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Confidentiality and Client Communications in Illinois

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Beware of what qualifies as privileged communications with your client when someone else is in the room.

Confidentiality and Client Communications in Illinois

BY JEFFREY A. PARNESS

SOME 30 YEARS AGO, THE ILLINOIS SUPREME COURT, IN *IN RE HIMMEL*, recognized that no discovery/evidentiary privilege would attach to nonconfidential attorney-client communications.[1] Some communications would be nonconfidential if made in the presence of those who were not "agents" of either the attorney or client. As to the client in *Himmel*, neither the client's mother nor her fiancé were deemed the client's agents so that there was no privilege. But in so ruling, the court failed to clearly describe in detail the substantive circumstances of client agency or the procedures necessary for establishing such agency. And since then, the Illinois Supreme

1. *In re Himmel*, 125 Ill. 2d 831 (1988).

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Court and lower Illinois courts have provided little further guidance.[2]

The December 2018 Colorado Supreme Court decision in *Fox v. Alfini*[3] demonstrates the need for clearer guidance in Illinois. There, the court surveyed varying possible approaches to both the substantive and the procedural elements underlying privileged attorney-client communications. That decision is reviewed below. Together with some thoughts on clarifying Illinois law, the Colorado ruling demonstrates several pitfalls for attorneys who assume that a privilege follows whenever client communications are preceded simply by promises to maintain confidences.

Client agency

As to who may serve as a client's agent during attorney-client communication, the *Fox* court opined the agent must be necessary to assist in the representation—that is, "reasonably necessary to facilitate" the attorney-client communication.[4] Further, it ruled that an "objective standard of necessity" must be met—that is, agency does not necessarily arise simply because of "an attorney's subjective belief" on "whether a third party's presence was necessary to facilitate" an attorney-client communication.[5]

In *Himmel*, the court did not speak directly to whether an objective or subjective standard should apply to "necessity" determinations.[6] An earlier appellate court ruling had held that subjective beliefs by an attorney, client, and nonclient that confidentiality had been secured was insufficient to prompt a privilege.[7] There, nonclients present only to provide moral support to clients would bar a privilege even when the client faced "particularly trying" times.

That earlier Illinois appellate court ruling also placed the burden of proof on agency on the party asserting the privilege. It said that the presence of a nonclient "indicates a lack of intention that the communications of a client to his attorney are meant to be confidential."[8] Thus, a subjective intent regarding confidentiality, together with an objective basis for such an intent, seemingly was required. Comparably, in *Fox* the court determined "the claimant of the privilege has the burden of establishing it."[9]

In determining that an objective element exists in the privilege setting, with the burden on the claimant, the *Fox* court's survey of state cases "found no applicable cases … in which necessity was based solely on an attorney's subjective view as to whether a third person's presence was necessary to facilitate an attorney-client communication."[10] Among the rationales supporting this finding was to avoid "the tactical gamesmanship that could result were third parties to be permitted to participate in attorney-client communications without clear and consistent limitations," including "an attorney's gathering a client and certain witnesses together to get everyone's story straight" or "to try to insulate otherwise nonprivileged and perhaps unhelpful information provided by a third party."[11]

Of course, client agency in the confidentiality setting, wherein a nonclient serves as a client's agent to facilitate effective attorney-client communication, differs from client agency in other settings. For example, at times clients must be distinguished from nonclients for purposes of determining who is a client during attorney-client communications involving a corporate client. In this setting—in Illinois, though often not elsewhere—the so-called "control group" test serves to limit who speaks as an agent for the corporate client.[12] As well, the law of masters and servants is usually not employed to determine issues of client agency in the attorney-client communication setting.[13]

TAKEAWAYS >>

- In Illinois, some communications are nonconfidential if made in the presence of those who are not "agents" of either the attorney or client.
- An attorney's subjective belief that a third party was necessarily present during a communication with a client isn't enough to protect that communication from discovery.
- An Illinois appellate ruling has placed the burden of proof on agency on the party asserting the privilege.

2. One Illinois federal court has described the pre-*Himmel* Illinois state precedents on family members serving as client agents during attorney-client communications as "somewhat inconsistent." *U.S. v. Evans*, 954 F. Supp. 165, 169 (N.D. Ill. 1997).
3. *Fox v. Alfini*, 2018 CO 94.
4. *Fox*, 2018 CO 94, ¶ 39.
5. *Id.* ¶¶ 29-30.
6. *Himmel*, 125 Ill. 2d at 794.
7. *People v. Doss*, 161 Ill. App. 3d 258 (4th Dist. 1987).
8. *Id.*
9. *Fox*, 2018 CO 94, ¶ 19.
10. *Id.* ¶ 28.
11. *Id.* ¶ 29, n.2.
12. *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103, 118-19 (1982).
13. *Jenkins v. Bartlett*, 487 F.3d 482, 491 (7th Cir. 2007) (agency in attorney-client communication setting differs from agency determined "under the law of master and servant").

GIVEN THE GENERAL DESIRABILITY OF AN ATTORNEY'S PRECONSULTATION INQUIRY REGARDING A CLIENT'S NEED FOR "NECESSARY" ASSISTANCE, HOW SHOULD ATTORNEYS PROCEED TO ESTABLISH CLIENT AGENCY BEFORE CONSULTING WITH CLIENTS ABOUT LEGAL ISSUES IN THE PRESENCE OF NONCLIENTS?

Agency establishment procedures

Whatever the standard for client agency, although they may be met, they may nevertheless not prompt a privilege. *Himmel* and *Fox* demonstrate how this can occur, despite providing attorneys with little guidance on adequate agency establishment procedures.

In *Himmel*, the nonclients present during attorney-client communications included the client's mother and fiancé. Unfortunately for the client, there seemingly was insufficient factual groundwork laid for client agency before the communications began. The client evidently was not questioned outside the presence of the nonclients about her need for the nonclients to help her convey her legal problems. Had questioning taken place, there may well have been a basis for agency, since the client was talking to Lawyer 2 about what might be done regarding the misconduct of Lawyer 1. It is easy to imagine that such a client would be experiencing distress or distrust, requiring the presence of certain nonclients for more than just "moral support."

In *Fox*, the nonclients were present at their 30-year-old daughter's initial consultation with her attorney, which was recorded. The recording was later successfully discovered by an adversary. Before the client's consultation regarding possible medical malpractice that led to her stroke, her attorney made "no effort … to determine before conferring" whether the client's "stroke caused any cognitive deficiencies such that her parents' presence was necessary to facilitate the consultation."[14] Discovery was allowed, though a neuropsychological evaluation done 15 months after the consultation concluded the client was "likely experiencing ongoing mild difficulties, weaknesses and/or impairments with her neuropsychological functioning."[15] Later affidavits of the client and her parents regarding the client's diminished mental capacity were also presented and attested to beliefs that the client would need her parents' assistance in effective decision making.

The cases clearly regard "after-the-fact suggestions" of a client's "diminished capacity" during earlier attorney-client communications as suspect.[16] Given the general desirability of an attorney's preconsultation inquiry regarding a client's need for "necessary" assistance, how should attorneys proceed to establish client agency before consulting with clients about legal issues in the presence of nonclients?

When prospective or actual clients present themselves alone, attorneys should inquire, at least in certain types of cases (contentious divorce?) or circumstances (language barrier?), whether the presence of a nonclient would facilitate later important communications that would otherwise be difficult, if not impossible. Such an inquiry is much easier when the clients are then accompanied by or in close proximity to helpful nonclients. Should nonclient presence during attorney-client communications likely seem not only helpful to, but necessary for, effective client communications and understanding, normally the client (if possible) and nonclients also should, at first, be separately questioned by the attorneys as to their views on the client's needs. To avoid any hint of "after-the-fact" manipulations, the colloquies on the client's needs should be memorialized in a memo (or electronic record) by the attorney, which should be distinct from any memorial regarding the communications about the facts prompting the need for legal counsel. To guard as best as possible against later ordinary work-product requests, this record should also be laced with the attorney's mental impressions, legal conclusions, and the like.

Attorney assessments of the necessity of client agency are more challenging when communication-facilitating nonclients are themselves fact witnesses. Separate initial questioning would help to answer later adversary concerns about any intentions by attorneys "to get everyone's story straight."[17] Where possible, family members serving as language interpreters, or otherwise as communication facilitators, should not be employed if they are potential or actual coplaintiffs—or if they are key fact witnesses (as in auto-accident cases).

ISBA RESOURCES >>

- ISBA Professional Conduct Advisory Opinion No. 18-03, *Communications With Represented Persons* (May 2018), law.isba.org/2mbnneK.
- Timothy J. Miller & Andrew P. Shelby, *Beware the Differences in Illinois and Federal Attorney-Client Privileges, Work Product Doctrines,* 105 Ill. B.J. 38 (Nov. 2017), law.isba.org/2l9ohZ9.
- Vincent Incopero, *Ensuring Client Confidentiality With Best Practices,* The Bottom Line (Sept. 2012), law.isba.org/2l8pAr4.

14. *Fox*, 2018 CO 94, ¶ 6.
15. *Id.* ¶ 8.
16. *Id.* ¶ 9.
17. *Id.* ¶ 29, n.2.

In assessing client agency, attorneys should consider whether attorney agency, if available, provides greater chances for confidentiality and privilege recognitions and respect. Thus, in one case a client's "union representative" was deemed to be the client's attorney's agent, and not the client's agent, as testimony showed that the representative of the client was present during attorney-client communications "solely to assist" the client's attorney.[18] In some settings, a language interpreter who is an attorney's agent may be more likely to maintain confidences than an interpreter chosen by the client. This would also avoid the appearance of the attorney trying to get "straight" all the witness accounts where the interpreter happens also to be a witness.[19]

Conclusion

In 1988, in *In re Himmel*, the Illinois Supreme Court recognized that no discovery or evidentiary privilege would attach to nonconfidential attorney-client communications. Some communications would be nonconfidential if made in the presence of those not "agents" of the attorney or the client. As to the client, in *Himmel* neither the client's mother nor her fiancé were deemed the client's agents. The *Himmel* court failed to describe the substantive circumstances of client agency in detail or the procedures necessary for establishing such agency. Since then, there has been little further guidance.

A 2018 Colorado high court decision demonstrates the pitfalls of client agency in the attorney-client communication setting. There remains a need for clearer guidance in Illinois after *Himmel*. The Colorado court surveyed possible approaches to both the substantive and procedural elements underlying privileged attorney-client communications. That ruling demonstrates the challenges facing Illinois attorneys, especially those who simply assume that confidentiality follows whenever client communications are preceded simply by promises to maintain confidences. IBJ

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18. *Jenkins*, 487 F.3d at 491, n.6.

19. Recently, the Illinois Supreme Court ruled that in a tort setting, an agent may have two principals who are each vicariously liable. *Sperl v. Henry*, 2018 IL 123132. Would it be beneficial to have the nonclient attending an attorney-client consultation be viewed as having two principals?