MONTHLY LUNCHTIME SEMINAR SERIES

32ND Session:

SUSTAINING PRIVILEGES: ATTORNEY-CLIENT & WORK PRODUCT

Judge Lynn M. Egan
Judge Susan F. Zwick (Ret.)

March 27, 2015

JUDGE LYNN M. EGAN

Judge Lynn M. Egan became a Cook County Circuit Court judge in 1995 and has served in the Law Division for over 15 years. She has presided over high volume motion calls, an Individual Commercial Calendar and bench and jury trials. Her current assignment is to the only General Individual Calendar in the Law Division and includes every type of case filed in the Division, specifically including personal injury actions such as medical & dental malpractice, product liability, defamation/slander, premises liability, construction & motor vehicle accidents, as well as commercial disputes such as breach of contract, wrongful termination, employment discrimination and legal & accounting malpractice. She manages these cases from time of filing until final disposition, including all motion practice, case management, settlement conferences and trials. Additionally, Judge Egan is committed to assisting parties with the voluntary resolution of cases. As a result, hundreds of cases pending on other judges' calls are transferred to Judge Egan each year for settlement conferences and she has helped facilitate settlements totaling nearly 200 million dollars.

Judge Egan has also served as a member of several Illinois Supreme Court Committees, including the Executive Committee, Discovery Procedures Committee, Civil Justice Committee and Education Committee. She has also been a faculty member at dozens of judicial seminars throughout the state, including the annual New Judges' Seminar, regional conferences and the mandatory Education Conference. She has authored numerous articles on subjects such as discovery, requests to admit, restrictive covenants, Day-In-The-Life films, directed verdicts, jury selection & instructions, Dead Man's Act, Supreme Court Rule 213, expert witnesses, reconstruction testimony, court ordered medical exams, sanctions and damages. She also serves as a mentor for new judges and was recently appointed to the Illinois Courts Commission, a 7 member panel responsible for rendering final decisions on matters of judicial discipline.

Judge Egan has served on Bar Association committees and Boards of Directors and has been a frequent speaker at Bar Association seminars. She has taught law school classes and judged trial & appellate advocacy competitions. In 2012, she became a registered CLE provider through the Illinois MCLE Board and provides free CLE seminars for attorneys and judges every month. Since her monthly seminar series began in August 2012, Judge Egan has awarded over 4,000 hours of CLE credit to Illinois attorneys.

Prior to joining the bench, Judge Egan was an equity partner at Hinshaw & Culbertson, where she focused her practice on medical negligence cases. In addition to trial work, she argued before the Illinois Supreme Court on a matter of first impression in the country in the case of *Cisarik v. Palos Community Hospital*. Similarly, during her earlier career in the Cook County State's Attorney's Office, she worked in the criminal and juvenile divisions and argued before the Illinois Appellate and Supreme Courts on matters of first impression in Illinois.

[redacted]

Hon. Susan F. Zwick (Ret.)

Experience and Qualifications

- Business/ Commercial
- Construction Defect
- Education/Schools
- Employment/Labor
- FELA/Jones Act
- Insurance
- Medical Negligence/Health Care
- Personal Injury/Torts
- Professional Liability

Representative Matters

- Presided over sevaral intantional tort/personal injury claims involving punitive damages and the resulting insurance ramifications, including a defamation/false light action which grew out of a termination of employment for a union employee
- Presided over numerous FELA actions, including both traumatic and repetitious injury claims
- Presided over a multi-party lawsuit Consumer Fraud Act lawsuit between homeowners and homebuilders involving land engineering through varied water tables and municipal regulations
- Nagotiated insurance coverage issues which allowed for the settlement of several cases involving allegations of fraud in contract formation
- Presided over numerous real estate foreclosure and mortgage disputes involving both commercial and residential units and allegations of contractual breaches
- Resolved all personal injury actions arising from the 2006 Blue Line derailment
- Presided over numerous professional liability/medical nagligence disputes, including disputes between individuals and the respective professional licensing board
- Determined numerous claims involving scope of contractual obligations between contractors and principals and individual workers on construction projects
- Presided over a multi-million dollar insurance fraud/fire loss claim
- Settled numerous personal injury suits, including several catastrophic injury and burn cases

Honors, Memberships, and Professional Activities

- Adjunct Faculty, Trial Advocacy, University of Notre Dame Law School, 2005-present
- Judicial Education Faculty, Administrative Office of Illinois Courts, 2006-2013

Background and Education

- Judge, Cook County Circuit Court, Chicago, Illinois, 1992-2014
  - Law Jury Division, 2002-2005; 2007-2014
  - Law Division, Motion Calendar C, 2005-2007
  - Complex Litigation and Mediation, 1995-2002
  - Domestic Relations Division, 1992-1995
- Trial and Appellate Attorney, Querrey, Harrow, Gulanick & Kennedy, 1980-1992
- J.D., University of Notre Dame, 1980
- A.B., Government and International Studies, University of Notre Dame, 1977

SECTION A

- *Illinois Rules of Professional Conduct, by Judge Lynn M. Egan, March 2015.*

ILLINOIS SUPREME COURT RULES
ARTICLE VIII:
ILLINOIS RULES OF PROFESSIONAL CONDUCT

by
Judge Lynn M. Egan
March 2015

INTRODUCTION:

"The Illinois Rules of Professional Conduct are rules of reason...and should be interpreted with reference to the purposes of legal representation and of the law itself." *Ill.S.Ct.R. of Prof. Conduct, Scope, ¶ 14 (eff. Jan. 1, 2010)(West 2014).* Significantly, the Rules of Professional Conduct recognize "that the practice of law is a public trust and lawyers are trustees of the judicial system." *In re Marriage of Newton, 2011 IL App (1st) 090683, ¶ 52.*

It is essential to understand the following threshold concepts about how and when an attorney-client relationship begins in order to comply with the rules and protect the attorney-client & work product privileges:

- "A formal or written agreement is not a prerequisite to the formation of an attorney-client relationship. Rather, the relationship can be created during the initial contact between the layperson and the lawyer." *In re Marriage of Kuziel, 2013 IL App (1st) 122612, ¶ 19.* "Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact." *Ill.S.Ct.R. of Prof. Conduct, Scope, ¶ 17 (eff. Jan. 1, 2010)(West 2014).*
- "Contrary to other jurisdictions, Illinois courts do not require the putative client to show that he actually submitted confidential information to the lawyer." *In re Marriage of Kuziel, supra.*
- "The analysis focuses on the client's viewpoint rather than that of the attorney. The payment of fees and the fact that a further relationship did not develop as a result of the preliminary consultation are not relevant considerations. The rationale for this policy is the concern that '[a]t the inception of the contacts between the layman and the lawyer it is essential that the layman feel free of danger in stating the facts of the case to the lawyer whom he consults.'" *Id. at ¶ 20.*

I. Ill. Sup. Ct. R. Prof. Conduct, R 1.6

(Recent case law: In re Daveisha C., 2014 IL App (1st) 133870)

Rule 1.6. Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b) or required by paragraph (c).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a crime in circumstances other than those specified in paragraph (c);

(2) to prevent the client from committing fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

(c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm.

(d) Information received by a lawyer participating in a meeting or proceeding with a trained intervener or panel of trained interveners of an approved lawyers' assistance program, or in an intermediary program approved by a circuit court in which nondisciplinary complaints against judges or lawyers can be referred, shall be considered information relating to the representation of a client for purposes of these Rules.

HISTORY: Adopted 7-1-09; eff. 1-1-10.

//. **Ill. Sup. Ct. R. Prof. Conduct, R 1.8**

Rule 1.8. Conflict of Interest: Current Clients: Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and

reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is informed in writing that the client may seek the advice of independent legal counsel on the transaction, and is given a reasonable opportunity to do so; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an

aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

III. **Ill. Sup. Ct. R. Prof. Conduct, R 1.9**

(Recent case law: Fletcher v. McDonald, 2013 IL App (4th) 120779; In re Marriage of Newton, 2011 IL App (1st) 090683)

Rule 1.9. Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

HISTORY: Adopted 7-1-09; eff. 1-1-10.

IV. Ill. Sup. Ct. R. Prof. Conduct, R 1.18

Rule 1.18. Duties to Prospective Client

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

1) both the affected client and the prospective client have given informed consent, or

2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and that lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

HISTORY: Adopted 7-1-09; eff. 1-1-10.

SECTION B

- Attorney/Client & Work Product Privileges, by Judge Susan F. Zwick (Ret.), March 2015.

Attorney/Client and Work Product Privileges

By
Judge Susan F. Zwick
March 2015

Article II of the Illinois Supreme Court Rules governs all aspects of discovery in Illinois. Rule 201 delineates the various methods of discovery, including examination of persons, tangible objects and documents. The rules mandate full disclosure, but draw the following parameters in paragraph b (2):

> (2) *Privilege and Work Product.* 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.

Ill. S. Ct. R. 201(b) (2) (eff. July 1, 2002).

Our supreme court has defined the attorney-client privilege as "where legal advice of any kind is sought from a professional legal advisor in his capacity as such, the communications relating to that purpose, made in confidence by the client, are protected from disclosure by himself or the legal advisor, except the protection be waived." ***Fischel & Kahn, Ltd. v. Van Straaten Gallery, Inc.,*** 189 Ill. 2d 579, 584, 727 N.E.2d 240, 2000 Ill. LEXIS 4 [citing ***In re Himmel***, 125 Ill. 2d 531, 541, 533 N.E.2d 790 (1988)]; ***People v. Adam***, 51 Ill. 2d 46, 48, 280 N.E.2d 205 (1972) [quoting 8 J. Wigmore, Evidence § 2292 (McNaughton rev. ed. 1961)]. The work-product doctrine "provides a broader protection than the attorney-client privilege and is designed to protect the right of an attorney to thoroughly prepare his case and to preclude a less diligent adversary attorney from taking undue advantage of the former's efforts." ***Fischel & Kahn, Ltd. v. Van Straaten Gallery, Inc.,*** 189 Ill. 2d at 591; see also: ***Hickman v. Taylor***, 329 U.S. 495, 91 L. Ed. 451, 67 S. Ct. 385 (1947).

Whether requested discovery is privileged or not protected, or whether the privilege has been abrogated by circumstances or the parties, has been continually scrutinized and re-evaluated through case law.

Note: the party asserting the privilege bears the burden of proving it.

I. Attorney-Client Privilege

A. To be entitled to the protection of the attorney-client privilege, a claimant must show that his statement or communication was:

(1) made to an attorney in confidence that it would not be disclosed;

(2) made to an attorney acting in his/her legal capacity for the purpose of securing legal advice or services; and

(3) it remained confidential.

Pietro v. Marriott Senior Living Servs., 348 Ill. App. 3d 541, 810 N.E.2d 217, 2004 Ill. App. LEXIS 523 (1 Dist. 2004); ***People v. Adams***, 51 Ill. 2d 46, 48, 280 N.E. 2d 205, 1972 Ill. LEXIS 389 .

- Historically, the privilege belonged to the client, not to counsel, and may only be waived by the client. ***In Re Marriage of Decker***, 152 Ill.2d 298,313, 606 N.E.2d 1094, 1992 Ill. LEXIS 184. In recent decisions, courts have decidedly established the privilege as mutual: it applies to statements of counsel made to the client, as well as the client's statements. See: ***Midwesco-Paschen Joint Venture for the Viking Projects v. Imo Industries, Inc.***, 265 Ill. App. 3d 654, 660-61, 638 N.E.2d 322, 1994 Ill. App. LEXIS 1084; ***In re Marriage of Granger***, 197 Ill. App. 3d 363, 374, 554 N.E.2d 586, 1990 Ill. App. LEXIS 528.
- Policy is to insure confidentiality; that sound legal advice and advocacy are dependent upon full and frank communication. ***People v. Simms***, 192 Ill. 2d 348, 381, 736 N.E.2d 1092, 2000 Ill. LEXIS 1224; ***Consolidation Coal Co. v. Bucyrus-Erie Co.***, 89 Ill. 2d 103, 117-18, 432 N.E.2d 250, 1982 Ill. LEXIS 218 ; ***Upjohn Co. v. United States***, 449 U.S. 383, 389, 101 S. Ct. 677, 66 L. Ed. 2d 584, 1981 U.S. LEXIS 56.

B. **Who qualifies:**

1. Attorneys, past and present [Ill. Sup. Ct. R. Prof'l Conduct, R 1.6 (2015)]

2. Clients, living and dead. [Privilege survived the death of a client, except in will contest. ***Adler v. Greenfield***, 2013 IL App (1st) 121066, 990 N.E.2d 1219, 2013 Ill. App. LEXIS 323.

3. Insurance company and personnel: Insured/Insurer communications are protected when made for the purpose of protecting the insured. ***People v. Ryan*** 30 Ill. 2d 456, 197 N.E.2d 15, 1964 Ill. LEXIS 384; ***Pietro v. Marriott Senior Living Servs.***, 348 Ill. App. 3d 541, 810 N.E.2d 217, 2004 Ill. App. LEXIS 523 (1 Dist. 2004) ***Chicago Trust Co. v. Cook County Hospital***, 298 Ill. App. 3d 396, 407, 698 N.E.2d 641, 649, 1998 Ill. App. LEXIS 520.

4. Control Group/Agents. Individual must be a member of the "control group" to establish an attorney-client privilege; mere employee insufficient. Control group includes: first tier decision-makers, or top management and second tier employees who directly advise top management, and upon whose opinions and advice the decision-makers rely. ***Consolidation Coal Co. v. Bucyrus-Erie Co.*** (1982), 89 Ill. 2d at

119; ***Midwesco-Paschen Joint Venture for the Viking Projects v. Imo Industries, Inc.,*** 265 Ill. App. 3d at 660.

C. What qualifies?

1. Any communication between an attorney and his/her client, in any confidential context, even if the client is not a party to the litigation in which he/she is expected to testify. ***Johnson v. Frontier Ford, Inc.,*** 68 Ill. App. 3d 315, 386 N.E.2d 112, 1979 Ill. App. LEXIS; [Ill. Sup. Ct. R. Prof'l Conduct, R 1.6 (2015)].

Not protected:

- Nurse's private notes concerning a patient's treatment that she compiled because of potential malpractice suit; notes were compiled privately, not at request of counsel or superiors, even though they were given to hospital counsel after suit. ***Cangelosi v. Capasso,*** 366 Ill. App. 3d 225, 851 N.E.2d 954, 2006 Ill. App. LEXIS 577 ; ***Rounds v. Jackson Park Hosp. & Med. Ctr.,*** 319 Ill. App. 3d 280, 745 N.E.2d 561, 2001 Ill. App. LEXIS 51 ; ***Chicago Trust Co. v. Cook County Hosp.***, 298 Ill. App. 3d at 396.
- Workers Compensation Claims file documenting medical treatment undertaken by claimant was not privileged and permitted as evidence of corporate knowledge in retaliatory discharge case; the communications to insurer were not designed to protect the insured but to chronical claimant's medical progress. ***Holland v. Schwan's Home Service Inc.***, 2013 Il App (5^{th}) 110560, 992 N.E. 2d 43, 2013 Ill.App. LEXIS 342, 372 (2013.)
- "Comments" from management to senior counsel; cover letter informing management of draft letter, and letter informing management of the retention of outside counsel was not privileged. ***Midwesco-Paschen Joint Venture for Viking Projects v. Imo Indus., Inc.,*** 265 Ill. App. 3d 654,660-661.

II. Work Product Privilege

The work-product doctrine embodied in Ill. S. Ct. R. 201(b)(2) provides that disclosure shall not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of attorneys, members of legal or investigative staffs. The privilege is not absolute; only the mental processes of an attorney

in the preparation of his client's case are protected. It is narrowly applied by most courts. See: ***Monier v. Chamberlain***, 35 Ill.2d 351, 359, 221 N.E. 2d 410, 1966 Ill. LEXIS 315.

The work-product rule "protects from discovery the mental processes of an attorney in the preparation of his client's case" and protects legal strategies. ***People v. Lego***, 116 Ill. 2d 323, 339, 507 N.E.2d 800, 1987 Ill. LEXIS 180 ; see also ***People v. Knuckles,*** 165 Ill. 2d 125, 131, 650 N.E.2d 974, 1995 Ill. LEXIS 80. Verbatim statements of witnesses obtained by an attorney or investigator do not fall within the scope of the protection afforded by the rule. ***People v. Boclair***, 119 Ill. 2d 368, 375, 519 N.E.2d 437, 1987 Ill. LEXIS 267.

A. Who qualifies:

- Attorneys and immediate staff.
- Consultants are protected by Supreme Court Rule 201:

(3) *Consultant.* A consultant is a person who has been retained or specially employed in anticipation of litigation or preparation for trial but who is not to be called at trial. The identity, opinions, and work product of a consultant are discoverable only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject matter by other mean. Ill. S. Ct. R. 201(b)(3) (eff. July 1, 2002).

- Non-testifying experts. The privilege is waived only with respect to the testimony and reports of those experts who are identified by the defense as witnesses who will be called to testify on behalf of the defendant at trial, or whose notes and reports are used by other defense experts who testify. ***People v. Knuckles,*** 165 Ill. 2d at 140. [State could not subpoena examining psychiatrist used by defense as consultant in an insanity defense plea] ***People v. Spiezer***, 316 Ill.App. 3d 75, 735 N.E.2d 1017, 2000 Ill. App. LEXIS 694 ; ***People v. Sutton,*** 316 Ill. App. 3d 874, 739 N.E.2d 54, 2000 Ill. App. LEXIS 803[State prohibited from cross-examining defendant with statements he made to a non-testifying psychiatrist retained by defense counsel].
- Disclosure to outside accountants/auditors does not abrogate privilege. ***Sherman v. Ryan,*** 392 Ill. App. 3d 712, 911 N.E.2d 378, 2009 Ill. App. LEXIS 300.
- Investigation/ investigators **are not** completely immunized either from surrendering their work or testifying; see: ***People v. Sutherland,*** 223 Ill. 2d 187, 860 N.E.2d 178, 2006 Ill. LEXIS 1650 [Supreme Court allowed State, in a

second trial, to subpoena and interrogate a defense investigator about conversations with a witness prepared for defendant's first trial holding those conversations were not work product] ***People v. Lego,*** 116 Ill. 2d at 338.

B. **What qualifies:**

- Documents prepared by counsel that pertain to legal strategy or core work product. Materials are protected if they are prepared for any litigation or trial as long as they were prepared by or for a party subsequent to the onset of litigation. ***Fischel & Kahn, Ltd. v. Van Straaten Gallery, Inc.,*** 189 Ill. 2d at 591.

Not Protected:

- Articles written by, or research done by, a testifying expert are not protected, even if these documents were given to counsel, and even if expert becomes party to suit. ***Jackson v. Reid***, 402 Ill. App 3d 215, 234; 935 N.E. 2d 978; 2010 Ill. LEXIS 1601.
- Self- evaluative audits, even if required by statute, not protected by work-product. Some statutes expressly create a limited privilege. See; ***Lawndale Restoration Ltd. P'ship v. Acordia of Ill., Inc.,*** 367 Ill. App. 3d 24, 31, 853 N.E.2d 791, 2006 Ill. App. LEXIS 642.
- Surveillance Tapes or videos. ***Shields v. Burlingtan N. & Santa Fe Ry.,*** 353 Ill. App. 3d 506, 509, 818 N.E. 2d 851, 2004 Ill.App. LEXIS 1278; ***Neuswanger v. Ikegai America Corp.,*** 221 Ill. App. 3d 280, 582 N.E.2d 192, 1991 Ill. App. LEXIS 1860.

Note: Whether a privilege applies to a specific person, document or circumstance is a question of law and is reviewed by Appellate/Supreme courts ***de novo.*** ***Ctr. Partners Ltd. V. Growth Head GP LLC,*** , 2012 IL 113107, 981 N.E.2d at 358, 2012 Ill. LEXIS 1525.

III. Waiver

Waiver is the voluntary relinquishment of a known right. It arises from an affirmative intentional relinquishment. Only the client may waive the privilege, although the attorney may assert it on his client's behalf. Attorney-client and work product privileges are separate and distinct protections; waiver of one does not serve as waiver of the other.

Waiver of the attorney-client privilege can be either express or implied. The client may expressly waive the privilege by voluntarily testifying (or reporting to non-privileged people)

privileged communications or failing to assert the privilege when information is requested. Implied waiver exists when claims or defenses are asserted that put communications with the legal advisor at issue.

Disclosure that a client consulted an attorney does not waive the privilege; only disclosure of the actual conversation with counsel will operate as a waiver. Waiver is limited; voluntary disclosure of privileged communications in one area does not "open the door" as to all other non-disclosed privileged communications. ***Estate of Hoover*** 226 Ill. App. 3d 422, 431, 589 N.E.2d 899, 1992 Ill. App. LEXIS 316 [*rev'd on other grounds*, 155 Ill. 2d 402, 615 N.E.2d 736, 1993 Ill. LEXIS 49]; ***Profit Management Development, Inc., v. Jacobson, Brandvik & Andersan, Ltd.,*** 309 Ill. App. 3d 289, 299, 721 N.E.2d 826, 1999 Ill. App. LEXIS 852.

A. **Subject Matter Waiver**

The client's offer of testimony as to a ***specific communication*** to the attorney is a waiver as to all other communications to the attorney on the same matter." 8 John Henry Wigmore, Evidence § 2327, at 638 (McNaughton rev. ed. 1961). This prevents partial disclosure of only favorable testimony while "sequestering the unfavorable". ***Center Partners LTD. V. Grawth Head LLC*** 981 N.E.2d at 358, citing: ***Graco Children's Products, Inc. v. Dressler, Goldsmith, Shore & Milnamow, Ltd.,*** No. 95 C 1303, 1995 U.S. Dist. LEXIS 8157, 1995 WL 360590, 8 (N.D. Ill. 1995).

- Subject matter waiver is a restrictive doctrine that applies to attorney-client confidential communications in judicial settings only. Statements made outside litigation, or in an "extra-judicial" setting are not impacted. ***Center Partners LTD. V. Growth Head LLC*** , 981 N.E.2d at 358.
- However, the scope of the subject can be broadened by implication:

  In 1995, Beverly Heard accused Congressman Reynolds of having a sexual relationship with her in 1992, when she was then 16. He was arrested and charged with criminal sexual assault. Within two weeks of the allegations, she recanted and refused to cooperate with the State. In a deposition, she indicated that her private attorneys told her "Mel would end up paying for all the things he did to me" and used the phrase "financial benefits". The State sought evidence to show the witness had been paid $100,000 to recant, and had admitted this to her counsel. State subpoenaed attorneys and their files. Ms. Heard and her counsel asserted privilege. Held: Ms. Heard's public reference, by deposition, of financial benefits, waived the attorney-client privilege as it pertained to money she may have been offered for her role in this incident. ***In Re Grand Jury January 246*** , 272 Ill. App. 3d 991, 651 N.E.2d 696, 1995 Ill. App. LEXIS 404.

B. **Common Interest Doctrine**

When an attorney acts on behalf of two different parties who each have a common interest, communications by either party to the attorney are not necessarily privileged in a subsequent controversy between the two parties. This is especially so where an insured and his insurer initially have a common interest in defending an action against the former, and there is a possibility that those communications might play a role in a subsequent action between the insured and his insurer. This includes instances where an attorney, is neither retained by or reporting to the insurer, but acts for the mutual benefit of both the insured and the insurer. It is the commonality of interests which creates the exception, not the conduct of the litigation. ***Waste Management, Inc. v. International Surplus Lines Ins. Co.,*** 144 Ill. 2d 178, 579 N.E.2d 322, 1991 Ill. LEXIS 35. See also: ***Western States Ins. Co. v. O'Hara,*** , 357 Ill. App. 3d 509, 828 N.E.2d 842, 2005 Ill. App. LEXIS 451.

C. **Crime-Fraud Exception.**

The crime-fraud exception is a limitation on the privileges. It is triggered when a client seeks legal advice in furtherance of criminal or fraudulent activity. If the exception applies, the privilege terminates; the role of the attorney ceases to be a professional and is viewed as conspiratorial.

A client may seek advice about the legal implications of conduct, or a proposed course of action, without abrogating the attorney-client privilege. If the client seeks legal counsel to further an ongoing or future illegal act, the privilege ceases.

To defeat the privilege, it must be shown "that a prudent person has a reasonable basis to suspect the perpetration or attempted perpetration of a crime or fraud, and that the communications were in furtherance thereof." ***In re Marriage of Decker,*** 153 Ill. 2d at 298.

1. **Case studies:**
   - In a domestic kidnapping case, attorney for the perpetrator was not shielded by attorney-client privilege and was held in contempt for failing to advise the court of her conversations and/or information about her client which may have led to the child's recovery. Appellate Court upheld the contempt, finding that conversations involving the intent to commit a crime were not privileged. ***In re Marriage of Decker,*** 204 Ill. App. 3d 566, 562 N.E.2d 1000, 1990 Ill. App. LEXIS 1547. The Supreme Court overturned the contempt, finding that the trial court failed to follow procedural guidelines before ordering the contempt. ***In re Marriage of Decker,*** 153 Ill. 2d at 298; **See dissent,** J. Heiple, 153 Ill.2d at 329.

- Parent company sued it's managerial subsidiary, who, while working for the parent company, formed a company(Woodland) that bought shares in parent company's main supplier, and allegedly syphoned business to a second company, (Homewerks)formed to compete with the parent company. Katten, Muchun represented both parent and ex-manager and assisted with the legal work; parent company subpoenaed legal files. Held: No attorney-client privilege due to dual representation of companies; and although Illinois has not adopted a fiduciary-exception, the court stated, "We find that the intentional breaches of fiduciary duty alleged here were on a par with the level of fraud necessary to establish the crime-fraud exception." ***Mueller Indus. V. Berkman***, 399 Ill. App. 3d 456, 927 N.E.2d 794, 2010 Ill. App. LEXIS 235.
- Defendant charged with mortgage fraud in conversions of condominiums for HUD. The attorney who handled the conversion and mortgage applications was subpoenaed by the State in exchange for immunity. Privilege asserted. Held: Even if attorney did not know he was being used in a fraudulent scheme, it was the client's intent that triggers the crime-fraud exception. No privilege allowed. ***People v. Radojcic***, 2013 IL 114197, 998 N.E.2d 1212, 2013 Ill. LEXIS 1364.

IV. What to do if privileged documents are requested?

Supreme Court Rule 201(n) requires a party to identify the documents or subject matter of the privilege and describe and specify the basis for the claim:

> (n) *Claims of Privilege.* When information or documents are withheld from disclosure or discovery on a claim that they are privileged pursuant to a common law or statutory privilege, any such claim shall be made expressly and shall be supported by a description of the nature of the documents, communications or things not produced or disclosed and the exact privilege which is being claimed.

Ill. Sup. Court Rule 201 (n) (eff. July 1, 2002). Case law had established procedures for asserting or challenging a privilege in the trial courts.

A. If privileged documents are requested from your client:

The party asserting the privilege bears the burden of proving the claim. If privileged materials are requested, asserting the privilege alone is insufficient. The document(s) must be identified [author, date, number of pages, general subject] and the specific privilege [

work product, attorney client or other] ascribed to the document. If case law supports the claim as to the type of document, cite the authority. Particularized construction of these privilege logs will aid opposing counsel, and ultimately a trial judge, in determining whether the claim is well-founded. It also will serve to keep an organized library of these protected documents, in case opposing counsel comes into possession of a privileged document independent of formal discovery.

B. If privilege is asserted over documents your client requests:

Require a detailed privilege log from opposing counsel. Review it for scope; often attorneys will not include documents they feel are " obvious" ; e.g. correspondence between counsel and client, or memos between control group members. If these are not delineated, or mentioned in group, the log is incomplete and a corrected/ complete log should be tendered.

Once a complete log is tendered, if you are in doubt as to the veracity of the log or the applicability of the privileges asserted, ask for an in-camera inspection by the court, and obtain a court order as to the completeness of the tender and the privilege's applicability.

- Illustrative:

Janousek v. Slotky, 2012 IL App (1st) 113432, 980 N.E.2d 641, 2012 Ill. App. LEXIS 875.

Tech. Solutions Co. v. Northrop Grumman Corp., 356 Ill. App. 3d 380, 826 N.E.2d 1220, 2005 Ill. App. LEXIS 305.

Menoski v. Shih, 242 Ill. App. 3d 117, 121, 612 N.E.2d 834, 836-37, 1993 Ill. App. LEXIS 220.

Mack v. Allstate Ins. Co., 2012 IL App (1st) 103739-U, 2012 Ill. App. Unpub. LEXIS 1168.

Youle v. Ryan, 349 Ill. App. 3d 377, 811 N.E.2d 1281, 2004 Ill. App. LEXIS 791.

C. If privileged documents surface outside formal discovery:

1. As against your client:

It is not sufficient to ask opposing counsel to surrender the privileged document, as information contained in the document may surface in the litigation. A motion to surrender, and to quash or prohibit use should be presented and a stipulation, or court order obtained to re-assert the discovery parameters and protect the client.

2. In discovery by inadvertence:

By definition, waiver is the intentional relinquishment of a known right; it is affirmative and can not be done by inadvertence. Privileged material that is inadvertently tendered must be surrendered to opposing counsel and can not be used in proceedings.

3. Outside formal discovery:

If potential privilege documents are obtained through non-parties, or outside formal discovery, an argument exists that the confidential nature of the communication has been abrogated and the privilege ceases. The circumstances under which the communication was obtained by the non-party will dictate whether the confidentiality was knowingly breached. If so, the document or communication ceases to be protected.

- Illustrative:

Hayes v. Burlington N. & Santa Fe R.R. Co., 323 Ill. App. 3d 474, 752 N.E.2d 470, 2001 Ill. App. LEXIS 431.
People v. Sutton, 316 Ill. App. 3d 874, 739 N.E.2d 543, 2000 Ill. App. LEXIS 803.
Vroman v. Wenciker, 2013 IL App (1st) 120883-U; 2013 Ill. App. Unpub. LEXIS 296, February 19, 2013 [Rule 23] [Trial Court wrongfully concluded waiver based upon the "totality of circumstances"].

V. Attorney-Client Communications and Ethical Boundaries

The Rules of Professional Responsibility, directly impact, and augment, the privileges discussed.

Rule 1.6. Confidentiality of Information prohibits a lawyer from revealing information relating to the representation of a client without informed consent. This prohibition extends to past as well as present clients and death of the client does not terminate the ethical obligations under this provision. ***Collins v. Utley,*** 332 Ill. App. 258, 75 N.E.2d 36, 1947 Ill. App. LEXIS 333 [obligation "perpetual"]. In limited circumstances, this may include a prohibition against revealing the clients' identity. ***People v. Williams***, 97 Ill. 2d 252, 454 N.E.2d 220, 1983 Ill. LEXIS 425[1]; ***Taylor v. Taylor,*** 45 Ill. App. 3d 352, 359 N.E.2d 820, 1977 Ill. App. LEXIS 2085.

This ethical obligation, as written, is far broader than the attorney-client privilege.

Rule 1.8, Conflict of Interests , Current Clients and Rule 1.9 , Duties to Former Clients, reiterates that a lawyer has a continuing duty to former clients not to accept legal representation if that representation is "materially adverse" to the former client's interests.

[1] Reversed on death penalty/ constitutional challenges: Williams v. Gramley, 514 U.S. 1011, 115 S. Ct. 1350, 131 L. Ed. 2d 209, 1995 U.S. LEXIS 1949.

Even after a client-lawyer relationship has terminated, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest. ***Owens v. McDermott, Will & Emery,*** 316 Ill. App. 3d 340, 736 N.E.2d 145, 2000 Ill. App. LEXIS 717.

SECTION C

- Privilege: Case Law Summaries, by Judge Lynn M. Egan, March 2015.

PRIVILEGE

Judge Lynn M. Egan[1]

***BRUNTON V. KRUGER*, 2015 IL 117663**

Will contest action. *(Court considered whether the testamentary exception & common interest doctrine applicable to the attorney-client privilege can defeat the accountant privilege of the Public Accounting Act.)*

In general, the attorney-client privilege survives the client's death. In a will contest, however, the privilege only exists during the client's lifetime. *Id. at ¶ 54.* "The testamentary exception to the attorney-client privilege is well settled law. *Id. at ¶ 51.*

"The existence of a statutory privilege of any kind necessarily means that the legislature has determined that public policy trumps the truth-seeking function of litigation in certain circumstances." *Id. at ¶ 64.*

***BORGWARNER, INC. V. KUHLMAN ELECTRIC CORP.*, 2014 IL App (1st) 131824**

Indemnification agreement dispute. *(In construing the attorney-client & work product privileges, the court concluded that the holding of the Illinois Supreme Court in Waste Management, Inc. v. International Surplus Lines Insurance Co., 144 Ill.2d 178 (1991) is not limited to situations involving insurance companies. The court also discussed the common interest doctrine applicable to the attorney-client privilege & the "at issue" exception to the work product privilege.)*

"The purpose of the attorney-client privilege is to encourage clients to engage in full and frank discussion with their attorneys without fear of being compelled to disclose that information. The attorney-client privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client. The work-product doctrine 'provides a broader protection than the attorney-client privilege and is designed to protect the right of an attorney to thoroughly prepare his case and to preclude a less diligent adversary attorney from taking undue advantage of the former's efforts.'" *Id. at ¶ 24.*

The common interest doctrine applies "'when an attorney acts for two different parties who each have a common interest,[such that] communications by either party to the attorney are not necessarily privileged in a subsequent controversy between the two parties.'" The common interest doctrine typically applies "where an attorney has provided joint or simultaneous representation of the parties." However, it can also apply "where the attorney, although neither retained by nor ...in direct communication with the insurer, acts for the mutual benefit of both the insured and the insurer." *Id. at ¶ 25.*

The "at issue" exception to the work product privilege "permits discovery of work product where the sought-after material is either the basis of the lawsuit or the defense thereof." Thus, where an attorney represents the common interests of two or more clients who become adverse in a subsequent action, the attorney's work product from the original action is not protected from disclosure by the work product privilege. *Id. at ¶ 25.*

[1] Updated March 2015

"Illinois has a strong public policy favoring complete disclosure in litigation, such that courts should be mindful that the privilege is not without conditions and 'it is the privilege, not the duty to disclose, that is the exception.'" *Id.*

DAILY V. GREENSFELDER, HEMKER & GALE, P.C., 2014 IL App (5th) 130273-U

Breach of fiduciary duty/conspiracy action against law firm by former client. *(Common interest doctrine & Rules of Professional Conduct support conclusion that certain documents not privileged, even those created years after firm ceased representation of client.)*

Even though the attorney-client privilege serves an important purpose, it must be acknowledged that it is "at odds with the general duty Illinois litigants have to disclose relevant information in discovery." Thus, it "must be strictly construed and confirmed to [its] narrowest limits." *Id. at ¶ 16.*

"The attorney-client privilege applies only to communications that the client expressly makes confidential or reasonably believes will be kept confidential in light of the circumstances. It is this limit that gives rise to the common representation exception. An attorney owes a duty of loyalty to his or her clients. This includes a duty to keep each client informed of any matters related to the attorney's representation of that client which might have an impact on the client's interests. When an attorney represents two clients in the same matter, the attorney thus has a duty to keep each client informed of matters that might otherwise be protected from disclosure by the attorney-client privilege. As such, the privilege generally does not attach to communications related to matters on which the attorney is representing both clients. Ill. R. Prof. Conduct (2010) R. 1.7 cmt. 30 (eff. Jan. 1, 2010). This is because both commonly represented clients should reasonably expect that the attorney will "owe that same duty of loyalty" to both clients. Under such circumstances, a client cannot reasonably expect communications related to that matter to be kept confidential from the other client." *Id. at ¶ 17.*

The common representation exception can apply even when the interests of the commonly represented parties are not identical. In fact, the court suggested the exception could apply even if the parties were on opposite sides of a negotiation, noting that "the Illinois Rules of Professional Conduct do directly address this situation. An attorney may represent parties involved in negotiations if the parties are 'generally aligned in interest even though there is some difference in interest among them.' Ill. R. Prof. Conduct (2010) R. 1.7 cmt. 28 (eff. Jan. 1, 2010)." *Id. at ¶ 22.*

"In doing so, the attorney works 'to resolve potentially adverse interests by developing the parties' mutual interests.' Ill. R. Prof. Conduct (2010) R. 1.7 cmt. 28 (eff. Jan. 1, 2010). In determining whether representation is appropriate under such circumstances, the attorney needs to consider the effect common representation will have on client confidentiality. This is because, as previously discussed, privilege does not attach to communications related to matters subject to the common representation." *Id.*

"Whether the privilege applies depends upon the reasonable expectations of the client." *Id. at ¶ 23.*

The fact that the documents were created three years after the firm's representation ended was not dispositive because the Rules of Professional Conduct impose "an ongoing duty of loyalty to a former client with respect to matters on which the attorney represented that client." Ill. R. Prof. Conduct (2010) R. 1.7 cmt. 33 & R. 1.9 (eff. Jan. 1, 2010). *Id. at ¶ 24.* "In fact, this is one of the reasons attorneys should act with caution before representing clients whose interests are likely to become adverse in the future." *Id.*

The attorney-client & work product privileges are not interchangeable. "The work product doctrine affords broader protection than the attorney-client privilege. However, even this broader protection is not absolute. Production of documents protected from disclosure under the work product doctrine may be ordered where the party seeking discovery shows that it is impossible to obtain the same information from other sources." *Id. at ¶ 27.*

MCCOMBS V. PAULSEN, 2013 IL App (3d) 120366-U

Medical malpractice action. (*Court considered whether summaries of depositions that were prepared by defense counsel & relied upon by defendant in formulating expert opinions were protected by the attorney-client or work product privileges.)*

"Our supreme court has held that counsel's notes and memoranda of witnesses' oral statements which are not verbatim and are not reviewed, altered, corrected, or signed by these individuals are protected work-product because, 'whether in the form of attorney's mental impressions or memoranda, these documents necessarily reveal in varying degrees the attorney's mental processes in evaluating the communications.' Our supreme court created a limited exception to this blanket rule holding, when an attorney's notes contain a mixture of unprivileged factual material and privileged opinion work product, the notes will be subject to discovery only if a party can show that it is absolutely impossible to secure the factual information from other sources." *Id. at ¶ 47.*

Because the summaries were prepared by defense counsel & shared only with defendant in preparation for trial, they were protected under both the attorney-client and work product privileges. *Id. at ¶ 51.* This conclusion was not altered by the fact that defendant also qualified as a Rule 213(f)(3) witness.

GERACI V. AMIDON, 2013 IL App (2d) 120023-U

Breach of contract/Trade Secrets Act claims. (*Court considered work product privilege & "common interest" exception in determining whether a joint defense agreement was privileged.)*

"Material which is otherwise privileged is discoverable if it has been disclosed to a third party. However, the privilege is not waived if the third party shares a common interest with the disclosing party which is adverse to the party seeking discovery." *Id. at ¶ 123.*

"Material prepared by or for a party in preparation for trial is subject to discovery unless it contains or discloses theories, mental impressions, or litigation plans of the party's attorney. This exception to discovery is known as the work product doctrine. The work-product doctrine is designed to protect the right of an attorney to thoroughly prepare his

case and to preclude a less diligent adversary attorney from taking undue advantage of the former's efforts." Id. at ¶ 124.

"In the present case, the JDA was prepared in anticipation of litigation and contains the thought processes of the attorney, including defense strategies and theories. It is therefore privileged under the work product doctrine." Id.

PEOPLE V. WILLIAMS, 2013 IL App (1st) 120518-U

Armed robbery/possession of controlled substance. (*Court considered whether defendant's letter to an investigator was protected by the work product privilege & the applicability of "at issue" exception.)*

"The privilege does not apply in this case because nothing in defendant's letter, simply instructing his investigators to obtain Willis's statement for use at trial, reveals any 'conceptual data' nor 'the shaping process by which [defendant] has arranged the available evidence for use in trial.'" Id. at ¶ 38.

"More importantly, however, this court has held that 'the work-product privilege may be waived as to a communication put 'at issue' by a party who is a holder of the privilege.' Here, defendant put the letter 'at issue' by attaching it to his motion to suppress evidence as well as by soliciting Willis's testimony regarding the June statement." Id. at ¶ 39.

The court also articulated the following five factors which are relevant when utilizing the balancing test necessary to determine whether a party waived the work product privilege: "1) the reasonableness of the precautions taken to prevent the disclosure; 2) the time taken to rectify the error; 3) the scope of the discovery; 4) the extent of the disclosure; and 5) the overriding issue of fairness." Id.

PEOPLE V. RADOJCIC, 2013 IL 114197

Mortgage fraud. (*Court considered the evidentiary showing necessary for the crime-fraud exception to the attorney-client privilege.)*

"The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. *** The privilege embodies the principle that sound legal advice and advocacy are dependent upon such full and frank communication." Id. at ¶ 39.

"The modern view is that the privilege is a two-way street, protecting both the client's communications to the attorney and the attorney's advice to the client." Id. at ¶ 40.

"The crime-fraud exception, relevant here, is one of the recognized limits to the attorney-client privilege. The exception is triggered 'when a client seeks or obtains the services of an attorney in furtherance of criminal or fraudulent activity." Id. at ¶ 41.

"A client, of course, may consult with his or her attorney about the legal implications of a proposed course of conduct, or how to defend against the legal consequences of past conduct, without triggering the crime-fraud exception. Such good-faith consultations are

protected by the attorney-client privilege. The privilege does not extend, however, to a client who seeks or obtains the services of an attorney to further an 'ongoing or future crime or fraud.'" *Id. at ¶ 43.*

"Disclosure of otherwise privileged attorney-client communications under the crime-fraud exception cannot be based solely on a charge of illegality unsupported by any evidence. Rather, '[t]o drive the privilege away, there must be something to give colour to the charge.' Specifically, the proponent of the crime-fraud exception must present evidence from which a 'prudent person' would have a 'reasonable basis to suspect' 1) the perpetration or attempted perpetration of a crime or fraud, and 2) that the communications were in furtherance thereof.' The difficulty of making this evidentiary showing lies in the fact that the best and often only evidence of whether the exception applies is the allegedly privileged communication itself." *Id. at ¶ 44.*

"The focus of the crime-fraud exception is on the intent of the client, not the legitimacy of the services provided by the attorney. An attorney may be completely innocent of wrongdoing, yet the privilege will give way if the client sought the attorney's assistance for illegal ends." *Id. at ¶ 49.*

"*In camera* review is not indispensable to a showing that the crime-fraud exception applies." *Id. at ¶ 60.*

DEPOSITORS INSURANCE COMPANY V. CANAL INSURANCE COMPANY, 2013 IL App (2d) 121410-U

Declaratory judgment action. (*Court considered the discoverability of insurance company's claim file, underwriting file & amount of reserves set on plaintiff's subrogation claim.)*

Court held that work product created by defense counsel in the underlying negligence lawsuit was privileged from discovery in the declaratory judgment action because it contained the attorney's theories & mental impressions. However, the amount of the reserves set by the insurance carrier was not privileged because the reserves do not reflect the mental impressions of defense or coverage counsel. In reaching this conclusion, the court distinguished Illinois work product privilege from the federal rules, specifically noting that "the scope of protected work product is broader in federal courts than in Illinois courts. *Id. at ¶ 7-8.* In federal court, the doctrine covers materials gathered by any consultant, surety, indemnitor, insurer, agent, or even the party itself.'" *Id. at ¶ 8.*

The court also reiterated the standard for sustaining the attorney-client privilege in the corporate context. *Id. at ¶ 11.*

JMB/URBAN 900 DEVELOPMENT PARTNERS, LTD. V. HAZAN, 2013 IL App (1st) 113714-U

Breach of settlement agreement. (*Court considered "at issue" waiver of attorney-client privilege after defendant's former attorney was allowed to testify about client's mental statement & communications during settlement negotiations.)*

"The protections afforded by the privilege can be waived by the client. This waiver can be either express or implied. The privilege is impliedly waived when the client asserts claims or defenses in the litigation that put his or her communications with the legal advisor at issue." *Id. at ¶ 22.*

HOLLAND V. SCHWAN'S HOME SERVICE, INC., 2013 IL App (5th) 110560

Retaliatory discharge claim. *(Court considered whether the worker's compensation claim file was protected by the attorney-client or work product privileges.)*

"To extend the attorney-client privilege to an insurer, the party asserting the privilege must prove: 1) the identity of the insured; 2) the identity of the insurance carrier; 3) the duty to defend a lawsuit; and 4) that a communication was made between the insured and an agent of the insurer." Additionally, the communication must be for the dominant purpose of conveying the information to an attorney for the protection of the insured. *Id. at ¶ 196.*

Because the purpose of the statements within the claim file was to assist the insurance carrier administer plaintiff's workers' compensation claim, rather than obtaining legal counsel, they were not protected by the attorney-client privilege. *Id. at ¶ 197.*

Similarly, because the claim file was not generated in preparation for trial and none of the contents revealed the mental impressions or theories of counsel, it was not covered by the work product doctrine. *Id. at ¶ 206.*

ADLER V. GREENFIELD, 2013 IL APP (1st) 121066

Legal malpractice claim in will preparation. *(Court considered attorney-client privilege before & after death of client, termination of agency for purposes of privilege & "at issue" waiver of privilege.)*

Generally, the attorney-client privilege survives the death of the client. However, the authority of an agent terminates with the client's death. *Id. at ¶ 54 & 60*

DEHART V. DEHART, 2013 IL 114137

Will contest. *(Supreme Court considered the will contest exception to the attorney-client privilege.)*

VROMAN V. WENCIKER, 2013 IL App (1st) 120883-U

Civil contempt for failing to comply with discovery order. *(Court considered whether the insurer-insured extension of the attorney-client privilege covered defendant's recorded statement to a claims adjustor.)*

"The attorney-client privilege extends to communications between an insurer and insured where the insurer has a duty to defend. The attorney-client privilege extends to this relationship because, in the typical situation, the insured is not represented at the time of communicating with the insurer. In addition, the insurer is also typically delegated the task of selecting an attorney and conducting the defense. Therefore, the

insured should be able to assume that the communication is made for the purpose of transmitting it to an attorney to protect the insured. The insurer-insured privilege covers statements that are made prior to the filing of a suit or retention of counsel if the communication is made with the possibility of being made a defendant in a future suit." *Id. at ¶ 22.*

"This court has extended the privilege to independent contractors hired by the insurer to investigate a possible claim." *Id.*

"Like the attorney-client privilege, the insurer-insured privilege is personal to the client and does not cease upon termination of the relationship." *Id. at ¶ 23.*

CENTER PARTNERS, LTD. V. GROWTH HEAD GP, LLC, 2012 IL 113107

Breach of fiduciary duty claim. (*Supreme Court decided that the doctrine of subject matter waiver does not apply to disclosures made in an extrajudicial context when not used to gain tactical advantage in subsequent litigation.)*

MDA CITY APARTMENTS LLC V. DLA PIPER LLP, 2012 IL App (1st) 111047

Legal malpractice action based on representation in arbitration & declaratory judgment action. (*Court considered the discoverability of communications between law firm & in-house & outside counsel. Specifically discussed the crime fraud exception, fiduciary duty exception and Rule 1.7).*

"Illinois has not adopted the fiduciary-duty exception to the attorney-client privilege." *Id. at ¶ 16.*

The crime-fraud exception "does not apply to good-faith consultations with an attorney about the legal implications of a proposed course of action, even if it is later determined that the course of action was improper. *Id. at ¶ 25.*

STEWART TITLE GUARANTY COMPANY V. CVOF 71, LLC, 2012 IL App (1st) 112526-U

Declaratory judgment regarding duty to defend/indemnify. (*Court considered the "at issue" exception to the attorney-client privilege & work product.)*

"Our courts have held that a party waives the attorney-client privilege where the attorney's advice is at issue. The at issue exception permits discovery where the sought-after material is either the basis of the lawsuit or the defense thereof.***The privilege may also be waived where the parties share a common interest in the material sought to be discovered. The leading authority in Illinois on the at issue exception is *Fischel & Kahn, Ltd.*" *Id. at ¶ 24-26.*

"The work-product privilege, like the attorney-client privilege, may be waived as to a communication put at issue by the party holding the privilege." *Id. at ¶ 35.*

OHIO SECURITY INSURANCE COMPANY V. RASLER PLUMBING COMPANY, 2011 IL App (5th) 100164-U

Declaratory judgment case where employer and spouse of deceased employee filed a bad-faith counterclaim against the employer's workers' comp insurer. *(Court considered whether documents generated in the underlying workers' comp case were protected by the work-product privilege in the bad-faith case.)*

"In Illinois, we have taken a narrow approach to the discovery of an attorney's work product. Because the work-product privilege protects rights outside of the discovery process and runs counter to the overriding considerations of discovery, i.e., ascertaining the truth and expediting the disposition of the litigation, the application of the privilege is strictly construed." *Id. at ¶ 22.*

"Under Supreme Court rule 201(b)(2), ordinary work product that does not disclose conceptual data is discoverable, and core work product, which consists of materials that are generated in preparation for litigation and that reveal the mental impressions, opinions, or trial strategy of an attorney, is subject to discovery upon a showing of impossibility of securing similar information from other sources." *Id. at ¶ 23.*

Because the documents were originally generated for the benefit of the insurer and employer in resolving the workers' comp claim, they are not protected by the work product privilege in the bad-faith case. Moreover, even the documents which reveal the mental impressions and trial strategy of defense counsel are not protected by the work product privilege because the bad-faith counterclaim placed them at issue. Further, there was no other apparent source for the information. *Id. at ¶ 24.*

BRAVEMAN V. HURSEY, 2012 IL App (5th) 090397-U

Breach of asset-purchase agreement. *(Court considered inadequacy of privilege holder's showing.)*

"The party asserting the protection of the work-product doctrine has the burden to show that it applies." *Id. at ¶ 16.*

Plaintiff's failure to file a privilege log, seek an *in camera* inspection or otherwise support his claim of privilege was fatal. Although a request for a contempt finding is an accepted method of testing a discovery order, the plaintiff was untimely in his request for such a finding and his behavior demonstrated a deliberate defiance of the court's authority. Therefore, the trial court decision to strike plaintiff's pleadings & dismiss the case with prejudice was affirmed. *Id. at ¶ 16-17.*

HILL V. METROPOLITAN PROPERTY & CASUALTY COMPANY, 408 Ill.App.3d 1123 (1st Dist., 2011)

Breach of contract action/contempt finding to test discovery order. *(Court considered relevance of plaintiff's retainer agreement with her attorney and whether it was protected by the attorney-client privilege.)*

"The question plaintiff poses before us is whether a legal services contract or retainer agreement is *per se* protected from discovery by the attorney-client privilege. We hold that it is not. Our supreme court has stated that the attomey-client privilege generally protects communications, made in confidence, which seek legal advice. In our view, the

usual contents of a retainer agreement are not the sort of communications the attorney-client privilege seeks to protect. The fact that an attorney-client relationship is created and the general information incidental to the attorney-client relationship, such as the payment of fees, simply does not amount to legal advice protected by the attorney-client privilege."

The agreement was relevant because the insurance company disputed the attorney's lien.

BATES V. MERCY REGIONAL EMERGENCY MEDICAL SYSTEM, LLC, 407 Ill.App.3d 1198 (5th Dist., 2011)

Contempt finding following refusal to produce statements of defendant's employees. *(Court considered whether the statements, which were generated immediately after the incident, were protected by the attorney-client privilege.)*

"In order for the attorney-client privilege to protect a communication, it must have originated in confidence."

"Further, communications between employees of the same company are not protected by the attorney-client privilege." Transmitting unprivileged documents to an attorney after they were created does not alter this conclusion.

"'If this court would allow documents merely labeled as 'special reports' to fall under the umbrella of documents prepared in anticipation of litigation, it would potentially 'insulate so much material from the truth-seeking process' that justice would no longer be served.'"

JACKSON V. REID, 402 Ill.App.3d 215 (3d Dist., 2010)

Medical malpractice case. *(Court considered whether the attorney-client or work product privileges protected the research conducted by defendant, who testified as his own Rule 213(f)(3) expert, merely because he discussed the research with his attorney.)*

"We reject the notion that plaintiffs in this case should have been restricted in the scope of Reid's cross-examination by the work product rule of the principles of attorney-client privilege. The work product rule protects documents prepared *by counsel*. Here, the articles, which plaintiffs' counsel sought to discuss during cross-examination, were not prepared by defense counsel. Thus, work product rule does not apply. Further, attorney-client privilege protects statements made by a client to counsel in confidence. Nonetheless, a client may waive the privilege and disclose communications with counsel. Here, once Reid elected to testify as an opinion witness, we conclude that her expert opinions previously shared with counsel prior to trial are no longer protected because the privilege has been waived, presumably in this case, with the approval of counsel." *Id. at 234.*

"Neither the case law nor Supreme Court Rule 213 provides authority for the proposition that the cross-examination of a controlled expert, who is also a party, should be less rigorous than cross-examination for any other expert. Consequently, we conclude that

an expert witness, who is also a party, is subject to the same scope of rigorous cross-examination as any other Rule 213(f) witness." *Id. at 235.*

SHARP V. TRANS UNION L.L.C., 364 Ill.App.3d 64 (1st Dist., 2006)

Declaratory judgment action regarding insurance coverage (*Issue: whether the attorney-client or work product privileges protect documents maintained by the insurance company that relate to the drafting and negotiation of the disputed policy.)*

"'The purpose of the **attorney-client privilege** is to encourage and promote full and frank consultation between a client and legal advisor by removing the fear of compelled disclosure of information.' However, the privilege against disclosure is the exception, rather than the rule. Thus, the privilege should be strictly confined within its narrowest possible limits. In the context of the relationship between insurer and insured, Illinois 'adhere[s] to a strong policy of encouraging disclosure, with an eye toward ascertaining that truth which is essential to the proper disposition of a lawsuit.'"

"The scope of the relationship between an **insurer and an insured** is defined and controlled by the insurance policy."

"In Waste Management, the supreme court applied all of the above principles and held that neither the attorney-client privilege nor the work product doctrine applied to documents created in defense of two previously-settled lawsuits in a subsequent coverage dispute regarding one of the suits. In so holding, the court determined that the parties' duties arising under the insurance contract did not end when the underlying litigation settled, but continued for as long as the insured sought to enforce the policy's terms."

"Unlike the documents at issue in Waste Management, the documents in question here were created prior to the inception of the policy; nevertheless, we find the supreme court's decision in that case to be instructive. The broad policies articulated by the supreme court in Waste Management are equally applicable to our interpretation of the insurance contract at issue here. Our application of principles of contract interpretation and the policies articulated in Waste Management reveals that the parties' manuscripted insurance policy was negotiated and written to require the disclosure of Trans Union's general counsel's knowledge, work product, and communications regarding the pre-policy litigation."

"Further, as noted above, the broad cooperation clause of the policy requires Trans Union to cooperate 'in all investigations, including investigations regarding coverage.'"

"...we find that Trans Union agreed to share the legal reasoning and analysis of its general counsel regarding whether there might be future claims based on its sale of target marketing information with the Underwriters in a coverage investigation. Although such information may be privileged because it is legal advice given by the general counsel to the corporation about whether its actions could result in liability (citation omitted), Trans Union, in agreeing to a policy with such particular language, has agreed to share this information with the Underwriters under these circumstances."

"As the supreme court explained in Waste Management, there is a strong public policy in Illinois of encouraging disclosure between insurer and insured, 'with an eye toward ascertaining that truth which is essential to the proper disposition of a lawsuit.'"

SHIELDS V. BURLINGTON NORTHERN & SANTA FE RAILWAY COMPANY, 353 Ill.App.3d 506, 818 N.E.2d 851, PLA denied 213 Ill.2d 576

Issue: whether any privilege prevents discovery of a videotape or film of plaintiff's activities taken during surveillance. (Defendant took the position that such material was privileged work product because it had not yet decided whether to use it.)

"'...the **[work product] rule** does not protect material and relevant evidentiary facts from the truth-seeking processes of discovery.'"

"Videotapes of a plaintiff in a personal injury suit include relevant, admissible substantive evidence concerning the extent of the plaintiff's injuries and continuing disability."

"...the majority of courts that have addressed the issue have permitted discovery of surveillance films and videotapes."

"Illinois law supports **discovery of videotapes prepared by consultants** in preparation for litigation."

"The court in Wiker did not overrule Neuswanger or Midwesco-Paschen. The court did not hold that the videotape constituted protected work product under the rule, nor did the court discuss how the surveillance videotape would reveal any protected 'mental impressions, opinions, or trial strategy.' Wiker does not compel reversal of the court's order for production of the surveillance videotapes here."

"Our supreme court expressly rejected the federal definition of 'work product' and deliberately narrowed the scope of the protection the work product doctrine provides."

"We do not see any material distinction between surveillance videotapes, with their substantive evidence of the plaintiff's physical limitations, and tape-recorded or transcribed statements from witnesses, or data collected from attempts to recreate an accident. All such evidence can have powerful impeaching effect if one party can conceal it fro the other, at least through the depositions of the parties and their principal witnesses. When defense witnesses learn of the statements of a plaintiff's witnesses concerning the manner in which an accident occurred, the defense witnesses can tailor their testimonies to explain what those witnesses saw in a manner that might exonerate the defendant. Concealing substantive evidence fro the opposing party always gives a tactical advantage, and it often permits greater impeachment of the opposite party's witnesses. Full discovery, demanded by supreme court rules, allows each party's witnesses to tailor their testimony to the opposite party's evidence. We see no reason to deviate from the policy of full disclosure here, as we see no need for special treatment of the substantive evidence in a surveillance videotape. Because surveillance videotapes constitute substantive evidence and not work product within the meaning of discovery rules, we find that the trial court correctly ordered Burlington to produce any surveillance videotapes of plaintiff."

"However, we agree with the court in Wiker that the videographer counts as a consultant within the meaning of Rule 201(b)(3), as long as he is not to be called as a witness at trial."

"Rule 201 requires a showing of 'exceptional circumstances' before the court orders disclosure of the identity of a consultant who is not to testify."

"Surveillance videotapes contain substantive evidence concerning the extent of a plaintiff's injuries, and they do not reveal mental processes, opinions or other conceptual data. Thus, **surveillance videotapes do not count as work product...**"

LAMA V. PRESKILL, 353 Ill.App.3d 300 (2d Dist., 2004)

Medical malpractice (*Issue: whether an allegation in plaintiff's complaint that she did not discover her injury until a certain date waived the* ***attorney-client privilege*** *as to communications about when she knew she was injured.)*

"The attorney-client privilege protects communication made in confidence by a client to a professional legal advisor where the client seeks legal advice from that advisor."

"The privilege, however, is not without conditions and should be 'strictly confined within its narrowest possible limits.'"

"The protections afforded by the **attorney-client privilege can be waived** by the client. The waiver can be express or implied. The privilege may be impliedly waived when the client asserts claims or defenses that put his or her communications with the legal advisor at issue in the litigation. In other words, an implied waiver occurs 'where a party voluntarily injects either a factual or legal issue into the case, the truthful resolution of which requires an examination of the confidential communications.' This type of waiver is referred to as an 'at issue' waiver. For example, when clients sue their attorneys for malpractice, or when lawyers sue their clients for fees, a waiver applies to the earlier communications between the now-adversarial parties."

"When an agent communicates with the principal's attorney, the agent speaks as the client, or principal, and his or her communications are protected to the same extent as though the principal was speaking. Generally, communications made to a legal advisor through one serving as an agent of the client will be privileged."

The appellate court concludes that "plaintiff voluntarily injected into the case the factual and legal issues of when she learned of her injury. She thus waived any attorney-client privilege regarding her agent's communications with Carden. We agree with the trial court that defendant was entitled to Carden's documents relating to when plaintiff learned of her injury."

PIETRO V. MARRIOTT SENIOR LIVING SERVICES, INC., 348 Ill.App.3d 541 (1st Dist., 2004)

Negligence against assisted living facility. (*The court considered the application of the* ***Medical Studies Act, work product*** *and* ***attorney-client*** *privileges.)*

"*The* burden of establishing the applicability of the privilege rests with the party seeking to invoke the privilege."

"The **attorney-client privilege** exists for the purpose of encouraging and promoting the full and frank consultation between a client and his or her legal advisor by removing the fear of compelled disclosure of information. The privilege is an exception to the duty to disclose. The party claiming the attorney-client privilege bears the burden of presenting factual evidence that establishes the privilege. To be entitled to the protection of the attorney-client privilege, a claimant must show that 1) the statement originated in confidence that it would not be disclosed; 2) it was made to an attorney acting in his legal capacity for the purpose of securing legal advice or services; and 3) it remained confidential."

"Our supreme court has also stated that this privilege extends to communications between an **insurer and an insured**, where the insurer is under an obligation to defend the insured."

"In this context, it has been stated that to extend the attorney-client privilege, the party asserting the privilege must prove: **1) the identity of the insured; 2) the identity of the insurance carrier; 3) the duty to defend a lawsuit; and 4) that a communication was made between the insured and an agent of the insurer."**

"The question of whether the privilege applies to an insured's communication to a self-insurer rather than an insurance carrier has never been squarely addressed in Illinois." Significantly, the appellate court declines to resolve this question because defendants failed to meet the threshold burden of proving that the statements remained confidential.

ILLINOIS EDUCATION ASSOCIATION V. THE ILLINOIS STATE BOARD OF EDUCATION, 204 Ill.2d 456 (2003)

Attorney-client privilege. (*Request made for documents provided by the Board to the Attorney General in the course of requesting opinions from the Attorney General.)*

"...this court has consistently held, under both the 1870 and the 1970 constitutions, that the Attorney General is the chief legal officer of the state. However, the question of whether the Attorney General is 'representing' a public body when receiving and fulfilling a request for an Attorney General opinion appears to be one of first impression."

"...we conclude that the Attorney General's opinion writing function is an inherent part of the Attorney General's duty to represent public bodies such as the Board."

"This court, in defining the **attorney-client privilege**, has stated that: 1) where legal advice of any kind is sought, 2) from a professional legal advisor in his capacity as such, 3) the communications relating to that purpose, 4) made in confidence, 5) by the client, 6) are permanently protected, 7) from disclosure by himself or the legal advisor, 8) except the protection be waived."

Merely stating that the documents were created in the course of obtaining legal advice is insufficient "...to establish that the definition of attorney-client privilege has been met, because the privilege is based on the confidential nature of the communication."

"Indeed, this court has found that matters intended by a client for disclosure by the client's attorney to third parties, who are not agents of either the client or the attorney, are not privileged."

"However, affidavits will not suffice if the public body's claims are conclusory, merely recite statutory standards, or are too vague or sweeping."

"But, in meeting its burden, the public body may not simply treat the words 'attorney-client privilege' or 'legal advice' as some talisman, the mere utterance of which magically casts a spell of secrecy over the documents at issue. Rather, the public body can meet its burden only by providing some *objective* indicia that the exemption is applicable under the circumstances."

STERLING FINANCE MANAGEMENT V. UBS PAINEWEBBER, INC., 336 Ill.App.3d 442 (1st Dist., 2002)

Fraud/breach of contract case. *(Attorney-client privilege.)*

"A trial court, however, lacks the discretion to compel the disclosure of information that is privileged. Nonetheless, because privileges are designed to protect the interests that are outside the truth-seeking process, they are strictly construed as an exception to the general duty to disclose."

"Despite the *Upjohn* decision, Illinois reaffirmed the control group test in *Consolidation Coal Co. v. Bucyrus-Erie Co.* As our supreme court held, not every communication made to a corporation's attorney by an employee of the corporation is privileged but, rather, the corporation attorney-client privilege applies only to those employees within the control group. In addition to top management, the Consolidation Coal court also included within the control group any 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.' Thus, Illinois law is clear that the control group test is used to determine whether the corporate attorney-client privilege applies to a communication."

"The Illinois Supreme Court in *Consolidation Coal* provided us with clear guidance as to how we must construe the **attorney-client privilege** under Illinois law."

Illinois law strictly construes the privilege in the corporate context.

"Distribution of otherwise privileged materials to individuals outside the corporation's control group destroys the privilege."

"The attorney-client privilege protects only the communication itself; opposing counsel is free to question a member of the control group about the underlying facts that were communicated."

SHAPO V. TIRES 'N TRACKS, INC., 336 Ill.App.3d 387 (1st Dist., 2002)

Attorney-client & work product privileges *(Director of Insurance, as liquidator, brought suit to collect premiums assessed to pay workers' comp claims; settlement*

reached, but motion to enforce necessary and discovery requested from defendant's attorneys.)

"In defining the **attorney-client privilege**, this court has stated that where legal advice of any kind is sought from a professional legal advisor in his capacity as such, the communications relating to that purpose, made in confidence by the client, are protected from disclosure by himself or the legal adviser."

"Rule 201(b)(2) sets the parameters for the scope of discovery of **work-product materials**. It provides, in pertinent part: '(2) *** Work Product. *** 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.'"

"The work product doctrine provides a broader protection than the attorney-client privilege and is designed to protect the right of an attorney to thoroughly prepare his case and to preclude a less diligent adversary attorney from taking undue advantage of the former's efforts."

"In Illinois, however, both the attorney-client privilege and the work-product privilege may be waived as to a communication put 'at issue' by a party who is a holder of the privilege. Thus, when a client sues his attorney for malpractice, or when a lawyer sues his client for payment of fees, waiver is applicable to earlier communications between the now-adversarial parties."

"In this case, the core of the instant litigation is premised upon defendant's complaint that its former attorneys were not authorized to settle the case on its behalf. Therefore, defendant has placed the conduct of its former counsel at issue, and **waiver is applicable** to those earlier communications between it and its former counsel involving the settlement agreement, and the trial court did not abuse its discretion by allowing those communications to be disclosed."

HAYES V. BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, 323 Ill.App.3d 474 (1st Dist., 2001)

Wrongful death action. *(Invocation of attorney-client & work product privileges.)*

"The party claiming a privilege bears the burden of proof."

"To prevail on an **attorney-client privilege claim in a corporate context**, a claimant must first show that a statement was made by someone in the corporate control group. Our supreme court has described a control group as one that includes those employees 'whose advisory role to top management in a particular area is such that a decision would not normally be made without [their] advice or opinion, and whose opinion in fact forms the basis of any final decision by those with actual authority.'"

"James's unrebutted statement that he evaluates all claims, directs trial strategy and controls settlement authority is more than sufficient to meet the test of control group membership."

"The attorney-client privilege belongs to and can only be waived by the client. The **work product** doctrine is broader than the attorney-client privilege and protects the right of an attorney to prepare his case and preclude the less diligent attorney from taking undue advantage of his opponent's preparation. Work product is not at issue in this case unless James is viewed as an attorney for defendant rather than a corporate officer who happens to be a member of the control group."

"The documents sought were prepared by James, an officer of the client for transmittal to an attorney, who in turn was trying to settle the claim."***"**work product applies only to those documents prepared for and in anticipation of litigation and contain an attorney's mental impressions.**"

"Supreme Court Rule 201(b)(2) protects certain attorney-client communications from discovery. The privilege is not without conditions. The privilege, not the duty to disclose, is the exception. A claimant must meet three requirements to trigger the privilege: 1) the statement must originate in the confidence that it will not be disclosed; 2) it must be made to an attorney acting in his official capacity; and 3) the statement must remain confidential."

"The attorney client privilege is derived from the common law. It is a limited evidentiary privilege that protects communications made by the client. The privilege encourages full and frank consultation between client and legal advisor by removing the fear of compelled disclosure."

ROUNDS V. JACKSON PARK HOSPITAL, 319 Ill.App.3d 280 (1st Dist., 2001)

Medical malpractice case. *(Attorney-client privilege.)*

Illinois Supreme Court Rule 201(b)(2)

"The attorney-client privilege exists for the purpose of encouraging and promoting the full and frank consultation between a client and his or her legal advisor by removing the fear of compelled disclosure of information. The party claiming the attorney-client privilege bears the burden of presenting factual evidence which establishes the privilege. To be entitled to the protection of the attorney-client privilege, a claimant must show that the statement originated in confidence that it would not be disclosed, was made to an attorney acting in his legal capacity for the purpose of securing legal advice or services, and remained confidential."

The hospital presented an affidavit of one of its nurses, attesting to the fact that she prepared a certain document after a stillbirth delivery because she "believed that this matter would likely result in litigation." Her affidavit further stated she prepared the document "in anticipation of litigation."

The appellate court rejected this, finding that the hospital did not present "any facts that would indicate to this court that the report was anything more than the result of a mere prediction by nurse Nwankwo. The record does not indicate to this court that the report created by Nwankwo originated in confidence, that it would not be disclosed, was made to an attorney for legal advice or services, or remained confidential for those purposes."

"In the instant case, however, there is no indication from the record that the documents were created subsequent to the lawsuit or at the direction of an attorney. In fact, the reports at issue were created approximately at the time of decedent's death as 'special reports' normally used for 'unusual' events. Records prepared in anticipation of litigation are not records 'made in the regular course of business.' There had not been an attorney-client relationship created prior to the creation of the reports."

"Under the **control group analysis**, 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 employees whose positions are merely advisory. The test focuses on the status of the employee within the hierarchy of the corporation. An employee's communications receive the protection of the attorney-client privilege when the claimant demonstrates that: 1) the employee is in an advisory role to top management, such that the top management would normally not make a decision in the employee's particular area of expertise without the employee's advice; and 2) that opinion does in fact form the basis of the final decision by those with actual authority."

"'[T]he concern is not on what is said, but on who said what."

FISCHEL & KAHN, LTD. V. VANSTRAATEN GALLERY, INC., 189 Ill.2d 579 (2000)

Legal malpractice action. *(Issue: waiver of attorney-client privilege with new attorneys.)*

Supreme Court finds client waived only the attorney-client privilege with the attorneys who sued him. No waiver between client and subsequently retained counsel.

CHICAGO TRUST CO. V. COOK COUNTY HOSPITAL, 298 Ill.App.3d 396 (1st Dist., 1998)

Medical malpractice action. *(Issues: Attorney-client/insurer-insured privileges in corporate context & Medical Studies Act privilege.)*

"The burden of establishing the applicability of a discovery privilege rests with the party seeking to invoke the privilege."

"Whether a discovery privilege applies is a matter of law, but the question of whether specific materials are part of a medical study is a factual question within that legal determination."

Attorney-client privilege. Supreme Court Rule 201(b)(2). "This privilege also extends to communications between an **insurer and an insured**, where the insurer has a duty to defend. In these cases, the party asserting the privilege must prove:

> '(1) the identity of the insured; (2) the identity of the insurance carrier; (3) the duty to defend the lawsuit; and (4) that a communication was made between the insured and an agent of the insurer.'

Situational reports prepared by hospital nurses are not covered by **attorney-client privilege** because nothing supports the conclusion that nurses were clients when they wrote and transmitted the documents.

"...{the} client was the Hospital, a municipal corporation. Notably, the Hospital does not contend...{the nurses}...were part of the **corporate control group** whose communications were subject to the corporate attorney-client privilege."

"If the documents were given to persons outside the attorney-client relationship, any privilege that might have existed was waived."

"...the **insurer-insured privilege**, as an offshoot of the attorney-client privilege, applies when:

> 'the insured may properly assume that the communication is made to the insurer *for the dominant purpose of transmitting it to an attorney for the protection of the interests of the insured.'*

ZDEB V. BAXTER INTERNATIONAL, INC., 297 Ill.App.3d 622 (1st Dist., 1998), appeal denied 179 Ill.2d 623

Defamation action. ***(Issue: application of absolute privilege to attorneys.)***

"Whether a statement is protected by absolute privilege is a question of law." Id. at 628.

"Section 586 of the Restatement (Second) of Torts, which is included in the chapter entitled "DEFENSES TO ACTIONS FOR DEFAMATION,' provides:

> 'An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceedings, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.'

Id. at 628.

"...the language of section 586 speaks directly and solely to attorneys, i.e., absolute privilege 'protects the attorney from liability.' Second, the impenetrable shield of absolute privilege should not be extended or available for the possible widespread abuse recognized by the trial court, i.e., a party simply could convey information through an attorney and escape any liability by crying privilege." Id. at 629.

"In addition, Illinois courts have not extended the section 586 privilege to claims for intentional interference with prospective economic advantage." Id. at 629.

"Accordingly, as the Restatement afforded **absolute privilege for defamation** actions under section 586, the Restatement expressly afforded the privilege under section 652(f) to false light claims." Id. at 630.

"'In Illinois, the issue of whether a **qualified privilege** exists has been a question of law for the court, and the issue of whether the privilege was abused has been a question of

fact for the jury.' Qualified privilege can apply in an action for interference with a prospective economic advantage." Id. at 631.

"Whether or not a qualified privilege exists determines the burden of proof upon the respective parties. Where the conduct of the defendant is privileged, the plaintiff bears the burden to plead and prove that the defendant's actions were unjustified or malicious. Where the conduct of the defendant does not invoke a privilege, the defendant shoulders the burden to plead and prove justification as an affirmative defense." Id. at 631-632.

"Courts will recognize a privilege 'where the defendant was acting to protect an interest which the law deems to be of equal or greater value than the plaintiff's contractual rights.'" Id. at 632.

"To determine whether a privilege applies, the court looks to the complaint. '[I]f the complaint may not fairly be said to introduce the existence of a recognized statutory or common law privilege, it is not the duty of the plaintiff to plead and prove lack of justification, but it becomes the defendant's burden to plead and prove the privilege as an affirmative matter, for there may be no way for a plaintiff to know in advance whether the defendant enjoys a privilege or, indeed, whether he will ever claim that he does.'" Id. at 632.

GOLDEN V. MULLEN, 295 Ill.App.3d 865 (1st Dist., 1997), as mod on denial of reh

Defamation case. *(Issue: litigation privilege applicable to attorneys.)*

"Whether a statement is privileged is a question of law. The defense of **privilege** in a **defamation action** involving statements made by an attorney is set forth in the Restatement (Second) of Torts, section 586 (1977) (Restatement) and provides as follows:

> 'An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.'

The privilege extends to out-of-court communications between opposing counsel, to out-of-court communications between attorney and client related to pending litigation, to out-of-court communications between attorneys representing different parties suing the same entities, to statements made during quasi-judicial proceedings, and to communications necessarily preliminary to a quasi-judicial proceeding.

"The privilege affords complete immunity, irrespective of the attorney's knowledge of the statement's falsity or the attorney's motives in publishing the defamatory matter. The only requirement is that the communication pertain to proposed or pending litigation. The pertinency requirement is not applied strictly, and the privilege will attach even where the defamatory communication is not confined to specific issues related to the litigation. All doubts should be resolved in a finding of pertinency, which is a question of

law for the court. If, however, the **defamatory statements** have 'no connection whatever with the litigation,' then no privilege will attach."

"The privilege is predicated on the tenet that although defendant's conduct is otherwise actionable, because he is acting in furtherance of some interest of social importance, the communication is protected and no liability will attach, even at the expense of uncompensated harm to the plaintiff's reputation. We believe that the same public policy considerations that protect communications between attorney and client during the course of a legal proceeding, necessarily protect post-litigation communications of the type at issue here."

"An attorney must be free to discuss with the client the outcome of the litigation, future strategies, if any, and generally respond to inquiries from the client without fear of civil liability. Indeed, it is incumbent upon an attorney, following the conclusion of a legal proceeding or some portion thereof, to explain fully to the client what has occurred, why it has occurred, and the ramifications. Such explanation may require an assessment of the conduct of opposing counsel, other parties to the litigation, witnesses, and even the court. We believe, as the circuit court did, that there is a 'tremendous public interest' in protecting and facilitating this type of open communication and commentary. Accordingly, we hold that the **absolute privilege which attaches to defamatory statements made by an attorney** incidental to a pending legal proceeding also applies to post-litigation defamatory statements made by an attorney to the client he or she represented in such proceeding."

In this case, the communication was initiated by the client following his receipt of the attorney's invoice for legal services and followed close on the heels of the dismissal; the attorney had already been discharged by the client prior to the defamatory letters were sent. "Even if true, the privilege nonetheless applies"

Another issue was whether a letter, addressed to the client and his wife, was covered by the privilege. "Since the privilege affords complete immunity, classification of absolutely privileged communications is necessarily narrow."

"We do not believe that the confidential nature of the relationship between **husband and wife** provides an adequate basis for extending the privilege and find no other basis in the law for doing so. Although at least one other jurisdiction has extended the privilege in certain circumstances to cover an attorney's communications to persons other than the client, we decline to do so here."

***EXLINE V. EXLINE*, 277 Ill.App.3d 10 (2d Dist., 1995)**

Attorney-client/insurer-insured privilege.

MIDWESCO-PASCHEN JOINT VENTURE V. IMO INDUSTRIES, INC., 265 Ill.App.3d 654 (1st Dist., 1994), appeal denied 157 Ill.2d 505

Attorney-client & work product privilege.

"In *Consolidated Coal*, the supreme court held that not every communication made by an employee of a corporation to the corporation's attorney is privileged. The court held

that a rule limiting the privilege to employees forming 'top management' was too narrow and adopted an expanded version of a **control-group test**. Under that test, there are two tiers of corporate employees whose communications with the corporate attorneys are protected. The first tier consists of the decision-makers, or top management. The second tier consists of those employees who directly advise top management, and upon whose opinions and advice the decision-makers rely. The court also said that the person claiming privilege has the burden of showing facts which give rise to the privilege; the claimant must show that the communication originated in a confidence that it would not be disclosed; that it was made to an attorney acting in his legal capacity for the purpose of securing legal advise or services; and that it remained confidential." Id. at 679.

"After reviewing all these cases and applying the holding of *Niven* that the applicability of a discovery privilege is a matter of law for the court to determine, we judge that all the factors which the party invoking privilege must establish shall be reviewed under a *de novo* standard." Id. at 680.

"The supreme court rule governing discovery and the **attorney-client privilege**, Rule 201(b)(2) (134 Ill.2d R. 201), explains that privileged matters including 'communications *between* a party or his agent and the attorney for the party' may not be discoverable. (Emphasis added.) Finally, Professor Graham explains that the privilege applies to communications 'between the client or her representative and her lawyer or her lawyer's representative.' M. Graham, Cleary & Graham's Handbook of Illinois Evidence sec. 505.2 at 269 (5th ed. 1990). " Id. at 681.

"There is no requirement that suit be filed before the attorney-client privilege attaches." Id. at 682.

"Distribution of otherwise privileged material to individuals outside of the control group destroys the privilege." Id. at 683.

"In *Consolidation Coal*, the supreme court said that 'to impose upon the trial bench of this State the burden of reviewing voluminous material of this character would be totally incompatible with the efficient disposition of litigation.' We believe that observation should be applicable in courts of review as well as the trial courts. We refuse to be used as a repository of Imo's exhibits and to sift through them in an attempt to divine in what manner they may come within the ambit of the exception to discoverable material." Id. at 684.

"There is very little law applicable to **consulting experts** and the discovery of their **work product** under Rule 220. The Committee Comments provide that this rule 'recognizes the difference between an expert who is to testify at trial and one who is retained to advise the parties without expressing an opinion under oath.' The comments explain that a consulting expert 'is a resource person whose retention is often essential to an appreciation of the technical aspects of a claim.'" Id. at 684.

"...Imo's argument appears to be that all it need show is that Schifler was a consulting expert. In *Neuswanger v. Ikegai America Corp.*, (1991) 221 Ill.App.3d 280, 163 Ill.Dec.926, 582 N.E.2d 192, the only reported case addressing the discoverability of a consulting expert's work product that we have found, the parties did not dispute that an insurance field inspector was a consulting expert." Id. at 685.

"The court held that the **work product doctrine** should be interpreted in the same manner for consulting experts as it is for attorneys as set forth in Rule 201(b)(2). The court explained that work product in Illinois is a narrow doctrine, protecting only 'materials generated in preparation for litigation which reveal mental impressions, opinions, or trial strategy' of the attorney or consulting expert. The court explained that parties should be required to bear the burden of obtaining their own experts to obtain special theories and opinions. But, 'on the other hand, where the material gathered or produced by an attorney or expert is of a more concrete nature *** and does not expose the attorney's or expert's mental processes, it *** serves the judicial process and is not unfair to require the parties to mutually share such material and analyze it prior to trial.'" Id. at 685.

"The advice of an expert to an attorney concerning technical matters and technical interpretation of facts is not protected from discovery." Id. at 686.

"...Illinois will use the control group test and will not apply the federal test for attorney-client privilege to corporations. As the *Consolidation Coal* court made clear, only members of a **corporate control group** may protect their communications with a corporate attorney through the attorney-client privilege." Id. at 686.

Lengthy discussion about nominal fines for **sanction** in contempt cases; "In our judgment, general acceptance of this procedure provides strong temptation to a party to raise frivolous objections to discovery requests, to refuse to obey discovery orders and thereby to delay proceedings. This is a result which was condemned in *Consolidation Coal* and noted in *Mlynarski*. While sanctions may not be imposed simply to inflict punishment, neither should they be imposed automatically just to provide a party with an appealable order. The point we wish to make is that a trial judge, in the exercise of discretion, should consider whether the party refusing a discovery order has made a colorable claim of privilege. And if the trial judge determines that the party has not made a colorable claim of privilege, the judge should consider more than a nominal fine for the refusal to obey a discovery order. A wide range of sanctions is available including the striking of a pleading or even a default judgment." Id. at 687.

BOETTCHER V. FOURNIE FARMS, INC., 243 Ill.App.3d 940 (5th Dist., 1993)

Attorney-client privilege/insurer-insured extension.

"Clearly, confidential communications made by a client to his attorney are privileged, as are communications made to representatives of the attorney such as paralegals, secretaries, file clerks, or investigators employed by the attorney."

IN RE MARRIAGE OF BECKER, 153 Ill.2d 298 (1992), reh denied

Attorney-client privilege.

"The **attorney-client privilege** is an 'evidentiary privilege which provides limited protection to communications from a client by prohibiting their unauthorized disclosure in judicial proceedings.' The privilege is recognized as one of the 'oldest of the privileges for confidential communications known to the common law.' The purpose of this privilege is to enable a person to consult freely and openly with an attorney without any fear of

compelled disclosure of the information communicated. The privilege has been described as being essential 'to the proper functioning of our adversary system of justice.' It is well established that the privilege belongs to the client, rather than the attorney, although the attorney asserts the privilege on behalf of his client. Thus, only the client may waive this privilege."

"A major exception to the **attorney-client privilege** exists, however, and that is the **crime-fraud exception**, which applies when a client seeks or obtains the services of an attorney in furtherance of criminal or fraudulent activity. The rationale for this exception is that in seeking legal counsel to further a crime or a fraud, the client does not seek advice from an attorney in his professional capacity."

"Thus, where the **crime-fraud exception** applies, no attorney-client privilege exists whatsoever, and the communication is not privileged."

"We note, however, that not all discussions between attorneys and their clients about possible illegal activities come within the crime-fraud exception to the attorney-client privilege." In order to invoke the exception to the privilege, the proponent of the evidence must show that the client, when consulting the attorney, knew or should have known that the intended conduct was unlawful. Good faith consultations by attorneys with clients who are uncertain about the legal implications of a proposed course of action are entitled to the protection of the privilege, even if that action should later be held improper.

"In addition to the **attorney-client privilege**, there exists the **attorneys' rule of confidentiality**, which encompasses the attorney-client evidentiary privilege as well as the attorney's fiduciary duty to his client. The rule of confidentiality sets forth what an attorney may, may not, or must ethically reveal about his client. Unlike the evidentiary attorney-client privilege, the rule of confidentiality applies not only during judicial proceedings, but at all times, and to clients' secrets, as well as confidences."

"Rule 4-101(c) provided that an attorney shall disclose information that would be necessary to prevent a client from committing a crime resulting in death or serious bodily harm. Rule 4-101(c) is mandatory."

"Rule 4-101(d)(3) provided that an attorney may reveal the intention of a client to commit a crime when the crime would not involve death or serious bodily harm. Rule 4-. 101(d)(3) is discretionary."

"Finally, Rule 4-101(d)(2) provided that an attorney may reveal confidences or secrets when required by law or court order."

"We conclude that an attorney must, when directed by final court order, and after the court has properly determined that information is not privileged, disclose the information to the court. To hold otherwise would place an attorney's discretion above judicial determination of the matter."

"Before an attorney can be compelled to disclose client information, the party opposing the attorney-client privilege must first establish that the information is not privileged."

"The question arises, however, as to what type of a burden the opposing party must meet to prove that certain communications fail within the crime-fraud exception to the attorney-client privilege"

"We conclude that when there is an attorney-client relationship in which an attorney and client have communicated in a professional capacity, as occurred in this case, there is a rebuttable presumption that their communication is privileged. If, however, the opposing party challenges the presumption, then the proponent of the privilege must prove the existence of the essential elements giving rise to the privilege."

WASTE MANAGEMENT, INC. V. INTERNATIONAL SURPLUS LINES INS. CO., 144 Ill.2d 178 (1991)

Attorney-client and work product.

MLYNARSKI V. RUSH-PRESBYTERIAN-ST. LUKE'S MEDICAL CENTER, 213 Ill.App.3d 427 (1st Dist., 1991)

Attorney-client/work product privilege.

"The **attorney-client privilege** protects confidential communications made by a client to an attorney while seeking legal advice." Id. at 430.

"When the client is a corporation, however, the question becomes which employees of the corporation are entitled to the protection of the privilege when they communicate with the corporation's attorneys. The Illinois Supreme Court has adopted what has been described as 'control group' test." Id. at 430.

"Under the **control-group test**, there are two tiers of corporate employees whose communications with the corporation's attorney are protected. The first tier consists of the decision-makers, or top management. The second tier consists of those employees who directly advise top management, and upon whose opinions and advice the decision-makers rely." Id. at 431.

"In Illinois, however, only **'opinion work product'** matter which discloses the theories, mental impressions or litigation plans of a party's attorney, is protected from discovery." Id. at 432.

"The doctrine applies not only to documents prepared by an attorney, but also to documents prepared by the attorney's agent or investigator." Id. at 432.

CLAXTON V. THACKSTON, 201 Ill.App.3d 232 (1st Dist., 1990)

Attorney-client/work product privilege.

"The rule governing protection of **attorney-client** communications and attorney **work product** from discovery is 201(b)(2) of the Supreme Court Rules (107 Ill.2d R. 201(b)(2)) which provides that: "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."

"The party who claims a privilege 'has the burden of showing the facts which give rise to the privilege.' Among other things, the party must prove that the statement was made for a privileged purpose and show the circumstances under which the statement was made."

"The burden of proof reflects the policy behind the attorney-client privilege. **Not all communications between attorney and client are privileged**. The privilege exists so that a present or potential client may 'consult freely with counsel without fear of compelled disclosure.' Under some circumstances, the privilege can pose an absolute bar to the discovery of relevant material and contravene the broad discovery which is essential for the fair disposition of a lawsuit. For this reason, courts limit the protection of the privilege, especially in a corporate context where broad privilege would effectively make most relevant material immune from discovery."

"**To be entitled to the privilege, a claimant must show** that the statement: (1) originated in a confidence that it would not be disclosed; (2) was made to an attorney acting in his legal capacity for the purpose of securing legal advise or services; and (3) remained confidential. Beyond this, a corporate claimant must show that the statement was made by someone in the corporate 'control group,' that is, someone who was:

> '(1) *** in an advisory role to top management, such that the top management would normally not make a decision in the employee's particular area of expertise without the employee's advise or opinion; and (2) [whose] opinion [did] in fact form the basis of the final decision by those with actual authority.'

"The **control-group test** provides a balance between privilege and discovery. The focus of the court for finding privilege is 'on individual people who substantially influenced decisions, not on facts that substantially influenced decisions.'"
"Under Illinois law, **attorney-client privilege** also extends to 'communications between an insured and insurer, where the insurer is under an obligation to defend.' This rule reflects the fact that the liability carrier usually selects the attorney under a common liability contract. Thus, 'the insured may properly assume that the communication is made to the insurer as an agent for the dominant purpose of transmitting it to an attorney for the protection of the interests of the insured.'"

"When a proponent cannot prove that a statement should be protected, submitting it for *in camera* inspection is a reasonable procedure for finding if a basis for privilege exists."

"Once privilege attaches to a communication, it is immaterial whether the client is or is not a party to a specific action. While both the client who made the communication and the attorney to whom it was given can invoke the privilege, only the client can waive it. The same principle applies to privileged statements made to insurance carriers. Only the client can waive the privilege."

"Furthermore, **the privilege protects only the attorney-client communication itself**. Opposing counsel is free to question a member of the control group about the underlying facts which were communicated."

CONSOLIDATION COAL CO. V. BUCYRUS -ERIE CO., 89 Ill.2d 103 (1982)

Court held that attorney's notes of employees/witnesses' oral statements which are not verbatim or reviewed/signed by them are protected as work product.

The typewritten memoranda "represent the attorneys' efforts in reviewing, analyzing and summarizing the portion of the communications with potential witnesses which the attorneys believed important in developing their theories of their client's cause. As such, they necessarily "'reveal the shaping process by which the attorney[s] [have] arranged the available evidence for use in trial as dictated by [their] training and experience'" and are therefore entitled to protection."

"The handwritten notes represent a mixture of factual material and counsel's **work product** in the form of his conclusions, characterizations and summaries. Concededly, some of the factual material may be relevant to the issues. In many instances, however, this material is so inextricably intertwined with the privileged material that its isolation is virtually impossible."

Accordingly, we hold that attorneys' notes and memoranda of oral conversations with witnesses or employees are not routinely discoverable. However, because of the possibility that such notes and memoranda may, on rare occasions, constitute the only source of factual material, we believe that an **exception** must be made from the absolute work-product exemption."

"...we believe that a narrowly limited exemption must be made and defined to permit access to such material in those rare instances."

"We therefore hold that the attorney's notes or memoranda are discoverable only if the party seeking disclosure conclusively demonstrates the absolute impossibility of securing similar information from other sources."

Court finds nothing to indicate exception should apply since defendant already produced thousands of individual documents and plaintiff can obtain depositions to get same factual information included in work product."

The court reached the opposite conclusion as to defendant's claim of privilege for a metallurgical report prepared by employee.

"...the report is actually a notebook that contains objective and material information consisting of mathematical computations, formulas, tables, drawings, photographs, industry specification data, and handwritten notes. It does not reflect or disclose the theories, mental impressions or litigation plans of B-E's attorneys. Nor is it the product of the attorneys' mental processes. Sailors never communicated with the legal department prior to preparing this material, nor was he advised by his superior, who had requested Sailors' help, as to what the theories or plans of the attorneys were relative to this litigation."
The report did not become part of the attorneys' thought processes simply because they received the report six months later. "It is therefore not entitled to protection under the work-product doctrine. Nor is it, in our judgment, exempt from discovery under the attorney-client privilege."

"The **control group-test** appears to us to strike a reasonable balance by protecting consultations with counsel by those who are the decision-makers or who substantially influence corporate decisions and by minimizing the amount of relevant factual material which is immune from discovery."

"We note, too, that the burden of showing facts which give rise to the privilege rests on the one who claims the exemption. Moreover, the claimant must show certain threshold requirements in order to avail itself of the privilege, including a showing that the communication originated in a confidence that it would not be disclosed, was made to an attorney acting in his legal capacity for the purpose of securing legal advice or services, and remained confidential."

"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."

STOCKER HINGE MFG. CO. V. DARNEL INDUSTRIES, INC., 61 Ill.App.3d 636 (1st Dist., 1978)

Trial court decision to preclude attorney-client communication during break in cross-examination affirmed.

"In our opinion, the right of a party to counsel in a civil case is quite divergent from the right of defendant in a criminal prosecution."

"We cannot equate the rule in criminal cases with the case at bar."

"..in criminal cases there are practical differences which make such a rule unnecessary in civil proceedings."

"We do not imply that the trial court has unlimited rights in this type of situation in a civil case. There may possibly be circumstances in civil cases in which extreme orders by a trial court regarding communication between lawyer and client would result in prejudicial error."

SUSTAINING PRIVILEGES:
Attorney-Client & Work Product

Judge Lynn M. Egan
Judge Susan Zwick [Ret.]

March 27, 2015

RULES OF PROFESSIONAL CONDUCT

It is important to know the Rules when discussing privilege because:

- They impact the issue of duty to prospective/current/former clients. *(Ill. Sup. C. R. Prof. Conduct, R. 1.18);* and
- They also dictate a level of confidentiality that exceeds the attorney-client or work product privileges. (*Ill. Sup. C. R. Prof. Conduct, R 1.6).*

"The rule of confidentiality applies not only during judicial proceedings, but at all times, & to clients secrets, as well as confidences."

In re Marriage of Decker, 153 Ill.2d 298 (1992).

WHEN DO ETHICAL OBLIGATIONS BEGIN & END?

- Do they begin during 1st meeting? After formal retainer agreement signed? After confidential information revealed?

  Ill. Sup. C. R. Prof. Conduct, R 1.6 & 1.18

- Do they end when lawyer is terminated? When the case ends? When the client dies?

  Ill. Sup. C. R. Prof. Conduct, R 1.9

WHEN DOES THE RELATIONSHIP (ETHICAL OBLIGATION) BEGIN?

- A lawyer's ethical obligation of confidentiality begins as soon as the lawyer agrees to CONSIDER whether to accept the client. *(Ill.S.Ct.R. of Prof. Conduct, Scope, ¶ 17)* "A person who discusses...the possibility of forming a client-lawyer relationship...is a prospective client." *(Rule 1.18(a))*

- "The relationship can be created during the initial contact between the layperson & the lawyer."

- "A formal or written agreement is not a prerequisite to the formation of an attorney-client relationship."

In re Marriage of Kuziel, 2013 IL App (1st) 122612, ¶ 19.

DISPOSITIVE INQUIRY

- When trying to determine when the attorney-client relationship begins, "the analysis focuses on the client's viewpoint rather than that of the attorney."

- "The payment of fees & the fact that a further relationship did not develop as a result of the preliminary consultation are not relevant considerations."

In re Marriage of Kuziel, 2013 IL App (1st) 122612, ¶ 20.

RULE 1.18
(Duties to Prospective Client)

- Even if no client-lawyer relationship results, the attorney cannot "use or reveal" information obtained during the consultation, except as allowed by Rule 1.9 regarding former clients. *(Rule 1.18(b))*

- If above section applies, the lawyer cannot represent any other client whose interests are materially adverse to the prospective client in the same or substantially related matter if lawyer rec'd. information that could be significantly harmful to the prospective client. *(Rule 1.18(c))*

- Disqualification can be waived via informed consent by prospective & affected clients or appropriate measures by attorney. *(Rule 1.18(d))*

RULE 1.6
(Confidentiality of Information)

Generally, a lawyer cannot reveal information about the representation of a client unless:

- the client consents;
- the disclosure is impliedly authorized in order to carry out the representation; or
- an exception applies.

CONFIDENTIALITY EXCEPTIONS

A lawyer may reveal information about client representation "to the extent the lawyer reasonably believes necessary..."

- To prevent the client from committing a crime;
- To prevent the client from committing fraud that is "reasonably certain to result in substantial injury" to another AND for which the client is using the lawyer's services;
- To secure legal advice about lawyer's compliance with Rules of Professional Conduct;
- To enable lawyer to establish a claim/defense in a controversy between lawyer & client or in criminal/civil claim against lawyer based upon client's conduct;
- To comply with other law or court order;
- To prevent certain death or substantial bodily harm.

WHEN DOES IT END?

A lawyer's ethical duties continue beyond termination of the attorney-client relationship. *(Rule 1.9 – Duties to Former Clients).*

- Cannot represent another person in same/substantially related matter in which person's interests are "materially adverse" to those of former client. *(Rule1.9(a))*
- Cannot represent another person in same/substantially related matter in which lawyer's prior firm had previously represented a client whose interests are materially adverse to that person & about whom lawyer obtained protected information. *(Rule 1.9(b)(1-2)*
- Both prohibitions can be waived if former client provides informed consent. *See, Rule 1.0(e).*

FINAL WORD:

DEATH IS NOT THE END!

- An attorney's ethical obligation to maintain client confidentiality "is perpetual & does not cease by the death of the client."

In re Estate of Busse, 332 Ill.App. 258, 266 (1947)

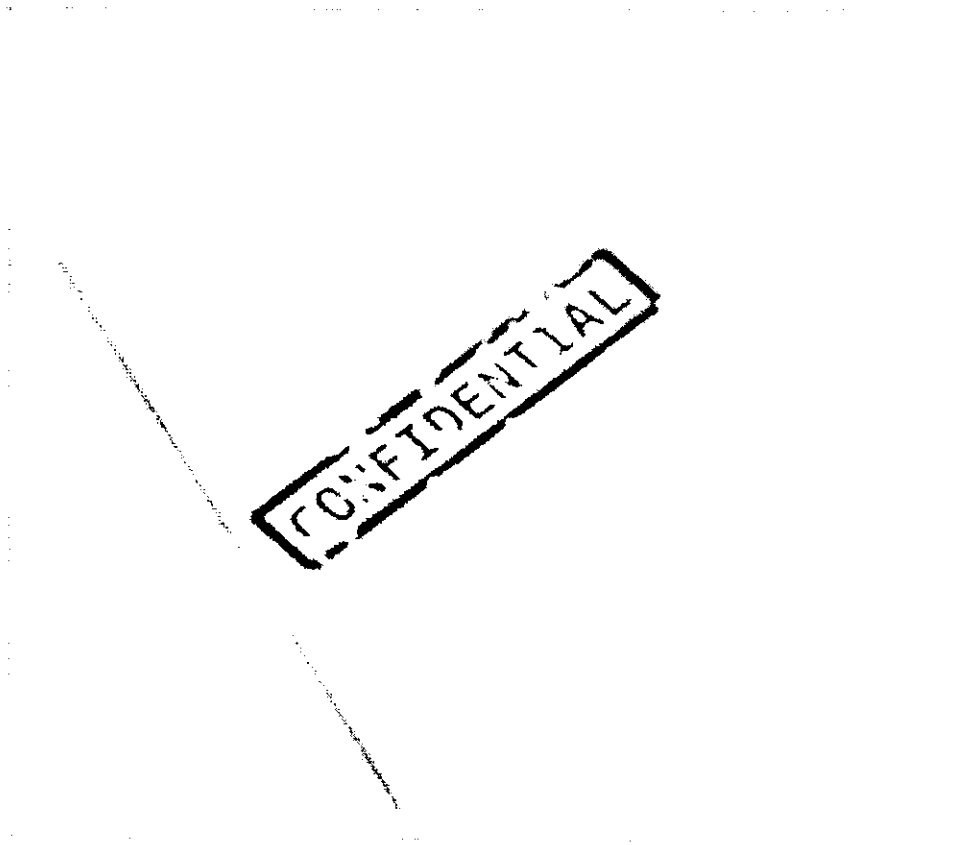
CONSTANT CAVEAT

In order to be successful in asserting the attorney-client & work product privileges, parties...

"May not simply treat the words 'attorney-client privilege' or 'legal advice' as some talisman, the mere utterance of which magically casts a spell of secrecy over the documents at issue. Rather, [a party] can meet its burden only by providing some *objective* indicia that the exemption is applicable under the circumstances."

Illinois Education Assoc. v. Ill. State Board of Education, 204 Ill.2d 456 (2003)

ATTORNEY-CLIENT PRIVILEGE



JUDGE SUSAN F. ZWICK (Ret.)

Ill. S. Ct. R. 201(b) (2):

Privilege and Work Product. 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.

Attorney-Client Privilege defined:

"Where legal advice of any kind is sought from a professional legal advisor in his capacity as such, the communications relating to that purpose, made in confidence by the client, are protected from disclosure by himself or the legal advisor, except the protection be waived."

Fischel & Kahn, Ltd. v. Van Straaten Gallery, Inc.,
189 Ill. 2d 579, 584 (2000).

REQUISITE SHOWING

To be entitled to the protection of the attorney-client privilege, a claimant must show that the statement or communication:

(1) Was made to an attorney in confidence that it would not be disclosed;

(2) Was made to an attorney acting in his/her legal capacity for the purpose of securing legal advice or services; and

(3) Remained confidential.

Pietro v. Marriott Senior Living Servs., 348 Ill. App. 3d 541 (1 Dist., 2004)

KEY POINTS

- The privilege belongs to the client, not to counsel, and may only be waived by the client.

  In Re Marriage of Decker, 152 Ill.2d 298,313 (1992).

- More recently, courts have decidedly established the privilege as mutual: it applies to statements of counsel made to the client, as well as the client's statements.

  Midwesco-Paschen Joint Venture for the Viking Projects v. Imo Industries, Inc., 265 Ill. App. 3d 654, 660-61 (1st Dist., 1994).

WHO QUALIFIES?

- Attorneys, past and present. **Ill. Sup. Ct. R. Prof'l Conduct, R 1.6 (2015).**
- Clients, living and dead. (Privilege survived the death of a client, except in will contest. *Adler v. Greenfield*, 2013 IL App (1st) 121066.)
- Insurance company and personnel: insured/insurer communications are protected when made for the purpose of protecting the insured. (***Pietro v. Marriott Senior Living Servs.***, 348 Ill. App. 3d 541 (1 Dist. 2004); ***Chicago Trust Co. v. Cook County Hospital***, 298 Ill. App. 3d 396, 407 (1st Dist., 1998).
- Control Group/Agents. ***Consolidation Coal Co. v. Bucyrus-Erie Co.*** (1982), 89 Ill. 2d at 119; ***Midwesco-Paschen Joint Venture for the Viking Projects v. Imo Industries, Inc.,*** 265 Ill. App. 3d at 660.

WHAT QUALIFIES?

- Any communication between an attorney and his/her client, in any confidential context.

Not protected:

- Notes or memos compiled privately; diaries, even if given to counsel after litigation.

Cangelosi v. Capasso, 366 Ill. App. 3d 225 (2006).

EXAMPLE #1

A patient dies in a self-insured nursing home. The risk/quality assurance manager asks the three attendants in charge of the decedent's care to prepare statements.

Nursing home is sued for wrongful death & negligence. During discovery, nursing home claims attorney-client privilege.

Are these statements privileged?

ANALYSIS

- Were the statements utilized only by risk management?
- Were the attendants told these statements were to be kept confidential by nursing home counsel?
- Were the statements kept by counsel or disseminated?

Pietro v. Marriott Senior Living Servs., 348 Ill.App.3d 541 (2004)

WAIVER

- Must be done voluntarily. Cannot be unintentional.

- Can be either express or implied.

- Disclosure that an attorney was consulted doesn't waive; must be details of actual conversation.

- Subject Matter waiver- Abrogating the confidentiality to a specific subject "opens the door" as to all conversations on that subject.

  In Re Grand Jury January 246, *272 Ill. App. 3d 991 (1995).*

CRIME FRAUD EXCEPTION

Triggered when a client seeks legal advice in furtherance of criminal or fraudulent activity- the privilege terminates; the role of the attorney ceases to be a professional and is viewed as conspiratorial.

- ***Mueller Indus. V. Berkman***, 399 Ill. App. 3d 456 (2010)
- ***People v. Radojcic***, 2013 IL 114197

What to do if privileged documents are requested?

- Supreme Court Rule 201(n):

Claims of Privilege. When information or documents are withheld from disclosure or discovery on a claim that they are privileged pursuant to a common law or statutory privilege, any such claim shall be made expressly and **shall be supported by a description of the nature of the documents**, communications or things not produced or disclosed **and the exact privilege which is being claimed.**

Attorney-Client Communications
&
Ethical Boundaries

- ***Ill. Sup. Ct. R. Prof'l Conduct, R 1.6 (2015)***

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, including...

- Client's identity

EXAMPLE #2

- John Doe walks into office & tells attorney that he was involved in a hit & run accident. Attorney takes down info & goes with Doe to the police to report the accident.
- Police fail to note in their report the driver's identity and Doe disappears. Later, the attorney is subpoenaed in a civil suit & asked to identify Doe. Attorney claims privilege & is held in contempt.

Is Doe's identity privileged?

WORK PRODUCT

SUPREME COURT RULE 201(b)(2)

Material prepared by or for a party in preparation for trial is subject to disclosure only if...

- It does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney.
- This type of material is sometimes called "opinion work product" or "core work product."

KEY POINTS

- As is true of the attorney-client privilege, the work product privilege is subject to Illinois' "strong public policy favoring complete disclosure in litigation." *BorgWarner, Inc. v. Kuhlman Electric Corp., 2014 IL App (1st) 131824, ¶ 25.*

- As a result, both privileges are strictly construed.

- However, the attorney-client & work product privileges are NOT interchangeable. The latter provides broader protection.

- The Federal interpretation of the work product privilege is broader than the Illinois interpretation and has been expressly rejected by the Illinois Supreme Court. *Shields v. Burlington Northern & Santa Fe Railway Co., 353 Ill.App.3d 506.*

IS IT LIMITED TO ATTORNEYS?

NO

- The work product privilege also applies to documents prepared by the attorney's agent, investigator or consulting expert.

  Mlynarski v. Rush-Presbyterian-St. Luke's Medical Center, 213 Ill.App.3d 427, 432 (1st Dist., 1991)

- However, reports from such people are not protected from discovery if they merely concern technical matters or a technical interpretation of facts. *Id.*

EXCEPTIONS

- "**At issue**" exception – client sues attorney for malpractice; attorney sues client for payment of fees; client reneges on an authorized settlement. Leading case is *Fischel & Kahn, Ltd. v. VanStraaten Gallery, Inc., 189 Ill.2d 579 (2000).*
- **Common representation** exception – attorney represents two clients in the same matter. Owes a duty to keep each client informed, including matters that might otherwise be protected from disclosure. Clients should expect that the attorney will have the same duty of loyalty to both. *Daily v. Greensfelder, Hemker & Gale, P.C., 2014 IL App (5th) 130273-U, ¶ 22.*
- **Impossibility** exception – the party seeking discovery "conclusively demonstrates the absolute impossibility of securing similar information from other sources." This is a rare & narrowly limited exception. *Consolidation Coal Co. v. Bucyrus-Erie Co., 89 Ill.2d 103 (1982).*

WAIVER

A balancing test is utilized to determine whether a party has waived the work product privilege & includes the following factors:

1) The reasonableness of precautions taken to prevent disclosure;
2) The time taken to rectify the error;
3) The scope of the discovery;
4) The extent of the disclosure;
5) The overriding issue of fairness.

People v. Williams, 2013 IL App (1st) 120518-U, ¶ 39.

EXAMPLES

CONTEXT: Declaratory judgment action on plaintiff's subrogation claim. Are these protected work product?

- Insurance company claim file;
- Insurance company underwriting file;
- Amount of insurance company reserves.

Depositors Insurance Company v. Canal Insurance Company, 2013 IL App (2d) 121410-U.

EXAMPLES

- Surveillance videotape of plaintiff. Defense counsel undecided about whether to use it. *Shields v. Burlington Northern & Santa Fe Railway Co., 353 Ill.App.3d 506.*

- Research by defendant who testifies as his own expert. *Jackson v. Reid, 402 Ill.App.3d 215 (3d Dist., 2010).*

- Consulting expert's report. *Midwesco-Paschen Joint Venture v. IMO Industries, Inc., 265 Ill.App.3d 654 (1st Dist., 1994).*

EXAMPLES

- Deposition summaries prepared by defense counsel & relied upon by defendant, who testified as expert. *McCombs v. Paulsen, 2013 IL App (3d) 120366-U, ¶ 51.*
- Attorney notes of witnesses' oral statements which are not verbatim or reviewed/signed by witnesses. *Consolidation Coal Co. v. Bucyrus-Erie Co., 89 Ill.2d 103 (1982).*

THE PRICE OF FAILURE

"The party asserting the protection of the work-product doctrine has the burden to show that it applies."

Plaintiff's refusal to produce documents, despite failing to file a privilege log, seek an *in camera* inspection or otherwise support his claim of privilege, resulted in his pleadings being stricken & the case being dismissed with prejudice.

Affirmed on appeal!

Braveman v. Hursey, 2012 IL App (5th) 090397-U, ¶ 16-17.