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LAWYERS ROUTINELY ASSERT THE ATTORNEY-CLIENT PRIVILEGE AND the work-product doctrines to protect communications and information from discovery in litigation in both state and federal courts. But despite the fact that the basic Illinois and federal attorney-client privilege rules are virtually identical, there are some notable differences in the way the two jurisdictions apply the rules. Further, the work-product doctrines are not identical in Illinois state and federal courts.

These differences can change the outcome of litigation. This article examines the attorney-client privilege and the work-product doctrines and points out some key areas in which the rules differ in state and federal courts.

The attorney-client privilege

General rule the same in state, federal courts. Illinois state and federal courts apply virtually the same "rule" with respect to the attorney-client privilege. The Illinois Supreme Court's attorney-client privilege rule is as follows:

> [1] Where legal advice of any kind is sought [2] from a lawyer in his or her capacity as a lawyer, [3] the communications relating to that purpose, [4] made in confidence [5] by the client, are protected [6] from disclosure by the client or lawyer, [7] unless the protection is waived.[1]

The seventh circuit applies a virtually identical rule:

> (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 at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived.[2]

1. *Center Partners, Ltd. v. Growth Head GP, LLC*, 2012 IL 113107, ¶ 30.
2. *United States v. Lawless*, 709 F.2d 485, 487 (7th Cir. 1983).

TAKEAWAYS >>

• Despite the fact that the basic Illinois and federal attorney-client privilege rules are virtually identical, there are some notable differences in the way the two jurisdictions apply the rules. Additionally, the work-product doctrines are not identical in Illinois state and federal courts.

• The jurisdictions' attorney-client privilege doctrines differ with respect to how the privilege is applied to corporations. Illinois applies the "control group" test to determine whether a communication within a corporation is privileged, but the federal courts do not.

• There are significant differences between the state and federal work-product rules. Illinois protects only *counsel's* theories, mental impressions, and litigation plans. In federal court, *all* materials prepared for trial are protected, although this protection can be overcome if there is substantial need for production.

Beware the Differences in Illinois and Federal Attorney-Client Privileges, Work-Product Doctrines

There are only a few ways in which Illinois and federal courts apply attorney-client privilege and the work-product doctrine differently, but those differences could be game-changing for your lawsuit. The authors describe how the jurisdictions diverge.

The only apparent difference between the rules is that element six of the federal rule is not included in the state rule. Nonetheless, Illinois recognizes that the attorney-client privilege belongs to the client.[3] Thus, element six of the federal rule also is recognized by Illinois.

In sum, both Illinois and federal courts in Illinois apply the same basic attorney-client privilege. However, the two jurisdictions apply the rule in ways that can result in significantly different protection.

The control group exception for corporate privilege. One significant example is how the jurisdictions apply the privilege differently to corporations. Illinois applies the "control group" test to determine whether a communication within a corporation is privileged, but the federal courts do not.

Illinois first adopted the control group test in *Consolidation Coal Co. v. Bucyrus-Erie Co.*[4] Under the test, lawyers' communications within a corporation are privileged *only* if they are communicating with (1) decision makers and top management or (2) direct advisors to top management and the people the decision makers rely on for opinions and advice.[5] As a result, the control group test does *not* protect communications with those upon whom top management merely relies for information.

Federal courts, in contrast, do not follow the control group test. Instead, they protect communications between counsel and people outside the control group. In *Upjohn Co. v. United States*, the Supreme Court specifically rejected the control group test:

> The control group test...frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation. The attorney's advice will also frequently be more significant to noncontrol group members than to those who officially sanction the advice, and the control group test makes it more difficult to convey full and frank legal advice to [those] who put into effect the client corporation's policy.[6]

In the seventh circuit, corporate communications are privileged if a corporate employee with whom counsel is communicating is performing the duties of his or her

3. See, *e.g.*, *Illinois v. Radojcic*, 2013 IL 114197, ¶ 39.
4. *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103 (1982).
5. *Id.*
6. *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981).

ILLINOIS APPLIES THE "CONTROL GROUP" TEST TO DETERMINE WHETHER A COMMUNICATION WITHIN A CORPORATION IS PRIVILEGED, BUT THE FEDERAL COURTS DO NOT.

employment when communicating with counsel:

> an employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged [1] where the employee makes the communication at the direction of his superiors in the corporation and [2] where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment.[7]

There are cases where the use of the control group test can make a difference. One example is *Archer Daniels Midland Co. v. Koppers Co.*[8] There, following the collapse of a grain storage structure, a senior product engineer prepared a report for in-house counsel regarding design problems with the structure. Only four employees saw the report.

The Illinois Appellate Court held the report was not privileged because the engineer was not top management or someone on whom top management relied for advice. In other words, the report's author was not a member of the corporate control group, so his communications with the corporation's lawyer were not privileged. It seems likely, however, that the report would have been privileged in federal court because the scope of the engineer's employment included preparing it.

Clearly, the differing approaches to the control group test can matter greatly. Admission into evidence of a report like the one at issue in *Archer Daniels* has the potential to be dispositive.

The fiduciary exception to the attorney-client privilege. The fiduciary exception to the attorney-client privilege also differs between state and federal courts. This exception allows a beneficiary of a fiduciary duty to learn of confidential communications between counsel and the person or entity that owes the fiduciary duty. For example, a shareholder may be able to discover confidential communications between corporate counsel and the corporation's board of directors.

There are two primary theories behind the exception. The first is that the fiduciary acts as a proxy client for the beneficiary. Under this logic, the attorney-client relationship is actually with the beneficiary. The second theory is that fiduciaries have a duty of full disclosure to their beneficiaries and should not be able to withhold information from them.

Federal courts generally recognize the fiduciary exception, which was first set forth in *Garner v. Wolfinbarger*.[9] In *In re United States* the court noted that the fiduciary exception "is now well established" among federal circuit courts.[10] Nonetheless, the rule does not apply automatically, but only under certain circumstances.

For example, as applied to stockholder suits, *Garner* held that a stockholder must show why stockholders – to whom corporate directors owe fiduciary duties – should be allowed to defeat the privilege:

> [W]here the corporation is in suit against its stockholders on charges of acting inimically to stockholder interests, protection of those interests as well as those of the corporation and of the public require that the availability of the privilege be subject to the right of the stockholders to show cause why it should not be invoked in the particular instance.[11]

Garner then applied a variety of factors to determine whether good cause had been demonstrated:

- The number of shareholder parties and percentage of stock;
- The "bona fides" of the shareholders;
- The nature of the shareholders' claim and whether it is "obviously colorable";
- The availability of information from other sources;
- Whether the shareholders' claim is of criminal or illegal action;
- Whether communications relate to past or prospective action;
- Whether communications relate to the lawsuit itself;
- The extent to which shareholders are blindly fishing; and

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- Hon. Gino L. DiVito, Brian C. Haussmann, and John M. Fitzgerald, *New Limits on Subject Matter Waiver of Attorney-Client Privilege*, 101 Ill. B.J. 348 (July 2013), https://www.isba.org/ibj/2013/07/newlimitsonsubjectmatterwaiverofatt.
- Andrew N. Plasz, *Waiver of Privilege for Documents Inadvertently Disclosed During Discovery*, 93 Ill. B.J. 126 (Mar. 2005), https://www.isba.org/ibj/2005/03/waiverofprivilegefordocumentsinadve.
- Daniel J. Polatsek, *Attorney-Client Privilege, Corporate Clients and the Control-Group Test*, 91 Ill. B.J. 80 (Feb. 2003), https://www.isba.org/ibj/2003/02/attorneyclientprivilegecorporatecli.

7. *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 491–92 (7th Cir. 1970).
8. *Archer Daniels Midland Co. v. Koppers Co.*, 138 Ill. App. 3d 276 (1st Dist. 1985).
9. *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970).
10. *In re United States*, 590 F.3d 1305, 1311–12 (Fed. Cir. 2009).
11. *Garner*, 430 F.2d at 1103–04.

• The risk of revealing trade secrets or other confidential information.[12]

A court following the *Garner* fiduciary exception is supposed to balance these factors to determine whether the privilege should be enforced or whether a shareholder should be allowed to review privileged matters.

Unlike the federal courts, the Illinois Appellate Court has – on three separate occasions – refused to adopt the fiduciary exception. In *Mueller Industries, Inc. v. Berkman*, the second district held that "Illinois has not yet adopted the fiduciary-duty exception."[13] In *Garvy v. Seyfarth Shaw LLP*, the first district rejected the fiduciary exception and held that "[t]he cases relied on by [the plaintiff] and the circuit court do not persuade us to create new law in Illinois by adopting [the fiduciary exception] here."[14] Finally, in *MDA City Apartments LLC v. DLA Piper LLP*, the first district again considered and rejected the fiduciary exception.[15] Thus, for now at least, the fiduciary exception applies only in federal courts in Illinois.

The Work-Product Doctrine

The general rule. The work-product doctrine was first set forth by the United States Supreme Court in *Hickman v. Taylor.*[16] Although it has been codified in both the Illinois Supreme Court Rules and the Federal Rules of Civil Procedure, the stated rules are quite different.

In Illinois, the work-product doctrine is set forth in Rule 201(b)(2). It provides that "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."[17]

In federal court, the work-product doctrine is set out in Rule 26(b)(3):

> (A) Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if: (i) they are otherwise discoverable under Rule 26(b)(1); and (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means. (B) If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions or legal theories of a party's attorney or other representative concerning the litigation.[18]

Despite the fact that Federal Rule 26(b)(3) does not appear to protect "intangible" things, *Hickman* remains good law and protects intangible work product, i.e., non "documents and tangible things."[19]

Ordinary work product. There are significant differences between the state and federal work-product rules. Illinois protects only *counsel's* theories, mental impressions, and litigation plans. In contrast, in federal court, *all* materials prepared for trial are protected, although it can be overcome if there is substantial need for production.

Federal courts thus give some level of protection to ordinary work product. In Illinois state court, however, "ordinary work product, which is any relevant material generated in preparation for trial which does not disclose conceptual data... is freely discoverable."[20]

Expert reports. The state and federal rules also differ with respect to how they treat draft expert reports. Federal Rule 26(b)(4) has explicit protections:

> (B) *Trial Preparation Protection for Draft Reports or Disclosures.* Rules 26(b)(3)(A) and (B) protect drafts of any reports or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.
>
> (C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses.* Rule 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications: (i) relate to compensation for the expert's study or testimony; (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.[21]

THE ILLINOIS WORK-PRODUCT DOCTRINE PROTECTS ONLY *COUNSEL'S* THEORIES, MENTAL IMPRESSIONS, AND LITIGATION PLANS. IN FEDERAL COURT, *ALL* MATERIALS PREPARED FOR TRIAL ARE PROTECTED

While Rule 26(b)(4) does recognize some exceptions to its protection of communications between counsel and the expert, their exact contours are unclear. For example, *Gerke v. Travelers Casualty Insurance Co. of America* allowed discovery into the extent of an attorney's involvement in drafting a report.[22] Yet *United States Commodity Futures Trading Commission v. Quiddity, Inc.* specifically rejected *Gerke*.[23] Nonetheless, what is clear is that federal courts generally protect draft expert reports.

The Illinois rules neither specifically protect draft expert reports nor call for their disclosure. Moreover, Illinois appellate courts do not appear to have addressed the issue. Consequently, prudence requires that in Illinois courts, practitioners should assume that all communications with experts and draft

12. *Id.* at 1104.
13. *Mueller Industries, Inc. v. Berkman*, 399 Ill. App. 3d 456, 469 (2d Dist. 2010).
14. *Garvy v. Seyfarth Shaw LLP*, 2012 IL App (1st) 110115, ¶ 35.
15. *MDA City Apartments LLC v. DLA Piper LLP*, 2012 IL App (1st) 111047, ¶¶ 16-19.
16. *Hickman v. Taylor*, 329 U.S. 495 (1947).
17. Ill. S.Ct. R. 201(b)(2).
18. Fed. R. Civ. P. 26(b)(3).
19. *In re Cendant Corp. Securities Litigation*, 343 F.3d 658, 662 (3d Cir. 2003).
20. *Waste Management, Inc. v. International Surplus Lines Insurance Co.*, 144 Ill. 2d 178, 196 (1991).
21. Fed. R. Civ. P. 26(b)(4).
22. *Gerke v. Travelers Casualty Insurance Co. of America*, 289 F.R.D. 316 (D. Or. 2013).
23. *United States Commodity Futures Trading Commission v. Quiddity, Inc.*, 301 F.R.D. 348 (N.D. Ill. 2014).

reports are discoverable (at least for *testifying* experts).

In the first place, Illinois has no analog to Fed. R. Civ. P. 26(b)(4)(B) or (C) protecting drafts and communications with experts. Instead, Illinois Supreme Court Rule 213(f)(3) provides that a testifying expert must produce "*any*" reports:

> *Controlled Expert Witnesses*. A "controlled expert witness" is a person giving expert testimony who is the party, the party's current employee, or the party's retained expert. For each controlled expert witness, the party must identify: (i) the subject matter on which the witness will testify; (ii) the conclusions and opinions of the witness and the bases therefor; (iii) the qualifications of the witness; and (iv) *any reports* prepared by the witness about the case.[24]

Presumably "any" reports includes drafts of reports.

Similarly, Illinois Supreme Court Rule 201(b)(3) protects *consulting* experts' work product from production:

> *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 means.[25]

There is no analogous protection for testifying experts' work product. Thus, the implication is that testifying experts' work product is discoverable. In other words, because consultants' work product is explicitly protected, testifying experts' work product is impliedly not protected.

Choice of law

So, which set of rules will be applicable in your case? Pursuant to Illinois Rule of Evidence 501, Illinois privilege law generally applies in state court, even if federal law is applicable:

> Except as otherwise required by the Constitution of the United States, the Constitution of Illinois, or provided by applicable statute or rule prescribed by the Supreme Court, the privilege of a witness... shall be governed by the principles of the common law as they may be interpreted by Illinois courts in the light of reason and experience.[26]

Federal law is different. Federal Rule of Evidence 501 makes federal law applicable to some cases in federal court and state law applicable to others:

> The common law – as interpreted by United States courts in the light of reason and experience – governs a claim of privilege unless any of the following provides otherwise:
>
> - the United States Constitution;
> - a federal statute; or
> - rules prescribed by the Supreme Court.
>
> But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.[27]

Thus, in a diversity case, the law of the state where the court sits applies.[28] In a non-diversity case where federal substantive law applies, federal privilege law applies as well.

But it's not always that simple. For instance, some federal claims, such as those under the Federal Tort Claims Act, borrow state substantive law. In those instances, federal privilege law may apply.[29] And the situation becomes even more complicated if there are both federal claims and pendant state claims at issue in one case. In such situations, some courts have gone so far as to suggest the need for two trials. As one court put it:

> Where the evidence sought from the witness is relevant to both federal and state claims, federal law of privilege controls…. If it becomes apparent that state and federal privileges are actually different, the state claim might have to be tried separately.[30]

Thankfully, the situation is simpler with respect to the work-product doctrine. Illinois courts follow the Illinois rule, and federal courts follow the federal rule, even in diversity cases.[31]

Practical considerations

The differences in the state and federal rules clearly have practical implications. For example, as *Archer Daniels* makes clear, in corporate investigations the scope of the privilege could vary depending upon whether a federal or state court is deciding the privilege question.

Of course, when conducting an investigation for a corporate client, counsel will not know whether the circumstances being investigated will lead to litigation and, if so, whether it will be in state or federal court. As a result, it's best to presume that the control group test applies and to restrict sensitive communications to the individuals in the corporation's control group.

Also, if litigation is imminent, it's important to consider how and whether the control group and fiduciary exceptions to the privilege rules apply when filing suit or deciding whether to remove a case. Similarly, the rules applicable to expert reports should lead lawyers to consider how they communicate with experts and how expert reports will be drafted.

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24. Ill. S.Ct. R. 213(f)(3) (emphasis added).
25. Ill. S.Ct. R. 201(b)(3).
26. Ill. R. Evid. 501.
27. Fed. R. Evid. 501.
28. *United States Surety Co. v. Stevens Family L.P.*, 2014 WL 902893 (N.D. Ill. Mar. 7, 2014).
29. See *Tucker v. United States*, 143 F. Supp. 2d 619, 621–24 (S.D. W.V. 2001) (applying federal law but recognizing conflicting authority).
30. *Rager v. Boise Cascade Corp.*, 1988 WL 84724, at *1 (N.D. Ill. Aug. 5, 1988).
31. *Abbott Laboratories v. Alpha Therapeutic Corp.*, 200 F.R.D. 401, 404–05 (N.D. Ill. 2001).