme Court Rule 201(b)(2) governs a party's assertion of privilege, and states, in relevant part, as follows:

> 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. Material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney.[4]

An assertion of a privilege is the exception, not the rule,[5] as Illinois law adheres "to a strong policy of encouraging disclosure, with an eye toward ascertaining the truth which is essential to the proper disposition of a lawsuit."[6] Consequently, Illinois law strongly disfavors the application of any privilege in litigation, including the attorney-client privilege.[7]Accordingly, courts narrowly construe the attorney-client privilege.[8] Finally, Illinois law provides that the party asserting the privilege bears the burden of establishing the facts that give rise to the privilege, and if that burden is not met, a privilege will not attach.[9]

Under Illinois law, the attorney-client privilege protects from discovery disclosure the documents or statements that reflect communications made in confidence between a lawyer and a client.[10] To be entitled to the attorney-client privilege's protection, a claimant must establish that: (1) the statement originated in confidence that it would not be disclosed; (2) the client or attorney made the statement while the attorney acted in his legal capacity for the purpose of securing legal advice or services for the client; and (3) the statement remained confidential, *i.e.*, neither the client nor attorney disclosed the statement to a non-party to the attorney-client relationship.[11] Not every disclosure from client to attorney is, however, entitled to protection by the attorney-client privilege. The attorney-client privilege protects only those disclosures necessary to obtain informed legal advice that might not have been made absent the privilege.[12] Furthermore, the attorney-client privilege does not protect communications primarily regarding business advice.[13] Thus, for the privilege to apply, the confidential communications must be primarily legal in nature.

While the attorney-client privilege seems like a simple principle of law, it becomes more complicated in the corporate context as an attorney is not just representing a person but a corporate entity that could employ one or thousands of people. In this context, Illinois uses a version of the attorney-client privilege that is commonly known as the control-group test,[14] which is explained as follows:

> As a practical matter, the only communications that are ordinarily held privileged under this test are those made by top management who have the ability to make a final decision rather than those made by employees whose positions are merely advisory. We believe that an employee whose advisory role to top management in a particular area is such that a decision would not normally be made without his advice or opinion, and whose opinion in fact forms the basis of any final decision by those with actual authority, is properly within the control group. However, the individuals upon whom he may rely for supplying information are not members of the control group.[15]

Thus, under Illinois' control-group test, attorney or client communications concerning legal advice in the corporate context are only protected by the attorney-client privilege if those communications: (1) meet the attorney-client privilege elements described above and (2) are made with the corporate client's top management who have the ability to make a final decision regarding the legal issue or their direct advisors, which, as discussed below, is a more complicated analysis than it seems. The control-group test will not

protect an attorney's communications with a corporate representative who does not have final decision-making authority.[16]

Illinois' version of the control-group test contrasts sharply with the United States Supreme Court's formulation of the attorney-client privilege in the corporate context.[17] In *Upjohn*, the Supreme Court rejected the control-group test, holding that it "frustrates the very purpose of the privilege by discouraging communication of relevant information."[18] Specifically, the Supreme Court concluded that the privilege can extend to any employee who communicates with counsel at the direction of her superiors, regarding matters within the scope of her duties.[19]

The Illinois Supreme Court has refused to adopt *Upjohn* and continues to adhere to the more limited control-group test. The supreme court has held that Illinois' control-group test "strike[s] a reasonable balance by protecting consultations with counsel by those who are the decision makers or those who substantially influence corporate decisions and by minimizing the amount of relevant factual material which is immune from discovery."[20] The Illinois Supreme Court's emphasis on the disclosure of relevant information was paramount to its decision to continue to utilize the control-group test, while the United States Supreme Court's rejection of the control-group test rested on its desire for open communications seeking legal advice in the corporate context. This difference in approach is instructive for the analysis to follow.

Under Illinois' control-group test, a court's threshold determination is whether an individual is a member of the corporation's control group. Under *Consolidation Coal*, a person is within the control group if she is top management able to make a final decision.[21] Other corporate employees must satisfy these elements to be in the control group: (1) the agent served as an advisor to top management of the corporate client; (2) the agent's advisory role was such that the corporate principal would not normally have made a decision without the agent's advice; and (3) the agent's opinion or advice in fact formed the basis of the final decision made by those with actual authority within the corporate principal.[22] However, just because an agent supplies information or facts to a corporation's top management does not mean that agent is within the corporation's control group.[23] Pursuant to Illinois' rule, an individual may be a member of the control group for some issues, but concerning other issues, that same agent may not be in the control group.

To determine who is in a corporation's control group, Illinois courts have looked at the agent's role in the organization, and not her title. In *Knief v. Sotos*, the appellate court held that because a bar's head waitress and manager were not in the bar's control group concerning litigation decisions, the attorney-client privilege did not protect the head waitress and manager's communications with counsel representing the bar from disclosure even though those two individuals managed the defendant's business.[24]

To establish that an individual is in a corporation's control group, the proponent of the privilege must supply facts to establish the basis for the assertion. In *Midwesco-Paschen Joint Venture for Viking Projects v. Imo Industries*,[25] the court considered a privilege claim that a field service manager responsible for an allegedly defective product sold by the corporation to plaintiff fell within the corporation's control group. In making its determination regarding the attorney-client privilege, the appellate court held that the manager was a member of the corporation's control group. Testimony established that the manager had direct managerial responsibility over the subject product and that the corporation obtained the manager's advice regarding liability for the subject product.[26]

Even if a communication appears to fit within the attorney-client privilege as it relates to individuals or to corporations, there are some exceptions to the attorney-client privilege that require a practitioner to take caution. Two of these exceptions are critical to understating the current status of the attorney-client privilege in the legal malpractice context: (1) the subject-matter-waiver doctrine and; (2) the fiduciary-duty exception. Next, this article addresses each exception and provides advice concerning avoiding the pitfalls related to each one.

The Subject-Matter-Waiver Doctrine

In *Center Partners, Ltd. v. Growth Head GP, LLC*, the Illinois Supreme Court addressed the subject-matter-waiver doctrine to the attorney-client privilege outside of the litigation context.[27] In doing so, the supreme court reversed a circuit court's order that had required the defendants to produce documents that fell within the attorney-client privilege.[28]

The *Center Partners* litigation arose from a dispute between the purchasers of real property and the general partners of the partnership that owned the property.[29] The plaintiffs alleged that the defendants had received legal advice on how to evade their contractual, fiduciary, and legal duties to the plaintiffs by creating a "synthetic partnership" as well as by stopping the business' growth and stealing certain corporate opportunities.[30]

During discovery, the plaintiffs moved to compel the production of defendants' documents that contained legal advice, which certain defendants shared among the remaining defendants.[31] The plaintiffs argued that the defendants waived any privilege by sharing the documents with parties who were not covered by the attorney-client relationship. Thus, according to the plaintiffs, they failed to maintain confidentiality of the documents.[32] The circuit court agreed that the defendants waived the privilege by sharing the documents and granted the plaintiffs' motion to compel.[33] The defendants produced the documents.[34]

Following the document production, the parties took the deposition of one of the defendant's executives. During that deposition, the executive testified as to the substance of legal advice he received, but refused to testify as to the rationale for the advice or other details concerning the advice.[35] The plaintiffs filed a second motion to compel, but the circuit court denied that motion finding the attorney-client privilege protected that testimony from disclosure.[36]

Later, the plaintiffs opposed the defendants' privilege claim regarding documents that concerned the negotiations for the purchase agreement at issue.[37] As the defendants refused to produce the documents, the plaintiffs filed a third motion to compel, arguing that the defendants waived the privilege as two of the defendants' witnesses testified about legal advice they had received in the presence of other parties.[38] The plaintiffs further argued that the defendants waived the privilege as a third witness for the defendants testified to legal advice he received despite an instruction from counsel not to answer such questions and an assertion that the privilege was not being waived.[39] Essentially, the plaintiffs argued that the defendants waived the privilege because the defendants disclosed only "tid-bits" of information, which was inappropriate as defendants could not use the privilege as both a sword and shield.[40] The defendants responded by arguing that their counsel's advice regarding the negotiations was not at issue, and they had not waived the privilege because their disclosure of some communications did not constitute a subject-matter waiver of all such communications.[41]

The circuit court granted the plaintiffs' motion after an *in camera* review of the documents, finding that because the defendants shared the documents with individuals who were not a party to the attorney-client relationship, the defendants had waived the privilege.[42] The circuit court entered "friendly contempt" against the defendants when they refused to produce the documents, and the defendants appealed the circuit court's ruling.[43]

The appellate court affirmed the circuit court's ruling and held that when defendants disclosed the information among one another they waived the privilege.[44] In its holding, the appellate court found no basis to distinguish between a subject-matter waiver in the litigation or business context.[45]

The Illinois Supreme Court addressed a question of first impression: whether the subject-matter-waiver doctrine applies to extrajudicial disclosures?[46] After setting forth Illinois' general principles of privilege law, the court reviewed the concept of waiver generally under Illinois law.[47] In doing so, the court observed, "[t]he attorney-client privilege belongs to the client, rather than the attorney, although the attorney asserts the privilege on behalf of the client."[48] The court went on to state that "[o]nly the client may waive the privilege" and "[t]he attorney, although presumed to have the authority to waive the privilege on the client's behalf, may

not do so over the client's objection."[49] According to the court, "[a]ny disclosure by the client [of information protected by the attorney-client privilege] is inherently inconsistent with the policy behind the privilege of facilitating a confidential attorney-client relationship, and therefore, must result in a waiver of the privilege."[50]

The court then turned to the subject-matter-waiver doctrine, which provides that the attorney-client privilege is waived on a specific subject matter otherwise protected by the attorney-client privilege when the client voluntarily breaches the attorney-client relationship by disclosing a confidential communication with his attorney to a third-party.[51] According to the court, the subject-matter-waiver doctrine is intended to prevent selective disclosure that could inure to the benefit of the disclosing party.[52]

Turning then to application of subject-matter waiver to the documents, which included attorney-client communications that occurred in the business transaction that preceded the litigation, the court held that while the content of the attorney-client communications made in the presence of the third party waived the attorney-client privilege as to those specific communications, the subject-matter-waiver doctrine did not apply to the remainder of the protected communications on the same subject matter made outside of the judicial proceeding context.[53]

In rendering this holding, the *Center Partners* court reviewed two federal court opinions.[54] Specifically, the court looked to *In re Von Bulow*[55] and *In re Keeper of Records (Grand Jury Subpoena Addressed to XYZ Corp.)*[56] In those cases, both courts held that subject-matter waiver did not apply extrajudicially.[57] In the *In re Bulow* case, the federal court held:

> [W]here, as here, disclosures of privileged information are made extrajudicially and without prejudice to the opposing party, there exists no reason in logic or equity to broaden the waiver beyond those matters actually revealed. Matters actually disclosed in public lose their privileged status because they obviously are no longer confidential. The cat is let out of the bag, so to speak. But related matters not so disclosed remain confidential. Although it is true that disclosures in the public arena may be 'one-sided' or 'misleading', so long as such disclosures are and remain extrajudicial, there is no *legal* prejudice that warrants a broad court-imposed subject-matter waiver. The reason is that disclosures made in public rather than in court—even if selective—create no risk of *legal* prejudice until put at issue in the litigation by the privilege-holder. Therefore, insofar as the district court broadened petitioner's waiver to include related conversations on the same subject it was in error.[58]

In *In re Keeper of Records*, the federal court observed that "[t]here [was] a qualitative difference between offering testimony at trial or asserting an advice of counsel defense in litigation, on the one hand, and engaging in negotiations with business associates, on the other hand."[59]

Following these rulings, the *Center Partners* court rejected the cases cited by the plaintiff, as it found the subject-matter-waiver doctrine should not be applied extrajudicially.[60] The court found that limiting the subject-matter-waiver doctrine's application better served the doctrine to prevent a party from strategically or selectively disclosing documents and rejected the analysis that application of the doctrine must lead to a tactical advantage in litigation.[61]

The supreme court then turned to whether the statements made during the depositions of the defendants' executives placed the disclosures at issue.[62] In doing so, the court held that while the witnesses testified as to the advice they received, they did not testify as to the actual content and basis for the legal advice.[63] Citing *United States v. O'Malley*,[64] the court stated that a client does not waive the attorney-client privilege merely by disclosing the subject that was discussed; rather, the waiver occurs when the client discloses the actual communication.[65] Thereafter, the supreme court found that the testimony did not waive the defendant's privilege claim.

The *Center Partners* ruling limits the type of disclosures that can lead to waiver of the attorney-client privilege. It allows businesses to conduct negotiations among themselves and other counsel without fear that their attorney-client communications later will be required to be disclosed. Despite this limitation, attorneys

should apply common sense measures to prevent waiver by keeping communications regarding legal advice and strategy between counsel and client as much as possible, and not between counsel for separate parties. Maintaining confidentiality of attorney-client communications is the best practice to avoid costly and risky litigation about those communications. But, if a disclosure occurs, the communication may still be protected according to *Center Partners*. Likewise, counsel must be aware of the fiduciary-duty exception to the attorney-client privilege and when it may operate to require disclosure of otherwise privileged communications.

Fiduciary-Duty Exception to the Attorney-Client Privilege

Recently, several courts have addressed whether the law should extend the attorney-client privilege to protect communications between a law firm's in-house counsel, seeking advice from other firm lawyers on how to handle a client's potential malpractice claim against the firm.[66] Before this development, courts sometimes required the production of communications involving a client's malpractice claim, even though the communications arguably fell within the purview of attorney-client privilege.[67] Those communications arguably fall within attorney-client privilege as the lawyer accused of malpractice turned to in-house counsel for legal advice on how to handle the malpractice issue. This exception to the attorney-client privilege is commonly referred to as the fiduciary-duty exception.[68] Two recent Illinois cases, *Garvy v. Seyfarth & Shaw*[69] and *MDA City Apartments, LLC v. DLA Piper LLP*,[70] have examined the application of the fiduciary-duty exception to the attorney-client privilege in the legal malpractice context. As explained below, both decisions declined to adopt the exception in Illinois.

Nevertheless, Illinois practitioners should understand the fiduciary-duty exception as several courts, including the United States Supreme Court, have acknowledged that it is a viable doctrine. This is especially true in light of the Illinois Supreme Court's emphasis on disclosure when it comes to privilege, which provides that Illinois law adheres "to a strong policy of encouraging disclosure, with an eye toward ascertaining the truth which is essential to the proper disposition of a lawsuit."[71]

According to the United States Supreme Court in *United States v. Jicarilla Apache Nation*, English courts first developed the fiduciary exception to the attorney-client privilege based on a principle of trust law in the 19th century.[72] As described in *Jicarilla Apache Nation*, "[t]he rule was that when a trustee obtained legal advice to guide in the administration of the trust, and not for the trustee's own defense in litigation, the beneficiaries were entitled to the production of documents related to that advice."[73] Courts applying the fiduciary-duty exception reasoned "that the normal attorney-client privilege did not apply in [the situation where the beneficiary was seeking advice for the administration for the trust] because the legal advice was sought for the beneficiaries' benefit and was obtained at the beneficiaries' expense by using trust funds to pay the attorneys' fees."[74]

Relying on *Jicarilla Apache Nation*, courts have imposed the fiduciary-duty exception for two reasons. First, the exception applies because the trustee obtains the legal advice as a mere representative of the beneficiaries, as the trustee has a fiduciary obligation to act in the beneficiaries' best interest when administering the trust.[75] Consequently, the beneficiaries are the "real clients" of the attorney who advises the trustee on trust-related matters, and therefore, the attorney-client privilege belongs to the beneficiaries rather than the trustee.[76]

Courts look at several factors in making this "real client" determination, including:

1. Determining when a trustee sought the legal advice to ascertain whether there was a reason for the trustees to seek advice in a personal capacity *(i.e.*, protection from claims against the trustee) rather than in a fiduciary capacity (*i.e.*, protection of the trust corpus);
2. Determining if the documents or advice at issue was intended for any purpose other than to benefit the trust; and

3. Determining if the trust's funds had been used to pay for the legal advice received by the trustee or whether the advice was obtained at a trustee's expense.[77]

Regarding the third factor, courts distinguish between "legal advice procured at the trustee's own expense and for his own protection," which would remain privileged, and "the situation where the trust itself is assessed for obtaining opinion of counsel where interest of the beneficiaries are at stake."[78] In the latter case, courts would apply the fiduciary exception, and typically a trustee could not withhold those communications from the beneficiaries.[79]

According to the United States Supreme Court, the second reason courts impose the fiduciary-duty exception is that the trustee's fiduciary obligation to furnish trust-related information to the beneficiaries outweighs the trustee's interest in the attorney-client privilege.[80] The policy of preserving disclosure in the trustee-beneficiary relationship is "ultimately more important than the protection of the trustees' confidence in the attorney for the trust."[81] Generally, courts applying the fiduciary-duty exception find that the full disclosure of information better assists a beneficiary in policing a trustee in the trust management, and a beneficiary's ability to police in a more informed fashion outweighs "the policy consideration of attorney-client privilege."[82]

The situation described in *Jicarilla Apache Nation*, regarding a trustee who seeks legal advice concerning his actions as trustee, is analogous to a lawyer who consults with in-house counsel to determine the appropriate course of action within the Rules of Professional Conduct. Thus, *Jicarilla Apache Nation* is instructive to determine whether otherwise privileged information will maintain protection from disclosure in the legal malpractice context.

Regarding the operation of the fiduciary-duty exception in the legal malpractice context, some courts have held that because: (1) an attorney owes a fiduciary duty to her client even after her client accuses her of malpractice; and (2) the attorney seeks legal advice on how to deal with a client's malpractice assertions while still representing that client, the fiduciary-duty exception applies. Thus, the attorney must produce all communications between herself and her in-house counsel in the subsequent malpractice litigation.[83] Some courts have even held that the fiduciary-duty exception applies when the attorney contacts her partners about legal and ethical issues concerning the malpractice.[84] This situation is similar to the one examined by the Appellate Court, First District, in *Garvy v. Seyfarth & Shaw*.[85]

Garvy v. Seyfarth & Shaw

In *Garvy*, the court held that a defendant, alleged to have committed legal malpractice, had properly withheld attorney-client communications with its in-house counsel and outside defense counsel made before the defendant withdrew from representing the plaintiff.[86] According to the *Garvy* court, the defendant represented the plaintiff in corporate transactions as well as the subsequent litigation that arose from those transactions.[87] During the underlying representation, the defendant advised the plaintiff that a number of conflicts had arisen and recommended that the plaintiff retain independent counsel to represent him concerning those conflicts, which the plaintiff did.[88] Thereafter, the plaintiff's independent counsel raised several issues regarding the defendant's legal advice, including several claims of potential malpractice. Despite the issues raised, and at the insistence of the plaintiff's independently-retained counsel, the defendant continued to represent the plaintiff.[89] During this period of continued representation, the defendant had multiple communications with its in-house counsel and outside defense counsel regarding the legal and ethical concerns related to the continued representation and the plaintiff's claims of malpractice. After determining that it could no longer represent the plaintiff, the defendant withdrew from representation.[90]

In the subsequent legal malpractice claim, the plaintiff sought all communications from the date of the defendant's letter setting forth the conflicts to the date of the defendant's withdrawal, including those between the defendant and its in-house counsel regarding the plaintiff's malpractice claim.[91] The circuit court ordered

production of all communications and documents. When the defendant refused to comply with its order, the court held the defendant in contempt for failing to produce the communications and documents.[92]

In vacating the contempt citation and reversing the judgment of the circuit court, the *Garvy* court held that the attorney-client privilege protected the communications sought by the plaintiff from disclosure.[93] In making its ruling, the court examined the fiduciary-duty exception and stated, "[t]he fiduciary-duty exception to the attorney-client privilege arose in the context of trust law, and was based on the principle that the beneficiary of the trust had a right to the production of the legal advice rendered to the trustee *related to the administration of the trust*."[94] According to the court, the logic "behind the exception was that because the advice was obtained using the authority and funds of the trust and the beneficiary was the ultimate recipient of the benefit of that advice, the beneficiary was entitled to discover the communications between the attorney and the fiduciary."[95] The court further observed, "The fiduciary-duty exception does not, however, apply to legal advice rendered concerning the personal liability of the fiduciary or in anticipation of adversarial legal proceedings against the fiduciary."[96]

After explaining the fiduciary-duty exception, the appellate court rejected the application of the two opinions from foreign jurisdictions holding that the fiduciary-duty exception applied in circumstances similar to those presented in *Garvy*.[97] In those foreign cases, two federal courts ordered legal malpractice defendants to produce documents protected by the attorney-client privilege because those courts found that the fiduciary-duty exception applied.[98] Those courts' decisions requiring disclosure stem from the defendant law firms' conflicting interests.[99] During representation of the legal malpractice claimants, the defendant law firms each had a fiduciary duty to their clients and duties to protect their firm or other clients from claims.[100] Therefore, the defendant law firms had to produce all attorney-client communication during the period they still represented their former clients, including their communications with outside legal counsel and in-house counsel regarding the potential malpractice claims.[101] The need for the disclosure was based on the law firm's fiduciary obligation of full disclosure to their clients.[102]

In rejecting these foreign decisions, the *Garvy* court first noted that the fiduciary-duty exception to the attorney-client privilege is not recognized under Illinois law.[103] The *Garvy* court did not, however, explicitly reject the fiduciary-duty exception. Following this, the court described the United States Supreme Court's discussion of the fiduciary-duty exception in *Jicarilla Apache Nation*. In doing so, the *Garvy* court reviewed the Supreme Court's examination of the adversary proceeding factor and stated that the adversarial factor was "important because, if adversarial proceedings were pending, it would indicate that the fiduciary was seeking legal advice in a personal rather than fiduciary capacity, and the [fiduciary-duty] exception would not apply."[104] Thereafter, the court held, "even if Illinois did recognize the fiduciary-duty exception, it clearly would not apply here where [the defendant] sought legal advice in connection with [the plaintiff's] legal malpractice claim against it, and not in its fiduciary capacity as [the plaintiff's] counsel in the pending litigation."[105] Consequently, the *Garvy* court concluded that "the documents and communications related to legal advice sought by [the defendant] in connection with [the plaintiff's] legal malpractice claims against it [were] protected from disclosure by the attorney-client privilege."[106]

The court next found that Rules 1.4 and 1.7 of the Illinois Rules of Professional Conduct did not provide a basis to allow the plaintiff to obtain the defendant's attorney-client communications, even though those rules required full disclosure to the client and required immediate withdrawal in the event of a conflict.[107] In reaching this conclusion, the court observed that Comment 9 to Rule 1.6 and Rule 5.1 contained language specifically allowing an attorney to communicate with in-house counsel.[108] The court stated, "[a] lawyer's confidentiality obligations do not preclude a lawyer from securing *confidential* legal advice about the lawyer's personal responsibility to comply with the Illinois Rules of Professional Conduct and that lawyers are permitted to make confidential reports of ethical issues to designated in-house counsel.[109] According to the *Garvy* court, permitting lawyers to confidentially communicate with counsel to ethically resolve a client dispute serves the interest of all involved.

Next, the *Garvy* court found that, consistent with its obligations under Rule 1.7, the defendant had sufficiently disclosed its conflicts to the plaintiff.[110] The court rejected the circuit court's conclusion that by allowing a law firm to disclose and identify the conflict that formed the basis of the privilege claim, it would essentially be allowing the law firm to "grade its own paper."[111] Such a holding would render the conflict disclosure requirement meaningless.[112]

Finally, the court held that the attorney-client privilege protected the defendant's communications because the defendant's in-house counsel did not labor under a conflict of having two clients with conflicting interests. Rule 1.7 would seem to bar that type of representation by any member of the defendant firm.[113] In making this ruling, the court rejected the application of the dual-representation doctrine referenced in *Mueller Industries, Inc. v. Berkman*, which held "that the attorney-client privilege did not apply where one client knew that the law firm represented another client in matters related to its representation of him, and could not have reasonably expected that his communications with his attorney would be confidential."[114] In discussing *Mueller Industries, Inc.*, the court stated:

> The *Mueller* court limited its holding to communications related to the business, the interest the two clients had in common. Even if we were to conclude that [the defendant] representing itself is similar to the representing of an external client, the representation did not involve a common interest with [the plaintiff]. Thus, the dual-representation doctrine is not applicable here and the attorney-client privilege applies to communications with [the defendant's] in-house counsel regarding [the plaintiff's] malpractice claim.[115]

Following this reasoning, the *Garvy* court reversed the circuit court and found that the attorney-client privilege applied.

MDA City Apartments, LLC v. DLA Piper LLP

In an opinion rendered 21 days after *Garvy* by the same appellate panel reviewing the same trial judge, the *MDA* court reversed a circuit court's order requiring a defendant law firm to produce documents concerning its communications with its in-house and outside counsel concerning a motion to disqualify the defendant law firm.[116] There, the underlying action arose from a contract dispute between the defendant's client, the MDA Apartments, and Walsh Construction.[117] Walsh Construction filed a motion to disqualify the defendant law firm because it had represented Walsh-related entities and individuals in other matters.[118] In response to Walsh's motion, the defendant consulted with its own in-house counsel and retained an attorney to defend Walsh's motion. The court granted Walsh Construction's motion to disqualify, and MDA subsequently filed a complaint for legal malpractice against the defendant.[119]

Unlike in *Garvy* where there was a direct assertion of malpractice when the legal malpractice defendant made the privileged communications at issue, MDA did *not* assert a malpractice claim against the defendant until nine months after the court granted the disqualification motion. In contrast to *Garvy*, the *MDA* case had no direct allegation of malpractice when the defendant communicated about the disqualification issue with its in-house or outside counsel (*i.e.*, no clear conflict between the attorney and client existed on a malpractice issue at the time the defendant law firm received the legal advice at issue).

Asserting the attorney-client privilege, the legal malpractice defendant, withheld from disclosure in discovery all communications with its in-house counsel and the attorney retained to represent it on Walsh's motion concerning the disqualification issue, including communications made regarding filings in MDA's claim against Walsh.[120] Upon MDA's filing of a motion to compel, the circuit court held that the defendant's communications did not fall within the attorney-client privilege and that the fiduciary-duty exception applied; thereafter, the circuit court ordered the defendant to produce those communications.[121] When the defendant refused to produce them, the circuit court held the defendant in contempt, and the defendant appealed.[122]

The *MDA* court reviewed the *Garvy* analysis, and like in *Garvy*, acknowledged that the fiduciary-duty exception did not exist in Illinois law.[123] The *MDA* court further held that even if Illinois had adopted the fiduciary-duty exception, the referenced communications did not fall within the purview of that exception. In making this ruling, the court examined the nature of the advice sought, and found that because the defendant was the "real client" in interest to the disqualification advice, the attorney-client communications did not fall within the fiduciary-duty exception. The court found that the defendant had the real interest in the disqualification advice because: (1) the defendant paid for its personal representation on the disqualification issue and (2) MDA was not the beneficiary of the advice concerning disqualification.[124] The *MDA* court stated:

> Although MDA can claim an interest in the ultimate ruling on the motion to disqualify, the motion itself was not directed to the merits of MDA's position but the alleged conflict involving [the defendant]. Thus, even if we were to extend Illinois law by adopting the fiduciary-duty exception, which we decline to do on the facts here, the exception would not apply to the communications in question.[125]

The court acknowledged that MDA received the ultimate benefit of the disqualification advice, but found that the defendant, and not MDA, was the "real client" in interest concerning that advice. Similar to *Garvy*, the *MDA* court rejected MDA's argument based on an application of the duty to disclose under the Illinois Rules of Professional Conduct and the *Mueller* court's dual-representation doctrine. Finally, the *MDA* court reversed the circuit court's contempt citation and held that the attorney-client privilege protected communications regarding disqualification.[126]

Other States

Recently, the highest courts of review of several sister jurisdictions have squarely addressed the fiduciary-duty exception's application to the attorney-client privilege in the legal malpractice context. In 2013, the Supreme Court of Georgia examined this issue in *Hunter, Maclean, Exley, & Dunn v. St. Simons Waterfront, LLC*.[127] In that case, the court applied Georgia's codified attorney-client privilege analysis to determine whether an attorney's communication with his law firm's in-house counsel regarding a client's potential malpractice claim would result in the application of the fiduciary-duty exception.[128] The court held that to avoid production in discovery, the party seeking the protection of the attorney-client privilege needed to show: (1) the existence of an attorney-client relationship; (2) the communications concerned the purpose for which legal advice was sought; (3) the communications were maintained in confidence; and (4) no exception to the privilege applied. [129]

To determine whether an attorney-client relationship existed as required for the first statutory element, the court looked at several facts regarding the nature of the legal relationship, including: (a) whether the firm maintained a designated in-house attorney for purposes of handling the firm's malpractice claims; (b) whether the firm maintained separate files for the client's legal work and the firm's malpractice defense work; (c) whether the firm billed the client for the malpractice defense work or billed the defense work to the file; and (d) whether the in-house attorney designated to handle the malpractice claim for the firm had worked for the client.[130] Regarding the maintenance of confidentiality element, the court said that intra-firm communications regarding the malpractice must only involve "in-house counsel, firm management, firm attorneys, and other personnel with knowledge about the representation that is the basis for the client's claim against the firm," otherwise communications about the malpractice claim may not be subject to protection.[131]

Concerning the exceptions to the attorney-client privilege, the court reasoned that the fiduciary-duty exception did not apply because the client's malpractice claim established a clear lack of mutuality between the firm and its client, which resulted in adverse positions much like in *Garvy*. The Georgia Supreme Court, however, did not have occasion to address how the court would rule when reviewing an issue like that offered

in *MDA, i.e.*, where there is no direct assertion of malpractice or clear adversarial position when the firm sought legal advice from its in-house counsel or outside defense counsel.

The Supreme Judicial Court of Massachusetts took a different approach to reviewing the attorney-client privilege's application concerning in-house communications regarding a client's malpractice claims.[132] In *RFF Family Partership, LP v. Burns & Levinson, LLP*, the court found that the attorney-client privilege applied to communications with in-house attorneys regarding malpractice claims made by current clients. The party asserting the privilege must establish: (1) the law firm had designated an attorney or attorneys within the firm to represent the firm as in-house counsel; (2) the in-house counsel had not performed any work on the client matter at issue or any substantially related matter; (3) the time spent by the attorneys in these communications with in-house counsel was not billed to the client; and (4) the communications were made and maintained in confidence.[133]

Two other state supreme courts, in Oregon and Minnesota, are currently reviewing the application of the fiduciary-duty exception in the legal malpractice context, and it is expected that several Illinois appellate courts will also consider the applicability of this exception to the attorney-client privilege in the near future.[134] Thus, Illinois practitioners may be able to help ensure that communications with other lawyers about malpractice claims from clients by following the standards established under the cases from other states.

Analysis

As noted above, the subject-matter waiver and fiduciary-duty exceptions to the attorney-client privilege are two issues that Illinois practitioners need to be mindful of when addressing legal malpractice claims. A review of these issues reveals some general rules that a practitioner should keep in mind when attempting to answer the type of questions posed in the introduction:

> *I closed part of a deal selling my client's membership interest in a limited liability company and the buyer just told my client that I committed malpractice concerning that aspect of the sale as I allegedly helped my client breach his fiduciary duty. How do I respond to my client's questions about whether he can tell the buyer our legal position so that buyer can understand that my client and I did nothing wrong?*
>
> *I just missed a deadline for filing an appeal concerning an issue in a lawsuit that I am defending, and my client sent me an email threatening a malpractice claim. Can I talk to my partner about the issues raised in my client's email?*

When a client inquires regarding how much of her discussions with you she can disclose while negotiating with an adversary or potential business partner, the best answer is still probably none. However, based on the Illinois Supreme Court's ruling in *Center Partners, Ltd.*, there is some flexibility regarding the subject-matter-waiver doctrine in the transactional context. Consequently, if your client tells the other party your advice in a transactional setting, the basis for your advice might still be protected by the attorney-client privilege in subsequent litigation.

The question of whether you can talk to your partner about a client's assertion of a malpractice claim, however, is a bit more difficult. Although Illinois has not adopted the fiduciary-duty exception to the attorney-client privilege, it is a pressing topic on the national stage, which means it is only a matter of time before an Illinois court squarely addresses it. Moreover, in light of the Illinois Supreme Court's emphasis on disclosure in the privilege context, we expect that Illinois will review the fiduciary-duty exception again.

Based on *Garvy* and *MDA* as well as some of the other national common law on this issue, Illinois firms should take steps to prepare for the potential advent of the fiduciary-duty exception. First, an Illinois firm should have a set procedure for handling client conflicts and malpractice claims that may arise when

performing legal services. Based on the common law referenced above, that procedure should probably include the retention of a separate attorney to provide legal advice on the conflict and malpractice issues as well as potentially withdrawing from the client's representation. Second, if an Illinois firm is going to designate a specific in-house counsel to advise its lawyers on conflict or malpractice issues relating to clients, the firm should ensure that: (1) it maintains a separate file for the conflict or malpractice work; (2) the firm does not charge the client for the legal advice on the conflict or malpractice issue; (3) the designated in-house attorney has not worked for the client or on the issue related to the conflict or malpractice claim; and (4) the communications with the in-house attorney are kept confidential.

As referenced above, Illinois utilizes the control-group test, which further complicates the confidentiality requirement. Under this test, only the in-house attorney's discussions with the firm's control group would arguably remain confidential, which means that an Illinois firm and its in-house attorney need to be careful as to whom they communicate with on the conflict or malpractice issue. Both the firm and the in-house attorney need to ensure that their communications are not disclosed outside of the control group.

Finally, an Illinois law firm needs to ensure that during the period of its continued representation in which the conflict or malpractice claim occurs, the firm keeps their clients informed of all aspects of their legal work and meeting its professional disclosure obligations to their clients. A law firm has a full disclosure obligation to its clients, and it must meet those obligations if it continues to represent the client in a conflict or malpractice context. In keeping its client informed, a firm should clearly differentiate between communication related to the client's legal work and the legal work performed for the firm's defense. Blurring the lines of communication regarding the client's legal work and the firm's defense work could result in the subsequent disclosure of communications protected by the attorney-client privilege.

While Illinois' common law continues to develop regarding the attorney-client privilege, practitioners should take steps to ensure that in the event of a malpractice claim their subsequent communications regarding that claim are protected from disclosure. Illinois attorneys need to take these steps while still fulfilling the duties they owe to their clients.

(Endnotes)

[1] 35 Ill. 2d 351 (1966).

[2] 89 Ill. 2d 103 (1982).

[3] Ill. S. Ct. R. 201.

[4] Ill. S. Ct. R. 201(b)(2).

[5] *Golminas v. Fred Teitelbaum Const. Co.*, 112 Ill. App. 2d 445, 448-449 (2d Dist. 1969).

[6] *Waste Management, Inc. v. International Surplus Supply Lines Ins. Co.*, 144 Ill. 2d 178, 190 (1991).

[7] *In re Marriage of Daniels*, 230 Ill. App. 3d 314, 324-25 (1st Dist. 1992). Illinois courts, however, have found that some privileges exist beyond those referenced in Supreme Court Rule 201(b)(2). See *e.g. People v. Ryan*, 30 Ill. 2d 456 (1964) (finding an insurer-insured privilege exists) and *FMC Corp. v. Liberty Mutual Ins. Corp.*, 236 Ill. App. 3d 355 (1st Dist. 1992) (finding that an accountant-client privilege exists based on a state statute).

[8] *Archer Daniels Midland Co. v. Koppers Co., Inc.*, 138 Ill. App. 3d 276, 278 (1st Dist. 1985).

[9] *Claxton v. Thackston*, 201 Ill. App. 3d 232, 234 (1st Dist. 1990).

[10] *Shapo v. Tires N' Tracks, Inc.*, 336 Ill. App. 3d 387, 393 (1st Dist. 2002).

[11] *Rounds v. Jackson Park Hosp.*, 319 Ill. App. 3d 280, 285-86 (1st Dist. 2001).

[12] *Cangelosi v. Capasso*, 366 Ill. App. 3d 225, 228-29 (2d Dist. 2006).

[13] *CNR Invest., Inc. v. Jefferson Trust & Sav. Bk.*, 115 Ill. App. 3d 1071, 1076 (3d Dist. 1983).

[14] *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103, 118-19 (1982).

[15] *Id.*

[16] *Id.*

[17] *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

[18] *Id*. at 392.

[19] *Id.* at 394.

[20] *Consolidation Coal*, 89 Ill. 2d at 118-119.

[21] *Id.*

[22] *Archer Daniels Midland Co.*, 138 Ill. App. 3d at 279-280.

[23] *Id*.

[24] 181 Ill. App. 3d 959, 964 (2d Dist. 1989).

[25] 265 Ill. App. 3d 654 (1st Dist. 1994).

[26] *Midwesco-Paschen*, 265 Ill. App. at 663; *see also, Mlynarski v. Rush-Presbytarian-St. Luke's Medical Center*, 213 Ill. App. 3d 427, 432 (1st Dist. 1991).

[27] Illinois Rule of Evidence 502(a) applies to subject matter waiver in the context of litigation, whereas the communications sought to be protected in *Center Partners* occurred prior to the institution of litigation.

[28] 2012 IL 113107, ¶ 1.

[29] *Id*. ¶¶ 3-10.

[30] *Id*. ¶ 10.

[31] *Id.* ¶ 11-13.

[32] *Id*. ¶ 12.

[33] *Id.*

[34] *Id*. ¶ 13.

[35] *Id*.

[36] *Id*.

[37] *Id*. ¶ 14.

[38] *Id*. ¶¶ 15-16.

[39] *Id*. ¶¶ 17-18.

[40] *Id.* ¶ 19.

[41] *Id*. ¶ 20.

[42] *Id*. ¶ 20.

[43] *Id*.

[44] *Id*. at 21-22.

[45] *Id*.

[46] *Id*. ¶¶ 25-27.

[47] *Id*. ¶35.

[48] *Id*.

[49] *Id*.

[50] *Id.*

[51] *Id.*

[52] *Id.* ¶ 39.

[53] *Id.* ¶ 76.

[54] *Id.* ¶ 43.

[55] 828 F.2d 94 (2d Cir. 1987).

[56] 348 F.3d 16 (1st Cir. 2003).

[57] *Id.* ¶¶ 45-51.

[58] *Id.* ¶ 47.

[59] *Id.* ¶ 50.

[60] *Id.* ¶ 57.

[61] *Id.* ¶¶ 57-60.

[62] *Id.* ¶ 64.

[63] *Id.* ¶ 73.

[64] 786 F.2d 786, 794 (7th Cir. 1986).

[65] *Center Partners*, 2012 IL 113107, ¶ 73.

[66] *Koen Book Distributors. v. Powell, Trachman, Logan, Carrle, Bowman & Lombardo, P.C.*, 212 FRD 283, 285-286 (E.D. Pa. 2002) (finding no attorney-client privilege for intra-firm communications regarding potential legal action by current client against law firm); *Bank Brussels Lambert v. Credit Lyonnais, S.A.*, 220 F.Supp.2d 283, 287 (S.D. N.Y. 2002) (same); *SonicBlue, Inc. v. Portside Growth and Opportunity Fund*., 2008 Bankr. LEXIS 181, at *26 (Bankr. N.D. Cal. Jan. 18, 2008) (same); *Thelen Reid & Priest, LLP v. Marland*, 2007 U.S. Dist. LEXIS 17482 (N.D. Cal. Feb. 21, 2007) (recognizing confidentiality of consultations with in-house ethics adviser but requiring disclosure of in-firm communications made after firm learned of client's adverse claim). *TattleTale Alarm Systems v. Calfee, Halter & Griswold, LLP*, 2011 U. S. Dist. LEXIS 10412 (S.D. Ohio, Feb. 3, 2011) (applying attorney-client privilege and rejecting client's access to documents for failure to show "good cause" to compel disclosure).

[67] *Id.*

[68] *Id.*

[69] 2012 IL App (1st) 110115.

[70] 2012 IL App (1st) 111047.

[71] *Waste Management, Inc. v. International Surplus Supply Lines Ins. Co.*, 144 Ill. 2d 178, 190 (1991).

[72] *United States v. Jicarilla Apache Nation*, 131 S.Ct. 2313 (2011).

[73] *Jicarilla Apache Nation*, 131 S.Ct. at 2326.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.* at 2322.

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Koen Book Distributors. v. Powell, Trachman, Logan, Carrle, Bowman & Lombardo, P.C.*, 212 F.R.D. 283, 285-286 (E.D. Pa. 2002) (finding no attorney-client privilege for intra-firm communications regarding potential legal action by current client against law firm); *Bank Brussels Lambert v. Credit Lyonnais, S.A.*, 220 F.Supp.2d 283, 287 (S.D. N.Y. 2002) (same); *SonicBlue, Inc. v. Portside Growth and Opportunity Fund*., 2008 Bankr. LEXIS 181, at *26 (Bankr. N.D. Cal. Jan. 18, 2008) (same); *Thelen Reid & Priest, LLP v. Marland*, 2007 U. S. Dist. LEXIS 17482 (N.D. Cal. Feb. 21, 2007) (recognizing confidentiality of consultations with in-house ethics adviser but requiring disclosure of in-firm communications made after firm learned of client's adverse claim). *TattleTale Alarm Systems v. Calfee, Halter & Griswold, LLP*, 2011 U.S. Dist. LEXIS 10412 (S.D. Ohio, Feb. 3, 2011) (applying attorney-client privilege and rejecting client's access to documents for failure to show "good cause").

[84] *Id.*

[85] 2012 IL App (1st) 110115, ¶ 47.

[86] *Id*.

[87] *Id*. ¶¶ 3-10.

[88] *Id*. ¶ 11.

[89] *Id*. ¶ 37.

[90] *Id*. ¶ 13.

[91] *Id*. ¶ 15.

[92] *Id*. ¶¶ 16-18.

[93] *Id*. ¶ 38.

[94] *Id*. ¶ 31.

[95] *Id*.

[96] *Id.*

[97] *Id*. ¶¶ 32-35; *Thelen Reid & Priest LLP v. Marland Co*., No. C 06-2071 VRW, 2007 WL 578989 (N.D. Cal. Feb. 21, 2007); and *Koen Book Distributors, Inc. v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, P.C.*, 212 F.R.D. 283, 284 (E.D. Penn. 2002).

[98] *Id*.

[99] *Id*.

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Garvy*, 2012 IL App (1st) 110115, ¶¶ 35.

[104] *Id.*

[105] *Id.*

[106] *Id*. ¶ 38.

[107] *Id*. ¶ 40.

[108] *Id.*

[109] *Id*.

[110] *Id.*

[111] *Id*. ¶ 36.

[112] *Id*. ¶ 39.

[113] *Id*. ¶ 42. Rule 1.7 precludes an attorney from representing two clients with adverse interests and Rule 1.4 requires an attorney to advise a client that such a conflict may exist. However, the court found that since in house counsel had no such divided loyalty, no communication with the client on this issue was required.

[114] *Id.*

[115] *Id.*

[116] 2012 IL App (1st) 111047.

[117] *Id*. ¶ 3.

[118] *Id*. ¶¶ 6-8.

[119] *Id*. ¶¶ 8-9.

[120] *Id*. ¶ 10.

[121] *Id.* ¶ 11.

[122] *Id*.

[123] *Id.*

[124] *Id.*

[125] *Id*. ¶ 19.

[126] *Id*.

[127] 317 Ga. App. 1 (2012).

[128] 317 Ga. App. at 2-4(2012).

[129] *Id*.

[130] *Id.*

[131] *Id.*

[132] *RFF Family Partnership, LP v. Burns & Levinson, LLP*, 465 Mass. 702 (2013).

[133] *RFF Family Partnership, LP v. Burns & Levinson, LLP*, 465 Mass. 702-06 (2013).

[134] *Coloplast A/S v. Spell Pless Sauro, PC*., 2013 Minn. Dist. 45 (4th Dist. 2013); *Crimson Trace Corp. v. Davis Wright Termaine, LLP*, 353 Ore. 430 (2013).

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