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IOWA DEFENSE COUNSEL ASSOCIATION

DEFENSE UPDATE

Spring 2018 VOL. XX, No. 2

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Legal Ethics and Cyber Security: Preserving the Attorney-Client Privilege in the Technology Age

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Frank B. Harty

Introduction

The attorney-client privilege is under attack. There is no question that one of the lynch pins of the legal profession is under siege. The American Bar Association recognized the problem and formed a task force to address it. *See* http://www.abanet.org/buslaw/attorneyclient/home. Likewise, the Association of Corporate Counsel, U.S. Chamber of Commerce and other professional and business groups have joined forces to gather facts and take steps to preserve the privilege. *See* http://www.acca.com/Surveys/attyclient2.pdf.

There are several forces at work undermining the attorney-client privilege in the corporate context. Many in-house counsel are called upon to do far more than practice law. They are required to make strategic business decisions and wear many hats. When acting as a business leader, in-house counsel may be doing a great job . . . of losing the privilege.

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IDCA President's Letter

Kevin Reynolds
IDCA President

THE VALUE OF IDCA–*AMICUS CURIAE*, OR "FRIEND OF THE COURT" BRIEFS

One of the services that the Iowa Defense Counsel Association provides to our members is our leading role in filing *amicus curiae* briefs in noteworthy cases. By way of example and in the nature of "success stories," I would like to highlight two recent amicus efforts of the IDCA.

The first case is *Cerwick v. Tyson Fresh Meats, Inc.*, Iowa Supreme Court No. 18-0152. *Cerwick* was a worker's compensation case. The issue framed by the appellant on appeal was: did "implicit bias" improperly play a role in the decision-making process? The Claimant in *Cerwick* argued that because the Administrative Law Judge questioned why the Claimant's attorney requested an interpreter when the Claimant could speak English, that implicit bias improperly motivated the decision. Throughout the proceedings the Claimant requested an interpreter and then asked if she could answer questions in English, instead of Arabic. During the proceedings she often could not think of the words in Arabic. During the hearing, she ultimately waived her right to an interpreter because she was having so much difficulty answering questions in Arabic.

The Claimant had injured her back when she fell. However, it was not until much later that she alleged a hip and shoulder injury. She also changed her description of the fall over time.

Cerwick and the "implicit bias" argument came to our attention through an IDCA member. I will use our experience in *Cerwick* to explain how the IDCA *amicus curiae* program works. Typically, someone will approach a Board Member with a request for consideration of filing an amicus brief. Initially, such requests go to our Executive Director, Heather Tamminga. Heather then notifies our Amicus Brief Committee. Our current chair of that Committee is Lisa Simonetta. Other members of the Amicus Committee are Frank Harty, Mike Moreland and Mike Gibbons. If the Amicus Brief Committee deems the case worthy of consideration, the full Board of Directors is asked to weigh in and make a decision. That is exactly what occurred in *Cerwick*. Lisa and the Amicus Brief Committee were then charged with the task of recruiting a suitable author for the brief, and soliciting funds, if necessary, to help defray the cost and expense of brief preparation. I would note that in most cases, the amicus brief authors donate significant amounts of their time in preparing the briefs.

The *Cerwick* case is typical in that several organizations aligned against the interests of IDCA and its members had expressed interest in filing amicus briefs. This included the Iowa Association of Justice (IAJ), the National Employment Lawyers Association (NELA), a claimant's group; and even a well-known plaintiff's employment law attorney, who essentially described himself to the Court as a foremost expert and teacher on "implicit bias." These groups warrant a counterbalance, and the IDCA ably fulfills that role.

As many of you know, the "implicit bias" theory is based on gauging a person's reaction to the implicit association test, or IAT. Social scientists cannot agree on what, if anything, the results from the IAT mean. When it comes to "implicit bias" and the courtroom, it would seem that this social science theory is most definitely not ready for "prime time." It would seem clear that it would not pass *Daubert* muster as "scientific, technical or other specialized knowledge" as applied in Iowa under *Ranes v. Adams Labs, Inc.*, 778 N.W.2d 677 (Iowa 2010).

IDCA's Amicus Brief was authored by Tyler Smith of Altoona, Iowa. The Brief is available from the members section of the IDCA website. It is must reading for anyone confronted with a claim of "implicit bias." Tyler introduced the argument to the Court in this fashion:

> The implicit bias construct as used in this case is based upon a social science theory. It is not an uncontroverted, established scientific principle. It is not akin to the law of gravity or the anatomy of the human body. It should therefore be subjected to the same scientific and legal scrutiny as other scientific theories.
>
> ***

> Further, importing this theory into our jurisprudence risks significant structural changes to the law in potentially every case and the accompanying cascade of unintended consequences. For the reasons explained below, this should not be undertaken given the current state of science. Assuming this theory to be true without meaningful scientific and legal scrutiny ultimately threatens justice.

Many thanks to Tyler Smith for such a quality work product on an important and timely issue confronting the bar.

The second case I would like to mention is *Hawkins v. Grinnell Regional Medical Center et al.,* Iowa Supreme Court No. 17-1892. In *Hawkins*, a Poweshiek County jury awarded over $5 million to a plaintiff in an employment discrimination case. Plaintiff claimed that he had been terminated because of his age and disability and retaliated against. After a ten-day jury trial and less than 90 minutes of deliberation following closing arguments, the jury returned a verdict of $5.3 million against the Defendants. Over $4 million dollars of the award was for past and future emotional distress damages for which the Plaintiff was not even treated by any health care practitioner.

Although there are some important employment law issues at stake in *Hawkins*, the IDCA was more broadly interested in addressing head-on the omnipresent Reptile Theory of argument as used by plaintiffs' counsel. It is important that this issue be addressed by Iowa appellate courts. Far too often the "counsel's argument" issues fall away in an appeal to make way for more substantive issues, or evaporate in the context of an "abuse of discretion" appellate standard of review. The issue addressed by IDCA's amicus brief in *Hawkins* was described as follows:

> The specific defendants in this case were the employer and supervising employees of the Plaintiff, but the issue here was much broader. The longstanding and well-respected role of the jury is to serve as a fair and dispassionate arbiter of the facts of the case. Hawkins exemplifies a trend in which the concerted strategy of plaintiff's counsel is to turn jury decision-making on its head, and implore jurors to make decisions based on inflamed passion and emotion. The strategy of urging jurors to abandon fair and dispassionate analysis of disputes negatively impacts all defendants and, in fact, all Iowans who rightfully turn to the judicial branch for fair and impartial disputed resolution.
>
> In particular, it has now become a common strategy of plaintiffs' counsel to infuse improper, unnecessary, and inflammatory argumentation that is intended to trigger an emotional response from the jurors, to the prejudice of the defendant. Such impropriety, including the making of improper Golden Rule-type arguments has infiltrated nearly all aspects of the presentation of plaintiffs' cases. The present case presents a cogent example. The interests of IDCA and the Iowa Insurance Institute represent the interests of these defendants and all person who could potentially find themselves hauled into court as a defendant. IDCA and the Iowa Insurance Institute request the Court provide a clear and forceful admonition that reaffirms and adds clarity to the rule that all person deserve fair and impartial jurors who decide cases on the evidence presented rather than emotionally-charged arguments.

In *Hawkins*, the Defendant filed a pretrial motion in limine seeking to preclude plaintiff's counsel from "advocating for jurors to put themselves in the shoes of the Plaintiff or that they should 'do the right thing.'" At the hearing on the in limine motions, the parties and the trial court judge agreed that such argument would not be permitted. Nevertheless, Plaintiff's counsel at trial failed to abide by this ruling and agreement. In far too many cases, severe transgressions by plaintiff's counsel are retroactively chalked up to "zealous advocacy." In addition to violating the proscriptions against making Golden Rule arguments, plaintiff's counsel improperly implored the jurors to "send a message" with their verdict. The result was predictable: an outrageously high verdict, untethered to the facts of the case.

IDCA members Thomas Boes and Catherine Lucas of the Bradshaw Law Firm in Des Moines authored the amicus brief. It is available from the IDCA website in the members' section. The amicus brief in *Hawkins* should be a part of every defense lawyers "tool-kit." Many thanks to Tom and Catherine for their excellent effort in support of the IDCA.

Cerwick and *Hawkins* are just a couple of examples of the professional service that IDCA offers to the defense bar on a continuing basis. Both cases involve cutting-edge, nettlesome litigation issues. The research and writing involved in both will be of great assistance to IDCA members and defense lawyers going forward.

Kevin M. Reynolds

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Advances in technology also serve to undermine the privilege. It is increasingly difficult to ensure absolute confidentiality of electronic communications.

Waiver requests from law enforcement continue to be a hot button item. In-house counsel with international clients are painfully aware that this is not just an American problem. The European Union has held that the attorney-client privilege does not apply to attorneys who are employed as in-house counsel. *See* Joined Cases T-125/03 & T-253/03, *Akzo Nobel Chems. Ltd. & Akcros Chems. Ltd. v. Comm'n*, 2007 ECJ CELEX LEXIS 555 (Sept. 17, 2007).

In the face of these forces, it is more important than ever for corporate counsel and attorneys representing corporate entities to be familiar with the fundamentals of the privilege and the best ways to protect it. This article discusses the top traps for counsel and offers some practical suggestions for avoiding these pitfalls.

The Parameters of the Privilege

In most model code states, the attorney-client privilege applies when "legal advice of any kind is sought from a professional legal advisor in his capacity as such, the communication relating to that purpose, made in confidence by the client, are protected from disclosure." *Fischel & Kahn, Ltd. v. Van Straaten Gallery, Inc.*, 727 N.E.2d 240, 243 (Ill., 2000) (citing *In re Himmel*, 533 N.E.2d 790 (Ill., 1988)). For example, Illinois Supreme Court Rule 201(b)(2) provides, in part, "All matters that are privileged against disclosure on the trial, including privileged communications between a party or his agent and the attorney for the party, are privileged against disclosure through any discovery procedure." The claimant of the privilege has the burden of showing the communication (1) was made in confidence that it would not be disclosed, (2) was made to an attorney acting in his legal capacity for the purpose of securing legal advice or services, and (3) remained confidential. *See Consolidation Coal Co. v. Bucyrus-Erie Co.*, 432 N.E.2d 250, 257 (Ill., 1982); *see also Rounds v. Jackson Park Hospital & Medical Center*, 743 N.E.2d 561 (Ill., 2001) and *Cangelosi v. Capasso*, 2006 WL 1875368 (2d App., 2006); *but see Hitt v. Stephens*, 675 N.E.2d 275, 278-79 (4th App., 1997) (party seeking disclosure from an attorney has the burden of establishing an exception to the attorney-client privilege). The privilege encourages "full and frank consultation between a client and [counsel] by removing the fear of compelled disclosure of information." *Consolidation Coal Co.*, 432 N.E.2d at 256. The extent of the attorney-client privilege is limited. Illinois has a "strong policy of encouraging disclosure," and, therefore, "the privilege, not the duty to disclose . . . is the exception." *Waste Management, Inc. v. International Surplus Lines Insurance Co.*, 579 N.E.2d 322, 327 (Ill., 1991); *see D.C. v. S.A.*, 687 N.E.2d 1032, 1038 (Ill., 1997) ("privileges are an exception to the general rule that the public has a right to every person's evidence"). Therefore, the privilege should be strictly confined within its narrowest possible limits. *Sharp v. Trans Union, L.L.C.*, 845 N.E.2d 719, 726 (1st App., 2006) (citing *Waste Management*, 579 N.E.2d at 327), as modified on denial of reh'g (Mar. 1, 2006); *see Western States Ins. Co. v. O'Hara*, 828 N.E.2d 842, 847 (4th App., 2005).

In the corporate context, in addition to the proponent of the privilege asserting the three (3) elements identified in the above paragraph, the Illinois Supreme Court has adopted a modified "control group" test that must be satisfied in order for the privilege to apply to protect the communication. *Consolidation Coal Company*, 432 N.E.2d at 257-258; *see Sterling Finance Management, L.P. v. UBS PaineWebber, Inc.*, 782 N.E.2d 895, 900 (1st App., 2002) (noting Illinois law is clear that the modified control group test is used to determine whether the attorney-client privilege applies to a corporate communication). There are two (2) tiers of corporate employees whose communications with corporate attorneys are protected. "The first tier consists of the decision-makers, or top management." *Midwestco-Paschen Joint Venture for the Viking Projects v. IMO Industries, Inc.*, 638 N.E.2d 322, 325(1st App., 1994) (*citing Consolidation Coal Company*, 432 N.E.2d at 257-58). "The second tier consists of those employees who directly advise top management, and upon whose opinions and advice the decision-makers rely." *Id.*; *see Jackson Park Hospital and Medical Center*, 745 N.E.2d at 567 (communication is privileged when (1) the employee is in an advisory role to top management, such that the top management would not normally make a decision in the employee's area of expertise without the employee's advice and (2) the opinion does in fact form the basis of the final decision). With respect to the second tier, the Illinois Supreme Court noted, "We believe that an employee whose advisory role to top management in a particular area is such that a decision would not normally be made without his advice or opinion, and whose opinion is such that a decision would not normally be made within his advice or opinion, is properly within the control group. *Consolidation Coal Company*, 432 N.E.2d at 258. However, the Illinois Supreme Court went on to note, "the individuals upon whom [the employees in the second tier] may rely for supplying information are not members of the control group." *Id.*

Some states have adopted slightly modified versions of the model rule. *See, e.g.*, *Shook v. City of Davenport*, 497 N.W.2d 883, 886 (Iowa 1993) ("Any confidential communication between an attorney and the attorney's client is absolutely privileged from disclosure against the will of the client.") overruled on other grounds by *Wells Dairy, Inc. v. American Industrial Refrigeration,*

Inc., 690 N.W.2d 38 (Iowa 2004). Together with several traditional privileges such as the physician-patient privilege and mental health professional privilege, it is clearly recognized by Iowa law. The law provides that the privilege is owned by the beneficiary, not the professional. Iowa law sets forth a number of procedural specifics with regard to the coverage and waiver of the privilege. It does not, however, clearly define the parameters of the privilege.

The Iowa Supreme Court outlined the privilege with respect to corporate communications. *Keefe v. Bernard*, 744 N.W.2d 663 (Iowa 2009). In *Keefe*, the Iowa Supreme Court agreed with the U.S. Supreme Court that the corporate attorney-client privilege should not be limited to those in the control group. Instead, "the test must focus on the substance and purpose of the communication. If an employee of a corporation or entity discusses his or her own actions relating to potential liability of the corporation, such communications are protected by the attorney-client privilege." *Id.* at *672. However, if "a corporate employee is interviewed as a 'witness' to the actions of others, the communication should not be protected by the corporation's attorney-client privilege." *Id.*

Both state and federal courts have adopted rules aimed at protecting the privilege in the context of modern litigation. *See*, for example, Federal Rule of Evidence 502. *See also* Iowa Rule of Evidence 5.502 addressing the disclosure of information covered by the attorney-client privilege and work-product doctrine in the context of electronic discovery. The Rule is substantially similar to the Federal Rule of Evidence 502.

PRIVILEGE PITFALLS

The United States Supreme Court raised the stakes when, on December 8, 2009, it issued its decision in *Mohawk Industries v. Carpenter,* 558 U.S. 100 (2009). In *Mohawk*, the plaintiff complained to human resources that the employer knowingly employed undocumented immigrants. Carpenter was told to meet with company counsel. Carpenter alleged that counsel pressured him to recant his allegation and he claimed that he refused. Carpenter sued claiming he was fired in violation of public policy and under false premises. The trial court granted Carpenter's motion to compel discovery of information relating to his meeting with in-house counsel, on the ground that the employer had waived its attorney-client privilege through disclosures in another court case. The employer appealed from the order and the Eleventh Circuit held that it lacked jurisdiction because this was not the sort of order that was immediately appealable. The U.S. Supreme Court affirmed the Circuit, holding that disclosure orders adverse to the attorney-client privilege do not qualify for immediate appeal under the collateral order doctrine.

1. FAILING TO RECOGNIZE THE FUNDAMENTALS OF THE PRIVILEGE.

It may seem simplistic to suggest that the attorney who forgets the fundamentals of the attorney-client privilege is asking for trouble. Nevertheless, it seems that many of us forget the basics. To be privileged, a communication must: (1) be made by an attorney acting as such; (2) to a client; (3) in confidence. *See Upjohn Co. v. United States*, 449 U.S. 383 (1981). In Illinois, the protected communication is information sent from the client to the lawyer. *See Consolidation Coal Company*, 432 N.E.2d at 257. Every single communication must be analyzed with these fundamentals in mind.

Indeed, only by revisiting the fundamentals of the privilege can we make sense of some decisions. A recent Pennsylvania decision points out the importance of sticking to the fundamentals. A lawyer sent a communication to a regular corporate client explaining a new development in the law and warning the client to take a proactive approach. The communication was ultimately determined not to be protected by the attorney-client privilege. This is because the client had not asked for the lawyer's input and therefore, the technical elements of the attorney-client privilege were not satisfied.

2. FAILING TO ACT AS "AN ATTORNEY."

One need look no further than a colleague's business card to identify problems associated with determining when in-house counsel is acting as an attorney. Many in-house attorneys perform important functions that cannot be described as the provision of legal services. Attorneys serve as assistant counsel and "director of governmental affairs." Others might be designated not only as general counsel, but also "vice president", "secretary" or "director of risk management." It is common for in-house counsel to provide input on a number of issues, some of which may clearly be legal, while others are clearly business. It is when an in-house counsel renders advice that is a mix of both legal and business advice that problems develop. Our courts have attempted to formulate workable standards for determining if an attorney is acting as an attorney as opposed to a business leader. *See In re Bieter Co.*, 16 F.3d 929 (8th Cir. 1994). Where roles may be intertwined, courts often require corporations to prove that they sought "primarily" legal advice from in-house counsel to avail themselves of the privilege. *See, e.g. Sedco Int'l, S.A. v. Cory*, 683 F.2d 1201 (8th Cir. 1992), *cert. denied* 459 U.S. 1017 (1982). Still other courts have held that, to be protected, the legal advice given to the client must be the "predominant element" in a communication. *See United States v. Davis*, 132 F.R.D. 12 (S.D.N.Y. 1990).

There are a number of areas of which corporate counsel should be wary. For example, in-house counsel acting as a human resource professional or risk manager may not be protected by the privilege. In *Neuder v. Battelle Pacific Northwest National Laboratory*, 194 F.R.D. 289 (D.D.C. 2000), the court held that an attorney's communications were not protected by the attorney-client privilege. In that case, the attorney was serving on a personnel action review committee. The lawyer, together with the rest of the committee, reviewed terminations to determine if they complied with company policy and practices. When the plaintiff, a former employee, brought a discrimination claim, the court held that, although the attorney may have provided some legal advice during committee discussions, his role was primarily non-legal in that he simply served as another member of the committee determining whether the termination was consistent with company policy. Likewise, in *Kramer v. Raymond Corp.*, 1992 Lexis 7418 (E.D. Pa. 1992), the court held that an attorney serving on a product liability risk reduction committee was not serving in a predominantly legal capacity. The attorney's communications were therefore not protected by the privilege. *See also Ga.–Pac. Corp. v. GAF Roofing Mfg. Corp.*, 1996 WL 29392 (S.D.N.Y. Jan. 25, 1996).

From a practical standpoint, in-house counsel should be extremely careful when serving on corporate committees such as affirmative action, personnel review, ERISA claim review, diversity, or product liability committees. If possible, it is essential for corporate counsel to segregate legal advice from non-legal business communications. This is really the only way to guarantee the protection of the privilege.

3. <u>FORGETTING WHO "THE CLIENT" IS.</u>

A corporation acts through people. Corporate counsel should be aware of the tests that might be applied in a given jurisdiction when determining whether the persons with whom the in-house counsel is speaking are considered "the client" for purposes of the privilege. Courts use the "control group test" or the "subject matter" test when analyzing communications. *See Upjohn Co.*, 449 U.S. 383; *E.I. du Pont de Nemours & Co. v. Forma-Pack, Inc.*, 718 A.2d 1129 (Md. 1998). As corporate counsel deal with employees, former employees and others, they should be mindful of that employee's role in the corporation, the subject matter of the discussion and the nature of any litigation, pending or threatened.

Attorneys should be aware that they might be seen as acting in a fiduciary capacity or that they might be representing someone other than a corporate entity. For example, corporate counsel conducting certain activities may in fact be acting on behalf of ERISA fiduciaries or claimants as opposed to the corporate entity.

The fiduciary exception prevents communications between a plan fiduciary and an attorney "in the execution of fiduciary duties" from being shielded against plan participants and beneficiaries. *Wachtel v. Health Net*, 42 F.3d 225, 226 (2d Cir., 2007). A fiduciary under ERISA is a person who: (a) exercises discretionary authority or control over an employee benefit plan; (b) provides investment advice; or (c) has discretionary administrative authority or responsibility over the plan. A fiduciary's primary responsibility is to act in the best interests of the plan and its beneficiaries. An employer does not act as a fiduciary when it engages in plan design activities. *Becher v. LILC*, 129 F.3d 268 (2d Cir., 1997). On the other hand, if the employer is acting as a plan administrator, it is acting in a fiduciary capacity. Thus, if it consults counsel on matters of plan administration, the employer cannot claim the privilege against participants.

4. <u>REPRESENTING MULTIPLE CLIENTS.</u>

All lawyers are especially careful when representing multiple clients. *See, e.g.*, *Illinois Emcasco Insurance Company v. Nationwide Mutual Insurance Company*, 913 N.E.2d 1102 (Ill App. Ct., 2009) (discussing inapplicability of attorney-client privilege due to the "common-interest doctrine" when an attorney represents two different parties who each have a common interest) (citing *Waste Management*, 579 N.E.2d at 328). However, sometimes in the corporate context, it is not always obvious when a lawyer is doing so. A recent decision by the Delaware chancery court highlights the danger of providing privileged information in the corporate context.

In *Ryan v. Gifford*, 2007 WL 4259557 (Del. Ch. No. 30, 2007); 2008 WL 43699 (Del. Ch. Jan. 2, 2008), the Delaware Chancery court held that an investigative report of counsel to a special board committee lost its privileged status when it was disclosed to directors who were also defendants in a derivative action. In the face of an SEC investigation of alleged stock option backdating, Maxim Integrated Products, Inc. created a special committee of outside directors to investigate the allegations. The law firm representing the special committee ultimately presented a report to the entire Board of Directors, including those directors who were individually named as defendants in a pending civil derivative action. The court granted a motion compelling the production of the report. The court held that the privilege had been waived because the privileged material had been produced to

the individual director defendants and their counsel and that the defendant's interests were "not common with the client."

The court's decision in *Ryan* created quite a stir. While the court later tried to clarify its decision to limit its application, the decision nevertheless should be closely analyzed by anyone representing Delaware corporations.

5. **SQUANDERING THE "ATTORNEY-CLIENT PRIVILEGE."**

Any attorney involved in complex commercial litigation is used to receiving a number of documents in the discovery process that may be labeled "confidential" or "privileged." Typically this occurs because the person creating the document really did not think about whether it was privileged. Many documents that may be designated as privileged have to be produced because they do not truly satisfy the elements of the attorney-client privilege.

Corporate counsel should remember that overuse of the "attorney-client privilege" legend may cause to cheapen it. It should be remembered that usually such documents are reviewed *in camera* by a court with a limited understanding of the facts years after the document was created. Saving the "attorney-client" designation for documents that are truly protected should ensure a greater degree of protection.

6. **TECHNOLOGY AND SLOPPY COMMUNICATION.**

Confidentiality is the hallmark of the attorney-client privilege. Attorneys must take reasonable steps to ensure that their communications are confidential. Transmitting a communication to parties outside of the control group or management team may cause it to lose its privileged status. *See Pritchard v. County of Erie*, 2007 WL 3232096 (W.D.N.Y. Oct. 31, 2007) overruled on other grounds by 546 F.3d 222 (2d Cir., 2008); *see also Sterling Finance Management*, 782 N.E.2d at 905 (one document that would be subject to attorney-client privilege distributed to an individual outside of the "control group;" appellate court affirmed trial court's rejection of privilege).

Counsel should be extremely cautious when acting as a "guest" on a "hosted" wireless internet. This is especially true if the internet is hosted by opposing counsel or a third party. Such sites typically require users to agree to terms and conditions when they log on. Counsel should pay particular attention to the conditions they are being asked to agree to. If they are agreeing that their messages may be monitored, they will not have an expectation of privacy and will therefore forfeit the privilege. *See Scott v. Beth Israel Med. Ctr.*, 847 N.Y.S.2d 436 (N.Y. Sup. Ct. 2007).

In a recent Fair Housing Act lawsuit, the non-party's attorney requested the return of privileged documents obtained through the plaintiff's previous subpoena. The privileged information included e-mails sent to the non-party attorney from one of his clients via her work e-mail address. The plaintiff argued that any privilege was waived on account of the company's privacy policy, which included the right to review and disclose all electronic messages created. Using a four-part balancing test that balanced the expectation of privacy against the lack of confidentiality, the court found that the company placed all employees on notice that e-mails would become the employer's property. The court also noted that the client's apparent lack of awareness of the privacy policy was unreasonable "in this technological age" and that the client's e-mail address itself clearly put the non-party attorney on notice of a potential issue of confidentiality. Thus, the court determined privilege was waived with respect to the e-mails sent using the client's work e-mail account.

Electronic communications continue to pose traps for the unwary. One must always remember the fundamental elements of the privilege, one of which is confidentiality. In order to protect a communication with the privilege, there must be an expectation that the communication will be confidential.

There is a growing body of law warning that someone who uses an email system with the advance knowledge that communications may be monitored cannot protect communication with an attorney. In *Holmes v. Petrovich Development Company*, the plaintiff-employee asserted the attorney-client privilege over email messages she sent her lawyer. *See* 191 Cal. at 4th 1047, 119 Cal. Rptr 878 (3rd Dist. 2011).

In *Holmes*, the court rejected the privilege claim because the plaintiff used a company computer and email account to communicate with her attorney and the company's employee handbook prohibited the use of the system for personal messages and clearly warned that the system would be monitored.

The *Holmes* decision is similar to the decision of the New York courts in *Scott v. Beth Israel Medical Center*, 17 Misc. 3d 934, 847 NYS 2d 436 (Sup. Ct. NYCTY 2007). In *Scott*, the court held that the plaintiff could not claim privilege over email correspondence sent on his employer-provided email account. The employer's policy reserved the use of the account for business purposes and clearly warned that the account would be monitored. Interestingly, it appears that the validity of the privilege may actually turn on the

precise language contained in the employer's handbook or electronic communication policy. The key question seems to be whether the employee knew or should have known that the system would be monitored. *See Long v. Maruvenian Corp.*, 05 Civ. 639, 206 WL 2998671 (SDNY Oct. 19, 2006). *See also Stengart v. Loving Care Agency*, 2001 NJ 300, 990 A.2d 650 (2010). The courts will look at whether the employee used an email address account furnished by the employer and whether the employer disclosed that it would monitor communications.

Cases like *Scott* and *Holmes* pose concerns not just for employees, but also for independent contractors. Many companies provide independent contractors with access to their email systems. They often treat these contractors just like employees when it comes to electronic communication. The rationale of the *Scott* and *Holmes* decisions would apply in such instances.

A closer question arises when dealing with visitors who hosted wireless systems. In *Stengart*, the court looked at whether the employee truly had knowledge that the employer would monitor. In *National Economic Research Associates v. Evans*, 21 Mass. L. Reporter 337 2006 WL 2440008 (Sup. Ct. 2006), the court held that the employee was not warned that the communication in question would be monitored. The court stated "many computer users did not know that the content of [web-based] emails could be stored on their computer hard drives as temporary internet files." In that case, the employee used the employer's system to access a private email account while at work. The employer did not clearly warn that messages opened using a computer supplied by the employer may cause messages to be stored on the hard drive.

Perhaps surprisingly, lawyers are not the primary cause of waiver of the attorney client privilege when it comes to technology. In this age of social media, clients often prove to be the source of the waiver of the attorney client privilege. It's not uncommon for someone to comment on Facebook or Instagram "my lawyer says." In recent decisions courts have held that the privilege was waived where a litigant frequently commented to friends and relatives on the strategy behind legal maneuvers.

In other instances it is clearly the attorney at fault. For example, in *Amersham Bioscience v. Percahnhelmer* attorneys produced electronic documents that they couldn't read. They figured that since they could not read the documents that there was no harm in producing them because the other side would not be able to read them either. Meanwhile, the other side obtained the correct technology and read the documents. The court determined that this is not an inadvertent waiver and that the ignorance of the ability to use the appropriate technology to read the documents is not a reasonable approach. Likewise, the court held in *Alpert v. Riley* that a lawyer who places confidential information on a computer server and then transfers the server forgetting to remove the confidential information has waived the privilege.

The next generation of cases may involve the ubiquitous wireless systems. Consider whether a visiting attorney has a legitimate expectation of privacy where, in order to use the system, he or she agrees to terms that clearly indicate that communications will be monitored. Attorneys should be very cautious. They should never "click through" user acknowledgement without carefully reading terms and conditions.

7. DESIGNATING COUNSEL AS CORPORATE REPRESENTATIVE.

Designating an attorney as a Rule 30(b)(6) witness is extremely dangerous. To be sure, most courts generally hold that merely designating an attorney pursuant to Rule 30(b)(6) does not waive any privilege. However, because an in-house attorney is an agent of the corporate entity, serving as a Rule 30(b)(6) witness may cause in-house counsel to unintentionally waive their client's privilege. *See Motley v. Marathon Oil Co.*, 71 F.3d 1547 (10th Cir. 1995). This is especially true if the attorney may be serving in a dual role. *See Adler v. Wallace Computer Servs., Inc.*, 202 F.R.D. 666 (N.D. Ga. 2001).

Like signing a 30(b)(6) designation, in-house counsel should be cautious about authoring or signing affidavits or cover letters to governmental agencies such as the Iowa Civil Rights Commission or Securities Exchange Commission. Once again, while merely signing an affidavit does not waive the attorney-client privilege, all the pitfalls associated with serving as a Rule 30(b)(6) representative likewise accompany signing an affidavit.

8. WAIVER; SCOPE OF WAIVER.

Once the attorney-client privilege applies, a communication is permanently protected unless waived. *Exline v. Exline*, 659 N.E.2d 407, 410 (2d App., 1995). Waiver of the privilege may be due to a voluntary/selective waiver, through a coerced or involuntary waiver, through an implied/at-issue waiver, or as a result of inadvertent production.

It is clear that the privilege belongs to the client, *In re Marriage of Decker*, 606 N.E.2d 1094, 1101 (Ill., 1992), but once voluntarily disclosed the privilege is waived. In Illinois,

the mere act of disclosing confidential information outside of the control group waives the privilege. *Sterling Finance Management*, 782 N.E.2d at 905. Some holders of the privilege have attempted to disclose confidential information to one party, but reserve the confidentiality with respect to others. This is called a "selective waiver," and is discussed in subsequent paragraphs.

Further, of late, many governmental agencies, including the Securities & Exchange Commission and the Department of Justice, have encouraged companies to "cooperate" in investigation and to do so by agreeing to waive the attorney-client privilege and work-product doctrine.

Counsel should also be wary of the "implied" or "at issue" waiver. A client may inadvertently waive the attorney-client privilege by asserting claims or defenses that put his or her communications with the legal advisor at issue in the litigation. *See Lama v. Preskill*, 818 N.E.2d 443, 448 (2d App., 2004) ("at issue" waiver occurs when a party voluntarily injects either a factual or legal issue into the case, the truthful resolution of which requires an examination of the confidential communications). The "at issue" waiver has been featured in the recent Securities and Exchange Commission/Bank of America litigation pertaining to Bank of America's acquisition of Merrill Lynch. *See Securities and Exchange Commission v. Bank of American Corporation*, 09 Civ. 6829 (S.D.N.Y., 2009). In proposing a $33 million settlement, the SEC noted that its normal policy was to go after company executives who were responsible for fraudulent conduct but claimed it could not do so because "[t]he uncontroverted evidence in the investigative record is that lawyers for Bank of America and Merrill drafted the documents at issue and made the relevant decisions concerning disclosure." *Id.* Claims could not be made against lawyers because "the Bank refused to waive attorney-client privilege." *Id.* However, the judge noted "the S.E.C. never seriously pursued whether [the Bank's defense that it relied on outside counsel] constituted a waiver of this privilege." *Id.* Bank of America, after opening the door, subsequently entered into a Federal Rules of Evidence Rule 502(d) consent order in an attempt to protect disclosures made to the SEC.

In a recent decision the Iowa Supreme Court clarified the law surrounding waiver of the privilege. *See Fenceroy v. Gelita USA, et. al.* No. 16-0775 (Iowa Supreme Court, February 23, 2018.) In *Fenceroy* the Court held when a corporate entity raises an affirmative defense that turns on the efficacy of an internal investigation the company waives the attorney client privilege and work product doctrine protections over testimony and documents related to the investigation. Although the *Fenceroy* opinion dealt with a very specific employment discrimination defense, the *Fenceroy* rationale provides a roadmap for navigating the outer limits of privilege and waiver in a number of contexts. Lawyers overseeing safety, financial and ethical investigations should pay close attention to the *Fenceroy* decision.

The Plaintiff in *Fenceroy* filed a race discrimination and harassment claim shortly after he retired from his job with as a Sargent Bluff gelatin maker. In response to his claim of harassment Gelitia retained an attorney to defend the company in responding to an administrative charge before the Iowa Civil Rights Commission. The attorney conducted an internal investigation. The company terminated one employee, and disciplined others as a result of the investigation. *Id* at 5.

In the ensuing litigation the company asserted what is known as the Farragher-Ellerth Defense. In its decisions in Farragher and Ellerth the Iowa Supreme Court outlined a two-part defense based upon a showing of (1) "reasonable care" to prevent harassment; and (2) that employee "unreasonably failed to take advantage" of preventative and corrective opportunities. *Farragher* 524 U.S. at 807. The Iowa Supreme Court, in a four to three decision, held that when a defendant asserts such a defense it necessarily waived the privileged surrounding the investigation. In a spirited dissent Justices *Waterman, Mansfield* and *Zaiger* reasoned that because the defense was based solely upon the Plaintiff's failure to use Gelita's complaint system "during" his employment there was no implied waiver surrounding a post-retirement investigation.

With respect to the scope of any voluntary waiver, in-house counsel should be very clear as to the extent of any waiver he or she intends to authorize. In Illinois, while a disclosure does not waive all other non-disclosed communications, a voluntary disclosure does waive the privilege as to the remainder of the conversation or communication about the same subject matter. *In re Grand Jury*, 651 N.E.2d 696, 700 (1st App., 1995). Under Federal law, Rule 502 of the Federal Rules of Evidence may provide some protection. Rule 502, adopted September 19, 2008, in essence, limits the scope of waiver. The Rule specifically provides that when a disclosure is made in a Federal proceeding or to a Federal office or agency any waiver extends to an undisclosed communication or information in a Federal or State proceeding *only* if three (3) conditions are met. These conditions include that the waiver was intentional, the disclosed and undisclosed

communications or information concern the same subject matter, and the disclosed and undisclosed communication ought in fairness to be considered together. Rule 502(b) governs inadvertent disclosures, while Rule 502(c) provides that if a disclosure is made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if certain conditions are met. Rule 502(d) authorizes the use of court orders to ensure privilege or protection is not waived by a disclosure, while Rule 502(e) impacts agreements regarding disclosure between parties, by stating that an agreement on the *effect* of a disclosure is binding only on the parties to the agreement unless the agreement is incorporated into a court order.[1]

However, Rule 502 does not change the law regarding "selective waiver." In fact, proposed "selective waiver" language was included in the proposed Rule but was removed in the final enactment. A selective waiver occurs where a party attempts to waive the privilege with respect to one party but not all parties. At present there are competing philosophies on such selective waivers. At one end of the spectrum, largely on policy grounds, is the Eighth Circuit's holding that a selective waiver is possible. *See Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977). In *Diversified Industries*, the defendant provided privileged communications to the SEC. In subsequent litigation, an opposing party argued that the SEC disclosure waived the attorney-client privilege. The court held that although there was a waiver of the privilege, it was only effective for actions initiated by the SEC and that the corporation could assert the attorney-client privilege to protect those released documents in subsequent litigation against parties other than the SEC. This well reasoned approach may provide solace to attorneys practicing in Iowa.

Corporate counsel should, however, be aware of competing philosophies when it comes to waiver. The Eighth Circuit approach has generally been rejected by a majority of federal jurisdictions. These jurisdictions hold that a full and complete waiver of the attorney-client privilege occurred following the disclosure of confidential information to the government. *See, e.g., In re Qwest Communications International Securities Litigation*, 450 F.3d 1179 (10th Cir., 2006); *In re Columbia/HCA Healthcare Corporation Billing Practices Litigation*, 293 F.3d 289 (6th Cir., 2002); and *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981). In *Permian*, the court rejected the limited waiver theory as "wholly unpersuasive" and held that an express "reservation of confidentiality" contained in documents transmitting privileged information made no difference whatsoever. The court held that a corporate client should not be allowed to "pick and choose among his opponents" and reasoned that the limited waiver would frustrate, rather than promote, full disclosure.

There are numerous other pitfalls associated with a deferred prosecution agreement. This is especially true if the DPA includes a prospective waiver rather than merely a waiver regarding past misconduct.

Counsel should keep in mind that, although documents provided to third parties are clearly not protected by the attorney-client privilege, drafts of those documents may receive protection. *See Klobluk v. Univ. of Minn.*, 574 N.W.2d 436 (Minn. 1998); *see also SEC v. Beacon Hill Asset Mgmt. LLC*, 2004 U.S. Dist. LEXIS 18390 (S.D.N.Y. Sept. 14, 2004). To protect documents in draft form from being swept up in an inadvertent disclosure argument, counsel should ensure that all drafts for circulation include an attorney, that the attorney is clearly asked to provide legal input, and that the documents are clearly labeled "drafts."

9. <u>SLOPPY INVESTIGATIONS.</u>

There are a number of problems that can arise when in-house counsel is conducting an internal investigation. Counsel should take steps to uniformly use the "Upjohn" or "corporate Miranda" warning at the beginning of any employee interview. The warning typically includes the following elements: (1) the attorney represents only the corporation; (2) the interview is covered by the attorney-client privilege; (3) the privilege belongs to and is controlled by the company, not the individual employee; and (4) the company, in its sole discretion, can decide whether to waive the privilege and disclose information from the interview to third parties. The uniform use of the warning serves multiple purposes. First, it fulfills corporate counsel's ethical obligation to refrain from misleading an employee with interests potentially adverse to those of the corporation. *See* Model Rules of Prof'l Conduct R. 1.13(f) (2007); *Westinghouse Electric Corporation v. Kerr-McGee Corporation*, 580 F.2d 1311 (7th Cir., 1978) (law firm for a trade association gave some individual members of association the impression that firm was also representing them when collecting information from the members; firm was required to withdraw from representation when matter arose for another client in which the information collected from the members might be used again them). In addition, the use of the warning should enable counsel to cloak the interview with the protection of the attorney-client privilege with respect to Federal action and/or states that do not follow the "control group" test. Finally, a failure to give the warning may result in the privilege being determined to be held jointly by the employee and the

company. This would obviously forfeit exclusive corporate control over the privilege. *See Adler*, 202 F.R.D. 666.

Corporate counsel should be prepared to respond to questions from employees regarding whether they need to retain separate counsel. Counsel should not offer advice to the unrepresented employee, except the advice that the individual should obtain counsel. Giving any other guidance may result in a violation of corporate counsel's professional duties.

10. FAILING TO CONTROL AGENTS.

Corporate counsel regularly use staff to assist in investigations or other matters. It is important to remember that, unless they are tightly controlled, agents may cause a waiver of the privilege. Generally, courts scrutinize agency claims very closely. A court will only uphold the attorney-client privilege or work product doctrine in an agency situation if it is clear that that agent was acting under the direct supervision and control of counsel. *See, e.g.*, *Cuno, Inc. v. Pall Corp.*, 121 F.R.D. 198 (E.D.N.Y. 1988); *Carter v. Cornell Univ.*, 173 F.R.D. 92 (S.D.N.Y. 1997).

To make it easier to establish the agency privilege, in-house counsel should follow some simple rules: (1) ensure the documents evidence the "agency" relationship on their face; (2) precisely define the role of the agent; (3) clearly document the legal purpose of the agent's activity; and (4) make sure that in-house counsel is included in all communications, especially e-mail.

PRESERVING THE PRIVILEGE

There are some simple steps that in-house counsel can take to avoid the pitfalls discussed above and to protect the privilege. In particular, in-house counsel should consider the following:

1. Consider the challenges posed by the pervasive use of e-mail and electronic communication.
2. Do not place the "attorney-client privileged" legend on every e-mail.
3. When writing, note the fact that the client requested the legal advice by writing words such as "in response to your request for legal advice."
4. Segregate legal functions from those that are non-legal.
5. Segregate the facts in a document from legal advice.
6. Maintain separate legal and business files where permissible.
7. Educate your clients on the privilege.
8. Avoid serving as Rule 30 designee.
9. Don't even consider a waiver without competent criminal counsel.
10. Know the corporate Miranda warning–"I REPRESENT THE CORPORATION, NOT YOU. THIS INTERVIEW IS COVERED BY THE ATTORNEY-CLIENT PRIVILEGE. THAT PRIVILEGE BELONGS TO THE CORPORATION—NOT YOU. THE CORPORATION MAY DECIDE, IN ITS SOLE DISCRETION, WHETHER OR NOT TO DISCLOSE THIS INFORMATION TO THIRD PARTIES, INCLUDING THE GOVERNMENT."
11. Avoid using a business title when giving legal advice.
12. Don't write what can be said.
13. Limit the number of recipients of communication.
14. Avoid being an affiant or 30(b)(6) designee.
15. Consider adding a "do not distribute or copy this document" DIRECTIVE.
16. If asked whether the employee should obtain counsel, the answer is always: "I cannot advise you on that matter" or . . . "yes."
17. Control privileged material to reduce the possibility of a waiver—voluntary or otherwise.

CONCLUSION

In this environment, it is extremely important for corporate counsel to make every effort to protect the attorney-client privilege. This is certainly one area of the law where being proactive may pay off.

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1 Careful drafting of such Rule 502(e) agreements and Rule 502(d) court orders are imperative as both use the term "disclosure" and not "waiver." Rule 502(d) allows a federal court to "order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is not a waiver in any other Federal or State proceeding." This provision contemplates where a party makes a "disclosure" of documents without making a "waiver." In the absence of an order in accordance with Rule 502(d), Rule 502(a) says that when a disclosure is made in a federal proceeding or to a federal office or agency and *waives* the attorney-client privilege or work product protection, the waiver extends to undisclosed communications and information if the enumerated conditions are satisfied. See, e.g., Zach Lowe, Did Bank of America Mess Up Its Privilege Waiver?, The American Lawyer (October 20, 2009) (arguing Bank of America waived attorney-client privilege), *available* at http://www.law.com/jsp/article.jsp?id=1202434746211 (last visited December 10, 2009).

2018 Legislative Report

By Legislative Counsel
Brad Epperly and Dustin Miller, Nyemaster Goode PC, Des Moines, Iowa

Brad Epperly

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After one of the most substantial sessions of passing numerous policy bills by the Republican majorities, the 2018 Session of the 87th Iowa General Assembly was bogged down by budget and tax reform. The Session was marked by a change in the Governor's office as Governor Branstad's appointment as Ambassador to China received Senate confirmation on May 22, 2017. Two days later he resigned as Governor and Kim Reynolds was sworn in as Iowa's 43rd Governor. Although there were a couple of special elections due to resignation and a death, The House and the Senate majorities remained the same at 59-41 and 29-20-1 respectively.

The legislature was again faced with a budget shortfall in the current budget year. However, the legislature waited until after the March Revenue Estimating Conference to move on a deappropriation. With revenues projecting more positively, the legislature needed only a net $23.3 million from the current 2018 budget. The impact on the Judicial Branch budget was a $1,611,815 reduction in funding.

The first policy bill of significance was water quality. The legislature failed to pass a bill in 2017, although both chambers passed water quality bills. In her State of the State address, the Governor asked that a water quality bill be the first piece of legislation she signed. After months of maneuvering prior to the start of session, the Senate bill received sufficient support in the House and the bill was passed and signed by the Governor in February. The Governor's Future Ready Iowa initiative, promoting skills training and internships to address Iowa's workforce shortage followed close behind.

At the end of February, after over a year of work on tax reform, the Senate finally unveiled its tax reform bill that was touted at cutting $1.2 billion in taxes annually. The bill included cuts to individual income taxes as well as corporate taxes, modernized the sales tax chapter and sunset many of the State's economic development incentives. Less than a week later, the Senate passed the bill out of the Senate on party lines and sent it over to the House where it sat. The Governor had filed her tax reform bill a week prior, which did not include corporate tax reform. With both bills sitting in the House and the budget impact of passing anything, leadership in the two chambers along with the Governor's office spent the next two months negotiating tax reform and working through individual budgets.

Finally, in the last week of session, two weeks past the last scheduled day of session, an agreement on tax reform was reached and they pushed through to adjournment on Saturday evening, May 5, 2018.

In 2017 we monitored the following legislative activity for the Iowa Defense Counsel Association ("**IDCA**"):

- 1344 bills and study bills (study bills are prospective committee bills) were introduced.
- 260 resolutions were introduced.
- 808 amendments were filed. Amendments can be as simple as changing a single word in a bill or can be the equivalent of lengthy, complicated bills in themselves.
- 176 bills and resolutions passed both chambers.

The full text of all bills, study bills, resolutions, and amendments can be viewed on the legislature's website: https://www.legis.iowa.gov.

The governor had 30 days after the legislature adjourned sine die (i.e., until June 4, 2018) to approve or veto legislation sent to her in the last three days before adjournment or sent to her after the legislature adjourns. Bills that were not finally acted upon during

the 2018 session are no longer eligible for consideration during the next legislative session.

The first session of the 88th Iowa General Assembly will convene on January 14, 2018.

A. Tort Issues

1. Mitigation of Damages for Failure to Wear Seatbelt. After coming up short in the House last year amongst all the success of the pro-defense related bills (Med mal, statute of repose, work comp), we were finally able to get our bill modifying the code on mitigation of damages for failing to wear a seatbelt. During the 2017 session, the IDCA reached a compromise with the Iowa Association for Justice to raise the percentage from 5 percent to 25 percent. Even though we had more than 50 Republican votes in the House, the bill was held hostage by a Representative concerning a bill on electronic verification of automobile insurance.

   This year we focused our early efforts in the Senate. Working with Democrat Nate Boulton, an IAJ member and gubernatorial candidate, we obtained his support and accordingly, a unanimous vote in the Senate, 49-0. Despite the compromise with the IAJ and the overwhelming support in the Senate, Rep. Brian Meyer still vehemently opposed the bill and worked against it in the House. On a day when three of our Republican Representative supporters were absent in the House, leaving us with only 49 confirmed Republican votes, Rep. Chip Baltimore asked Majority Leader Hagenow to bring the bill to the floor anyway, forcing a few undecided Republicans to either support or go against their own caucus. The bet paid off, with the final tally of 58-38, with six Democrats in favor of the bill. The Governor signed the bill on March 15, 2018 and the effective date is July 1, 2018.

2. Dram Shop. Over the last several years there has been significant effort by the restaurant industry to modify Iowa's dram shop laws. Although legislation finally passed this year, it did so with significant dilution of the bill's most controversial provision, damages caps.

   Like the medical malpractice bill a year ago, SF 2135 did pass the Senate with noneconomic damages caps. In this case, the caps were $75,000 and $100,000. The bill was opposed by the Association for Justice and the Iowa Bar Association, along with the Defense Counsel. After passing the Senate, the bill sat on the House daily debate calendar for almost six weeks. Finally, the restaurant lobby agreed to raise the cap to $250,000 and include the same exception language contained in the medical malpractice bill from the prior year in order to get the necessary votes and passed the House, 61-36. The exception language is as follows:

   > unless the jury determines that there is a substantial or permanent loss or impairment of a bodily function, substantial disfigurement or death, which warrants a finding that imposition of such a limitation would deprive the plaintiff of just compensation for the injuries sustained.

   Although the Senate accepted the House amendment and the bill was passed and sent to the Governor who signed the bill, subsequent concerns were raised that the caps language of the bill could be interpreted to apply beyond noneconomic damages. As such, the changes were amended by section 51 of HF 2502, the Standings Bill.

3. Brain Injury Extracurricular Interscholastic Activities. The legislature passed legislation addressing concussions after a couple of sessions of work. HF 2442 requires the Department of Public Health to work with the boys and girls high school athletic associations to develop training materials and courses, training for coaches and officials and to distribute guidelines for prevention. The bill provides for protocols for the removal from a contest and to develop return-to-play protocols. If a school district or nonpublic school fully implements the protocols and provides a licensed health care provider at an extracurricular interscholastic activity, the school shall not be liable for any claim for injuries or damages based upon the actions or inactions of the provider present at the extracurricular interscholastic activity at the request of the school district or nonpublic school.

B. Labor and Employment Issues

1. Civil Actions for Victims of Sexual Abuse. A perennial bill each year concerns the statute of limitations for civil and criminal actions for victims of sexual abuse. SF 2134 would have extended the statute of limitations for civil actions in several areas. First, it increased the statute of limitations from 5 years to 10 years after last treatment or end of enrollment where the perpetrator is a counselor, therapist or school employee. Second, for persons with mental illness or minors, it would have extended the statute of limitations after the attainment of the age of majority from one year to 25 years. In addition, where the person was a minor and did not discover the abuse until after reaching the age of majority, the statute would have been extended to 25 years after the discovery of both the injury and the causal relationship between the injury and the sexual abuse.

A related bill was filed for criminal actions for sexual abuse to minors wherein the statute of limitations of ten years would have been eliminated. The bill, SF 2375, passed the Senate on February 27th, but died in the House. Later in the session, SF 2134 was filed as an amendment on an unrelated bill concerning the statute of limitations for collection of rent by landlords. The underlying bill was brought to the Senate floor for debate the day following the resignation of the Majority Leader, Bill Dix. In what was likely confusion of the prior criminal law bill (SF 2375) that was passed in the Senate earlier, the Senate mistakenly accepted the amendment for the civil causes of action to the landlord bill and passed the bill out of the Senate. We communicated the circumstances to the House Majority Leader the following day and were given assurances that the bill would not move. The bill died in the House.

C. Insurance

HF 2238 was passed by the legislature and signed by the Governor. The bill relates to insurers as victims for purposes of receipt of criminal restitution damages. The bill amends the definitions of pecuniary damages and victim in the criminal restitution Code chapter. An insurer may be a victim for purposes of criminal restitution if the insurer is a victim of insurance fraud due to fraudulent submissions or fraudulent sales practices. Insurers are currently excluded as victims for purposes of criminal restitution.

D. Judicial Funding

1. Judicial Branch Funding. After much negotiation, the legislature funded the Judicial Branch at $177.5 million, which is $3.4 million more than the current FY 18 appropriation (after the de-appropriation). At this amount, the Court believes it will be able to maintain current service levels in all 99 counties. However, language was struck from the bill that would have allowed the Supreme Court to set judicial officer salaries for FY 19. HF 2495.

E. Failed Bills of Note

- SF 2282, a bill that would have required a super majority by the Iowa Supreme Court to overrule a statute as unconstitutional passed the Senate but died in the House. ICDA opposed the bill.
- SF 2357, a bill that would have increased the jurisdictional limit for small claims cases to $7,500 passed the Senate but also died in the House. Most of the property & casualty groups opposed the bill, as did the Bar Association, the Iowa Association of Magistrate Judges, the Academy of Trial lawyers and the Association for Justice. The IDCA was neutral on the bill.
- SF 2305, a bill that would have created a worker's compensation fraud unit within the Insurance Division passed the Senate, but also died in the House. The bill was opposed by the Bar Association and the Iowa Association for Justice, but supported by most property and casualty groups. IDCA registered neutral on the bill with the stated basis that it did not concern the practice of law.

Defining the Parameters of the Attorney-Client Privilege in Iowa

By Frank B. Harty, Nyemaster Goode PC, Des Moines, Iowa

Frank B. Harty

Introduction

The traditional heart of the attorney-client privilege in Iowa is well defined. So are the common events that result in a waiver of the privilege. It is the somewhat porous borders of privilege and waiver that pose practical problems for Iowa lawyers. Vexing issues surrounding partial waiver, subject matter waiver and inadvertent waiver regularly confront Iowa lawyers. In a recent decision the Iowa Supreme Court clarified the law surrounding waiver of the privilege. *See Fenceroy v. Gelita USA et al* No. 16-0775 (Iowa Supreme Court, February 23, 2018.) In *Fenceroy* the Court held when a corporate entity raises an affirmative defense that turns on the efficacy of an internal investigation the company waives the attorney-client privilege and work product doctrine protections over testimony and documents related to the investigation. Although the *Fenceroy* opinion dealt with a very specific employment discrimination defense, the *Fenceroy* rationale provides a roadmap for navigating the outer limits of privilege and waiver in a number of contexts. Lawyers overseeing safety, financial and ethical investigations should pay close attention to the *Fenceroy* decision.

Privilege Basics

In most model code states, the attorney-client privilege applies when "legal advice of any kind is sought from a professional legal advisor in his capacity as such, the communication relating to that purpose, made in confidence by the client, are protected from disclosure." *Fischel & Kahn, Ltd. v. Van Straaten Gallery, Inc.*, 727 N.E.2d 240, 243 (Ill., 2000) (citing *In re Himmel*, 533 N.E.2d 790 (Ill., 1988)). For example, Illinois Supreme Court Rule 201(b)(2) provides, in part, "All matters that are privileged against disclosure on the trial, including privileged communications between a party or his agent and the attorney for the party, are privileged against disclosure through any discovery procedure." The claimant of the privilege has the burden of showing the communication (1) was made in confidence that it would not be disclosed, (2) was made to an attorney acting in his legal capacity for the purpose of securing legal advice or services, and (3) remained confidential. *See Consolidation Coal Co. v. Bucyrus-Erie Co.*, 432 N.E.2d 250, 257 (Ill., 1982); *see also Rounds v. Jackson Park Hospital & Medical Center,* 743 N.E.2d 561 (Ill., 2001) and *Cangelosi v. Capasso*, 2006 WL 1875368 (2d App., 2006); *but see Hitt v. Stephens*, 675 N.E.2d 275, 278-79 (4th App., 1997) (party seeking disclosure from an attorney has the burden of establishing an exception to the attorney-client privilege). The privilege encourages "full and frank consultation between a client and [counsel] by removing the fear of compelled disclosure of information." *Consolidation Coal Co.*, 432 N.E.2d at 256. The extent of the attorney-client privilege is limited. Illinois has a "strong policy of encouraging disclosure," and, therefore, "the privilege, not the duty to disclose . . . is the exception." *Waste Management, Inc. v. International Surplus Lines Insurance Co.*, 579 N.E.2d 322, 327 (Ill., 1991); *see D.C. v. S.A.*, 687 N.E.2d 1032, 1038 (Ill., 1997) ("privileges are an exception to the general rule that the public has a right to every person's evidence"). Therefore, the privilege should be strictly confined within its narrowest possible limits. *Sharp v. Trans Union, L.L.C.*, 845 N.E.2d 719, 726 (1st App., 2006) (citing *Waste Management*, 579 N.E.2d at 327), as modified on denial of reh'g (Mar. 1, 2006); *see Western States Ins. Co. v. O'Hara*, 828 N.E.2d 842, 847 (4th App., 2005).

In the corporate context, in addition to the proponent of the privilege asserting the three (3) elements identified in the above paragraph, the Illinois Supreme Court has adopted a modified "control group" test that must be satisfied in order for the privilege to apply to protect the communication. *Consolidation Coal Company*, 432 N.E.2d at 257-258; *see Sterling Finance Management, L.P. v. UBS PaineWebber, Inc.*, 782 N.E.2d 895, 900 (1st App., 2002) (noting Illinois law is clear that the modified control group test is used to determine whether the attorney-client privilege applies to a corporate communication). There are two (2) tiers of corporate employees whose communications with corporate attorneys are protected. "The first tier consists of the decision-makers, or top management." *Midwestco-Paschen Joint Venture for the Viking Projects v. IMO Industries, Inc.*, 638 N.E.2d 322, 325(1st App., 1994) (*citing Consolidation Coal Company*, 432 N.E.2d at 257-58). "The second tier consists of those employees who directly advise top management, and upon whose opinions and advice the decision-makers rely."

Id.; *see Jackson Park Hospital and Medical Center*, 745 N.E.2d at 567 (communication is privileged when (1) the employee is in an advisory role to top management, such that the top management would not normally make a decision in the employee's area of expertise without the employee's advice and (2) the opinion does in fact form the basis of the final decision). With respect to the second tier, the Illinois Supreme Court noted, "We believe that an employee whose advisory role to top management in a particular area is such that a decision would not normally be made without his advice or opinion, and whose opinion is such that a decision would not normally be made within his advice or opinion, is properly within the control group. *Consolidation Coal Company*, 432 N.E.2d at 258. However, the Illinois Supreme Court went on to note, "the individuals upon whom [the employees in the second tier] may rely for supplying information are not members of the control group." *Id.*

Some states have adopted slightly modified versions of the model rule. *See, e.g.*, *Shook v. City of Davenport*, 497 N.W.2d 883, 886 (Iowa 1993) ("Any confidential communication between an attorney and the attorney's client is absolutely privileged from disclosure against the will of the client) overruled on other grounds by *Wells Dairy, Inc. v. American Industrial Refrigeration, Inc.*, 690 N.W.2d 38 (Iowa 2004). Together with several traditional privileges such as the physician-patient privilege and mental health professional privilege, it is clearly recognized by Iowa law. The law provides that the privilege is owned by the beneficiary, not the professional. Iowa law sets forth a number of procedural specifics with regard to the coverage and waiver of the privilege. It does not, however, clearly define the parameters of the privilege.

The Iowa Supreme Court outlined the privilege with respect to corporate communications. *Keefe v. Bernard*, 744 N.W.2d 663 (Iowa 2009). In *Keefe*, the Iowa Supreme Court agreed with the U.S. Supreme Court that the corporate attorney-client privilege should not be limited to those in the control group. Instead, "the test must focus on the substance and purpose of the communication. If an employee of a corporation or entity discusses his or her own actions relating to potential liability of the corporation, such communications are protected by the attorney-client privilege." *Id.* at *6. However, if "a corporate employee is interviewed as a 'witness' to the actions of others, the communication should not be protected by the corporation's attorney-client privilege." *Id.*

Fenceroy Decision

The Plaintiff in *Fenceroy* filed a race discrimination and harassment claim shortly after he retired from his job with as a Sargent Bluff gelatin maker. In response to his claim of harassment Gelitia retained an attorney to defend the company in responding to an administrative charge before the Iowa Civil Rights Commission. The attorney conducted an internal investigation. The company terminated one employee, and disciplined others as a result of the investigation. *Id* at 5.

In the ensuing litigation the company asserted what is known as the Farragher-Ellerth Defense. In its decisions in Farragher and Ellerth the Iowa Supreme Court outlined a two-part defense based upon a showing of (1) "reasonable care" to prevent harassment; and (2) that employee "unreasonably failed to take advantage" of preventative and corrective opportunities. *Farragher* 524 U.S. at 807. The Iowa Supreme Court, in a four to three decision, held that when a defendant asserts such a defense it necessarily waives the privilege surrounding the investigation. In a spirited dissent Justices *Waterman, Mansfield* and *Zager* reasoned that because the defense was based solely upon the Plaintiff's failure to use Gelita's complaint system "during" his employment there was no implied waiver surrounding a post-retirement investigation.

Fenceroy Lessons

In light of the *Fenceroy* ruling counsel should be extremely clear at the onset of any investigation as to whether the results of the investigation will be used to defend a claim. If so, the investigation should be conducted as if it would ultimately be available for all the world to see.

Case Law Update

By Stephanie A. Koltookian, Bradshaw Fowler Proctor & Fairgrave PC, Des Moines, Iowa

Stephanie A. Koltookian

Banwart v. 50th Street Sports, L.L.C., 2018 WL 1559812, No. 16-1218 (Iowa Mar. 30, 2018)

(Dramshop-Knowledge/Scienter on Summary Judgment)

Relevant Facts and Procedural Background: In February 2015, Michelle Campbell went to Draught House 50 ("Draught House") with a group of co-workers for happy hour. She admitted to drinking three bottled beers. Her last beer was purchased at 7:30 p.m. During the happy hour, no one exhibited excited emotions or yelled. Campbell left Draught House around 8:30 p.m. Campbell testified that she was "buzzed" but "in control." Campbell rear-ended Plaintiff Rhonda Banwart's car shortly after.

When the police officer arrived at the scene at 8:39 p.m., Campbell smelled of alcohol, had watery eyes, and slurred speech. She had trouble understanding the police officer's request for her license, registration and insurance. Campbell failed field sobriety tests. Almost two hours later, the Datamaster reported a BAC of .143.

Banwart sued Draught House under the dramshop statute. Draught House moved for summary judgment, which was granted based on the plaintiff's failure to prove that Draught House knew or should have known that Campbell was intoxicated at time of service.

Holding: Summary judgment was reversed and the case was remanded for further proceedings.

Analysis: The majority held that if a police officer could tell that Campbell was intoxicated shortly after Campbell left Draught House, it would be reasonable to infer that Draught House knew or should have known that Campbell was intoxicated at the time it served her alcohol. The majority emphasized the "close temporal proximity" between Campbell leaving Draught House and the accident and the fact that Campbell had been to no other bars that night. The majority expressly disregarded the evidence regarding Campbell's demeanor at Draught House on the grounds that a jury is free to reject testimony in reaching a decision. To support their result, the majority cited other jurisdictions that had found summary judgment was inappropriate when the alleged intoxicated person ("AIP") was intoxicated shortly after his or her visit to the dramshop, even if the record lacked evidence of the AIP's demeanor at time of service.

In a *Casablanca*-themed dissent, Justice Mansfield characterized the majority opinion as adopting an "overbroad blanket inference of negligence from intoxication." He emphasized that there was no evidence that Campbell was conspicuously intoxicated in Draught House right after having been served a beer, and the plaintiff had failed to factually develop her case.

Why It Matters: In this case, the majority was willing to entertain many rosy inferences from circumstantial, after-the-fact evidence to preclude summary judgment under the guise of viewing the evidence in the light most favorable to the plaintiff. Many of the court's inferences were made despite uncontroverted testimony to the contrary. This means in dramshop cases, summary judgment may not be viable on the knowledge issue unless the AIP visited many bars over the course of the night, or the AIP's accident occurred a long time after leaving the bar in question, or the officer was unable to observe the AIP's intoxication at the time of the stop.

Fenceroy v. Gelita USA, Inc., 908 N.W.2d 235 (Iowa 2018)

(*Faragher-Ellerth* Defense, Attorney-Client Privilege, Work-Product Privilege)

Relevant Facts and Procedural Background: Oliver Fenceroy worked at Gelita USA, Inc. ("Gelita"). Gelita had an antiharassment policy that addressed race discrimination. Under the policy, employees had to report harassment to their supervisor, or in limited circumstances, their supervisor's superior. Fenceroy had training and received Gelita's Code of Conduct, which contained the antiharassment policy. In 2011, Fenceroy made a harassment report to his supervisor based on a rope that he believed represented a noose. It was determined that the rope was not a noose, but the loop was removed. Fenceroy stopped working for Gelita in March 2013.

Fenceroy brought an Iowa Civil Rights Commission ("ICRC") complaint. Gelita retained attorney Ruth Horavich to defend the company during administrative proceedings. Horavich interviewed Gelita employees. Based on her investigation, one employee was terminated and three others were disciplined for making racially disparaging comments in the workplace.

Gelita raised the *Faragher-Ellerth* defense in the ICRC proceedings, which requires proof that the employer exercised reasonable care to prevent and correct harassing behavior. Gelita argued that it had "investigated the allegations of harassment," discharged one employee, and disciplining three others

During the civil suit, Fenceroy's counsel attempted to depose Horavich, and requested her notes. Defendants moved for a protective order. Defendants also filed a motion for summary judgment, which noted in one sentence that Gelita had investigated Fenceroy's allegations, discharged an employee, and disciplined three others. The district court denied the protective order, and the Iowa Supreme Court granted interlocutory review.

Holding: The district court's denial of the protective order was affirmed.

Analysis: The majority held that the attorney-client and work-product privileges are waived when an employer raises a *Faragher Ellerth* affirmative defense and relies on a presuit investigation that was conducted by an attorney. The majority reasoned that the plaintiff must be allowed to probe the nature and scope of the investigation to rebut the affirmative defense.

The majority emphasized that work product and attorney-client privileges are only waived if the employer *relies* on the attorney's investigation into the discrimination allegations to prove its defense. The majority observed that a party can rely on an attorney's presuit investigation even if the investigation is not necessary to prevail in the defense. In this case, the reliance was done based on the defendants' choice of using the investigation as evidence to the commitment to avoiding discrimination. The majority concluded that the brief references to the presuit investigation were enough to waive the attorney-client and work-product privilege in this case. The majority noted that opinion work product is not waived during discovery because opinion work product is not relevant to the reasonableness of an employer's investigation.

However, the majority noted that the defendants could retract their waiver by "clearly and unequivocally" establishing that the investigation would not be used to support the defense.

Justice Waterman's dissent emphasized that any waiver was inadvertent and had been retracted. Additionally, Justice Waterman argued that a greater showing should be required to depose Gelita's attorney.

Why It Matters: In this case, the Court found that one sentence in a summary judgment brief was enough to waive privilege regarding an attorney's presuit investigation. Defendants should be cautious when raising any affirmative defenses that may waive privilege. In the event waiver inadvertently occurs in a case, the corrective measure is to "clearly and unequivocally" retract the waiver and represent to the court that the party does not intend to rely on an attorney's investigation.

New Lawyer Profile

Kristymarie Shippley

In every issue of *Defense Update*, we will highlight a new lawyer. This issue, we get to know Kristymarie Shippley of Shuttlworth & Ingersoll PC in Cedar Rapids.

"I think I have moved as far north as I would want to go."

Kristymarie's northward movements have brought her from her hometown in Caguas, Puerto Rico, to college at the University of Florida, and finally to Iowa. She currently practices employment law and litigation at Shuttleworth & Ingersoll in Cedar Rapids. While at the University of Iowa College of Law, Kristymarie was an intern for U.S. Magistrate Judge Bruce McGiverin of the U.S. District Court for the District of Puerto Rico, a research assistant for Professor Enrique Carrasco, the Senior Note & Comment Editor for the Journal of Transnational Law & Contemporary Problems, and a member of the Baskerville Moot Court Traveling Team. As a second-year student, she joined Shuttleworth & Ingersoll as a Summer Associate, returning upon graduation. "It is a beautiful thing when you can find work that challenges you and presents emerging issues consistently, in an environment with colleagues that are invested in your success."

In her last three years with Shuttleworth, Kristymarie has focused on litigation and counseling related to wage-and-hour, employee classification, non-compete and restraint of trade issues, and employment discrimination and wrongful termination matters. She has also expanded her practice into employment-related areas such as workers' compensation, OSHA compliance, and professional negligence cases before state agencies. However, if you ask her what type of law she practices, she will most often say "whatever type they tell me to." She is invested in learning more about different areas of the law to become a more well-rounded advocate.

Kristymarie also devotes time to her community, often speaking to students and prospective students at Iowa colleges, assisting with planning the Downtown Farmers' Market through the Cedar Rapids Metro Economic Alliance, and as a Volunteer Lawyer for Iowa Legal Aid. She is involved in the legal community, participating in organizations such as the Linn County Bar Association's Summer Outing CLE Committee, the Linn Law Club, and the ISBA YLD's Diversity Committee.

Kristymarie spends her free time with her husband, Sidot, her 8-month-old son, William, and their dogs Jack and Blue Carol. She enjoys reading and learning new languages, currently venturing cautiously into Korean.

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The *Defense Update* is the vehicle we use to inform and educate our readers about new developments in the law so that our readers can better represent their clients. It is a publication that the Iowa Defense Counsel Association has used for this purpose since 1988. We have been very fortunate over the years in having authors, both members and non-members of the IDCA, contribute high quality articles that have been published in the quarterly issues of the *Defense Update*. We think that our *Defense Update* is one of the premier publications of state defense counsel organizations in the country.

But, we want to get even better. Our organization has many talented members who have many years of experience in the practice of law and who periodically encounter new and interesting legal issues that are worthy of sharing with the membership. After you deal with such an issue, what about submitting an article about it for publication in the *Defense Update*? Articles don't have to be terribly long works, larded with footnotes and analyzing every state and federal court decision where that particular issue came up. Nor do articles need to be written in a professorial style. Articles simply need to be authoritative and discuss the legal matter at hand for the betterment of the reader. The *Defense Update* is for the flow of information. It's not a law review.

Where might you find the beginnings of an article? Perhaps you wrote a brief recently on a particular topic and could rework that brief into an article. Perhaps you had an experience in court or in a deposition that you would like to share with us. Perhaps you simply would like to write about an area of law or a new piece of legislation that you think would be of interest and benefit to our members.

How do you go about submitting an article or an idea for an article? All you have to do is contact one of the members of the Board of Editors (their names are listed on the cover of the *Defense Update* and their e-mail addresses and phone numbers can be found easily on the IDCA website, www.iowadefensecounsel.org, in the Member Directory). Just tell us you think an article on a particular topic would be worthwhile and that you'd like to submit an article for publication. Or, that you had an unusual situation come up that you'd like to share with our readers. We'll get right back to you.

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IDCA Schedule of Events

September 13–14, 2018

54TH ANNUAL MEETING & SEMINAR
September 13–14, 2018
Embassy Suites by Hilton, Des Moines Downtown
Des Moines, IA
Watch your mailbox and inbox for registration details this summer!

September 12–13, 2019

55TH ANNUAL MEETING & SEMINAR
Embassy Suites by Hilton, Des Moines Downtown
Des Moines, IA