No. 11-0115

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PETER GARVY, Plaintiff-Appellee	)	Appeal from the Circuit Court of Cook County, Illinois County Department, Law Division
v.	)	Circuit Court No. 07 L 4924 Notice of Appeal: January 6, 2011
SEYFARTH SHAW LLP, Defendant-Appellant	)	Hon. Daniel J. Pierce, Presiding
and	)	
EDWARD J. KARLIN, Defendant,	)	
v.	)	
LOWIS & GELLEN LLP, Third-Party Defendant.	)	

BRIEF OF THE ILLINOIS STATE BAR ASSOCIATION
AND THE CHICAGO BAR ASSOCIATION AS AMICI CURIAE

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POINTS AND AUTHORITIES

INTRODUCTION

The Illinois State Bar Association ("ISBA") and the Chicago Bar Association ("CBA") submit this brief as *amici curiae* in support of Defendant-Appellant Seyfarth Shaw LLP pursuant to Supreme Court Rule 345.

The ISBA, a 134-year-old voluntary bar association organized under the laws of Illinois to promote the interests of the legal profession and improve the administration of justice, has approximately 35,000 members, including lawyers from every segment of the profession. ISBA members practice as solo practitioners, in large and small law firms, as in-house counsel at corporations, in a multitude of governmental positions, as judges and in other places of employment throughout the State of Illinois.

The CBA, a 137-year-old voluntary bar association, is one of the oldest and most active metropolitan bar associations in the United States. The CBA's approximately 22,000 members consist largely of lawyers and judges from Cook County and the surrounding greater metropolitan area. The CBA seeks to file this brief in furtherance of its Mission Statement which requires that the CBA seek to ensure that the bar adheres to acceptable professional and ethical standards and to increase members' effectiveness in the practice of law. According to the CBA's Amicus Brief Guidelines, an amicus brief is authorized in a matter of compelling public interest or special significance to the legal profession.

Amici respectfully submit that their views on the attorney-client privilege and the right of lawyers, like all others in our society, to obtain confidential legal advice may be of assistance to this Court as it considers the issues in this case. The resolution of this case is of concern to *amici* and their members because the interests of both lawyers and

their clients are best served when those lawyers are able to obtain confidential, expert legal advice with regard to their professional obligations, malpractice claims and other difficult issues that may arise during the representation of clients.

This appeal presents two issues of first impression in Illinois that are of critical importance to the lawyers, law firms, government units, and other entities that employ lawyers in this state: (1) whether communications with regard to possible claims of malpractice between lawyers and other lawyers in their firm or employing entity are privileged and protected from disclosure when the client involved continues as a client at the time of those communications; and (2) whether similar communications between lawyers and outside counsel retained to advise on the potential malpractice claim are privileged and protected from disclosure.

The facts involved here present a particularly strong case for reversal of the trial court's order: a lawsuit filed against the client by his siblings raised the possibility of a malpractice claim against the lawyers at Seyfarth Shaw LLP ("Seyfarth") who had advised the client with regard to the matters in dispute; the Seyfarth lawyers consulted with the firm's in-house general counsel (and later with outside counsel); the Seyfarth lawyers informed the client that the possibility of a malpractice claim created a conflict of interest and that the client should seek independent legal advice; the client did in fact obtain independent legal advice with regard to the conflict and the possible claims against Seyfarth; and the client through its independent counsel insisted that Seyfarth continue with the representation, thereby waiving the conflict. In these circumstances, there is only tenuous support from cases in other jurisdictions for holding that consultations with Seyfarth's in-house general counsel are not privileged and no support for holding that

communications with outside counsel are not privileged.

But even absent these compelling circumstances, Amici believe that lawyers, law firms (large and small), and other entities employing lawyers – like all others in our society – have the right to obtain confidential legal advice without fear that what they tell their attorney, or the advice they receive, will be disclosed to their adversaries. That right should be denied only under extraordinary circumstances not found in this case.

Amici take no position on the third issue in this appeal, whether the Circuit Court's denial of a co-defendant's motion for substitution of judges was erroneous, making the court's discovery order null and void. However, Amici believe that the attorney-client privilege and work product issues are of such importance that this Court should exercise its discretion to address these issues even if it decides the substitution issue in favor of Seyfarth. See, *e.g.*, *Nasrallah v. Davilla*, 326 Ill.App.3d 1036, 1040 (1st Dist. 2001).

ARGUMENT

As the Supreme Court of the United States has observed, "[t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citation omitted). See also, *Fischel & Kahn, Ltd. v. Van Straaten Gallery, Inc.*, 189 Ill.2d 579, 584-585 (2000), and cases cited therein. The work product doctrine serves similar interests. "At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and

prepare his client's case." *United States v. Nobles*, 422 U.S. 225, 238 (1975). See also *Hickman v. Taylor*, 329 U.S. 495, 510-511 (1947); *Kemeny v. Skorch*, 22 Ill.App.2d 160, 165 (1st Dist. 1959).[1]

Although to our knowledge no court has previously issued as broad a ruling as the Circuit Court did in this case – holding that the attorney-client privilege does not apply to communications between a lawyer for a current client and outside counsel – a few trial courts have held that the privilege is not applicable to communications between a lawyer and in-house counsel at the lawyer's firm when the inquiry relates to a current client. See, *e.g.*, *In re Sunrise Securities Litigation*, 130 F.R.D. 560 (E.D. Pa. 1989); *Bank Brussels Lambert v. Credit Lyonnais (Suisse)*, S.A., 220 F.Supp.2d 283 (S.D.N.Y. 2002); *Koen Book Distributors v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, P.C.*, 212 F.R.D. 283 (E.D. Pa. 2002).

Amici believe those decisions are based on a misunderstanding of the fiduciary exception to the attorney-client privilege and on a view of the law governing attorney conflicts of interest that has rightly been rejected by the leading authorities. They also are contrary to the public policy that supports the attorney-client privilege as strongly in the organizational context as it does in other contexts. A fundamental principle of our legal system – indeed, of our society – is that everyone has a right to confide in legal counsel of their choosing, and to expect lawyers and judges to protect those confidences. This Court should reverse the Circuit Court's ruling to preserve that principle.

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[1] To avoid excessively long and complicated sentences, this brief will hereafter use the terms "attorney-client privilege" and "privilege" to also refer to the work product doctrine.

THE CIRCUIT COURT'S DECISION, AND THE CASES ON WHICH IT WAS BASED, MISAPPLY THE FIDUCIARY EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE

In this case, the Circuit Court held that communications between the Seyfarth lawyers and the firm's in-house general counsel and outside counsel were not protected by the attorney-client privilege and were therefore discoverable by their former client, Garvy. The communication at issue occurred between November 3, 2004, when Seyfarth informed Garvy of the potential malpractice claim, the conflict of interest that could arise as a result, and the advisability that Garvy obtain independent legal advice on these issues, and May 2, 2007, when Seyfarth withdrew from representing Garvy. Record of Proceedings 82-83. Seyfarth claimed that communications with its general counsel and its outside counsel regarding those potential malpractice claims – communications in anticipation of litigation between Garvy and Seyfarth – were privileged. But the Circuit Court held that Seyfarth's fiduciary duties to Garvy required that it disclose those communications, including both those with its in-house general counsel and those with its outside counsel. *Id.* at 114-16. Although a few courts, mistakenly in our view, have held that similar communications with a law firm's in-house counsel are not privileged, the Circuit Court's decision that communications with outside counsel are also not protected is unprecedented.

The handful of courts that have denied protection to communications with law firm in-house counsel regarding a current client have relied upon *In re Sunrise, supra*, which in turn relied upon *Valente v. Pepsico, Inc.*, 68 F.R.D. 361 (D. Del. 1975), and *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), cases that examined the fiduciary-duty exception to the attorney-client privilege in the context of shareholders' litigation.

Cases relying on *In re Sunrise* to deny protection to communications between lawyers and law firm in-house counsel include *Asset Funding Group, LLC v. Adams & Reese, LLP*, 2008 U.S. Dist. Lexis 96505 (E.D. La. Nov. 14, 2008); *Bank Brussels Lambert v. Credit Lyonnaise (Suisse), S.A.*, 220 F.Supp.2d 283 (S.D.N.Y. 2002); and *Koen Book Distributors v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, P.C.*, 212 F.R.D. 283 (E.D. Pa. 2002).

Unfortunately, these decisions, unlike a recent decision of the Illinois Appellate Court in the corporate context, *Mueller Industries, Inc. v. Berkman*, 399 Ill.App.3d 456 (2d Dist. 2010), do not reflect careful consideration of the scope and limitations of the fiduciary exception to the attorney-client privilege. The fiduciary-exception cases originated in English trust law and recognize that when a fiduciary seeks legal advice with regard to the administration of a trust, the carrying out of corporate obligations, or similar fiduciary responsibilities, the fiduciary is doing so not on his or her personal behalf, but on behalf of the beneficiaries of the trust, the shareholders of the corporation or those others to whom the fiduciary duties are owed. Indeed, in those circumstances, the fees of the attorney consulted are ordinarily paid by the trust, corporation or other entity, not by the fiduciary personally. In those circumstances it would be anomalous to shield the legal advice from those on whose behalf it was obtained, and who ultimately paid for it.

In *Wachtel v. Health Net, Inc.*, 482 F.3d 225 (3d Cir. 2007), a case brought by two beneficiaries of health insurance plans against the companies that sold and administered those plans, the court of appeals reviewed the history and development of the fiduciary exception, beginning with the English common law:

> Under English common law, when a trustee obtained legal advice relating to his administration of the trust, *and not in anticipation of adversarial legal proceedings against him*, the beneficiaries of the trust had the right to the production of that advice. *See Talbot v. Marshfield*, 2 Drew & Sm. 549, 62 Eng. Rep. 628 (Ch. 1865). *See also Wynne v. Humbertson*, 27 Beav. 421, 54 Eng. Rep. 165 (1858). The theory of the rule was that the trustee obtained the advice using both the authority and the funds of the trust, and that the benefit of the advice regarding the administration of the trust ran to the beneficiaries.

Id. at 231 (emphasis added).

The court of appeals observed that the fiduciary exception was introduced into American law by decisions beginning in the 1970s, including *Garner, supra* (a shareholder suit), *Riggs Nat'l Bank v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976) (a trust case), and by employee benefit plan cases beginning in the 1980s, such as *Donovan v. Fitzsimmons*, 90 F.R.D. 583 (N.D.Ill. 1981), and *Washington-Baltimore Newspaper Guild, Local 35 v. Washington Star Co.*, 543 F.Supp. 906 (D.D.C. 1982). The law that developed in this country also recognized that the identity of the true client, and the purpose of the advice sought, were critical in determining whether the fiduciary exception applied. Thus, in *Wachtel*, the court (citing *Riggs Nat'l Bank*) held that the fiduciary exception applied because "counsel's 'real' clients – in whom, under long-standing principle, the attorney-client privilege vested – were the beneficiaries, not the trustees." *Wachtel*, 482 F.3d at 232. "Identification of the 'real' client was informed by several factors: (1) the content of the advice was for the benefit of the trust, not the trustees; (2) the advice was paid for with assets of the trust, not the trustees; and (3) no adversarial proceeding against the trustees was pending, meaning that the trustees had no need to seek personal legal advice." *Ibid.*

However, when a trustee, corporate manager or other fiduciary seeks legal advice with regard to his own potential liability, he is entitled to seek personal legal advice, and that advice is protected by the attorney-client privilege. "When a legitimate personal interest does emerge – such as when a corporate manager is sued by shareholders – the manager then becomes entitled to legal advice which is not discoverable by the shareholders." *Ibid.* The communication is entitled to protection not only after a suit has been filed, but also when adversary action seems a possibility. "[A] fiduciary, seeking the advice of counsel for its own personal defense in contemplation of adversarial proceedings against its beneficiaries, retains the attorney-client privilege." *Id.* at 233, citing *Riggs Nat'l Bank*, 355 A.2d at 711, and *United States v. Mett*, 178 F.3d 1058, 1063-1064 (9th Cir. 1999). The decisive issue in these cases is not whether the person who obtained the legal advice has fiduciary duties toward the person seeking to discover the communication, but the nature of the legal advice, and the "real" client for whom the advice was sought.

The Illinois Appellate Court recently considered the fiduciary exception to the attorney-privilege privilege, reviewing *Wachtel*, *Garner*, *Mett*, and similar decisions, and noting the limited nature of the exception:

> The fiduciary-duty exception is limited by the requirement that the subject of the communications with the attorney was the ordinary affairs of the trust or corporation: if the communications concern the personal liability of the fiduciary or were made in contemplation of adversarial litigation, the exception does not apply.

Mueller Indus., Inc. v. Berkman, 399 Ill.App.3d at 469. The court noted that the fiduciary-duty exception has not yet been adopted in Illinois, but held that it would not

apply in the case before it because the communication at issue concerned possible adversarial action between the corporation and the corporate manager. *Ibid.*

These cases – *Wachtel, Garner, Mett, Riggs Nat'l Bank* and *Mueller Industries* – conclusively demonstrate that, to the extent the Circuit Court's decision and the *In re Sunrise* line of cases rely on the fiduciary exception to the attorney-client privilege, they do so mistakenly. Beyond doubt, the fiduciary exception does not apply to communications the fiduciary has with counsel regarding his (or its) own liability, including liability to clients or beneficiaries. That exception does not justify denying the attorney-client privilege protection when a lawyer consults another attorney with regard to a possible malpractice claim against him or his firm.

DENIAL OF ATTORNEY-CLIENT PRIVILEGE PROTECTION IS ALSO NOT WARRANTED UNDER CONFLICT-OF-INTEREST ANALYSIS

In holding that communications with in-house counsel are not protected, in addition to relying on the fiduciary-duty exception, some courts have applied an equally misguided conflict of interest analysis. Whether the communication at issue was with a lawyer at an outside law firm or with in-house counsel would be of no relevance in determining the applicability of the fiduciary exception. If the communication at issue was for the benefit of the beneficiaries of a trust, the shareholders of a corporation, or another individual or entity to whom a fiduciary duty is owed, the exception applies, whether the communication was with an in-house lawyer or a lawyer at an outside firm. *Valente v. Pepsico, Inc.*, 68 F.R.D. at 367. See also *Wachtel*, *supra*, (examining the exception with regard to in-house counsel); *Mueller Industries*, *supra*, and *Riggs Nat'l Bank*, *supra* (examining the exception with regard to counsel at an outside law firm). If the communication was for the benefit of the fiduciary, such as when the fiduciary seeks

legal advice as to personal liability, the exception does not apply at all.

But the distinction between in-house and outside counsel does appear to have been important to the courts that have relied on conflict-of-interest analysis in examining whether the attorney-client privilege is available to lawyers at law firms. Those courts have cited the conflicts rules in holding that communications with a law firm's in-house general counsel or the equivalent are not protected when those communications involve a current client, even when they relate to the lawyer's own liability. In those decisions the fact that the communications were made within the law firm that still represented the client and the notion that the conflict between the client and the lawyer representing the client would be imputed to the firm's in-house counsel, appears to have been of critical importance.

The leading case, once again, is *In re Sunrise Securities Litigation,* 130 F.R.D. 560, 595-597 (E.D. Pa. 1989), a decision that specifically acknowledges that communications with outside counsel would be protected, *id.* at 597 & n.12. The court's analysis depended largely on a purported conflict of interest under Rule 1.7, Pennsylvania Rules of Professional Conduct:

> [A] law firm's consultation with in house counsel may cause special problems which seldom arise when other businesses or professional organizations consult their in house counsel. A law firm's representation of a client, and its ability to meet its ethical and fiduciary obligations to that client, may be affected by its representation of another client, even if the second client is the law firm itself.

Id. at 595. The court concluded that "a law firm's communication with in house counsel is not protected by the attorney client privilege if the communication implicates or creates a conflict between the law firm's fiduciary duties to itself and its duties to the client

seeking to discover the communication." *Id.* at 597. See also, *Koen Book Distributors*, 212 F.R.D. at 285 ("to the extent that the seeking or obtaining of legal advice by one lawyer from another lawyer inside the firm 'implicates or creates a conflict of interest,' the attorney-client privilege between the lawyers in the firm is vitiated"); *Asset Funding Group, LLC v. Adams & Reese, LLP*, 2008 U.S. Dist. Lexis 96505 at *7-*10 (E.D. La. Nov. 14, 2008).

This conflict-of-interest analysis is misguided. Two major ethics authorities have addressed the issue and come to the same conclusion: a lawyer's consultation with in-house counsel does not give rise to a conflict of interest between the firm and its client. The American Bar Association Standing Committee on Ethics and Professional Responsibility examined the issue in Formal Opinion 08-453 (Oct. 17, 2008). The ABA Committee's explanation demonstrates that the Seyfarth lawyers fully complied with their ethical obligations:

> Consent of the client is not required before a lawyer consults with in-house counsel, nor must the client be informed of the consultation after the fact. The consultation does not give rise to a per se conflict of interest between the firm and its client, although a personal interest conflict will arise if the principle goal of the ethics consultation is to protect the interest of the consulting lawyer or law firm from the consequences of a firm lawyer's misconduct. In that event, the representation may continue only if the client gives informed consent.

Id. at 6.

That is exactly what occurred here. When the firm's client was sued by his siblings in a complaint that referred to conduct on which the client had been advised by Seyfarth, the lawyers involved consulted with the firm's in-house counsel. The law firm then wrote to the client, informed him of the potential conflicts of interest the lawsuit

presented, and advised the client to seek independent legal advice. The client did so, and through its independent counsel insisted that Seyfarth continue with the representation, thus waiving any conflict. In short, the Seyfarth lawyers followed the ABA Committee's guidance to the letter. They certainly did nothing that would "vitiate" the attorney-client privilege.

The New York State Bar Association Committee on Professional Ethics reached the same conclusion in Opinion 789 (Oct. 26, 2005). The Committee specifically noted that some courts – including the courts in *Koen Book Distributors*, *Bank Brussels Lambert* and *In re Sunrise* – suggested that consultation with in-house counsel was not protected by the attorney-client privilege because they "introduced a conflict between the law firm and its clients." *Id.* at 2 & n.1. But the Committee rejected the notion that such consultation gave rise to a conflict of interest, or that the ethics rules require that a firm seek the advice of outside counsel to avoid a conflict and preserve the attorney-client privilege:

> These rules persuade us that the Code endorses and in some cases requires mechanisms within a law firm to promote obedience to a firm's obligations. Those ethical obligations frequently raise issues potentially or actually implicating the interests of one or more clients. Either a law firm must address these issues with one of its own lawyers, or else look to others for this advice. To hold that a law firm must always seek guidance outside its halls in order to preserve an attorney-client relationship – that is, to hire outside counsel (whose fiduciary duties may extend only to the firm) in every instance in which such an adversity arises – is simply impractical in the day-to-day life of many law firms, when issues of professional responsibility frequently require prompt responses most usefully provided by lawyers knowledgeable about the firm, its client relationships and its culture. It also imagines a world in which a lawyer must hire another lawyer to practice law,

> thereby depriving the firm of the well-recognized right to represent itself.

Id. at 3-4.

The Restatement (Third) of the Law Governing Lawyers § 46, cmt. C (2000) agrees that lawyers in a law firm may invoke the attorney-client privilege to decline to disclose internal communications regarding a potential malpractice claim by a client: "A lawyer may refuse to disclose to the client certain law-firm documents reasonably intended only for internal review, such as a memorandum discussing . . . the firm's possible malpractice liability to the client. See also Illinois State Bar Ass'n Op. 94-13 (1995) (quoting identical language from Tentative Draft No. 4 of the Restatement of the Law Governing Lawyers); see also E. Chambliss, *The Scope of In-Firm Privilege*, 80 Notre Dame L. Rev. 1721, 1723-24 (2005); D. Richmond, *Law Firm Internal Investigations: Principles and Perils*, 54 Syracuse L. Rev. 69, 94-104 (2004).

These authorities demonstrate that consultation with in-house counsel regarding a current client does not give rise to a conflict of interest. But even if it did, none of the cases denying attorney-client privilege protection to such communications explain why such a conflict would negate the privilege, or cite any persuasive authority for that proposition. *In re Sunrise, supra* – the source of the notion that the purported conflict of interest would vitiate the attorney-client privilege – relied upon *Valente v. Pepsico, Inc.*, *supra*. But *Valente*, whether correctly decided or not (see D. Richmond, *supra*, at 97-99) is not analogous. *Valente* involved a lawyer who served as the in-house general counsel of one company (Pepsico) while also serving on the board of a subsidiary (Wilson). In litigation brought by Wilson's minority shareholders, the court held that under the common-interest exception to the attorney-client privilege, communications between the

lawyer and one client (Pepsico) were not privileged as to the other client. *Valente*, 68 F.R.D. at 368. But as Richmond persuasively explains (54 Syracuse L. Rev. at 99-101), the common interest exception has no application where a law firm's in-house counsel advises his firm and its lawyers with regard to a possible malpractice claim by the client against the firm. That is clearly a matter on which the firm does not have a common interest with its client.

Moreover, holding that a conflict of interest results in the loss of the privilege would be bad policy:

> It makes no sense to craft a conflict of interest exception to the attorney-client privilege, or to otherwise abrogate the privilege based on some sort of conflict analysis. Indeed, to do so would have the perverse effect of discouraging law firms from appointing in-house general counsel and ethics counsel, who in all likelihood spend far more time dispensing prophylactic advice valuable to their firm, and to their firms' clients alike than they do conducting internal investigations after potential problems are alleged to arise.

Richmond, *supra*, at 101. Other than *Valente*, which is inapposite, *In re Sunrise* cites no authority for the proposition that a client conflict negates the attorney-client privilege. Subsequent cases simply cite *In re Sunrise* or each other for the proposition. See, *e.g.*, *Asset Funding Group*, 2008 U.S. Lexis 96505, at *9-*10; *Koen Book Distributors*, 212 F.R.D. at 284-285; *Bank Brussels Lambert*, 220 F.Supp.2d at 286-287. Cf. Restatement (Third) of the Law Governing Lawyers § 121, cmt f (2000) (discussion of sanctions and remedies for conflicts of interest makes no mention of loss of attorney-client privilege).

DENYING ATTORNEY-CLIENT PRIVILEGE PROTECTION TO ATTORNEYS WHO SEEK LEGAL ADVICE ON HOW TO HANDLE POTENTIAL MALPRACTICE CLAIMS OR OTHER DIFFICULT CLIENT ISSUES IS CONTRARY TO SOUND PUBLIC POLICY

Lawyers, whether in solo practice, at small or large law firms, or working for corporations, units of government, public-interest organizations or other entities, face an increasingly difficult regulatory and liability environment. "[F]iguring out the right thing to do in increasingly complex transactions or lawsuits has become too difficult for the average lawyer." J. Glater, *In a Complex World, Even Lawyers Need Lawyers*, N.Y. Times, Feb. 3, 2004, at C1. When faced with difficult professional issues outside their normal area of experience and expertise, lawyers need to be able to consult with expert counsel on a confidential basis.

Lawyers need legal advice on a wide variety of issues, including whether a current or proposed representation presents a conflict of interest (and how to handle it if it does); whether a client's conduct or proposed conduct is ethical or legal (and what to do if it is not); whether the lawyer has a duty to disclose client conduct under the Sarbanes-Oxley Act or other law (or a contrary duty to keep even questionable conduct confidential); how to deal with allegations of attorney misconduct; whether it is prudent to take on a new client or a new matter; how to deal with potential malpractice claims, which may have been raised by the attorney working on the matter or by the client; how to deal with clients who dispute or fail to pay legal bills; whether and how to discharge a client or how to respond to a client who wants to discharge the lawyer; and a host of other difficult issues. See E. Chambliss & D. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms*, 44 Ariz. L. Rev. 559 (2002); P. Jarvis & M. Fucile, *Inside an In-House Legal Ethics Practice*, 14

Notre Dame J. L. Ethics & Pub. Pol'y 103 (2000). And of course lawyers need lawyers – both outside counsel and often in-house counsel – to manage and handle litigation involving the lawyers themselves, the institutions in which they practice, or both.

The Illinois Rules of Professional Conduct of 2010 recognize that lawyers on occasion need to obtain legal advice in confidence about their professional responsibilities. See Rule 1.6(b)(4) & cmt [9] ("A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules"); Rule 5.1 & cmt [3] (recognizing law firm procedures permitting lawyers to make confidential reports of ethical issues to designated firm counsel). There is no reason why lawyers should not be able to obtain confidential legal advice, and to fully brief their lawyers on the facts and circumstances that give rise to the need for confidential legal advice, in the same way clients come to them knowing that what they reveal, and the advice they obtain, is privileged and confidential.

This case presents an excellent illustration. As a result of the complaint filed against Garvy by his siblings, the Seyfarth lawyers realized that work the firm had performed for Garvy had been called into question, and that a malpractice claim against the firm was possible. Expert, confidential advice was needed on how to deal with that realization, and the Seyfarth lawyers obtained just that from its in-house counsel. They were advised to inform the client that the possibility of claims against the firm presented a potential conflict of interest and that the client should consult independent legal counsel with regard to the potential conflict. The Seyfarth lawyers took that advice, informed the client of those issues, and the client in turn took the advice and retained independent

counsel. The law firm agreed to continue representing Garvy only after the client, separately represented, insisted that it continue, thus waiving any conflict of interest.

Would the client in this very difficult situation have been better served had the Seyfarth lawyers who were representing Garvy not consulted with in-house or outside counsel because that consultation would not be protected by the attorney-client privilege? Or would the client have been better served had the Seyfarth lawyers immediately withdrawn without regard to his best interests, knowing that they could obtain confidential legal advice only after they withdrew? Of course not. Not only were the Seyfarth lawyers and the firm itself better served by having obtained immediate legal advice, but so was the firm's client, Garvy. The consultation led to Garvy retaining separate counsel and obtaining independent advice about the potential conflict of interest, the advantages and disadvantages of continuing to use Seyfarth as its counsel, and the possible claims Garvy might have against Seyfarth, while continuing to use the Seyfarth lawyers, as he preferred, at least for a limited time.

The impact of the Circuit Court's decision is not limited to large law firms with in-house general counsel or other ethics advisers. The decision would preclude a lawyer in a two-lawyer office from having a protected conversation with his partner if a client complains about the lawyer's work, or from seeking confidential advice from another lawyer outside the office with expertise in professional liability matters. It would apply to a public defender's discussion with a colleague not involved in the representation regarding a client complaint. Any lawyer facing a possible malpractice claim by an existing client or attempting to resolve any other question of professional responsibility would need to withdraw from the representation at issue before obtaining any advice, or

assume that any communications would be discoverable, or – perhaps most likely – do without needed legal advice to the detriment of both the lawyer and the client.

Recognition that communications like those between the Seyfarth lawyers and their in-house and outside counsel are protected by the attorney-client privilege does not give lawyers any "special protection" not available to other litigants. It would also not interfere with the normal truth-seeking process or the ability of Garvy to discover critical facts about the law firm's representation of him. The privilege would not apply to communications between Garvy and the firm, or to other communications by Seyfarth lawyers with each other or with those outside the firm generated in the normal course of the firm's representation. The vast bulk of communications that occurred in the representation, and documents generated as part of that representation, are fully discoverable. The only communications that are protected by the attorney-client privilege are those between the Seyfarth lawyers and the lawyers who represent them (inside or outside the firm) pertaining to the professional obligations and potential liability of the Seyfarth lawyers and the firm. In sum, the only communications protected in this context are those that are protected in litigation generally: communications between clients and their lawyers made in confidence for the purpose of obtaining legal advice.

In the absence of a fully reasoned opinion, the Circuit Court's decision is difficult to understand. To our knowledge no previous court has gone as far as the Circuit Court went, holding not only that communications with in-house counsel were not protected by the attorney-client privilege, but also that communications with outside counsel were not protected. That decision cannot be explained by the *In re Sunrise* line of cases, which

rest on the misguided notion that consultation with in-house counsel gives rise to a conflict of interest which vitiates the privilege. The Circuit Court decision also cannot be based on the fiduciary exception to the attorney client privilege, which clearly does not apply when a fiduciary seeks legal advice as to his personal liability toward a beneficiary.

CONCLUSION

The decisions that have held that communications between lawyers and their own lawyers (in-house or outside) are not privileged when they relate to a current client, whether they invoke the fiduciary exception or rely on conflict-of-interest analysis, are deeply flawed and contrary to sound public policy. They should not be followed in Illinois. The Illinois State Bar Association and Chicago Bar Association respectfully urge this Court to reverse and vacate the orders of the Circuit Court requiring Seyfarth to produce attorney-client privileged communications between Seyfarth lawyers and the firm's in-house General Counsel or its outside counsel and work product related to claims against the firm.

Dated: May 13, 2011

Respectfully submitted,

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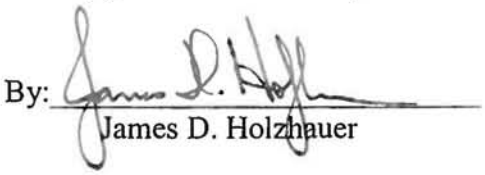
Certificate of Compliance

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of the brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance and the certificate of service is 20 pages.

By: 
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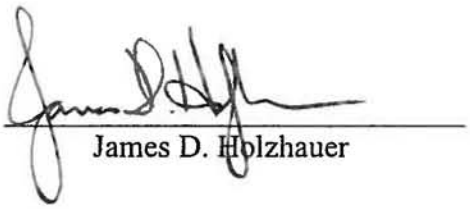

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