AN OVERVIEW OF THE LAW OF PRIVILEGE FOR PRACTITIONERS IN ILLINOIS

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THE ATTORNEY-CLIENT PRIVILEGE IN GENERAL

A. Illinois law -- The Modified Control Group Test

1. Illinois applies a modified "control group" test to determine the ambit of corporate employees whose communications with counsel are subject to the attorney-client privilege:

2. In *Consolidated Coal co, v. Bucyrus-Erie Co*., 89 Ill. 2d 103, 432 N.E.2d 250, 257-58 (1982), the Illinois Supreme Court held that communications between counsel and corporate employees were protected where the corporate employees belonged to top management or as to:

> "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 in fact forms the basis of any final decision by those with actual authority**...."**

3. *Midwesco Paschen Joint Venture for the Viking Projects v. IMO Indus., Inc*., 265 Ill. App. 3d 654, 638 N.E.2d 322, 325 (1st Dist. 1994): "[T]here are two tiers of corporate employees whose communications with corporate attorneys are protected. The first tier consists of the decision-makers, or top management. The second tier consists of those employees who directly advise top management, and upon whose opinions and advice the decisionmakers rely."

4. Under the Illinois rule, the determination of whether the employee falls within the modified control group is highly fact intensive:

   a. In *Claxton v, Thackston*, 201 Ill. App. 3d 232, 236, 559 N.E.2d 82, 86 (1st Dist. 1990), the court held that the corporation failed to carry its burden of proving privilege as to an accident report to an insurer prepared by an employee who also served as a member of the corporation's board of directors and who had overall responsibility for manufacturing and who was responsible for accident investigation.

      The affidavit submitted in support of the privilege claim failed to indicate:

"if he had an advisory role in top management, whether a decision in this area would normally not be made without his advice, or whether his opinion would in fact form the basis for any decision by others with authority in the company."

b. Compare *Midwesco-Paschen*, 638 N.E.2d at 328-29: Field service manager of turbine division of corporate defendant was a member of the control group where he reviewed data concerning the turbines at issue, he was personally consulted as to the extent of the corporation's potential liability to the plaintiff buyer of turbines, he was "deeply involved with decisions concerning the turbines sold to" the plaintiff, and the general manager of the division submitted an affidavit to the effect that he relied on the field service manager's advice in making decisions concerning the corporation's potential liability.

c. Compare *Mlynarski v. Rush Presbyterian-St. Luke 's Medical Center*, 213 Ill. App. 3d 427, 572 N.E.2d 1025, 1028 (1st Dist. 1991), where the court held that a "Coordinator" in the hospital's Risk Management Department was within the modified control group. The hospital submitted an affidavit stating that the Coordinator was routinely consulted by counsel and the hospital's Director of Risk Management as to the course of action to follow in litigation and in settlement decisions.

5. The content and quality of the affidavit in support of the claims of privilege is critical to the determination of whether the employee is within the control group.

a. In *Claxton* the employee was held outside the control group, even though he was on the board of directors and was in charge of manufacturing and accident investigation, because there was no statement in the affidavit to the effect that his advice was routinely sought by top management in decisions of the type at issue. 559 N.E.2d at 86.

b. In *Midwesco-Paschen* a field service manager was held inside the control group when the affidavit submitted stated that his input was routinely sought in decisions relating to the corporation's liability. 638 N.E.2d at 329.

c. In *Mlynarski* the appellate court noted that the affidavit was uncontradicted to the effect that the Risk Management Coordinator routinely had input into litigation decisions. The Court suggested, however, that such affidavits may be tested in the trial court:

"The extent to which Goldsberry participated in the decision-making process, the nature of her opinions, although not the opinions

themselves, and the weight given her opinions should themselves be the subject of inquiry."

572 E.2d at 1028-29.

6. Communications with employees outside the control group may still be protected as privileged where corporate counsel is also serving as counsel to the employee:

   a. In *Buckman v. Columbus-Cabrini Medical Center*, 272 Ill. App. 3d 1060, 651 N.E.2d 767 (1st Dist. 1995), the privilege was held to protect the pre-deposition communications between counsel for the defendant hospital and a part-time nurse employed by the hospital, where counsel was also serving as the nurse's attorney for her deposition.

   b. This "exception" to the control group test probably only works where the employee can show that he or she was (i) personally in need of legal advice and (ii) the representation of the corporation and employee were congruent -- e.g., when the employee has been noticed to appear for a deposition.

B. Federal and Majority Rule -- *Upjohn v. United States*, 449 U.S. 383 (1981)

1. The privilege applies to communications with corporate employees, regardless of their status, where "[t]he communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice." *Upjohn*, 449 U.S. at 394.

2. *Upjohn* is generally interpreted as imposing a five-part test:

   a. "The communications were made by corporate employees to corporate counsel upon order to superiors in order for the corporation to secure legal advice from counsel;"

   b. "The information needed by the corporate counsel to formulate legal advice was not available to upper level management; "

   c. "The information communicated concerned matters within the scope of the employee's corporate duties;"

   d. "The employees were aware that the reason for communications with counsel [was] so the corporation could obtain legal advice;" and

e. “The communications were ordered to be confidential and they were kept confidential.”

See John William Gargacz, *Attorney Corporate Client Privilege*, at 3-6 (2d ed. 1990).

3. Inclusion of nonlawyer agents in the communication between the client and lawyer does not destroy the privilege, provided that the nonlawyer's role is to assist in the procurement of legal advice and confidentiality is maintained.

   a. Just as a non-English speaking client would be entitled to use an interpreter to communicate with a lawyer, the presence of an accountant during the communication will not destroy the privilege if the role of the accountant was to mediate in a confidential communication had for the purpose of obtaining legal advice. *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961) (Friendly, J.).

   b. Where inclusion of nonlawyer in communications is principally for routine business purposes, unconnected with obtaining legal advice, the attorney-client privilege does not protect the communication. *United States v. Adlman*, 68 F.3d 1495, 1500 (2d Cir. 1995) (where officer-lawyer of corporation contacted regular outside accountant to analyze tax consequences of corporate reorganization, the accountant's report was not covered by the attorney-client privilege).

   c. *Curcio v. Chinn Enterprises, Inc*., 1996 U.S. Dist. LEXIS 2816 (N.D. Ill. Jan. 29, 1996): Questionnaires that were completed by management employees at a seminar conducted by the defendant's lawyers to educate management as to the law of sexual harassment were protected under the attorney-client privilege. The questionnaires were intended to create a dialogue between management and counsel to facilitate the lawyer's transmittal of legal advice to management, placing the questionnaires "squarely within the parameters" of the privilege. [d. at *3.

C. **Communications with Former Employees**

1. Communications with former employees are generally outside the attorney-client privilege under Illinois law.

2. *See Barrett Industrial Trucks, Inc. v. Old Republic Co*., 129 F.R.D. 515, 517 (N.D. Ill. 1990) (Holderman, J.) (Ill. law): "Former employees are not the client It is virtually impossible to distinguish the position of a former employee from any other third party who might have pertinent information about one or more corporate parties to a lawsuit."

3. Where the former employee has retained the employer's counsel to represent him in a deposition, the privilege may apply. *See Buckman v. Columbus-Cabrini Medical Center*, 272 Ill. App. 3d 1060, 651 N.E.2d 767 (1st Dist. 1995) (privilege applied where current employee represented by employer's counsel for deposition).

D. **Choice of federal or state law to govern the privilege**

1. Federal courts sitting in diversity generally apply the Illinois law of attorney-client privilege when Illinois substantive law governs the dispute. *See, e.g., Barrett Indus. Trucks, Inc. v. Old Republic Ins. Co*., 129 F.R.D. 515, 516-17 (N.D. Ill. 1990) (Holderman); *Abbott Laboratories v. Airco, Inc*., 82 C 3292 (U.S. Dist. N.D. Ill. Nov. 5, 1985) (Rovner, J.)

2. Where state law claims are joined with federal question claims in a case before a federal court, the federal law of privilege is applied where the federal claims predominate.

   a. *See Memorial Hospital for McHenry County v. Shadur*, 664 F.2d 1058, 1061 n.3 (7th Cir. 1981). see also cases from other circuits cited in *Reichhold Chemicals, Inc. v. Textron, Inc*., 157 F.R.D, 522, 528 (N.D. Fla. 1994).

   b. *Freeman v. Fairman*, 917 F. Supp. 586 (N.D. Ill. 1996): Where the plaintiff's federal civil rights claims had been dismissed, such that state wrongful death claim was all that remained, applicability of privilege would be determined under state, not federal, law.

THE WORK PRODUCT PRIVILEGE

A. Illinois law

1. Under Illinois law, the privilege mainly protects the theories, mental impressions and litigation plans of counsel.

2. Illinois Supreme Court Rule 201 (b)(2) defines the work-product privilege in a quite limited fashion:

   "Material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney."

3. The Illinois Supreme Court has extended the work product privilege to statements given by a party to its insurer. *People v. Ryan*, 30 Ill. 2d 456, 197 N.E.2d 15 (1964).

4. Witness statements may be discoverable under Illinois law when they are verbatim, or acknowledged in writing by the witness, but nonverbatim notes and memoranda taken by a lawyer or investigator working for the lawyer are generally held to be privileged.

   a. Verbatim, transcribed witness statements have long been recognized as outside the Illinois work product privilege. *Stimpert v. Abdnour*, 24 Ill. 2d 26, 179 N.E,2d 602 (1962).

   b. "Attorney notes and memoranda of oral conversations with witnesses or employees are not routinely discoverable. *Consolidation Coal*, 89 Ill. 2d at 110.

   c. In *Mlynarski*, the court upheld the application of the work product privilege to a memorandum prepared by a nonlawyer employee, summarizing witness interviews that she had conducted. 572 N.E.2d at 1029.

5. Applicability of the work product privilege to the work of a nontestifying consultants, retained to assist in litigation, is porous under Illinois law:

   a. A report prepared by a consulting expert that contained merely a compilation of data, without any opinions or theories of the expert, was held unprotected by the privilege. *Midwesco-Paschen*, 638 N.E.2d at 331-32.

   b. Where the consultant was retained by a non-party, the court held that the work product privilege did not shield his work from discovery, even though the non-party had retained the consultant in anticipation that it might be subject to a claim. *Neuswanger v. Ikegai America Corp*., 221 Ill. App. 3d 280, 582 N.E.2d 192 (3d Dist. 1991).

B. The Federal and Majority Rule of Work Product Privilege

1. Litigation need not have been formally commenced or threatened. Rather, the party claiming the privilege merely has to have prepared the material in the recognition that litigation was possible. *Upjohn*, 449 U.S. at 402.

   a. "Prudent parties anticipate litigation, and begin preparation prior to the time when suit is formally commenced." 8 C. Wright, A. Miller & R. Marcus, *Federal Practice & Procedure* § 2024 at 343 (1994).

b. Therefore, the test is "whether, in light of the nature of the document and factual situation in the particular case, the document can be said to have been prepared or obtained because of the prospect of litigation." *Id.*

2. Persons whose work may be subject to the work product privilege under majority and federal rule:

a. The privilege is not limited to work performed by lawyers. Rather, the federal and most state rules explicitly provide that the privilege applies to work "by or for another party or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)." See Fed. R. Civ. Pro. 26(b)(3).

b. The privilege protects the mental impressions of all agents and consultants involved in preparation for litigation, not just those of lawyers. *See, e.g., United Coal Cos. v Powell Constr. Co.*, 839 F.2d 958, 966 (3d Cir. 1986), quoting, *United States v. Nobles*, 422 U.S. 225, 238-39 (1975) ("attorneys must often rely on the assistance of investigators and other agents").

c. Examples of non-lawyers who have been held within the ambit of the federal work product privilege:

(1) Memorandum prepared by outside accountant, analyzing tax consequences of proposed corporate reorganization, at the request of inhouse counsel for the corporation, could be privileged if corporation could carry its burden of proving that memorandum was prepared in anticipation of possible litigation with the IRS. *United States v. Adlman*, 68 F.3d 1495, 1 501-02 (2d Cir. 1995).

(2) Work product privilege protected communications with employee of sister corporation to the corporate litigant when his expertise in real estate transactions was sought in connection with anticipated litigation concerning failed commercial real estate project. *Janivo Holding, B. V. v. Continental Bank, N.A.,* No. 91 C 7728 (U.S. Dist. N.D. Ill. June 30, 1993) (Alesia, J.) (attorney-client privilege held inapplicable under the Illinois control group test).

(3) Work product privilege applied when internal business employees of the corporate client gathered information "with an eye toward litigation." *Newton v. Yates*, 170 Ind. App. 486, 353 N.E.2d 485, 490 (1976).

(4) Document prepared by employee of an insurer, assessing merits of litigation, were protected under work product privilege. *United Coal*, 839 F.2d at 966-67.

(5) Documents prepared by non-lawyer staff member of FDA protected by the privilege. *Sterling Drug Inc. v. Harris*, 488 F. Supp. 1019, 1027 (S.D.N.Y. 1980).

3. The federal (and Illinois) privilege is qualified, and may be overridden upon a showing of substantial need.

a. The substantial need test is most often applied to override the privilege when it is asserted to obtain access to factual material and the party seeking discovery has no adequate alternate means to obtain that factual material. Fed. R. Civ. Pro. 26(b)(3).

(1) Klawes *v. Firestone Tire & Rubber Co*., 572 F. Supp. 1 16, 125-26 (E.D. Wis. 1983): Where workers comp. insurer conducted engineering investigation into automobile accident contemporaneous with the accident, which was made available to the plaintiff, the court would order that the report of investigation be turned over to the defendant. The defendant did not receive notice of the claim until three years after the accident.

(2) *Fontaine v. Sunflower Beef Carrier, Inc*., 87 F.R.D, 89, 93 (E.D. Mo. 1980): The "mere" fact that one party had obtained contemporaneous witness statements was not sufficient to satisfy the "substantial need" test.

b. The mental impressions, conclusions, opinions, and legal theories of a lawyer -- i.e., "attorney work product" or of any "other representative of a party" (e.g., a non-testifying, consulting expert) must be protected from disclosure even when a court orders production of work product under the substantial need rule. Fed. R. Civ. Pro. 26(b)(3).

(1) *Horn & Hardart Co. v. Pillsbury Co*., 888 F.2d 8, 12 (2d Cir. 1989) (handwritten notes of defendant's general counsel, relating to negotiations over potential acquisition, were protected from discovery as attorney work product), *aff'g*, 703 F. Supp. 1062 (S.D.N.Y. 1989).

C. Communications with Testifying Experts

1. Information shared with a testifying expert is generally not privileged. Accordingly, parties and outside counsel must be cautious in sharing internal corporate memoranda, analyses prepared by counsel, and similar work product material (e.g., draft briefs) with a testifying expert.

2. *Georgou v. Fritzshall*, No. 93 C 997 (U.S. Dist. N.D. Ill. Feb. 5, 1996) (Nordberg, J.): Given that Fed. R. 26(a)(2)(B) requires disclosure of all "data or other information considered by the (testifying expert] witness in forming the opinion," testifying expert was required to disclose all information learned from counsel, including disclosure of the notes taken by the expert in conversations with counsel. *Accord Karn v. Rand*, 168 F.R.D. 633 (N.D. Ind. 1996).

3. *Intermedics, Inc. v. Ventritex, Inc*., 139 F.R.D. 384, 387 (N.D. Cal. 1991): "[A]bsent an extraordinary showing of unfairness that goes well beyond the interests generally protected by the work product doctrine, written and oral communications from a lawyer to an expert that are related to matters about which the expert will offer testimony are discoverable, even when those communications otherwise would be deemed opinion work product."

4. Although some older cases do seem to hold that a privilege might apply to communications with a testifying expert, the continued validity of those cases is suspect, especially in the federal courts, given Rule (added in 1 993), governing required disclosures relating to testifying experts. Cases in which disclosures to a testifying expert have been held to be privileged include:

   a. *Hamel v. Genera/ Motors Corp*., 128 F.R.D. 281 (D. Kan. 1 989).

   b. *Bogosian v. Guff Oil Co*., 738 F.2d 587 (3d Cir. 1984)

EX PARTE COMMUNICATIONS WITH CURRENT AND FORMER CORPORATE EMPLOYEES

A. The Ethical Prohibitions on Ex Parte Contacts with Corporate Employees

1. The ethical rules prohibit a lawyer from "communicat[ing] on the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter unless the first lawyer has obtained the prior consent of the other lawyer or as may otherwise be authorized by law." *See* Ill. R. Prof. Conduct 4.2.

2. This prohibition ordinarily prevents a lawyer, or an investigator acting under the lawyer's direction, from conducting an ex parte interview of a party to litigation.

3. The application of the rule has become muddy, however, when the party in litigation is a corporation and opposing counsel is attempting to interview either current or former employees. *See generally* E. Reider, "Evidence from the Opposition," 22 *Litigation* 17 (Fall 1995).

B. Ex Parte Contacts with Current Employees of Adverse Party

1. Illinois Law

a. Under Illinois law, the bar against ex parte contacts generally depends upon whether a privileged relationship exists between the adverse party and the person with whom ex parte contact is sought.

b. Ex parte contacts with current corporate employees are prohibited only when the current employee is within the control group. *Fair Automotive Repair, Inc. v. Car-X Service Systems, Inc*., 128 Ill. App. 3d 763, 471 N.E.2d 554 (2d Dist. 1984) (Lindbergh, J.).

c. *Mondelli v. Checker Taxi Co*., 197 Ill. App. 3d 258, 554 N.E.2d 266, 270-73 (1st Dist. 1990): Ex parte contacts with the plaintiff's treating physician were prohibited because they might invade the patient/physician privilege. *Accord Petrillo v. Syntex Laboratories, Inc*., 148 Ill. App. 3d 581, 499 N.E.2d 952 (1986).

2. Federal and Majority Rule

a. The emerging federal rule, and the rule followed by the majority of states, is that ex parte contact is prohibited as to any current employee who is in a position to make an evidentiary admission under the hearsay rule, absent permission of the employer's counsel or the court presiding over the litigation.

b. A federal court sitting in Illinois has applied this rule. *See In re Air Crash near Roselawn, Indiana*, 909 F. Supp. 1 1 1 6 (N.D. Ill. 1995) (Castillo, JA): It was violation of Rule 4.2 for plaintiffs' counsel to send a questionnaire to pilots concerning the training they had received, Plaintiffs' counsel should seek court's permission, in a close case under the ethical rule, before proceeding with ex parte contacts. Citing *McCallum v. CSX Transp., Inc*., 149 F.R.D. 104 (M.D.N.C. 1993).

c. Other courts which have applied this or similar formulations of the rule are: *Niesig v. Team I*, 76 N.Y.2d 363, 558 N.E.2d 1030 (1990); *Strawser v. Exxon Co. U.S.A*., 843 P.2d 613 (Wyo. 1992); *Dent v. Kaufman*, 185 W. Va. 171, 406 S.E.2d 68 (1991); *Wright by Wright v. Group Health Hospital*, 103 Wash. 2d 192, 200, 691 P.2d 564, 569 (1984).

d. Some courts hold that, although the rule does not flatly prevent opposing counsel from ex parte communications with all current corporate employees, if such communications are had, the party initiating such contacts is barred during the litigation from arguing that statements by the contacted employee constitute evidentiary admissions by the corporate employer under the hearsay rule. *Frey v. Department of Health & Human Services*, 106 F.R.D. 32 (E.D.N.Y. 1985) (contacts were with employees of government agency). *Accord B.H. v. Johnson*, 128 F.R.D. 659 (N.D. Ill. 1989) (Grady, C.J.) (permitting contacts with low level employees of DCFS).

3. A few jurisdictions have adopted a balancing test. This test has the unfortunate consequence that lawyers do not clearly know, in advance, whether an ex parte contact is permitted. *See, e.g., Mompoint v. Lotus Development Corp*., 1 10 F.R.D. 414 (D, Mass. 1986).

C. Ex Parte Contacts with Former Employees

Ordinarily ex parte communications with a former employee of a corporate party do not violate the ethical rules of Illinois or most other jurisdictions.

1. Illinois Law

a. The Illinois State Bar Association has endorsed the rule that an ex parte contact with an adversary's former employee is not a violation of the rules. See Opinion No. 85-12 (April 4, 1986).

b. Illinois federal courts have followed this rule. *See Breedlove v. Teletrip Co.*, 1992 U.S. Dist. LEXIS 12149 (N.D. Aug. 12, 1992) (Leinenweber, J.).

2. Federal and Majority Rule: A blanket rule permitting ex parte contacts with former employees is generally followed in the federal and most state courts. See, e.g.:

a. *Nalian Truck Lines, Inc- v. Nakano Warehouse & Transp. Corp*., 6 Cal. App. 4th 1256, 8 Cal. Rptr. 2d 467 (2d Dist. 1 992): Even contacts with former employees in control group permitted.

b. *Wright v. Group Health Hospital*, 691 P.2d 564 (Wash. 1984): Given that former employee has not ability to speak for or bind corporation, ex parte contacts are permitted.

c. *Polycast Technology Corp. v. Uniroyal, Inc*., 1 29 F.R.D, 621 (S.D.N.Y. 1990).

d. *Shearson Lehman Bros., Inc. v. Wasatch*, 139 F.R.D. 412 (D. Utah 1991).

e. *Dubois v. Gradco Systems, Inc*., 136 F.R.D. 341 (D. Conn. 1991).

3. ABA Formal Opinion 91-360 (July 1991) states that ABA Rule 4.2 does not preclude contact with any former employee but that other ethical rules may not be ignored -- i.e., an ex parte contact with a former employee may still violate the ethical rules if there is an effort to induce the former employee to reveal attorney-client privileged communications, in violation of ARA Rule 4.3. See S. Miller & J. Baum, "Ex Parte Witness Contacts: Who Can You Talk To?" (ABA Section of Litigation Paper #531-0201D Aug. 1995).

SHIELDING INTERNAL INVESTIGATIONS THROUGH PRIVILEGE

A. Illinois Law

1. Because of the more limited scope of both the attorney-client and work product privileges under Illinois law, it is more difficult to conduct a privileged investigation in Illinois than in most states and under the federal rules:

2. In *Bucyrus-Erie*, the Illinois Supreme Court applied the control group test to hold that the attorney-client privilege did not protect communications with a corporate employee intended to elicit factual information, when the employee was not directly involved in providing top management with advice on how to address matters of the nature at issue.

3. In *Bucyrus-Erie*, the Illinois Supreme Court did permit use of the work-product privilege to shield discovery of a report prepared by counsel where the factual information in the report was intertwined with the mental impressions and legal advice of counsel.

4. The Illinois rule seems to promote drafting reports in forms where opinion and "fact" are intermingled, so as to avoid partial discovery of the report.

5. Unless the report is prepared "in anticipation of litigation," it will be difficult to shield it even under the Illinois work product rule.

B. Federal Rule

1 Investigations that are principally motivated by an ordinary business purpose as opposed to those conducted in anticipation of litigation or to collect information for the purpose of rendering legal advice to the corporate client are not protected under either the work product or attorney-client privileges as interpreted under federal law, and the law of most states.

2. *In re Kidder Peabody Securities Litigation*, 166 F.R.D. 459 (S.D.N.Y. 1996): Notes and memoranda prepared by team of outside lawyers, headed by former Director of Enforcement of the SEC, conducted or 120 employees to investigate fraudulent trading of securities, were not protected by the work product privilege where the predominant purpose of the investigation was not to prepare for anticipated litigation, but rather to assure the public and shareholders that the corporation was rooting out any possible wrongdoing.

3. *Janicker v. George Washington University*, 94 F.R.D. 648 (D.D.C. 1 982): Investigation into the cause of a fire in a university building, conducted by a security officer at the request of the university's vice president, was not privileged.

4. Where corporate management directs the investigation, even with the participation of inhouse counsel, the investigation is generally viewed as having primarily a business purpose, and any report is discoverable. *See, e.g., General Counsel v. United States*, 599 F.2d 504, 510-11 (2d Cir. 1979).

C. Waiver through Disclosure of Investigation to Government

1. Disclosure of the investigation to a government enforcement agency may waive the privilege in litigation with private parties.

2. *Salomon Bros. Treasury Litigation v. Steinhardt Partners, L.P.*, 9 F.3d 230 (2d Cir. 1993): Voluntary disclosure of internal investigation to the SEC waived the privilege that would otherwise be available in private civil litigation. *Accord In re Kidder Peabody Securities Litigation*, 168 F.R.D. 459, 468-73 (S.D.N.Y. 1996); *Westinghouse Elec. Corp. v, Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991); *In re Subpoena Duces Tecum*, 738 F.2d 1367, 1369-70 (D.C. Cir. 1984).

3. Other courts permit "selective waiver," by which the privilege may be waived as to some persons and preserved as to others. *See Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977) (recognizing selective waiver of privilege to SEC but not others).

4. Where a party has been compelled by a court to disclose privileged communications in one proceeding, the party may continue to assert the privilege in other proceedings. *See Shields v. Sturm, Ruger & Co*., 864 F.2d 379 (5th Cir. 1989).

THE SELF-CRITICAL ANALYSIS (OR SELF-EVALUATIVE) PRIVILEGE

A. History and Development of the Self-Critical Analysis Privilege

1. The privilege originated to protect investigations conducted by peer review panels in hospitals as part of accreditation review. *See Bredice v. Doctors Hospital Inc*., 50 F.R.D. 249 (D.D.C. 1970), *aff'd mem*., 479 F.2d 920 (D.C. Cir. 1973).

2. Recent expansion of the privilege has centered on environmental audits.

3. A few courts have expanded the privilege to include other regulated activities, such as audits of affirmative action plans. *See, e.g., Cobb v. Rockefeller Univ*., 85 Fair Empl. Prac. Cas (BNA) 184 (S.D.N.Y. 1991); *Banks v. Lockheed-Georgia Co*., 53 F.R.D. 283, 285 (N.D. Ga. 1971) (protecting nonfactual opinions and conclusions in report concerning investigation into equal employment opportunities in company).

B. Illinois Statutory Privilege Protecting Certain Hospital and Medical Records

1. By statute, Illinois recognizes a privilege for various types of hospital peer review and similar medical and insurance records "used in the course of internal quality control or of medical study for the purpose of reducing morbidity or mortality, or for improving patient care." 735 LCS 5/8-2101.

2. The statute prohibits the discoverability and admissibility of such records in litigation or in administrative proceedings. 735 ILCS 5/8-21 02.

3. Federal courts sitting in Illinois do not recognize the privilege where the claims arise under federal law. *See Memorial Hospital v. Shadur*, 664 F.2d 1058 (7th Cir. 1981): Hospital could be compelled to disclose documents relating to disciplinary proceedings conducted against plaintiff physician, in antitrust action brought by physician against hospital.

4. Compare *Freeman v. Fairman*, 917 F. Supp- 586 (N.D. Ill. 1996): Following in camera review of Morbidity and Mortality Conference Report, court declined to order production of the document, finding it privileged under the statute, with respect to state law wrongful death action.

C. Illinois Statutory Environmental Audit Privilege

1. Recognition of a self-critical analysis privilege applying to qualifying environmental audits has been codified by statute in Illinois. *See* 415 ILCS 5/52.2 (1996).

2. The Illinois statute creates a qualified privilege for "environmental audits," defined as:

> "voluntary, internal, and comprehensive evaluation[s] of one or more facilities regulated under State, federal, regional, or local laws or ordinances, or of management systems related to the facilities or activity, that is designed to identify and prevent noncompliance and to improve compliance with those laws."

3. The Illinois statutory privilege applies only to "voluntary" audits, not to material required to be collected or otherwise made available to regulatory agencies under federal, state, or local law.

   a. In this regard, the Illinois privilege runs counter to that recognized by many courts, which have held that a prerequisite to the privilege is that the report is required by law. *See, e.g., Resnick v. American Dental Ass'n*, 95 F.R.D. 372, 374 (N.D. Ill. 1982) (in absence of legal requirement for the report, there was no occasion to consider whether the privilege could apply).

4. The Illinois privilege does not apply if:

   a. "asserted for a fraudulent purpose," or

   b. "[t]he material shows evidence of noncompliance with State, federal, or local environmental laws e and the owner or operator failed to undertake appropriate corrective action or eliminate any violation of law identified during the environmental audit within a reasonable time."

5. Illinois' statutory privilege cannot immunize discovery of an environmental audit in proceedings conducted under federal law because of the Supremacy Clause of the U.S. Constitution.

   b. *See generally Memorial Hospital v. Shadur*, 664 F.2d 1058, 1063 (7th Cir. 1981).

   b. Therefore, the actual value of the state recognition of the privilege, in the context of environmental compliance, is minimal given the substantial role that federal law plays in environmental compliance.

D. Federal Recognition of the Environmental Audit Privilege

1. Because of the pervasive applicability of federal environmental law, Illinois businesses wishing to avail themselves of an environmental audit privilege need to consult federal law.

2. The EPA Enforcement Policy: The EPA has only weakly endorsed an environmental audit "privilege." Rather than recognizing any true testimonial or discovery "privilege," the EPA guidelines provide for more lenient penalties when a company has conducted a compliant audit. This is not a privilege in the true sense of the word.

   a. The EPA's enforcement policy on environmental audits provides that parties who conduct audits are not immune from the assessment of standard enforcement penalties, but that, generally, parties who conduct audits and voluntarily report infractions will not be assessed punitive ("gravity-based") fines. *See* 60 Fed. Reg. 66706 (Dec. 22, 1995).

   b. To qualify for reduced civil penalties, based on the EPA privilege, nine criteria must be met. *Id*.

3. Federal common law: Some federal courts have recognized a self-critical analysis privilege, applied to environmental audits, as a matter of federal common law.

   a. The leading federal case recognizing the self-critical analysis privilege, applied to environmental audits, is *Reichhold Chemical Inc. v. Textron Inc.*, 157 F.R.D. 522 (N.D. Fla. 1 994), which set out four criteria for applying the privilege, citing *Dowling v. American Hawaii Cruises*, 971 F.2d 423 (9th Cir. 1992):

      (1) "the information must result from a critical self-analysis undertaken by the party seeking protection; "

      (2) "the public must have a strong interest in preserving the free flow of the type of information sought;"

      (3) "the information must be of a type whose flow would be curtailed if discovery was allowed;" and

      (4) the document was "prepared with the expectation that it would be [kept] confidential and it has in fact been kept confidential."

   b. Federal courts have held that the privilege, to the extent that it does exist, should be limited to private litigation and is not available in litigation

with the government. *See, e.g., Federal Trade Commission v. TRW*, 628 F.2d 207, 210 (D.C. Cir.1980).

c. The federal self-critical analysis privilege is generally held only to protect opinions and evaluations, not facts. *See, e.g., Granger v. National R.R. Passenger Corp*., 1 1 6 F.R.D. 507 (E.D. Pa. 1987) (factual sections of accident report not protected by privilege).

d. Most federal courts have been hostile to the privilege, either by overtly refusing to recognize it or by finding that the party claiming the privilege has failed to satisfy the test for the privilege.

(1) *In re Saloman Bros. Sec. Litigation*, Fed. Sec. L. Rep. (CCH) ¶ 97,254 at 98,148 (S.D.N.Y. 1992): Even in the absence of the privilege corporation was likely to conduct management control studies and prepare internal audit reports relating to financial practices because they "are so integral to the success of a business. "

(2) *Williams v. Vulcan-Hart Corp*., 136 F.R.D. 457 (W.D. Ky. 1991): Internal evaluations of corporate practices are in the best interest of corporation and therefore, even in the absence of the privilege, they are likely to be conducted. *Accord United States v. Dexter Corp*., 132 F.R.D. 8 (D. Conn. 1990).

(3) *United States ex rel. Falsetti v. Southern Bell Telephone & Telegraph Co*., 915 F. supp. 308 (N.D. Fla. 1996): Refusing to apply the self-critical analysis privilege to a federal Qui Tam action. This case was decided in the same district as *Reichhold*, where the privilege was recognized for environmental audits.

(4) *Culinary Foods, Inc. v. Raychem Corp*., 151 F.R.D. 297, 304-05 (N.D. Ill. 1993): Declining to decide whether the self-critical analysis privilege is recognized under Illinois law. The court cites several federal decisions under Illinois law for the proposition that the recognition of the privilege in Illinois remains an open question.

E. **Doubtful value of the self-critical analysis privilege**

Given the uncertain and qualified nature of the self-critical analysis privilege, under both Illinois and federal law, it is risky to prepare a document based upon any expectation that it will be protected by the privilege. See J. Conway, "Self-Evaluative Privilege & Corporate Compliance Audits," 68 So. Cal. L. Rev. 621, 641 (1995) ("the privilege has received only sporadic acceptance and an inconsistent privilege is probably no more effective than no privilege at all").

F. **Traditional Privileges may shield Environmental Audits**

1. Environmental audits may also be protected under traditional privileges available under federal (and state) law, depending upon the circumstances in which they are prepared and to whom they are disseminated.

2. *Olen Properties Corp. v. Sheldahl Inc*., 24 Envtl. L. Rep. 20936 (C.D. Cal. 1994), held that an environmental audit was protected under the attorney-client privilege. The audits were conducted for the purpose of assessing compliance with the law to assist the company's lawyers.

3. *But see United States v. Chevron*, 1989 U.S. Dist. LEXIS 12267 (ED. Pa. Oct. 1989): Fact that three-member audit team included internal environmental lawyer did not make the audit privileged because lawyer was involved in fact-finding as part of the company's routine business, not in providing legal advice.

THE ILLINOIS STATUTORY ACCOUNTANT'S PRIVILEGE

A. By statute, Illinois recognizes an accountant's privilege:

A public accountant shall not be required by any court to divulge information or evidence which has been obtained by him in his confidential capacity as a public accountant.

225 LCS 450/27.

B. To assert the privilege, the communications between the client and accountant [n] must originate in a confidence that they will not be disclosed." *FMC corp. v. Liberty Mut. Ins. Co*., 236 Ill. App. 3d 355, 603 N.E.2d 716, 718 (1st Dist. 1992), *citing*, *October 1985 Grand Jury No. 746*, 124 Ill. 2d 466, 475, 530 N.E.2d 453 (1988).

1. Backup information provided to an accountant for the purposes of preparing and filing tax returns has been held outside the privilege because the client could not reasonably expect that the accountant might not disclose it - e.g., in an audit in order to support the tax return. *October 1985 Grand Jury*, 124 Ill. 2d at 477.

2. In *FMC*, the court excluded from production any documents related to the establishment of accounting reserves for potential environmental liabilities except insofar as such reserves had been disclosed to the third parties e.g., through tax returns or SEC filings. 603 N.E.2d at 719.

C. The Illinois law is clear that the privilege belongs to the accountant, not the client.

1. *See, e.g., Capitol Fed. Savings v. Geldermann & Co.*, 1987 U.S. Dist. LEXIS 1531 at *5 (N.D. Ill. Feb. 23, 1987); *F.D.I.C. v. Mercantile Nat'l Bank*, 84 F.R.D. 345, 349 (N.D. Ill. 1979); *Dorfman v. Rombs*, 218 F. Supp. 905, 907 (N.D. Ill. 1963).

2. In *Winston v. Alhadoff*, No. 83 C 3801 (N.D. Ill. April 4, 1986), the court held that - although the accountant could not be required to turn over a report and other documents that it had prepared the privilege did not prevent obtaining those documents from the client either (a) by requiring the client to produce copies in its possession, or (b) insofar as the client lacked possession of the documents, by requiring the client to obtain copies from the accountant for production to the opposing side. The rationale for the latter was that, although the documents were not in the client's possession, they were within its "custody or control."

3. The accountant's work papers, insofar as they had never been disclosed outside the accounting firm, remain subject to the privilege. *Id. Compare Western Employers Ins. Co. v. Merit Ins. Co.*, 492 F. Supp. 53, 55 n.2 (N.D. Ill. 1979) (where accountant work papers had been turned over to the client, the client was compelled to produce them).

D. Where the accountant's function has been to assist in the analysis and preparation for litigation, the work may be sheltered under the attorney ̲client privilege.

1. *See FMC*, 603 N.E.2d at 719, where the court directed the accounting firm to produce all documents that had been sent to "third parties" relating to governmental or private environmental claims, but excluded documents "which fall within the scope of privileged communications in the course of litigation" -- referring, presumably, to documents the accountant may have shared with third-party experts serving in a consulting capacity for the litigation.

E. The accountant's privilege is not recognized under federal law. Therefore, it is unavailable in a case brought in federal court based on federal question jurisdiction -- e.g., securities, or antitrust claims. *See, e.g., F.D.I.C. v. Mercantile Bank*, 84 F.R.D. 345 (N.D. Ill. 1979).

F. In contrast to Illinois law, other states do provide that the accountant privilege may be asserted by the client. *See generally FMC Corp. v. Liberty Mut Ins. Co.*, 603 N.E.2d at 716 n. 1 (citing cases from Georgia, Indiana, New Mexico, and Tennessee).