Illinois Lawyer Investigations of Current Client Concerns

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This Article examines the various issues surrounding attorney-client communication privileges, with a focus on intra law firm communication protections and how current trends in case law will impact Illinois law.

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I. INTRODUCTION

Attorney-client communication privileges generally recognize that sound legal advice and advocacy is dependent “upon the lawyer's being fully informed by the client” and with the client being fully informed by the lawyer. Thus, these laws encourage full and frank communication between attorneys and their clients because anything but full disclosure by the client limits a lawyer’s ability to advise, and anything but full disclosure by the lawyer limits a client’s ability to make an informed decision about legal advice. Such immunities promote truthful and candid communications between clients and their lawyers “by removing the fear of compelled disclosure of information.”

Immunity laws also help to insure that lawyers are fully informed of the relevant facts. Thus, these laws protect at least some factual investigations by lawyers occurring outside of attorney-client communications. Protection is typically provided by the work product doctrine.

But what happens when a lawyer representing a current client effectively becomes a client herself by seeking legal advice or by investigating facts regarding the quality of her work which is prompted by a current client’s concerns? Can the lawyer expect her inquiries to be immunized from compelled disclosure if the current client becomes a former client who sues for malpractice? Generally, the answer has been yes when the lawyer consults outside counsel for legal advice. But what if the lawyer seeks counsel from another lawyer within her own firm? Do the conflicting interests of the firm and its current client compel disclosure notwithstanding the attorney-client communication privilege? While the extent of protection of such intra-firm communications on legal matters varies, there is a growing trend in support. This Article reviews this trend as it might surface in Illinois. As well, it will review immunities of other legal, as well as factual, investigations by lawyers prompted by current client concerns.

The Article first explores the early federal precedents on the attorney-client communication privilege relevant to intra law firm communications regarding a firm member’s questioned representation of a current client, as well as more recent state court rulings, including the Garvy precedent in Illinois. Upon exploration, it concludes that an intra-firm attorney-client communication privilege should continue to be recognized in Illinois. The

3. MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(4) & cmt. 9 (AM. BAR ASS’N 2013) (“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.”).
Article then goes beyond recent precedents by exploring other possible immunized investigative work by questioned lawyers. It suggests that Illinois attorney-client communication and work product immunities will likely differ in significant ways from the immunities afforded in other states.

II. EARLY FEDERAL CASES

Increasingly, law firms have in-house counsel who advise firm members regarding potential civil liability to clients and who promote firm compliance with professional conduct norms. The notion that the attorney-client communication privilege should protect this advice and advance this compliance is not new. It arose from an analogy drawn between a law firm and a corporation. Law firms, like corporations, want the benefits of employing in-house advisors. Benefits include decreased costs, quicker access to advice, and informed decision making. However, until recently, there were no clear precedents on whether intra law firm communications would be privileged. The early cases, mostly federal, were, on the whole, not favorable.

A. DENYING PROTECTIONS FOR INTRA LAW FIRM COMMUNICATIONS

Most federal cases denying the attorney-client privilege for intra-firm communications did so on some variant of a fiduciary duty analysis or a current client exception. The fiduciary duty analysis arose from trust law—operating on the theory that the beneficiary of the trust is the ultimate beneficiary of any legal advice the trustee receives related to administration of the trust—and therefore such advice cannot be privileged against the bene-

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7. Upjohn v. United States, 449 U.S. 383, 390-92 (1981). In *Upjohn*, the Court addressed the issue of privilege in the corporate setting, holding that privilege does attach to conversations between corporate employees and the corporation’s in-house counsel when the communication is made for the purpose of obtaining legal advice. *Id.* at 403.

The current client exception holds that an attorney’s fiduciary duty to her current client trumps any privilege for the attorney. Recent state court cases and scholarly work have criticized the early federal cases.

One illustrative federal case is Koen Book Distributors v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo. There, a law firm was informed by its clients that the clients were considering a malpractice action. The firm nevertheless continued to represent the clients. Before the clients brought a malpractice action, the firm hired outside counsel to evaluate its representation. The lawyers employed by the firm who had performed the questioned work for the clients also sought advice from another attorney within the firm.

The intra-firm communications had generated some documents which were sought by the former clients in the malpractice case. The court rejected the law firm’s assertion of privilege, holding that “the law firm was in a conflict of interest relationship with its clients” because “the firm owed a fiduciary duty to plaintiffs while they remained clients” and that “this duty is paramount” to the firm’s own interests.

The court suggested that when a law firm found itself in such an ‘unenviable situation,’ it should either immediately request to withdraw as counsel or seek the client’s consent to continue representation after a full disclosure.

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9. Mueller Indus., Inc. v. Berkman, 927 N.E.2d 794, 807 (Ill. App. Ct. 2d Dist. 2010). The federal courts often misapplied the fiduciary duty exception. The Mueller court stated, “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.” Id. For an example of a case extending the fiduciary duty exception outside the bounds of trust law to the attorney-client relationship, see Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970).

10. See, e.g., Bank Brussels Lambert v. Credit Lyonnais (Suisse), 220 F. Supp. 2d 283, 287 (S.D.N.Y. 2002) (“While the privilege will be applicable as against all the world, it cannot be maintained against [a current client].”)


13. Id. at 284. The court did not specifically address whether such communications would be discoverable.

14. Id.

15. Id.

16. Id. at 286.


18. Id.; King & Parness, supra note 8, at 9.
The law firm in Koen seemingly would even have been ordered to disclose communications made to outside counsel before the firm’s representation of the clients ended. The court stated that “because plaintiffs may have retained other counsel does not remove the conflict so long as defendants also continued to represent them.”

B. AFFORDING PROTECTIONS FOR INTRA LAW FIRM COMMUNICATIONS

A few early federal cases protected the attorney-client privilege for intra firm communications. In one illustrative case, Hertzog, Calamari & Gleason v. The Prudential Insurance Company of America, the court stated it is “well settled that the attorney-client privilege applies to communications between the corporation and its attorneys,” with the privilege attaching to “communications with in-house counsel if the individual in question is acting as an attorney, rather than as a participant in the underlying events.” The court concluded that “[n]o principled reason appears for denying a comparable attorney-client privilege to a law partnership which elects to use a partner or associate as counsel of record in a litigated matter.”

III. GARVY

In Garvy v. Seyfarth Shaw LLP, an Illinois court first recognized a privilege for intra law firm communications. There, a law firm was sued by its former client, Garvy. The firm had advised Garvy regarding certain legal issues, which Garvy alleged led to a suit in chancery against Garvy by corporate shareholders. Garvy asked the firm to defend him in that lawsuit, though the firm anticipated being added as a defendant. As directed

19. Koen Book Distrib., 212 F.R.D. at 286. In a number of cases, either the client or the client’s new counsel determined it was in the client’s best interest for the firm, though conflicted, to continue representation. This makes sense, especially where the firm has been handling the case for a long time and is intimately familiar with the client’s interests, which can be well-pursued despite the conflict. See, e.g., RFF Family Partnership, LP v. Burns & Levinson, LLP, 991 N.E. 2d 1066, 1068 (Mass. 2013); Garvy v. Seyfarth Shaw LLP, 966 N.E.2d 523, 529 (Ill. App. Ct. 1st Dist. 2012).
21. Id.
23. Id. at 526.
24. Id. at 526-27.
25. Id. at 527.
26. Id. at 528.
by in-house counsel, the firm sent Garvy a letter detailing extensively how the chancery suit could unfold and making it clear that their interests could diverge.27 The letter advised that before Garvy opted for the firm’s continuing representation in chancery, Garvy should “seek independent counsel regarding the import of this consent.”28 Although Garvy never signed a letter formally acknowledging consent, the firm continued to represent Garvy in chancery while Garvy separately pursued the firm for malpractice.29 Garvy’s malpractice attorney said in a letter that it was his understanding that Garvy was satisfied with the law firm’s work in chancery and that Garvy wished to proceed with its continuing representation.30

Subsequently, the firm retained outside counsel who formally requested a waiver from Garvy of any conflict between him and the firm.31 While no waiver was ever provided, Garvy insisted throughout that the firm’s withdrawal from the chancery suit would be detrimental to him and inconsistent with the firm’s assurance of its continuing commitment.32 When settlement could not be reached in chancery, the firm withdrew as Garvy’s counsel and Garvy sued the firm.33

During discovery in Garvy’s malpractice suit, Garvy sought the firm’s internal and external communications related to its representation of him.34 The firm asserted privilege.35

Garvy’s principal argument was that the attorney-client privilege did not apply because the firm continued to represent Garvy while seeking legal advice regarding such representation, and, as such, owed to Garvy a continuing fiduciary duty.36 The appeals court found that even though the fiduciary duty exception was adopted in Illinois, it would not help Garvy.37 The fiduciary duty exception is a concept from trust law which holds that the beneficiary of a trust owns the privilege of advice rendered by an attorney to the trustee relating to

28. Id.
29. Id. at 529.
30. Id.
31. Id. at 529.
33. Id.
34. Id. at 530.
35. Id.
36. Id. at 534. The court found Garvy’s actions constituted a waiver: “Garvy cannot have it both ways. He cannot insist that Seyfarth continue to represent him in the chancery litigation while he has malpractice claims pending against Seyfarth, but then use that continued representation to insist that Seyfarth produce all documents related to legal advice sought in relation to the malpractice claims generated during that time.” Garvy v. Seyfarth LLP, 966 N.E.2d 523, 537 (Ill. App. Ct. 1st Dist. 2012).
37. Id. at 535.
the administration of the trust. The Garvy court noted, however, that the fiduciary duty exception does not apply to communications regarding the personal liability of the fiduciary, or to communications in anticipation of litigation with the fiduciary.

The Garvy court did note that it would not apply any fiduciary duty analysis where the legal advice sought by the fiduciary was related to an adversarial proceeding involving the fiduciary and the beneficiary. It cited to U.S. Supreme Court precedent where it was important “whether there were any adversarial proceedings pending between the fiduciary and the beneficiary at the time the legal advice was sought.” The Garvy court declared:

This factor was important because, if adversarial proceedings were pending, it would indicate that the fiduciary was seeking legal advice in a personal rather than a fiduciary capacity, and the exception would not apply . . . Therefore, even if Illinois did recognize the fiduciary-duty exception, it clearly would not apply here where Seyfarth [the law firm] sought legal advice in connection with Garvy’s legal malpractice claims against it, and not in its fiduciary capacity as Garvy’s counsel in the chancery litigation.

This analysis makes clear that the fiduciary duty exception does not apply where a law firm attorney seeks legal advice regarding her representation of a current client regardless of whether that advice comes from in-house counsel or outside counsel.

Garvy also argued that the firm could not have had any expectation of confidentiality regarding its communications with in-house counsel due to its professional responsibility disclosure requirements. The relevant rule, however, stated that a “lawyer’s confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer’s personal responsibility to comply

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40. Id. at 536 (citing United States v. Jicarilla Apache Nation, 13 S. Ct. 2313 (2011)).
41. Id.
42. Id.
43. Garvy, 966 N.E.2d at 538 (referring to ILL. RULES OF PROF’L CONDUCT r. 1.4(a)(3) and 1.7(2010)).
with these Rules.” The Garvy court further noted that the rules permit lawyers “to make confidential reports of ethical issues to designated firm counsel.”

Finally, as to both in-house and outside counsel materials outside of any attorney-client communication privilege, the firm argued there was opinion work product protection. Recognizing that opinion work product protection is often “broader” than attorney-client communication protection, the Garvy court sustained the firm’s argument because Garvy had not shown the “impossibility” of obtaining “similar information from other sources.” The court recognized that a work product privilege may not operate for the firm’s work in the chancery case (where Garvy was the firm’s client).

IV. STATE CASES SINCE GARVY

A. RFF FAMILY PARTNERSHIP

In the first state high court case to recognize an intra law firm privilege, the Massachusetts Supreme Court delineated these specific requirements:

(1) the law firm has designated an attorney or attorneys within the firm to represent the firm as in-house counsel,
(2) the in-house counsel has not performed any work on the client matter at issue or a substantially related matter, (3) the time spent by the attorneys in these communications with in-house counsel is not billed to a client, and (4) the communications are made in confidence and kept confidential.

In the case, the client, RFF, argued that while often intra law firm communications may otherwise be privileged, here they were not as RFF was a current client. RFF urged the firm had neither withdrawn as counsel

44. MODEL RULES OF PROF’L CONDUCT r. 1.6(b)(4) cmt. 9 (AM. BAR ASS’N 2013).
45. Garvy, 966 N.E.2d at 538.
46. Id. at 539.
47. Id.
49. Id.
nor obtained informed consent from RFF regarding a potential conflict.\textsuperscript{51} RFF relied upon the fiduciary duty that a law firm owes its clients.\textsuperscript{52}

The court compared a law firm’s in-house counsel to the in-house counsel of a corporation or a governmental entity, where there is a privilege for consultations between employees and in-house counsel.\textsuperscript{53} The court noted that “a large and increasing number of law firms have appointed one or more attorneys within the firm to serve as in-house or ethical counsel.”\textsuperscript{54} and that firms are doing so under the guidance of the American Bar Association (ABA) Model Rules of Professional Conduct.\textsuperscript{55} In-house counsel was said to serve a valuable purpose.\textsuperscript{56}

In answering RFF’s claim regarding the prohibition on a law firm from representing a client whose interests are adverse, the court ruled that solicitation of legal advice from in-house counsel does not create an inherent conflict of interest.\textsuperscript{57} It observed that such advice-seeking complies with ethical obligations to the client.\textsuperscript{58} Clients were said to benefit when their representing attorneys are well informed, able to rectify any mistakes, and inform clients of any errors or conflicts of interest.\textsuperscript{59} Since a law firm is similar to a corporation and a government entity, the court found that a privilege for a law firm was appropriate.\textsuperscript{60}

As to fiduciary duty, the court found the exception did not apply to trustees seeking legal advice at their own expense regarding personal liability, even when the advice related to the trustee’s handling of the trust.\textsuperscript{61} “Such an exception would incentivize law firms to act in one of several ways, none of which were beneficial to clients. A firm could proceed with in-house consultations knowing that they will not be privileged from the client, prompting the consultations to be ill-informed and less than candid.”\textsuperscript{62} Alternatively, the firm could not seek counsel, leading to uninformed legal representation.\textsuperscript{63} A firm could also immediately seek a with-

\begin{itemize}
\item \textsuperscript{51} \textit{Id.} at 1070.
\item \textsuperscript{52} \textit{Id.} at 1066.
\item \textsuperscript{53} \textit{Id.} at 1071.
\item \textsuperscript{54} \textit{Id.}
\item \textsuperscript{55} RFF Family Partnership, LP v. Burns & Levinson, LLP, 991 N.E.2d 1066, 1071 (Mass. 2013) (referring to MODEL RULES OF PROF’L CONDUCT r. 5.1 (AM. BAR ASS’N 2013)).
\item \textsuperscript{56} \textit{Id.} at 1072 (especially in promoting ethics compliance).
\item \textsuperscript{57} \textit{Id.} at 1072-73.
\item \textsuperscript{58} \textit{Id.} at 1073.
\item \textsuperscript{59} \textit{Id.} at 1072. \textit{See also} Chambliss, supra note 5, at 1730.
\item \textsuperscript{60} RFF Family Partnership, LP v. Burns & Levinson, LLP, 991 N.E.2d 1066, 1080 (Mass. 2013).
\item \textsuperscript{61} \textit{Id.} at 1075.
\item \textsuperscript{62} \textit{Id.} at 1074; King & Parness, supra note 8, at 24.
\item \textsuperscript{63} \textit{RFF}, 991 N.E.2d at 1074.
\end{itemize}
drawal, thereby protecting its communications with in-house counsel. But this would often be detrimental to the client, leaving the client without representation. Of course, while a firm could always seek a waiver from the client, such a waiver is not guaranteed. A waiver request could also adversely affect the relationship between the firm and the client, especially where there is later determined to be no reason for concern about the law firm’s past work.

A privilege was found consistent with a law firm’s duty to keep its clients fully informed. If an internal investigation leads to a finding of a conflict of interest or the commission of some wrongdoing, the information would not be kept from the client. The client would be informed, with either a waiver or law firm withdrawal following.

B. ST. SIMONS WATERFRONT

“The day after the RFF was decided, the Georgia Supreme Court upheld the intra-firm attorney-client communication privilege in St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.” Several attorneys from a law firm representing St. Simons Waterfront (SSW) in the pre-sale of condominiums were informed by SSW that several of SSW’s customers had sought to rescind the pre-sale contracts drafted by firm attorneys. The attorneys representing SSW promptly informed the firm’s in-house general counsel, suspecting that SSW would seek to hold the firm liable. The firm’s in-house counsel discussed the circumstances with the representing attorneys and sought advice from outside counsel. SSW subsequently retained another law firm to deal with its customers seeking rescission, as well as to pursue a malpractice action. The new law firm re-

64. Id.
66. RFF, 991 N.E.2d at 1069. See also Garvy, 966 N.E.2d at 529. In both cases, a law firm questioned by a client was asked to continue representation until the matter concluded. In the cases independent counsel also found continued representation would be in the client’s best interest.
67. See, e.g., Garvy, 966 N.E.2d at 529 (law firm informed client and sought consent; client requested that representation continue, but did not sign the waiver).
68. RFF, 991 N.E.2d at 1076.
69. Id. at 1075.
70. King & Parness, supra note 8, at 27.
72. Id.
73. Id.
74. Id.
quested that the former firm continue to represent SSW in any ongoing closings, to which the firm agreed.\textsuperscript{75}

“SSW filed suit after representation ended. During discovery, SSW sought communications between both the former firm’s in-house and outside counsel and the representing attorneys.”\textsuperscript{76} At trial, the intra-firm communications were ordered disclosed, but the communications with outside counsel were deemed privileged.\textsuperscript{77}

The high court analyzed the privilege issue as it would in other cases.\textsuperscript{78} While the court acknowledged that the Georgia Rules of Professional Conduct would not allow an attorney to represent herself in adversity to a current client, it declared the rules were irrelevant to the assessment of any attorney-client communication privilege.\textsuperscript{79} The court further found that the requirement of seeking legal advice is met when a firm attorney consults with the firm’s in-house counsel in that capacity “regarding matters within the scope of the attorneys’ employment with the firm.”\textsuperscript{80} As to confidentiality, the court said that in the context of a law firm, such communications should only involve the “in-house counsel, firm management, firm attorneys, and other firm personnel with knowledge about the representation that is the basis for the client’s claim[] against the firm.”\textsuperscript{81} The court discussed, but declined to adopt, the fiduciary duty exception.\textsuperscript{82}

\begin{itemize}
\item \textsuperscript{75} Id.
\item \textsuperscript{76} St. Simons Waterfront, L.L.C. v. Hunter, Maclean, Exley & Dunn, PC, 746 S.E.2d 98, 102 (Ga. 2013); King & Parness, supra note 8, at 27.
\item \textsuperscript{77} St. Simons Waterfront, L.L.C. v. Hunter, Maclean, Exley & Dunn, PC, 746 S.E.2d 98, 103 (Ga. 2013).
\item \textsuperscript{78} Id. at 104. The privilege factors were (1) whether an attorney-client relationship existed; (2) whether legal advice was being sought; (3) whether the communications were made and kept in confidence; and (4) whether there were any applicable exceptions to the privilege. Id. For the existence of an attorney-client relationship, the court also said the relationship should be clearly established by acts such as billing the firm or maintaining a separate file for the in-house communications. Id. at 105. Additionally, the court said the level of scrutiny regarding questioning the existence of an attorney-client relationship will rise as the level of formality of the relationship falls. Id.
\item \textsuperscript{79} Id. at 105-06 (the Preamble to the Georgia Rules of Professional Conduct, states that the rules “are not intended to govern or affect judicial application of either the attorney-client or work product privilege”).
\item \textsuperscript{80} Id. at 106.
\item \textsuperscript{81} St. Simons Waterfront, L.L.C. v. Hunter, Maclean, Exley & Dunn, PC, 746 S.E.2d 98, 107 (Ga. 2013).
\item \textsuperscript{82} Id. at 107-08. The court found the exception did not apply based on the same reasoning as in Garvy, specifically that when a fiduciary seeks legal advice regarding her own liability, the ultimate beneficiary is herself and not her client to whom she owes a fiduciary duty. Id. at 107. See also Garvy v. Seyfarth Shaw LLP, 966 N.E.2d 523, 536 (Ill. App. Ct. 1st Dist. 2012).
\end{itemize}
C. CRIMSON TRACE CORPORATION

After the Georgia and Massachusetts rulings, the Oregon Supreme Court likewise recognized an intra law firm privilege for questioned attorneys who seek counsel.\textsuperscript{83} During discovery in a malpractice case, the former client sought all communications among its former law firm’s attorneys that took place before representation ended.\textsuperscript{84} The firm asserted the privilege under an Oregon statute. It argued that consultations with in-house counsel were confidential, made for the purpose of seeking legal advice, and part of an outside client’s file.\textsuperscript{85} The trial court ordered disclosure, finding a conflict of interest between the firm and former client, and sustained a fiduciary exception as the firm’s obligations to clients were paramount.\textsuperscript{86}

The Supreme Court emphasized that its task was to determine what the legislature intended.\textsuperscript{87} The court found that the communications fit within the statutory definition. One requirement was that the communications be “made for the purpose of facilitating the rendition of professional legal services to the client.”\textsuperscript{88} The court found that the firm’s attorneys and the firm’s in-house counsel had a “separate interest,”\textsuperscript{89} the firm’s own liability rather than the firm’s representation of its former client.

Upon determining the statute applied, the court considered whether the legislature intended any exceptions.\textsuperscript{90} The court rejected a fiduciary exception because courts were powerless to create non-statutory exceptions.\textsuperscript{91} The statute specified certain exceptions, but none applied.\textsuperscript{92} Further, the legislative history indicated that the list of statutory exceptions was exhaustive.\textsuperscript{93}

\begin{itemize}
  \item \textsuperscript{83} Crimson Trace Corp. v. Davis Wright Tremaine, 326 P.3d 1181, 1195 (Or. 2014).
  \item \textsuperscript{84} Id. at 1184-85.
  \item \textsuperscript{85} Id. at 1185.
  \item \textsuperscript{86} Id.
  \item \textsuperscript{87} Id. at 1187.
  \item \textsuperscript{88} Crimson Trace Corp. v. Davis Wright Tremaine, 326 P.3d 1181, 1190 (Or. 2014).
  \item \textsuperscript{89} Id.
  \item \textsuperscript{90} Id. at 1191.
  \item \textsuperscript{91} Id. at 1192.
  \item \textsuperscript{92} Id. at 1191.
  \item \textsuperscript{93} Crimson Trace Corp. v. Davis Wright Tremaine, 326 P.3d 1181, at 1193 (Or. 2014) (legislature delineated several detailed and specific exceptions).
\end{itemize}
D. MORE RECENT STATE CASES

There have been a few new cases since Crimson Trace. A California appellate court applied the attorney-client communication privilege to intra-firm communications involving current client questions of the work done by law firm attorneys. The court ruled it had no power to limit the privilege via new non-statutory exceptions.94

More troubling is a New Hampshire trial court ruling.95 Sensibly, it recognized that law firms may be able to claim the attorney-client communication privilege for intra-firm legal advice about problems with a current client’s representation even where the consulted lawyer was not officially designated as the firm’s in-house ethics counsel. But there the consulted lawyer had been the “de facto ethics counsel” for ten years. Unfortunately, the court found a prima facie showing of privilege, although the ethics counsel had earlier billed a small amount of time in the client’s case and the consulting lawyer billed the client for conversations with the ethics counsel intended to advance the firm’s interest in limiting exposure to liability rather than to advance the client’s interest in securing sound legal advice.

V. GUIDELINES ON INTRA LAW FIRM COMMUNICATIONS INVOLVING CURRENT CLIENT CONCERNS

As there are no high court direct precedents, rules, or statutes, how should discovery or evidentiary requests in Illinois for intra law firm confidential communication requests be resolved? The following guidelines are suitable for protecting intra-firm communications involving law firm concerns about legal work earlier done for current clients:

A privilege should apply to consultations between attorneys within a law firm who represent outside clients and the firm’s in-house ethics counsel where

(1) the in-house ethics counsel has not performed any work for the client on the matter at issue or on any substantially related matter; the time spent in consultations was not billed to any outside client; and the communications were made confidentially for the purpose of obtaining legal advice;

(2) upon any finding of potential liability implicating a conflict of interest between the firm as client and the outside client, the outside client is timely and fully informed of such potential liability;

(3) the firm does not continue its representation of the outside client after a finding of a conflict of interest prior to obtaining a waiver of the conflict; and

(4) the outside client is advised to seek independent counsel before consenting to waiver and continuing representation.\textsuperscript{96}

These guidelines reflect the growing consensus that law firms should be able to employ in-house counsel when current clients question their legal work.\textsuperscript{97} Despite the fiduciary duty of a lawyer and her law firm to a client, assessments by a lawyer and her firm of their representation of—and potential liabilities to—outside clients should be encouraged. A privilege well serves law firms, their lawyers, and their clients. A law firm and its lawyers must be able to assess their representation of a current client internally as well as through outside counsel. Retention of outside counsel often entails both an unnecessary expense and a delay in the time when the assessment is received, which will delay and may hamper the opportunity to rectify mistakes. If an intra-firm investigation leads to a finding that a law firm’s interests are or may be significantly adverse to the current outside client, the firm should inform the client\textsuperscript{98} and either withdraw as counsel or obtain a waiver in order to continue representation.\textsuperscript{99} The approach should be the same regardless of whether a conflict is discovered by in-house or outside counsel. A firm using in-house counsel to evaluate the firm’s work on behalf of a client—current or former—should not constitute a breach of the firm’s fiduciary duty to the client. Rather, the

\textsuperscript{96} Practical advice for law firms is also found in Richmond, \textit{supra} note 5, at 104-06.


\textsuperscript{98} \textit{Model Rules of Prof’l Conduct} r. 1.4(a)(3) (AM. BAR ASS’N 2013). On lawyers’ (and law firms’) duty to report their own possible malpractice to their clients, see Benjamin P. Cooper, \textit{The Lawyer’s Duty to Inform His Client of His Own Malpractice}, 61 BAYLOR L. REV. 174 (2009).

\textsuperscript{99} \textit{Model Rules of Prof’l Conduct} r. 1.7(b) (AM. BAR ASS’N 2013).
firm’s reaction to its findings should determine whether the firm has met its professional obligations. If there is no conflict, no action need be taken. But, if a conflict is discovered, the firm must inform the client promptly. The client, its law firm, and a firm lawyer are all best served by quick and inexpensive access to informed legal counsel for all concerned.

As a law firm using in-house counsel does not necessarily prompt a conflict of interest with a client, a privilege should be maintained for such intra-firm communications. Given that a firm can employ in-house counsel ethically and without compromising its fiduciary duties to a client, there is no reason why intra-firm communications should not enjoy the same attorney-client communication privilege as communications between lawyers from two law firms. The absence of confidentiality would dissuade an attorney from seeking informed and expeditious legal advice on how to best proceed on a client’s behalf.

Intra-firm advice allows timely rectification of errors, benefiting both lawyers and clients.

VI. INVESTIGATIONS BEYOND OUTSIDE COUNSEL AND INTRA-FIRM COMMUNICATIONS

A. OTHER ATTORNEY-CLIENT COMMUNICATIONS

When confronted with a former outside client’s requests for certain outside counsel and intra law firm communications, Illinois courts should recognize a privilege. While the Illinois Supreme Court has “concluded that the extension of an existing privilege or

100. Model Rules of Prof’l Conduct r. 1.7(a)(2) (Am. Bar Ass’n 2013).
101. King & Parness, supra note 8, at 33; See Thelen Reid & Priest LLP v. Marland, 2007 WL 578989, at *7 (N.D. Cal. 2007) (“A rule requiring disclosure of all communications relating to a client would dissuade attorneys from referring ethical problems to other lawyers, thereby undermining conformity with ethical obligations.”).
102. See Model Rules of Prof’l Conduct r. 1.4(a)(3) (Am. Bar Ass’n 2013) (“A lawyer shall keep the client reasonably informed . . . .”); See also id. at r. 4.1(a) (“In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact . . . .”).
103. Though no formal opinion has been issued by either group, the Illinois State Bar Association (ISBA) and the Chicago Bar Association (CBA) jointly submitted a brief in Garvy supporting intra law firm privilege. Brief of ISBA and CBA as Amici Curiae Supporting Defendants, Garvy v. Seyfarth Shaw LLP, 996 N.E.2d 523 (Ill. App. Ct. 1st Dist. 2012) (No. 11-0115).
establishment of a new one is a matter best deferred to the legislature,"\(^{104}\) this deference does not extend to attorney conduct, as the court has generally exercised preemptive (or exclusive) authority over the regulation of legal practice in Illinois.

Nevertheless, the Illinois Supreme Court has construed the attorney-client communications privilege very narrowly, maintaining a “strong [public] policy of encouraging disclosure, with an eye toward ascertaining the truth.”\(^{105}\) When a claim of this privilege is made, “it is the privilege, not the duty to disclose, that is the exception.”\(^{106}\) The party asserting the attorney-client communication privilege must establish its elements.\(^{107}\) Once a party asserting the privilege has established its elements, the burden shifts to the opponent to demonstrate any exception.\(^{108}\)

One example of the rather narrow attorney-client communication privilege in Illinois involves an attorney and the agents of the attorney’s corporate client. Here, the Illinois Supreme Court, in rejecting the federal law approach, has adopted the “control group” test.\(^{109}\) That test dictates the attorney-client communication privilege only applies to an attorney’s communications with certain corporate employees, described generally as follows:

“[I]f the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply. In all other cases the employee would be merely giving information to the lawyer to enable

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106. Id. (quoting Consolidation Coal Co. v. Bucyrus-Erie Co., 432 N.E.2d 250, 257 (Ill. 1982)).
109. Consolidation Coal, 432 N.E.2d at 257 (“The control-group test appears to us to strike a reasonable balance by protecting consultations with counsel by those who are the decision makers or who substantially influence corporate decisions and by minimizing the amount of relevant factual material which is immune from discovery.”).
the latter to advise those in the corporation having the authority to act or refrain from acting on the advice.”

The test was applied by the Illinois Supreme Court this way:

In our judgment, it is clear that Sailors was not a member of B-E’s corporate control group. As one of several engineers within his department, he supplied information to those whose opinions were sought and relied upon by others such as Hansson who occupied an advisory role and substantially contributed to decisionmaking. It is this fact which is critical, for it seems clear that Sailors’ role was one of supplying the factual bases upon which were predicated the opinions and recommendations of those who advised the decisionmakers. While those who directly advise the decisionmakers could, conceivably, come within the control group, it is evident that Sailors did not.

By contrast, in rejecting the “control group” test in corporate client settings, the U.S. Supreme Court deemed privileged attorney-client communications involving any corporate employee and the corporation’s in-house counsel when the communications are undertaken in order for counsel to gain information facilitating the delivery of later legal advice. The rationale underlying this broader privilege was the encouragement of “communication of relevant information” by corporate employees to the corporate lawyers so that lawyers may more easily “convey full and frank legal advice to the employees who will put into effect the client corporation’s policy”, lawyers who will be better able to provide counsel to control group members as they can more easily ascertain “the factual background” and sift “through the facts with an eye to the legally relevant”, and lawyers who will “ensure their client’s compliance with the law.”

With the narrower privilege in corporate client settings, seemingly confidential intra law firm communications regarding questionable attorney conduct would only be privileged in Illinois if the communications involved actual legal advice, and not the “factual bases” on which any later legal advice would depend. So, following Garvy, future Illinois courts must distinguish between communications involving theretofore disputed or un-

110. Id. at 255 (quoting City of Phil. v. Westinghouse Elec. Corp., 210 F. Supp. 483, 485 (E.D. Pa. 1962)).
111. Id. at 258.
113. Id. at 392.
114. Id. at 390-91.
115. Id. at 392.
known facts and communications involving legal advice based upon assumed facts, that is, courts must differentiate between talk about what happened and talk about what to do under law about what happened (like how to remedy or correct or mitigate harm that already happened).

B. WORK PRODUCT

In Illinois, the work product doctrine, like the attorney-client communications privilege, operates more narrowly than elsewhere. Under Federal Civil Procedure Rule 26, “[o]rdinarily” there are protections against compelled disclosures of material “prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party’s attorney),” with even stronger – if not absolute – protections of such material containing “mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation.”116 By contrast, under Illinois Supreme Court Rule 201: “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.”117 So, in the absence of an attorney-client communication privilege (as when an attorney communicates with a nonclient), the work product doctrine is less available in Illinois courts than in federal courts. In Illinois, only opinion work product is significantly protected118 (and perhaps, given the language of the Illinois court rule, then there is more protection for material assembled in preparation for actual litigation, with less protection for material prepared in anticipation of later litigation).

“As noted, Garvy found protections from compelled disclosure only for the opinion work product of the firm’s outside and in-house counsel relating to Garvy’s concerns about the firm’s malpractice.”119

Whether conferring with outside counsel, in-house counsel, or some other counsel, public policy supports an attorney-client communications privilege forbidding the involuntary nondisclosure of conferral communications involving legal advice as to the questionable legal work of a conferring lawyer. But all lawyers providing ethics counselling may also need to communicate with witnesses, as well as to assemble additional information and prepare other materials, in order to provide good counsel. Here, as there often is no attor-

118. See Garvy v. Seyfarth Shaw LLP, 966 N.E.2d 523, 539 (Ill. App. Ct. 1st Dist. 2012) (no protection if impossible to secure “similar information from other sources”); King & Parness, supra note 8, at 43.
119. See Garvy, 966 N.E.2d at 539.
ney-client communication, are there nevertheless other possible privilege sources? In a few of the earlier-noted cases, work product protections were raised. But those courts, as well as most commentators, have yet to grapple significantly with how—if at all—work product operates.

Work product clearly operates when counselling lawyers undertake certain work in preparation for (and likely in anticipation of) trial. Lawyers conferring with questioned lawyers may, in fact, be obligated to investigate and prepare tangible materials in order to avoid their own malpractice. In Illinois, as there is no protection of ordinary work product, conferring lawyers should prepare mostly tangible materials that only or predominantly constitute opinion work product, keeping their ordinary work product (i.e., witness statements), as best they can, in their heads. In the seminal ordinary work product case of *Hickman v. Taylor*, the U.S. Supreme Court said in 1947:

> But, as to oral statements made by witnesses to Fortenbaugh [a lawyer], whether presently in the form of his mental impressions or memoranda, we do not believe that any showing of necessity can be made under the circumstances of this case so as to justify production. Under ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. No legitimate purpose is served by such production. The practice forces the attorney to testify as to what he remembers or what he saw fit to write down regarding witnesses' remarks. Such testimony could not qualify as evidence; and to use it for impeachment or corroborative purposes would make the attorney much less an officer of the court and much more an ordinary witness. The standards of the profession would thereby suffer.

Good advice for Illinois lawyers, though reliance on memory alone can be dangerous, as can be—at times—peppering ordinary work product

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120. *See, e.g.*, Chambliss, *supra* note 5, at 1723; *But see* Richmond, *supra* note 5, at 75-77 (while discussing work product protections, however, federal and state precedents are employed interchangeably as all laws seemingly are assumed to be comparable).

with opinion work product, since cut-and-paste analyses, done by judges in camera, might be able to separate the discoverable and the privileged.

C. HYPOTHETICALS

Clients sometimes question Illinois lawyers who do not work in law firms, lawyers who work in law firms without designated in-house ethics counsel, or lawyers who cannot pay for outside counsel. When questions arise, how should these questioned lawyers respond? Are there ways for such questioned lawyers to gain counsel confidentiality?

Privileges attending conferences with other lawyers who are neither outside counsel nor in-house ethics counsel should be available when questioned lawyers consult other lawyers in the hypothetical regarding legal issues in ways wherein the identities of the questioned lawyers’ clients are not revealed. A comment to the ABA Model Rule on lawyer confidentiality regarding “information relating to the representation of a client” recognizes that a “lawyer’s use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.” Of course, the questioned lawyer or her law firm should not bill the questioning client for the hypothetical discussion.

D. SELF-CRITICAL ANALYSIS

Not relevant in Illinois as yet is the so-called self-analysis, or critical self-analysis, or deliberative process doctrine, which sometimes shields from discovery internal investigations by service providers involving their own earlier questionable conduct, at least when undertaken to improve service provider effectiveness. In finding nondiscoverable in a malpractice suit a hospital’s minutes and reports of hospital staff concerning an earlier death at the hospital, one court said this:

The minutes and reports of the boards or committees of the Hospital are records of medical staff reviews by committees of doctors acting pursuant to the requirements of the Joint Commissions on Accreditation of Hospitals . . . .

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122. **Model Rules of Prof’l Conduct r. 1.6 cmt. 4 (AM. BAR ASS’N 2013).**
These committee proceedings take the form of ‘staff meetings’ of the professional personnel involved in the care and treatment of patients in the hospital. The Commission has said that the ‘sole objective’ of such staff meetings is the ‘improvement’ in the available care and treatment . . .

The purpose of these staff meetings is the improvement, through self-analysis, of the efficiency of medical procedures and techniques. They are not a part of current patient care but are in the nature of a retrospective review of the effectiveness of certain medical procedures.123

Any such privilege in Illinois is irrelevant to many intra law firm and similar counseling communications regarding questionable attorney conduct because such communications are not retrospective, but rather introspective.124 Yet mixed purpose counselling can present troubles later when former clients seek counselling communications and related opinion work product. Thus, to more likely prompt the immunities from compelled disclosure, communications and materials designed to further current client interests should be separated from communications and materials designed for general quality control by a lawyer or law firm.

E. WAIVERS

Where the privileges involving attorney-client communications and work product provided to law firms shields against current or former clients seeking discovery or evidence, those shields need not be employed. Privileges are waivable by privilege holders. Whether outside, in-house, or other counsel are employed by a law firm, the law firm, and not the individually questioned lawyers within the law firm who obtain counsel, will typically be the privilege holders.125

124. The Illinois Supreme Court rejected a privilege for such a retrospective analysis outside of medical peer review. See Harris v. One Hope United, Inc., 2013 IL App (1st) 131152, 2 N.E.3d 1132 (social service agency, contracted with the state, which did “continuous quality review,” including a case where mother left a child unattended in a bath, resulting in the child’s death), aff’d, 2015 IL 117200, 28 N.E.3d 804 (any new privilege should be determined by the General Assembly).
125. See, e.g., MODEL RULES OF PROF’L CONDUCT r. 1.13(a) (AM. BAR ASS’N 2013) (“A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”).
Counselling lawyers should make sure that the conferring questioned lawyers understand this. In somewhat comparable settings, nonlawyer corporate employees who have talked with corporate in-house counsel investigating questionable employee conduct have been surprised to learn later that a corporation can waive its available privileges, which effectively puts the theretofore cooperating employees (who wished to keep their jobs) in the cross-hairs. Corporate waivers are sometimes prompted when investigating governments offer leniency to corporations, but not to their individual current or former employees who cooperate during investigations.

F. CONFLICTS OF INTEREST

Illinois lawyers “who investigate questionable conduct by other lawyers within their law firms should be very wary of potential client-law firm conflicts, law firm attorney-law firm conflicts, and law firm attorney-client conflicts.” Investigating in-house lawyers may be talking with firm colleagues about work done for current firm clients in settings where the conduct of the client, the firm or another firm attorney may each have been questioned, and where courts might act negatively against one, two, or three of these parties. Consider a law firm attorney who filed a complaint in a federal district court on behalf of a law firm client and who later faces, together with the law firm and the client, a possible court sanction if the complaint is deemed frivolous, or, worse yet, filed in bad faith after the twenty-one day safe harbor period runs.

126. At some point a duty arises for counselling lawyers. See, e.g., MODEL RULES OF PROF’L CONDUCT r. 1.13(f) (AM. BAR ASS’N 2013) (“In dealing with an organization’s . . . employees . . . a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.”); Yanez v. Plummer, 164 Cal. Rptr. 3d 309 (Cal. App. 3d 2013) (former employee sues former employer’s in-house counsel for malpractice arising from failure to reveal conflict of interest).


128. See, e.g., Peggy Aulino, Attorneys Still at Odds Regarding Waiver of Corporate Attorney-Client Privilege, 25 LAW. MAN. ON PROF. CONDUCT 630 (2009) (U.S. Attorneys’ Manual revised so that federal prosecutors “are directed not to” ask a corporation to waive its privileges, but “a corporation remains free to convey non-factual or ‘core’ attorney-client communications or work product”).

129. King & Parness, supra note 8, at 45.

130. FED. R. CIV. P. 11(c)(1) (sanction against a rule violator or one “responsible” for the rule violation; law firm will not always be held jointly responsible for a violation
who confers with the filing attorney must tread cautiously, and may well need, with the law firm, to withdraw from any further representation of the questioned firm attorney and the firm client.”

G. CHOICE OF LAW

Lawyers who investigate and provide counsel on questionable conduct by other lawyers, be they outside, in-house, or other, must also look ahead, both before and while working, toward potential choice of law issues regarding both the attorney-client communication privileges and the work product doctrines that might later apply when discovery or evidentiary requests regarding confidential materials are resisted. Of course, choices between the laws of two or more interested jurisdictions are unnecessary where all laws are similar. But all American laws are not the same. Where there are clearly at least two significantly interested jurisdictions, counselling lawyers should undertake their work, if possible, in ways in which the work will most likely be immunized under the most narrow privilege law.

Sometimes, the choice between competing discovery and evidence laws is guided by a written law. Under Federal Evidence Rule 501, for the attorney-client communications privilege, the federal common law is used when determining a federal law claim, but state law is employed when determining a state law claim. Some state

committed by a law firm member); *Compare with Ill. Sup. Ct. R.* 137 (no safe harbor period).

131. *Model Rules of Prof’l Conduct* r. 1.7(a) (AM. BAR ASS’N 2013); King & Parness, *supra* note 8, at 45.


133. *Fed. R. Evid.* R. 501 (“The common law . . . governs a claim of privilege . . . But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.”). Yet, Federal Evidence Rule 502 also says that “even if state law provides that rule of decision,” disclosure of “communication or information covered by the attorney-client privilege or work product protection” made “in a federal proceeding or to a federal office or agency” is governed by the Rule 502 waiver standards (distinguishing between inadvertent disclosures and intentional waivers). *Fed. R. Evid.* 502(a)-(b), (f). By comparison, the Uniform Rules of Evidence, as amended in 2005, say nothing in
Evidence rules, which otherwise track the Federal Evidence Rules, do not comparably require their state courts to employ the federal, or some other American state’s, attorney-client communication privilege law when hearing foreign law claims.\textsuperscript{134}

A different written law guiding the choice between competing immunity doctrines appeared in an earlier version of Federal Civil Procedure Rule 43(a), which preceded the promulgation of the Federal Evidence Rule 501. It said:

All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes of rules to which reference is herein made.\textsuperscript{135}

In the absence of a written law on choosing between the differing immunity doctrines of two interested jurisdictions, courts will typically apply principles from one of the Restatements of Law of the American Law Institute. However, the principles differ between the varying Restatements issued over the years. State courts have employed differing Restatements and thus varied guidelines on choice of immunity law.\textsuperscript{136} Of course, this makes the task of a counselling lawyer who is looking ahead quite difficult, as when there are possible federal and state forums for any future litigation, as well as vary-

\textsuperscript{134} See, e.g., W. Va. R. Evid. 501 (“The privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common law except as modified by the Constitution of the United States or West Virginia, statute or court rule.”); Mont. R. Evid. 501 (“Except as otherwise provided by constitution, statute, these rules, or other rules applicable in the courts of this state, no person has a privilege to . . . refuse to disclose any matter”).

\textsuperscript{135} Dall. Cnty. v. Commercial Union Assurance Co., Ltd., 286 F.2d 388, 394 (5th Cir. 1961) (quoting the rule and describing it as “liberal” and as “affirmatively” expanding “the scope of admissibility”).

ing locations where legal counsel is given or where factual investigations are undertaken.

H. CHOICE OF LAWMAKER

Finally, should greater clarity in attorney-client communication and work product matters be sought via new written laws in Illinois, care is needed in locating the appropriate lawmaker. In Oregon, under *Crimson Trace* one should look to the legislature.\(^{137}\) For the Article III federal courts, U.S. Supreme Court rulemaking can be employed, but at least some Congressional approval is likely needed.\(^{138}\) Elsewhere, high court rulemaking can be employed with no opportunity for General Assembly approval, or oversight, or independent initiative, as where attorney-client communication privilege laws are deemed within the exclusive authority of the judiciary to regulate the practice of law.\(^{139}\) In Kentucky, given uncertainties regarding the locus of lawmaking authority, both the high court, via court rulemaking, and the legislature, via statute, adopted new privilege laws.\(^{140}\) In

\(^{137}\) See also Mo. Const. art. V, §5 (Supreme Court makes rules of practice and procedure, but they “shall not change . . . the law relating to evidence”).


\(^{139}\) See, e.g., *Illinois ex rel. Brazen v. Finley*, 519 N.E.2d 898, 902 (Ill. 1988) (high court has “exclusive rulemaking and disciplinary authority” regarding the practice of law). On substance/procedure dichotomies relating to court rulemaking and separation of powers, see *Opinion of the Justices*, 688 A.2d 1006 (N.H. 1997). But see *Eli Wald, Should Judges Regulate Lawyers?*, 42 MCGEORGE L. REV. 149, 174-75 (2010) (“[T]he simplistic assumption that judges should regulate lawyers” must be abandoned, with “a contextual comparative institutional analysis scrutinizing the promulgation and enforcement abilities of the judiciary broken into various elements . . . and to contrast them with those of alternative regulatory bodies.”).

\(^{140}\) In Kentucky, when first adopted in the early 1990’s, the evidence rules were a “joint effort” by the legislature and high court. *Mullins v. Commonwealth*, 956 S.W.2d 210, 211 (Ky. 1997). This joint effort was “a polite fiction” recognizing “some parts of the rules fell within the sole purview of the legislature (substantive law), whereas others fell within the sole purview of [the high] court (practice and procedure).” The fiction avoided a fight “over which was which.” *Ky. v. Chauvin*, 316 S.W.3d 279, 285 (Ky. 2010). The rules were passed by the legislature and then adopted by the court “to the extent that they may have constituted a rule of practice or procedure.” Id. at 285. Under the Kentucky constitution the high court has had for some time exclusive authority to enact “rules of practice and procedure for the Court of Justice.” Ky. Const. §116. Since initial enactment, evidence rules require the high court to report possible evidence rule amendments to the legislature, which may disapprove and to recognize the legislature “may amend any proposal reported by the Supreme Court” and that the legislature “may adopt amendments or additions to the Kentucky Rules of Evidence not reported.” Ky. R. EVID. 1102. Legislative changes, however,
Illinois, chiefly, if not exclusively, Supreme Court rulemaking and case precedents will address protections for attorney-client communication and work product.  

VII. CONCLUSION

When questions are raised regarding a law firm attorney’s representation of a firm client, a questioned attorney often wishes to obtain counsel. Obtaining counsel often benefits the attorney, the firm, and the client. Counsel regarding questioned conduct should be encouraged, not discouraged. A lawyer consulted for counsel may need to investigate both legal issues and factual issues. A broad attorney-client communication privilege and broad opinion work product protection should be available in Illinois, with availability not dependent upon whether an in-house, outside, or some other lawyer is employed. Yet because of the differences between the two immunities in Illinois and other American jurisdictions, Illinois lawyers and judges must proceed cautiously, recognizing that protections in Illinois should be more limited than in many other states.

are limited by the exclusive judicial authority over rules of practice and procedure. Chauvin, 316 S.W.3d at 284.