The Limits on Common Law Privileges and Self-Critical Analyses

Jeffrey A. Parness

Professor Emeritus, Northern Illinois University College of Law

In Harris v. One Hope United, Inc., 2013 IL App (1st) 131152, heeding the Supreme Court's general admonitions the Appellate Court ruled that any "self-critical analysis privilege" is a "matter best left to the legislature." Yet, it also recognized that under Illinois Evidence Rule 501, "evidentiary privileges" shall be "governed by the principles of common law as they may be interpreted by Illinois courts in the light of reason and experience." Common law interpretations can both extend existing privileges and establish new privileges. The Harris court did not elaborate on any differences between General Assembly deference in privilege extension or establishment.

The Supreme Court's general admonitions employed in Harris originated in People v. Sanders, 99 Ill. 2d 262, 270 (1983) and People ex rel. Birkett v. City of Chicago, 184 Ill. 2d 521, 527 (1998). In Sanders, the court declined to introduce a common law "privilege . . . applicable to communications between parents and children." Any such privilege would have to be founded on "broader social goals . . . distantly related to the judiciary," where "a balancing of public policies . . . should be left to the legislature." The court noted the legislature had already undertaken such a balancing in codifying interspousal communications privileges, but had shown a "lack of interest" in any privilege establishments for other interfamily communications.

In Birkett, the court deemed any "deliberative process privilege" that would "protect certain advice and discussions between government officials concerning formulation of governmental decisions and policy" was "best left to the legislature." Yet it did so only while
recognizing that although new privilege establishment is "presumptively a legislative task," such establishment can occur in "rare instances" where there are (1) confidential communications; (2) confidentiality is essential to "satisfactory maintenance of the relation between parties;" (3) the relation ought to be "sedulously fostered;" and (4) the harm caused the relation by disclosure would be greater than the benefit gained in litigation via "correct disposal." The Birkett court found no "rare" instance before it. These rare case conditions had been set out earlier in Illinois Educational Labor Relations Board v. Homer Community Consolidated School Dist. No. 208, 132 Ill.2d 29, 35 (1989).

The General Assembly itself has also recognized the rebuttability of the presumption favoring statutes in privilege extension and establishment. In the Code of Civil Procedure, where there are seven explicit privileged communications, 735 ILCS 5/8-801 et seq., the legislature has said the Supreme Court has the power to make procedural rules "supplementary to, but not inconsistent with" the Code.

The presumption rebuttal seemingly operates differently in privilege extension and certain privilege establishment settings. In People v. Trzeciak, 2013 IL 114491, the court recently extended the statutory privilege for spousal communications in criminal cases, 725 ILCS 5/115-16. An earlier judicial extension has the privilege applying only to confidential communications. The extension in Trzeciak encompasses private exchanges "induced by" the marital relationship, meaning "prompted by the affection, confidence and loyalty engendered" by the relationship. This extension was grounded on commentaries and precedents outside of Illinois, much to the chagrin of Justice Theis in a special concurrence. This extension was undertaken only after the Trzeciak court deemed the "purpose" of the statutory privilege was
“derived from common law.” There was no mention by the court of the presumptive role of the legislature or of “rare” circumstances.

So, should the Harris court have found it had the authority to recognize a self-critical analysis privilege? Its use would proceed differently if there was to be a privilege extension or a new privilege establishment, as illustrated in Trzeciak. The Harris court deemed a self-critical analysis privilege could not extend from the Medical Studies Act. It suggested any newly established privilege would have no roots in Illinois common law, citing People v. Campobello, 348 Ill. App. 3d 619 (2d Dist. 2004) and Rockford Benevolent & Protective Assn. v. Morrissey, 398 Ill. App. 3d 145 (2d Dist. 2010). The Harris court found the privilege “had its genesis in a medical malpractice case” in a federal district court, Bredice v. Doctors Hospital, Inc. 50 F.R.D. 249 (D.D.C. 1970). The Harris court never considered whether it had before it a “rare” instance supporting a new privilege establishment.

In Campobello the court failed to recognize a church’s self-critical analysis privilege for “personnel records regarding abuse which its priests allegedly committed against minors.” These records seem quite different than the Bredice records of hospital staff meetings periodically convened to review earlier, not current, patient care. In Campobello, the records were not only sought for use in a criminal sexual assault prosecution against a particular priest, but were assembled in order for the church to determine whether the priest under investigation “should remain employed by the Church or should at least be removed from active ministry.” In Bredice, any meeting had as its sole objective “the improvement in the available care and treatment” of hospital patients, and was chiefly attended by doctors and medical students who were not involved in the earlier care under review.
In Morrissey, city officials objected on self-critical analysis grounds to releasing certain information sought under the Illinois Freedom of Information Act. The requested information involved a college class’s anonymous survey, requested by the city, of city police officers; police department civilian employees; and, community residents. The survey was prompted by the city in order to assess the police department’s performance. The objection was overruled not only because “courts refer the creation and expansion of privileges to the legislative arena,” but also because the court should not act on a privilege not adopted by the legislature in FOIA as one of the many exemptions that the legislatures did adopt.

The Harris court refused to recognize the self-critical analysis privilege for a report undertaken by a state-affiliated children and family services organization that reviewed the services it provided a particular child when the public guardian, on behalf of the child who died while in her mother’s care, sued the organization and one of its agents. The report was initiated by the organization’s “continuous quality review department.” The refusal was based on the court’s explicit unwillingness to extend the Medical Studies Act and implicit unwillingness to establish a new privilege having no roots in common law.

Given the Supreme Court’s admonitions in Sanders and Birkett about how privileges “work against the truthseeking function of legal proceedings,” seemingly after Harris any new privileges should only be extended judicially from existing legislation when extensions further statutory goals and have deep roots in common law, as in Trzeciak. Seemingly, as well, new privileges should only be established in precedents in those “rare instances” where there is little or no benefit gained in “correct [judicial] disposal” since the information in the protected communications can be obtained from other sources, since protected confidential communications should be “sedulously fostered,” and since the privilege has some roots in
common law. Finally, seemingly there is somewhat broader opportunity for new privilege establishment, or new statutory privilege extension, via court rule, rather than precedent. The General Assembly expressly recognizes in the Code that new rules can be “supplementary to, but not inconsistent” with legislation, 735 ILCS 5/1-104, while the Supreme Court recognizes, in Rule 1, that court rules only yield to inconsistent statutes when legislation regulates “the procedure in a particular kind of action” outside the Civil Practice Law (Article II of the Code). Thus new written privilege rules are chiefly appropriate for common law actions. Rulemaking, compared to adjudicating, presents significant opportunities for General Assembly input as the process for rule creation and rule amendment are substantially open and accessible, per Supreme Court Rule 3.

For now, all those undertaking self-critical analyses, even confidentially, cannot assume inevitable privileged status. Such analyses, however often must proceed even after Harris, however, given business and legal duties. So, to make such an analysis more likely privileged, it should be undertaken confidentially under the direction of lawyers and their agents; include lawyers mental impressions and the like regarding pending or future litigation; and, have such litigation preparation as a significant- if not primary or exclusive-objective.