



## Alerts

### Illinois Appellate Court Rejects Fiduciary Duty Exception to Attorney-Client Privilege

March 14, 2012

*Lawyers for the Profession® Alert*

*Garvy v. Seyfarth Shaw LLP*, 2012 WL 695426 (Ill.App. 1 Dist. 2012)

#### Brief Summary

The Appellate Court of Illinois, First District, Fourth Division, declined to adopt the fiduciary duty exception to the attorney-client privilege. Where defendant law firm sought legal advice related to a malpractice claim at a time when the firm was still representing plaintiff client, the court held that the firm's communications with its lawyers were privileged as to the client.

#### Complete Summary

This legal malpractice lawsuit was initiated at a time when the law firm still represented the client in a civil proceeding (the "chancery litigation"), which was factually related to the malpractice claim. Upon commencement of the chancery litigation, the firm warned the client of the firm's potential conflicts of interest. The client therefore sought independent counsel, and although that counsel initiated the instant malpractice suit, the client chose to be represented by the firm in the chancery litigation. During that time, and before the firm withdrew from the chancery litigation, the law firm had communications with both its in-house and outside counsel regarding the client's malpractice claim. Following the firm's withdrawal from the chancery litigation, the client sought production of such communications.

The Appellate Court of Illinois held that the communications were attorney-client privileged. In reaching that conclusion, the court declined to adopt what is known in some other jurisdictions as the fiduciary duty exception to the attorney-client privilege. That exception sometimes allows a party who is the beneficiary in a fiduciary relationship to have access to legal advice rendered to the fiduciary. The rule originated in the context of trust law and the trustee-beneficiary relationship.

The court further held that even if the fiduciary duty exception were recognized in Illinois, it would not apply. Relying on recent guidance from the U.S. Supreme Court, the appellate court held that where adversarial proceedings are pending between the fiduciary and beneficiary (here, the firm and the client, respectively), and the fiduciary seeks advice regarding such proceedings, it is seeking advice in its personal capacity rather than its fiduciary capacity. Therefore the exception does not apply.

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## Significance of Opinion

Courts have divided on whether to apply the fiduciary duty exception to the attorney-client privilege and, if so, in what circumstances. In a well-reasoned decision, the appellate court here declined to adopt the exception. The opinion posits a sensible, reasonably clear, and practical rule, which turns on whether the fiduciary is seeking legal advice for its own benefit or to protect the interests of the beneficiary.

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