



## Alerts

### Under Dual Representation Doctrine, Attorney-Client Privilege Generally Does Not Apply to Communications Related to Matters on Which the Attorney Represents Both Clients

October 21, 2014

*Lawyers for the Profession® Alert*

*Bill Daily and Cardiothoracic Surgery Associates v. Greensfelder, Hemker & Gale, P.C.*, 2014 IL App (5th) 130273-U.

#### Brief Summary

An Illinois appellate court found that the dual representation doctrine (or the common representation exception to the attorney-client privilege) applied with respect to the production of a law firm's file.

#### Complete Summary

Plaintiff, Dr. Bill Daily, and Cardiothoracic Surgery Associates (CSA) entered into service contracts with SSM Healthcare St. Louis (SSM). SSM operated several medical facilities in the St. Louis metro area. Defendant law firm represented both CSA and SSM in various matters. In 2003, the firm represented CSA and SSM in negotiating and drafting a service agreement between CSA and SSM at one of SSM's facilities.

The service agreement contained nonsolicitation and noncompete clauses. In February 2007, two doctors employed by CSA filed a declaratory action in St. Louis County, Missouri to hold the noncompete clause unenforceable. By this time, the firm was no longer representing CSA. However, the firm still represented SSM and, on behalf of SSM, filed a motion to intervene in the declaratory action and sought its own declaratory relief for a finding that the noncompete and nonsolicitation clauses were unenforceable. These clauses were contained in the contract the firm had drafted while representing both CSA and SSM. That case settled in May 2007.

In July 2009, CSA sued the law firm, alleging breach of fiduciary duty and conspiracy. In the course of discovery, CSA requested a complete copy of the firm's "SSM file," including the work the firm did on behalf of SSM in the St. Louis County litigation. The law firm refused, and CSA filed a motion to compel, which the trial court granted. The firm was held in friendly contempt.

The Illinois Appellate Court affirmed. The court noted that attorneys owe a duty of loyalty to their clients, which includes a duty to keep a client informed of any matters that might impact the client's interest. When a firm is representing

#### Attorneys

Terrence P. McAvoy

#### Service Areas

Counselors for the Profession

Lawyers for the Profession®

Litigators for the Profession®



common clients, both clients should reasonably expect that the lawyers will owe the same duty of loyalty to the other client. Under these circumstances, a client cannot reasonably expect that communications related to a client's interest will be kept confidential.

The firm argued that the file was protected by the attorney-client privilege and that the common representation exception to the privilege should not apply because three years had passed between the common representation and the St. Louis County litigation. The court disagreed. It noted that lawyers have an ongoing duty of loyalty to a former client. This is one of the reasons attorneys should avoid representing clients whose interests are likely to become adverse.

The court found that the exception applied regardless of whether the parties actually understood that the attorneys would not be able to keep the information confidential from the other clients. Regardless of what the parties may have believed, the parties could have no reasonable expectation of confidentiality; thus the exception applied.

The law firm also asked the court to conduct an *in camera* review, but the court refused. All the documents in question were subject to the common representation exception, so the court did not need to review the documents to determine whether the attorney-client privilege applied.

### **Significance of Opinion**

Although this decision is an unpublished order issued pursuant to Illinois Supreme Court Rule 23 (which cannot be cited as precedential), it does serve as a caution to attorneys who represent clients with common interests. Lawyers should determine whether commonly represented clients could ever become adversarial before considering whether to represent both clients. The attorney-client privilege generally does not attach to communications related to matters on which the lawyer is representing both clients.

For more information, please contact [Terrence P. McAvoy](#) or [Adam R. Vaught](#).

*This alert has been prepared by Hinshaw & Culbertson LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship.*