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Fifth District grants new trial on damages when jury's verdict is inconsistent with the evidence

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Illinois law provides that a trial court may order a new trial if the damages are manifestly inadequate and a proven element of damages was ignored. The most recent decision on this issue is a Rule 23 Order entered by the Fifth District Appellate Court in the case of *Spearman v. Sunley* on October 2, 2007 (5th Dist. App. Ct. No.5-06-0499) arising from the Circuit Court of Madison County, Illinois. The Fifth District agreed with the plaintiff that the verdict was inconsistent with the evidence and that the trial court erred in denying his post trial motion for a new trial. A discussion of the facts of the case and evidence adduced at trial gives a better understanding of why the Fifth District, in keeping with prior Illinois case law, reversed the trial court and remanded the case for a new trial on damages only.

The plaintiff Walter Spearman was involved in an automobile accident that occurred on December 11, 2002 in Edwardsville, Madison County, Illinois. The accident happened when the defendant rear-ended the vehicle the plaintiff was driving. Evidence showed that the impact was moderate and the police report indicated neither car was damaged. The trial court directed a verdict against the defendant for his negligence on the issue of liability.

The parties stipulated to the admission of the medical bills of the plaintiff in the amount of $62,807.47. The jury returned a verdict in Spearman's favor in the exact amount of the medical bills that were stipulated to by the parties. The jury failed to award to the plaintiff any sum of money for future medical expenses, past and future disfigurement, past and future disability or past or future pain and suffering.

Typical in such cases, the plaintiff had a complex medical history. He had been a coal miner who had not worked apparently for years as a result of disabling injuries, primarily to his lower back, that he received on the job in 1989. He also had sustained work injuries to his head and neck. Medical records indicated that he had complaints of cervical pain and/or discomfort off and on since 1989. The plaintiff's family physician, Dr. Mary Agne, testified that in four office visits of the plaintiff immediately preceding the December 11, 2002 accident that he made no complaints of pain. Dr. William Sprich, the neurosurgeon who had operated on the plaintiff's back prior to the accident, testified that a cervical MRI he had ordered in 1992 showed no defects other than straightening of the normal curvature of the spine. He stated that the plaintiff also had made no complaints of cervical pain at two office visits in early 2002 before the accident. A cardiologist indicated that in January 2002 the plaintiff had a history of cervical problems but there was no mention of current complaints of cervical pain in the doctor's office notes.

The plaintiff was treated in the emergency room within hours of the December 2002 accident, although he had initially refused to be transported by ambulance from the accident scene to the hospital. The emergency room physician made a diagnosis of a neck strain and cervical muscle spasms. He was treated with an injection that provided immediate relief and later with prescription medication.

Dr. Agne ordered in January 2003 an MRI and physical therapy. The MRI revealed disc herniations at C4-5 and C5-6. While Dr. Agne testified it was possible the disc herniations predated the December 2002 accident, she was of the opinion that more likely than not they were caused by the automobile accident. The plaintiff began treating with Dr. Sprich who reviewed the MRI and agreed with Dr. Agne that the accident caused the disc herniations. However, Dr. Sprich did not rule out other possible causes for the plaintiff's disc herniations. Dr. Sprich conducted additional diagnostic tests on March 18, 2003 and subsequently performed cervical disc surgery at both levels with disc material removed and a fusion.

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The defendant had the plaintiff examined by medical expert Dr. Karen Pentella who also reviewed the MRI films and medical records. She opined that the plaintiff's complaints were as a result of long-term degenerative conditions and not the accident of December 2002. She based her opinions on the MRIs taken before and after the December 2002 accident that showed prior degeneration of the cervical spine as well as a pathology report related to the disc material that was removed during the plaintiff's neck surgery. The pathologist indicated that the disc material was hard: consistent with long-standing degenerative changes.

The verdict form the jury returned read as follows:

> We the jury find for Walter Spearman and against Michael Sunley. We assess the damages in the sum of $62,807.47 as follows:
>
> | | |
> |---|---|
> | Past Medical Expenses | $62,807.47 |
> | Future Medical Expenses | $ 0.00 |
> | Past and Future Disfigurement | $ 0.00 |
> | Past and Future Disability | $ 0.00 |
> | Past and Future Pain and Suffering | $ 0.00 |

The Fifth District acknowledged that although fault was determined by the trial court against the defendant by directed verdict, the jury still had to determine if damages were proximately caused by that fault and, if so, in what amount. It assumed that based on the award of damages in favor of the plaintiff that the jury determined the damages were the proximate cause of the accident.

The Fifth District rejected the defendant's contention that evidentiary and hotly contested issues of causation and damages led the jury to conclude that even though the plaintiff incurred medical bills, he had no pain and suffering and no disfigurement. The Appellate Court found this argument to be illogical since the jury must have concluded that the injuries were proximately caused by the accident and only then could the jury have decided that the plaintiff was at least entitled to be compensated for medical bills he incurred after the accident. The Fifth District ruled that the jury's verdict was inconsistent based on the amount of the medical bills and that the jury had concluded that the injuries were proximately caused by the accident, stating "While the jury could have discounted future medical bills and/or future pain and suffering, the jury could not ignore the surgery involved and the plaintiff's recovery therefrom. The surgery was not insignificant. And the jury was presented with objective evidence of pain and suffering."

The defendant contended that the plaintiff had suffered only a cervical strain with an 11-day recover period and therefore the strain itself was not painful and there could be no award for disfigurement or pain. The Fifth District rejected these arguments noting that the jury awarded the plaintiff damages for medical bills of $62,807.47 which was a sum of money for treatment of an injury much greater than an 11-day neck strain. The Appellate Court stated:

> We know the jury causally connected the herniated disc to the accident because Spearman was awarded every penny of his medical specials incurred-including all the surgical costs associated with the discectomy. By the very nature of the cervical surgery, including chiseling bone for the cervical fusion from Spearman's hip, and the recovery from the necessary surgery, it is illogical that the jury could have deemed the surgery causally connected to this accident and yet not worthy of pain and suffering damages.

The Fifth District held that based on the evidence that the trial court had abused its discretion when it refused to grant Spearman's motion for a new trial on damages.

The Fifth District previously granted new trials in two other cases involving inconsistent verdicts that it did not mention in its *Spearman* decision. One case is *Hinnen v. Burnett*, 144 Ill. App.3d 1038, 495 N.E.2d 141 (5th Dist. 1986). The jury had awarded the plaintiff $2,500 for physical therapy and medication but nothing for pain and suffering. The Fifth District explained its reasoning to grant a new trial as follows:

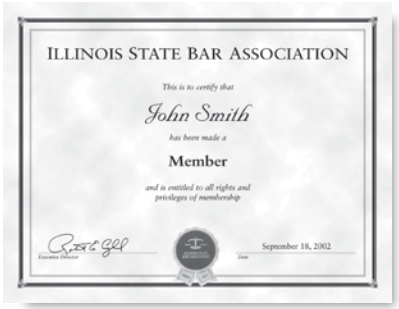
> First, although the jury awarded nothing for pain and suffering, it did compensate plaintiff for the full amount of her expenses for pain medication and physical therapy. To this extent, the verdict is irreconcilably inconsistent. If the jury believed that plaintiff had no compensable pain and suffering, its award of pain-related expenses was wholly unwarranted and contrary to the manifest weight of the evidence. Conversely, if it believed that plaintiff's pain and suffering were sufficiently serious to warrant expenditures for pain medication and physical therapy, its failure to award her compensation for that pain and suffering means that it disregarded a proven element of damages.
>
> 144 Ill.App.3d at 1046.

Similarly, in *Kumorek v. Moyers*, 203 Ill.App.3d 908, 561 N.E.2d 212 (5th Dist. 1990) the Fifth District held that a jury could not award damages for extended medical treatment to alleviate pain and suffering and fail to award compensation for that pain and suffering. The appellate court held that by doing so the jury had disregarded a proven element of damages and thereby rendered an irreconcilably inconsistent verdict and a new trial on damages was awarded. The Appellate Court set forth its reasons for granting a new trial on damages as follows:

> Clearly the jury's verdicts are irreconcilably inconsistent. Had the jury awarded a small amount for pain and suffering in each situation, then the situation might be different. We could then arguably acknowledge that the jury recognized such damages but chose not to believe all of the plaintiffs' testimony. Where we are faced with zero dollar awards when damages are clearly evident, however, we have no choice but to declare that the verdicts are inconsistent.
>
> 203 Ill.App.3d at 913.

The *Hinnen* and *Kumorek* decisions are clearly consistent with its position in Spearman to grant the plaintiff a new trial on damages.

The Fifth District did make reference in *Spearman*, however, to the earlier case of *Murray v. Philpot*, 305 Ill. App.3d 513, 713 N.E.2d 152 (5th Dist. 1999) in which objective evidence of pain and suffering in the form of radiological evidence, complaints of pain to



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the emergency room staff and medical testimony warranted a reversal of the jury's verdict of $0 for pain and suffering. In *Murray*, plaintiff was injured when, while preparing to water ski, defendant drove his boat over the ski rope causing it to strike plaintiff in the back of the head and slam her face forward into the water. The jury found the defendant's negligence caused plaintiff's injuries and awarded plaintiff $1,600 for wage loss and home healthcare and $9,000 for past medical expenses. However, the jury awarded nothing for pain and suffering. The plaintiff moved for a new trial on the issue of damages, which was denied.

In *Murray*, the Court noted that three different doctors found objective symptoms of injury when they examined the plaintiff. An X-ray showed the plaintiff had a straightening of the lordotic curve of her cervical spine, which was an objective sign consistent with subjective complaints of stiffness and spasm. The medical experts agreed that the plaintiff sustained a soft tissue injury, although their opinions differed as to the extent of the injury. Additionally, the plaintiff in *Murray* missed nine weeks of work due to the injury. However, the jury was informed that plaintiff did not see any doctors during a one year time period, that some of plaintiff's complaints of pain could be attributed to the repetitiveness of her job and that she had not had any treatment for nearly a year at the time of trial.

The *Murray* court noted that a jury is free to find plaintiff's evidence of pain and suffering to be unconvincing when plaintiff's evidence is primarily subjective, however, when the plaintiff submits objective evidence of pain and suffering, such evidence may not be disregarded. The evidence in *Murray* showed that plaintiff's X-rays revealed an injury, that she had limited range of motion in her neck, and that she complained of neck and head pain to emergency room personnel. Based upon that medical testimony, the *Murray* court found there was no doubt that plaintiff sustained an injury that produced pain. Further, the *Murray* court noted that the jury awarded plaintiff substantially all of the damages that she sought for her medical expenses, home healthcare, and lost wages, and therefore acknowledged her injury and need for treatment, but awarded her nothing for pain and suffering.

In concluding its opinion, the *Murray* court stated that an award of zero damages for pain and suffering, along with an award for full damages for medical care and lost wages, ignores a proven element of damages that the jury is not free to disregard. Thus, it found that the jury's verdict was irreconcilably inconsistent and must be set aside. The *Murray* court held that because the jury's failure to award damages for pain and suffering was not supported by the evidence, the trial court abused its discretion when it denied the plaintiff's post-trial motion. The case was therefore, reversed and remanded to the trial court for a new trial on the issue of damages.

While the Fifth District has often granted new trials for damages when it has determined that the jury's award is inconsistent with the evidence, other Illinois appellate courts have done the same under similar facts and circumstances. For example, the Third District in *Schranz v. Halley*, 128 Ill.App.3d 125; 469 N.E.2d 1389 (3rd Dist. 1984), found that the jury's failure to award damages for past pain and suffering was not supported by the record. The record showed that the plaintiff experienced headaches and double vision for a month after being released from the hospital. The appellate court held that experiencing pain was such an obvious and natural result of the injuries of concussion, cerebral contusions, and basal skull fracture that a failure to award damages by the jury for such pain and suffering constituted reversible error. The appellate court granted a new trial.

In *Healy v. Bearco Management, Inc.*, 216 Ill.App.3d. 945, 576 N.E.2d. 1195 (2nd Dist. 1991) the appellate court reversed a jury verdict of $120,767.31 for medical expenses and $0 for pain and suffering involving a back injury where plaintiff introduced evidence of lengthy hospitals stays and included testimony from experts regarding the nature of plaintiff's injury and her pain and suffering. The *Healy* court stated in support of its ruling:

> Despite the fact that the jury awarded plaintiff pain-related expenses, it failed to compensate her for pain and suffering. If the jury believed plaintiff had no compensable pain and suffering, its award of pain-related expenses was contrary to the manifest weight of the evidence. Or, if it believed that plaintiff's pain and suffering were sufficiently serious to justify the expenses, the jury's failure to compensate for pain and suffering means it disregarded a proved element of damages.
>
> 216 Ill.App.3d at 955.

In *Rice v. Merchants National Bank*, 213 Ill.App.3d 790, 572 N.E.2d. 439 (2nd Dist. 1991) the appellate court reversed a jury verdict of $48,000 for medical expenses and $0 for pain and suffering and granted a new trial where the plaintiff presented expert testimony that she suffered a fractured vertebrae leading to permanent back pain, broken pelvic bone, and torn knee ligaments. In contrast, the First District in *Bledsoe v. Amiel*, 57 Ill.App.3d 54; 372 N.E.2d 1033 (1st Dist. 1978) upheld the award by the jury of the amount of the plaintiff's medical bills and no damages for pain and suffering on the basis that the plaintiff presented at trial no medical testimony, the only witness was the plaintiff, the only evidence of medical treatment was the doctor's bill, and the description of the plaintiff's injuries and the treatment received was vague and indefinite.

The Illinois Supreme Court in *Snover v. McGraw*, 172 Ill.2d. 438, 667 N.E.2d. 1310 (1996) upheld the denial of a plaintiff's motion for a new trial on damages.

Kimberly Snover was involved in a traffic accident on September 23, 1989. She complained of abdominal pain at the scene. She was taken to the emergency room where there were no recorded complaints of neck pain and she had full range of motion of her neck. She testified she missed three days to one week of tennis activities on her school's tennis team. Afterward, she was able to play tennis regularly. She missed three days to one week of gym class. She was on the school's track team and was able to participate in that activity. She was seen by her family physician two days after the accident complaining of headaches. At trial she stated she had suffered headaches once or twice per month prior to the collision. A post-accident CT scan was negative. About four months after the accident she was seen by a neurologist complaining of headaches, dizziness, and neck pain. She was diagnosed as suffering from cervical strain and physical therapy was recommended. She went to nine physical therapy sessions. The jury awarded a total of $1,601.65, which was exactly equal to the total

of all medical bills incurred from the date of the accident through the end of the first round of physical therapy. The jury awarded nothing for any additional medical expenses incurred after the last physical therapy session or for any pain and suffering.

At trial, plaintiff sought to recover medical damages incurred after the first round of physical therapy which ended on February 21, 1990. About a year after the accident she was seen by a chiropractor who diagnosed her with cervical strain. She also received additional physical therapy treatments between January 2, 1991 and June 2, 1992. In August of 1992 she returned to the neurologist for more physical therapy. The jury did not award any damages for pain and suffering or the post February 21, 1990 medical treatment by the chiropractor and the neurologist. There was evidence that plaintiff was involved in two additional car accidents after the one that was the subject matter of the trial. She also had suffered a weight lifting injury subsequent to the auto accident. It was argued that these incidents aggravated any existing neck injury.

The *Snover* court noted that one line of Illinois appellate cases, such as *Hinnen, supra*, held that any award of pain-related expenses without a corresponding award for pain and suffering required reversal per se, even if the evidence of pain and suffering was insignificant or strongly disputed. However, another line of cases took a more flexible approach upholding jury verdicts where the evidence of pain and suffering was minimal and the nature and extent of plaintiff's injuries were questionable, as in *Paulan v. Jett*, 190 Ill.App.3d. 497, 545 N.E.2d. 1377 (2nd Dist. 1989).

The *Snover* court noted in its decision the cases of *Healy v. Bearco Management, Inc*. and *Rice v. Merchants National Bank*, referred to above, in which new trials on damages were granted because the jury award of $0 for pain and suffering was not supported by the evidence. The *Snover* court recognized that the evidence in *Healey* and *Rice* had established significant injuries, which in turn, justified and required an award for pain and suffering. 172 Ill.2d at 446.

In *Snover*, the Supreme Court noted that plaintiff only missed a few days of tennis because of the collision and after that was able to play tennis every day. The Supreme Court also found that plaintiff had few, if any, objective symptoms of injury and relied instead on subjective complaints of pain. The Supreme Court was of the opinion that credibility was significant in the case in light of the fact that plaintiff delayed in seeking some of the treatment, her ability to continue participating in everyday activities, the subjective nature of her complaints, and the conflicting expert testimony. The *Snover* court held that based on the evidence, the jury could have simply concluded plaintiff suffered only minor injury and awarded damages accordingly.

Importantly, the *Snover* court qualified its decision by stating, "We emphasize that, in other cases, an award of medical expenses without a corresponding award for pain and suffering may be inappropriate. If the evidence clearly indicates that plaintiff suffered serious injury, a verdict for medical expenses alone could be inconsistent. This determination is best made by the trial court in a post-trial motion." 172 Ill.2d at 449. The *Snover* court advised, "In making this determination, that the trial court should focus on the distinction between subjective complaints of injury and objective symptoms." Id.

Accordingly, the Supreme Court in *Snover* ruled that each case must be decided on its own facts and the determination of whether the jury disregarded a proven element of damages should focus on objective evidence of the plaintiff's injuries and pain, rather than the plaintiff's subjective complaints. The Fifth District in *Spearman* made reference to *Snover, Rice* and *Healy* in support of its decision to grant the plaintiff a new trial on damages and agreed with the Supreme Court in *Snover* that each case turns on its own facts of when a new trial should be granted.

While *Spearman v. Sunley* is a Rule 23 Order only and to that extent has limited precedential value, the Fifth District provided a well-reasoned opinion to justify its reversal of the trial court and an excellent review of existing Illinois case law of when a jury's verdict is inconsistent with the evidence and a new trial on damages should be granted.

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The mailbox rule does not apply to refiling of a voluntarily dismissed complaint

By Kimberly L. Dahlen, Carbondale

In *Wilson v. Brant*, 374 Ill.App.3d 306, 869 N.E.2d 818 (1st Dist. 2007), a unanimous First District Appellate Court determined that the mailbox rule does not apply to the commencement of any action, specifically in this case, where a plaintiff refiled a complaint after taking a voluntary dismissal.

As set forth in the opinion, on June 4, 2002, Terrance Wilson, plaintiff, filed a complaint against the defendants, Robert Brant and Star Transportation Company, within the statute of limitations period. The complaint alleged that Brant, while working for Star Transportation Company negligently caused an automobile accident resulting in injuries to Wilson. The accident occurred on December 18, 2000. Wilson's counsel withdrew during the discovery stage, and on December 7, 2004, Wilson voluntarily dismissed his action pursuant to section 2-1009 of the Code of Civil Procedure (735 ILCS 5/2-1009 (West 2004)). The statute of limitations expired prior to the time Wilson took his voluntary dismissal. Thus, Wilson had one year after he took the voluntary dismissal, to refile his action pursuant to section 13-217 of the Code of Civil Procedure (735 ILCS 5/13-217 (West 2004)).

On December 7, 2005, exactly one year after the voluntary dismissal, Wilson attempted to refile his complaint pursuant to section 13-217 of the Code of Civil Procedure by sending his complaint, with notice of filling and proof of service, through the regular United States mail to the Cook County Circuit Clerk's office and the defendants. Wilson's complaint was file-stamped by the Cook County Circuit Clerk's office on December 20, 2005, which was days after he mailed it.

The defendants subsequently filed a motion to dismiss pursuant to section 2-619 (a) (4) of the Code of Civil Procedure, (735 ILCS 5/2-629 (a) (4) (West 2004)), alleging that the complaint was not refiled in a timely manner. The circuit court granted the defendants' motion to dismiss. Wilson filed a motion to reconsider, and the circuit court denied the motion.

On appeal, the plaintiff asserted the following arguments in support of the application of the mailbox rule to the facts of his case:

1. The "trend in Illinois" is to construe the mailing date as the date of filing.
2. Refiling a complaint pursuant to section 13- 217 is different than filing an initial complaint under section 2-201 of the Code of Civil Procedure.
3. Supreme Court Rules 12 and 373 support the argument that refiling a complaint after a voluntary dismissal can be accomplished by placing the complaint in the mail.

In reference to the argument that the "trend in Illinois" is to construe the mailing date as the date of filing, the plaintiff cited several cases, but in each of those cases, the mailbox rule was applied to filings made after the commencement of the action. *Wilson*, 374 Ill.App.3d at 309, 869 N.E.2d at 821. In furtherance of his argument about the "trend in Illinois," the plaintiff attempted to distinguish the cases of *Wilkins v. Dellenback*, 149 Ill.App.3d 549, 500 N E.2d 692 (2nd Dist. 1986), and *Kelly v. Mazzie*, 207 Ill.App.3d 251, 565 N.E.2d 719 (2nd Dist. 1990), which rejected the application of the mailbox rule to the filing of a petition to vacate a dismissal order pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 2-1401 (West 2004)) and to the initial filing of an original personal injury complaint pursuant to section 2-201 of the Code of Civil Procedure (735 ILCS 2-201 (West 2004)). His argument was that since his case involved a refiling of a previously dismissed action, it was not a commencement of an action like *Wilkins* or *Kelly*, but a re-commencement of an action. The appellate court rejected this argument, pointing out that 735 ILCS 5-13-217 (West 1994), "states that after taking a voluntary dismissal a plaintiff may commence a new action within one year." *Wilson*, 374 Ill.App.3d at 311, 869 N.E.2d at 822. In observing that Wilson's action was a new action, the court relied upon "*Miller v. Bloomberg*, 60 Ill.App.3d 362, 364, 376 N.E.2d 748, 749 (1978) [***12], which stated ("[T]he party who takes a voluntary nonsuit or dismissal is equitably estopped from thereafter vacating the order of dismissal or reinstating the cause, unless he has been given leave to reinstate at the time of the dismissal, and his only recourse is to commence a new action")." *Wilson*, 374 Ill. App.3d at 311, 869 N.E.2d at 822.

Wilson also argued that Supreme Court Rules 12 and 373 supported his contention that the mailbox rule applied to the refiling of a complaint that was voluntarily dismissed. The court rejected these arguments, finding that Rule 12 applied to the service of papers and Rule 273 applied to filing papers in a reviewing court. *Wilson*, 374 Ill. App.3d at 312, 869 N.E.2d at 823. The court cited *Harrisburg-Raleigh Airport Authority v. Department of Revenue*, 126 Ill.2d 326, 341-42, 533 N.E.2d 1072, 1078 (1989), and acknowledged that the Illinois Supreme Court extended Rule 373 to apply to notices of appeal which were filed in the circuit court and pointed out that "the supreme court specifically stated that its rationale for this extension was predicated upon the close relationship between notices of appeal and the appellate process as encompassed in Rule 373." *Wilson*, 374 Ill.App.3d at 313, 869 N.E.2d at 824.

In short, the mailbox rule does not apply to the commencement of an action, and a complaint brought pursuant to section 13-217 of the Code of Civil Procedure is a new action. Thus, the timeliness of refiling a complaint after it has been voluntarily dismissed will be controlled by when it is file-stamped by the circuit clerk's office.

Contacting an opponent's employee and former employees

By Mark Rouleau ©; Rockford

This article addresses the scope of the attorney-client privilege with respect to counsel's contact with employees of an opposing party. One should not automatically assume that they can either communicate with the employee or former employee directly or through an agent (i.e., through an investigator or one's client) or that such contact should never be done. A careful examination of the facts and applicable law is essential to a correct decision.

Frequently, a party learns that an employee or former employee of an opponent may have significant information regarding the facts of a case. In such a circumstance, both ethical and legal issues arise regarding whether you can contact the opposing party's employee or former employee. The analysis must consider whether the possible witness is an opposing party represented by counsel and whether the information sought to be obtained contains "privileged" communications. Additional factors must be considered if the case is in a jurisdiction other than Illinois.

The first and foremost consideration for any lawyer should be whether such contact with an employee or former employee of a possible opponent constitutes a violation of the rule prohibiting contacts with a persons known to be represented by counsel. The Illinois Rules of Professional Conduct, Rule 4.2, provides:

> During the course of representing a client a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by another lawyer in that matter unless the first lawyer has obtained the prior consent of the

lawyer representing such other party or as may otherwise be authorized by law.

Illinois has long followed the "control group" test to determine whether communications from a corporate defendant's employees are "privileged" under the attorney client privilege.

> As discussed by our supreme court in *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill.2d 103, 59 Ill.Dec. 666, 432 N.E.2d 250 (1982), various tests have been used by jurisdictions in deciding the question of who speaks for a corporation on a privileged basis. The control group test "focuses on the status of the employee within the corporate hierarchy." *Consolidation Coal*, 89 Ill.2d at 114, 59 Ill.Dec. 666, 432 N.E.2d at 255.

Sterling Finance Management, L.P. v. UBS PaineWebber, Inc., 336 Ill.App.3d 442, 782 N.E.2d 895 (1st Dist. 2002).

Applying the "control group" test, the appellate court has held that Rule 7-102 (now Rule 4.2 of the Illinois Rules of Professional Conduct) was not violated when current employees at defendant's repair shops were contacted by plaintiff's investigators, as those employees were not shown to have sufficient decision-making or advisory responsibility within the corporate defendant. *Automotive Repair, Inc. v. Car-X Service System*, 128 Ill.App.3d 763, 471 N.E.2d 554 (2nd Dist. 1984). The court determined that the non-contact rule, as with the attorney-client privilege generally, applied only to:

> …those top management persons who had the responsibility of making final decisions and those employees whose advisory roles to top management are such that a decision would not normally be made without those persons' advice or opinion or whose opinions in fact form the basis of any final decision.

In *U.S. v. Dempsey*, 740 F.Supp. 1295 (N.D. Ill. 1990), a federal district court held that, even if the prosecutor's contacts violated Rule 4.2, such a violation would not be grounds for suppressing a defendant's statements in a criminal case. Likewise, in *People v. Nance,* 100 Ill.App.3d 1117, 427 N.E.2d 630, 634-35 (4th Dist. 1981), the court ruled that a statement taken by a defendant's attorney from a prisoner being held in connection with the same criminal incident as the defendant should not be excluded, at least where the ethics of the attorney's conduct was "debatable."

In *Bruske v. Arnold*, 44 Ill.2d 132, 254 N.E.2d 453, 455-56 (1969), the court dealt with a statement that was as improperly obtained in violation of the cannons of ethics and discovery procedures. In that case, plaintiff's counsel hired a private investigator who obtained a statement from the defendant at his home after defense counsel had appeared in the case. The court found that, in order to make the ethical obligation and the discovery rules meaningful, the statement must be excluded.

One should also examine *Weibrecht v. Southern Illinois Transfer, Inc.*, 241 F.3d 875 (7th Cir. (Ill.) 2001), where in a FELA case the Seventh Circuit applied a more restrictive interpretation of the rule than used in *Automotive Repair*, supra. In *Weibrecht*, the court applied the local ethics rule 4.2 of the United States District Court for the Southern District of Illinois (which mirrored Illinois DR 4.2) but applied the scope of the federal attorney client-doctrine for corporations where:

> … a defendant's employee is considered to be represented by the defendant's lawyer, and so is covered by the prohibition in Rule 4.2, if the employee meets any one of the following three criteria: (1) she has "managerial responsibility" in the defendant's organization, (2) her acts or omissions can be imputed to the organization for purposes of civil or criminal liability, or (3) her statements constitute admissions by the organization.

After one has considered whether the individual is a member of the companies control group the next consideration is whether the information obtained is privileged. Communications are privileged; facts are not. *Wepy v Shen*, 175 A.D.2d 124, 571 N.Y.S.2d 817, 818 (1991); *Upjohn Co. v. U.S.*, 449 U.S. 383, 395, 101 S.Ct. 677, 685, 66 L.Ed.2d 584, 595 (1981); *Kunz v. South Suburban Hospital*, 326 Ill. App.3d 951, 761 N.E.2d 1243, 1249 (1st Dist. 2001), citing *Wepy*.

The privilege protects only the attorney-client communication itself. Opposing counsel is free in the course of formal discovery to question a member of the control group about the underlying facts, which were communicated. *Carrillo v. Indiana Grain Division*, 149 Ill.App.3d 135, 144, 500 N.E.2d 682 (1st Dist. 1986), citing *Upjohn Co. v. U.S., supra*. Also see *Claxton v. Thackston*, 201 Ill.App.3d 232, 559 N.E.2d 82, 87 (1st Dist. 1990). One must be sure to distinguish the ability to obtain factual information verses the issue of ex parte contact with a "person" represented by counsel.

Former employees, including former managers, have been held to not be encompassed by the rule forbidding ex parte contact, so that they can freely engage in conversations with counsel representing other employees pursuing a discrimination suit against the employer; however, the former employees were barred from discussing any privileged information to which they were privy. *Orlowski v. Dominick's Finer Foods, Inc.*, 937 F.Supp. 723 (N.D. Ill.1996). In that case, the court held that the possibility that former employees may reveal damaging information, which may give rise to the corporation's liability, was insufficient to implicate rule prohibiting ex parte contact.

The First District Appellate Court in *Sterling Finance Management, L.P. v. UBS PaineWebber, Inc.*, 336 Ill.App.3d 442, 782 N.E.2d 895 (1st Dist. 2002), provided a thorough explanation of the attorney-client privilege as it relates to present and former employees. In that case the court held that whether the contact was prohibited was a subject for a choice of law analysis.

Federal Court - Northern District of Illinois

In Federal Court, the issue may depend on whether you can demonstrate the former employee was a "managing agent." Compare the holding in *Orlowski v. Dominick's Finer Foods, Inc., supra,* with *Richard Wolf Medical Instruments Corp. v. Dory*, 1989 WL 51127 (N.D. Ill. 1989), where the court noted:

> Since Mr. Marquer is no longer a director of EDAP, the issue is whether he can be considered a "managing agent" of EDAP. The term "managing agent" should not be interpreted literally. Instead, its meaning "should

depend largely on whether the interests of the individual involved are identified with those of his principals and on the nature of his 'functions, responsibilities and authority … respecting the subject matter of the litigation.'" *Tomingas v. Douglas Aircraft Co., Inc*., 45 F.R.D. 94, 96 (S.D.N.Y.1968) (quoting *Kolb v. A.H. Bull Steamship Co.*, 31 F.R.D. 252, 254 (E.D.N.Y.1962)) (emphasis in original). Factors which must be examined to determine whether Mr. Marquer is a "managing agent" of EDAP include: (1) whether he has general powers allowing him to exercise judgment and discretion in corporate matters; (2) whether he can be relied on to testify, at EDAP's request, in response to Wolf's demands; (3) whether there are any other EDAP employees who have more authority than Mr. Marquer in regard to information concerning the EDAP patent at issue in this case; (4) his general responsibilities respecting the matters involved in this litigation; and (5) whether Mr. Marquer can be expected to identify with the interests of EDAP. *Sugarhill Records, Ltd. v. Motown Record Corp.*, 105 F.R.D. 166, 170 (S.D.N.Y.1985). See also *Founding Church of Scientology of Washington, D.C. v. Webster*, 802 F.2d 1448, 1453 (D.C.Cir. 1986), cert. denied 108 S.Ct. 199) (1987), (to determine whether an individual is a "managing agent" for purposes of the discovery rules, examine the character of the individual's control over the corporation, the degree to which the interests of the individual and the corporation converge, and how helpful the individual will be in fact-finding on the matter at issue in comparison to others associated with the corporation). Wolf has the burden of proving that Mr. Marquer is a "managing agent" of EDAP.

Once again we can see a different formulation regarding permissible contact with a former employee of an opposing party, which focuses on the overall degree of relationship between the former employee and his former employer.

Conclusion

Before contacting an employee of a possible opposing party, an attorney must evaluate whether the employee is potentially part of the control structure of the business entity. If the case is in a jurisdiction other than Illinois state courts, one must consider whether the employee or former employee is someone for whom liability may be imposed on the business entity. This must then be viewed through the lens of the jurisdiction's formulation of the attorney-client privilege as it relates to employees. Always keep clear the fact that merely because the attorney-client privilege does not apply to a specific communication that, as an attorney, you are not relieved from the ethical duties imposed upon you to refrain from communicating with persons who are represented by counsel. If in doubt subpoena the person for the deposition.

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