



In-House Lawyers' Communications:

Ethical and Professional Considerations

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Agenda

- I.** The Duty of Confidentiality
- II.** The Attorney-Client Privilege
- III.** The Work Product Doctrine
- IV.** Special Concerns for In-House Lawyers
- V.** Some Best Practices

Confidentiality of Information

Ill. Sup. Ct. R. 1.6

Rule 1.6 - Confidentiality of Information

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

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* * *

(e) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

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

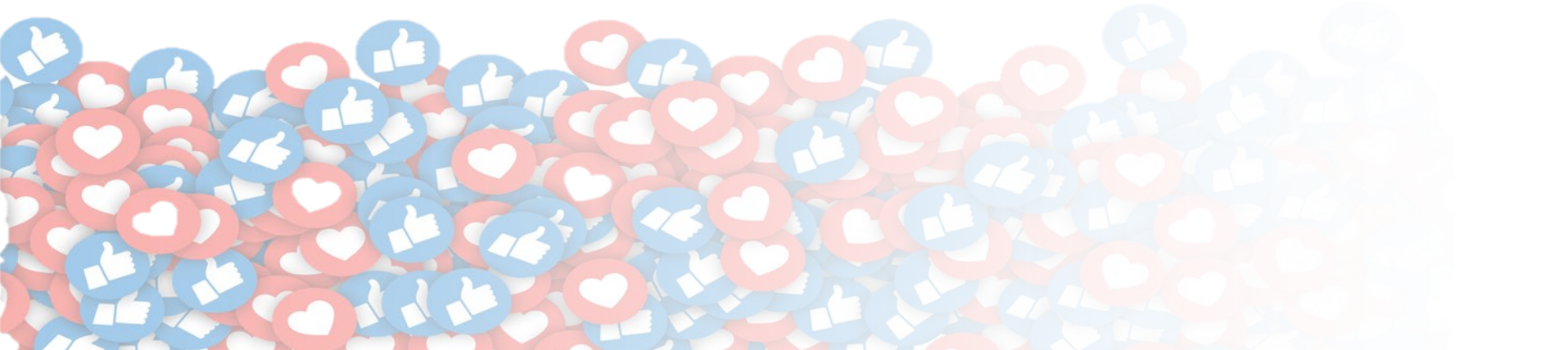
(d) Information received by a lawyer participating in a meeting or proceeding with a trained intervener or panel of trained interveners of an approved lawyers' assistance program, or in an intermediary program approved by a circuit court in which nondisciplinary complaints against judges or lawyers can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

(e) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.



Not Limited to Privileged Communications

- Broader than what is learned from the client
- Applies to all forms of public commentary and matters in the public record
- Fiduciary duty of confidentiality



Consequences of Breaching Confidentiality?



- **Suspension**
- **Other Attorney Discipline**
- **Damages**

Rule 1.6 Illinois Rules of Professional Conduct

Rule 1.6 - Confidentiality of Information Ill. Sup. Ct. R. 1.6

Adopted July 1, 2009, effective January 1, 2010, amended Oct. 13, 2015, eff. Jan. 1, 2016.

Comment [1]. This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients. [2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld. [3] The principle of client-lawyer confidentiality is given effect by related bodies of law, the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to disclose relevant information to a court. The rule of client-lawyer confidentiality applies in situations other

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics.

lawyer's disclosure adverse to a client. [4] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (c) recognizes the overriding value of life and physical integrity and requires disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows from information relating to a representation that a client or other person has accidentally discharged toxic waste into a town's water main must reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims. [6.1] Paragraph (b)(1) preserves the policy of the 1950 Illinois Code of Professional Responsibility, and the 1990 Illinois Rules of Professional Conduct that permitted a lawyer to reveal the intention of a client to commit a crime



II. The Attorney-Client Privilege

- A communication
- Between lawyer and client
- For purposes of legal advice
- Made and kept in confidence

Who Is the In-House Lawyer's Client?

- Majority rule – the *Upjohn* test
- Illinois – the control group test

Who Is the In-House Lawyer's Client?

Upjohn factors – whether communication:

- Made for **purpose of legal advice**
- Contained **information needed** by counsel
- Concerned matters within **scope of duties**
- Made by employee **aware of legal purpose**
- Kept **confidential**

Who Is the In-House Lawyer's Client?

Beware – whether attorney-client relationship is formed depends on *client's reasonable belief*

Illinois Control Group Test



Top Management



Final Decision Makers



Necessary Advisors



~~Information Suppliers~~

Substance of Attorney-Client Communication

- Legal advice must predominate in communication
 - Is the advice the result of the lawyer's skill and training?

- The privilege protects legal advice, not underlying facts

What Qualifies as “Confidential”?

- No third parties involved in communication (with exceptions)
- Communicator intended the communication to be confidential
- Recipient understood that communication should be kept confidential
- Both parties, in fact, maintained confidentiality

III. The Work Product Doctrine

- Material prepared by or for a party
- In anticipation of litigation
- Made and kept in confidence

What's Meant by "by or for a Party"?

- Need not be prepared by attorney
 - Party
 - Expert
 - Private investigator
 - Accountant
 - Employee

What's Meant by "in Anticipation of Litigation"?

- "Because"
 - Lawsuit need not be filed
 - BUT: Remote chance of litigation not enough
 - Government investigation

- Investigations
 - Instigated by in-house counsel, outside counsel involved

What “Material” Is Protected?

Fact vs. Opinion

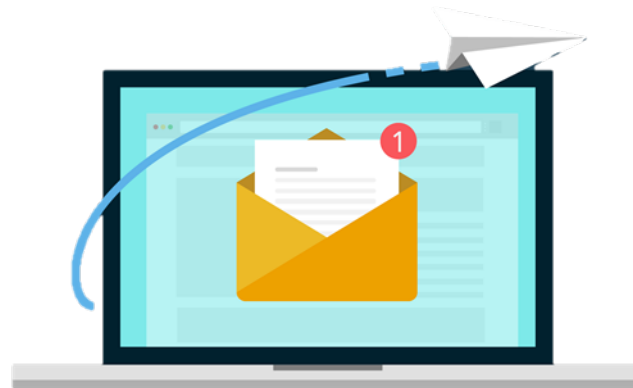


Third-Party Consultants

- Communications are privileged if:
 - *The purpose is to give or receive legal advice*
 - *Other requirements for privilege are satisfied*

Choice of Law Issues

Forum State v. Most Significant Relationship



IV. Special Concerns for In-House Lawyers

Common Interest Privilege

- Common interest agreement, including confidentiality
- Communications further the common interest shared by the parties to defeat a litigation opponent
- Communications occur with counsel
- A special relationship and privity of contract

IV. Special Concerns for In-House Lawyers

Employee Interviews

- Investigation led and controlled by counsel
- Identify who has the privilege
- Limit interview attendees
- *Upjohn* warnings
- Document interview
- Interview memos should include preliminary statement
- Mark confidential, maintain as confidential

IV. Special Concerns for In-House Lawyers

Reports of Investigation

- Memorialize that investigation is for the purpose of rendering legal advice
- Maintain confidentiality
- Illinois vs. Federal considerations
- Limit dissemination of reports, consider oral summary report

Regulatory Disclosures

- Risk of absolute waiver
- Confidentiality agreements can help
- Consider oral, hypothetical proffers
- Prepare factual summary document for government

Communications With Counterparties

Rule 4.2 Illinois Rules of Professional Conduct

Communication with Person Represented by Counsel

- Prohibition against communication with represented parties
- Applies to represented organizations



V. Some Best Practices

- Advise colleagues that communications may not be privileged
- Think through the best means of communicating sensitive information
- When communicating sensitive information in writing, consider involving outside counsel where appropriate
- Consider subject lines carefully



V. Some Best Practices

- Only include need-to-know people on emails
- Think about your attachments, which may not be independently privileged
- Avoid inflammatory language
- Forward emails instead of relying on BCC to avoid “reply all” problems



V. Some Best Practices

Privileged & Confidential Label

- Reinforces that counsel believed legal advice was being given
- Signals caution before forwarding
- Could help privilege reviewers identify privileged documents



BUT

- Overuse or underuse could make it more difficult to claim privilege
- Could be misleading and give false sense of security

Questions?

For questions, please contact us at:

events@mololamken.com

Appendix

▪ Confidentiality of Information

- *In re Nelson*, 02 CH 12 (Hearing Bd. Sept. 15, 2003)
- *In re O'Connor*, 01 CH 96 (Hearing Bd. Jan. 21, 2004)
- *In re Teplitz*, 97 CH 94 (Review Bd. Aug. 11, 1999)

▪ Attorney-Client Privilege/In-House Counsel's Client

- *Acosta v. Target Corp.*, 281 F.R.D. 314 (N.D. Ill. 2012)
- *Archer Daniels Midland Co. v. Koppers Co., Inc.*, 138 Ill. App. 3d 276 (1st Dist. 1985)
- *Consol. Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103 (1982)
- *Hayes v. Burlington N. & Santa Fe Ry. Co.*, 323 Ill. App. 3d 474 (1st Dist. 2001)
- *Moore v. Bd. of Trs. of Ill. Cmty. Coll.*, 2010 WL 4703859 (N.D. Ill. Nov. 8, 2010)
- *Pietro v. Marriott Senior Living Servs., Inc.*, 348 Ill. App. 3d 541 (1st Dist. 2004)
- *Roth v. Aon Corp.*, 254 F.R.D. 538 (N.D. Ill. 2009)
- *Upjohn v. United States*, 449 U.S. 383 (1981)
- *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978)

Appendix

▪ The Work Product Doctrine

- *Consol. Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103 (1982)
- *Daily v. Greensfelder, Hemker & Gale, P.C.*, 2018 IL App (5th) 150384
- *Dalen v. Ozite Corp.*, 230 Ill. App. 3d 18 (2d Dist. 1992)
- *Doe v. Twp. High Sch. Dist. 211*, 2015 IL App (1st) 140857
- *Huebner v. Family Video Movie Club, Inc.*, 2019 IL App (5th) 180215-U
- *Maune Raichle Hartley French & Mudd, LLC v. 3M Co.*, 2016 IL App (5th) 150235-U
- *Mlynarski v. Rush Presbyterian-St. Luke's Med. Ctr.*, 213 Ill. App. 3d 427 (1st Dist. 1991)
- *Sakosko v. Mem'l Hosp.*, 167 Ill. App. 3d 842 (5th Dist. 1988)
- *Waste Mgmt., Inc. v. Int'l Surplus Lines Ins. Co.*, 144 Ill. 2d 178 (1991)

▪ Third-Party Consultants and Investigations

- *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, 244 F.R.D. 412, 420 (N.D. Ill. 2006)
- *Schlicksup v. Caterpillar, Inc.*, No. 09-CV-1208, 2011 WL 4007670 (C.D. Ill. Sept. 9, 2011)
- *Sullivan v. Alcatel-Lucent USA, Inc.*, 2013 WL 2637936 (N.D. Ill. June 12, 2013)
- *United States v. Ackert*, 169 F.3d 136 (2d Cir. 1999)
- *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961)
- *United States ex rel. Robinson v. Northrup Grumman Corp.*, 2003 WL 21439871 (N.D. Ill. June 20, 2003)

Appendix

- **Choice of Law Issues**

- Restatement (Second) of Conflict of Laws §139 (1971)

- **Common Interest Privilege**

- *Dexia Credit Local v. Rogan*, 231 F.R.D. 268 (N.D. Ill. 2004)
- *Robert R. McCormick Found. v. Arthur J. Gallagher Risk Mgmt. Servs., Inc.*, 2019 IL 123936
- *Selby v. O’Dea*, 2017 IL App (1st) 151572
- *Waste Mgmt., Inc. v. Int’l Surplus Lines Ins. Co.*, 144 Ill. 2d 178 (1991)

- **Communications with Counterparties**

- Ill. R. Prof’l Conduct (2010) R. 4.2 (eff. July 1, 2013)



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