AN ILLINOIS LAW FIRM

HEYL ROYSTER GOVERNMENTAL NEWSLETTER

 January 2014

WELCOME LETTER

Dear Friends:

Welcome to the latest issue of Heyl Royster's newsletter addressing issues facing governmental entities.

We would like to thank everyone who attended our "Lunch and Learn" seminars (at locations throughout Illinois) on the "Illinois Firearm Concealed Carry Act," which went into effect on January 5, 2014. Many local government officials and employees have had questions about the application of this new law. If you were unable to attend our seminar, please do not hesitate to contact an attorney in any of our offices to discuss questions you may have related to this Act.

This edition of the Heyl Royster Governmental Newsletter begins with an article by John Redlingshafer on recent legislation signed into law that may affect your day-to-day operations. Keith Fruehling then comments on common ethical dilemmas facing government attorneys, and provides tips for complying with Illinois law. Tim Bertschy next addresses critical changes in Illinois's Prevailing Wage Act, and Stacy Crabtree discusses a Fourth District Court of Appeals decision relating whether email and texts qualify as "public records" under the meaning of the Freedom of Information Act.

And finally, Chrissie L. Peterson, a new addition to our group, discusses one of the new laws aimed at reducing the number of accidents caused by distracted drivers: Public Act 98-0506, which prohibits the operation of a motor vehicle on any road in Illinois while using a mobile phone or other electronic communication device.

As always, if there are particular topics that you would like us to discuss in future editions, or at our seminars, we welcome your recommendations. If we can assist you with these or any other legal matters, please do not hesitate to contact us at any time.

Mark J. McClenathan
Governmental Practice Group

Mark J. McClenathan has represented municipalities and clients before various governmental bodies, and has experience in annexations, subdivisions and developments, zoning, and intergovernmental agreements. Mark joined Heyl Royster in 1989, and became a partner with the firm in 1998. Prior to joining Heyl Royster, Mark worked for the legal departments of the Defense Logistics Agency (Defense Contract Services) of the Department of Defense, Land O'Lakes, Inc. and 3M Corporation.

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2013 LEGISLATION SIGNED INTO LAW BY GOVERNOR QUINN

By John Redlingshafer
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Another legislative session has ended, and our General Assembly was very busy. Over 3,600 bills were introduced, and of those, 589 were passed by both houses and signed into law by Governor Quinn.

As expected, many of these almost 600 new "Public Acts" influence you and your unit of government. Some (such as the one authorizing concealed carry) received a lot of press, but here are a few examples of other important changes to your existing powers or obligations that will take effect in the coming months:

Senate Bill 2268 (Now Public Act 98-0549)

This Act amends 60 ILCS 1/30-50 of the Township Code, which authorizes the use or sale of township and road district property. Section 30-50 will now allow these public bodies to lease or sell personal property by a vote of the township board or at the request of the township highway commissioner. These officials will soon be able to authorize the sale of personal property by a licensed auctioneer or an approved internet auction service. This change also provides that the township board or highway commissioner (versus the electors previously) can declare real or personal property surplus (which can impact requirements on the bidding process).

House Bill 2488 (Public Act 98-0420)

You may recall the Illinois Local Government Professional Services Selection Act requires you to follow certain procedures when selecting an architect, engineer or land surveyor for particular construction projects. Under this new law, you must now also mail or email notices requesting a professional's interest in a project and place an advertisement for those services on the public body's website.

House Bill 2540 (Public Act 98-0173)

For years, you have been sending your annual ordinance setting your Prevailing Wage rates to both the Illinois Secretary of State and the Illinois Department of Labor. When you pass the ordinance in 2014, you will only need to file proof of the ordinance with the Department of Labor.

If you have questions on these or any other new laws taking effect in Illinois, please let us know.

John M. Redlingshafer concentrates his practice on governmental law, representing numerous townships, fire districts, road districts, and other governmental entities. John currently serves on the Tazewell County Board and is a past President of the Illinois Township Attorneys' Association.

PETERSON JOINS FIRM'S PEORIA OFFICE

In September of 2013, Chrissie Peterson joined the firm's Governmental Practice. Ms. Peterson previously served for seven years as the City Attorney for Canton, IL where she managed municipal ordinance prosecutions and was responsible for Freedom of Information and Open Meetings Act guidance; construction contracts, franchise agreements and utility infrastructure contracts; drafting resolutions, ordinances and policy updates; and managing the legal aspects of economic development. She handled matters before various state and federal administrative agencies including the Illinois Commerce Commission, the Illinois Human Rights Commission, and the EEOC.

Ms. Peterson's practice is focused on government law — representing municipalities and other public entities in a broad range of issues, including administrative and regulatory law, the operation and governance of critical services, infrastructure construction and financing, council procedures, tax increment financing, and economic development.

In the area of environmental law, Ms. Peterson has defended claims before the Illinois EPA. She has successfully negotiated Compliance Commitment Agreements, Highway Authority Agreements and has obtained No Further Remediation letters. She has worked with both the Illinois and United States EPA on multiple aspects of Brownfield redevelopment and financing.

Ethical Issues For Government Attorneys

By Keith Fruehling
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Who is My Client?

City and county attorneys across the state and nation both enter and hold their positions in unique ways. For example, some are elected, some appointed, some are full-time, while others are part-time and work with private clients in addition to their public entity client. Regardless of how they got there or how many hours they work, these attorneys face a number of interesting ethical questions almost on a daily basis.

While the scope of these issues covers a wide spectrum, the most basic question is: who does the City or County Attorney represent? This determination is important because as a fundamental ethical responsibility, the lawyer has a duty to safeguard his or her client's confidences. In addition, the attorney has the professional responsibility to avoid conflicts of interest. However, this duty is owed only to "clients."

… in the government context, client identification and the resulting obligations can be quite difficult to gauge.

At first glance, the question of "who" is the client seems easy to determine. However, upon closer examination, it can test the ethical and moral resolve of even the most learned ethics professor. Often, determining who the client really is can be a complex process when a governmental entity is involved. The definition of "client" may differ depending on whether the lawyer is representing an individual or an agency, and whose interests are being served by the legal advice. For example, is the client of a county attorney the county, the county legislative body, individual county commissioners, department heads, or the taxpayers of the county?

Regardless of the employment category into which a City or County Attorney falls, questions of client identity affect each in a wide variety of ways, including:

- Does the attorney represent the County Commission or the City Council?
- What issues of conflict arise in representing various agencies of the City or County?
- What issues of conflict arise in representing officers and employees of the City or County?

Some City and County Attorneys may believe that public service means that their client is "the public." Most public servants assume that their ultimate responsibility rests with the public they serve. Thus, it is reasonable for them to conclude that their representational responsibility rests not with their County Board or City Council, but rather with the public, in general. Characterizing the "public" as the client allows broad discretion in determining which causes to pursue, and can produce chaotic policy conflicts in governance.

The ABA's Model Rules of Professional Conduct for Lawyers recognize that, in the government context, client identification and the resulting obligations can be quite difficult to gauge. However, most cases that have dealt with the issue have the governmental attorney representing a specific governmental entity and/or individual as opposed to the amorphous "public."

Client Identification and Privilege

Once the client is identified, other questions arise. One of the more challenging involves privilege. For example, where a government lawyer must represent an entity through its County Board and/or City Council, which conversations in the course of that representation are privileged? One such case arose here in the State of Illinois.

That case involved a federal investigation into alleged corrupt practices by the Governor of Illinois while he was the Illinois Secretary of State. The U.S. Court of Appeals for the Seventh Circuit addressed the question of whether communications between a government lawyer and employees of a government agency were protected by the attorney-client privilege. In that context the court posed the question this way: "The central question . . . is whether a state government lawyer may refuse, on the basis of the attorney-client privilege,

to disclose communications with a state officeholder when faced with a grand jury subpoena." *In Re: A Witness Before the Special Grand Jury 2000.2*, 288 F.3d 290 (7th Cir. 2002)

The Seventh Circuit provided an excellent discussion on the issue of privilege. They noted that despite the fact that the concept of privilege is an old one; there were surprisingly few cases analyzing the question of a government's right to assert attorney-client privilege, and whether a government client can assert the attorney-client privilege in a civil matter.

The court held:

> One of the oldest and most widely recognized privileges is the attorney-client privilege, which protects confidential communications made between clients and their attorneys for the purpose of securing legal advice. . . . It is well established that a client may be either an individual or a corporation. . . . . But here, we have a special case: the client is neither a private individual nor a private corporation. It is instead the State of Illinois itself, represented through one of its agencies. There is surprisingly little case law on whether a government agency may also be a client for purposes of this privilege, but both parties here concede that, at least in the civil and regulatory context, the government is entitled to the same attorney-client privilege as any other client.

In Re: A Witness Before the Special Grand Jury 2000.2, 288 F.3d at 291.

The basis upon which the attorney-client privilege rests has historically been linked to the need for an attorney, while representing a client, to be accorded a full and frank factual description of the client's case. The privilege is intended to induce the full and frank discussion. Whether that same foundation exists for cases involving the government may not be so clear. Even more important, government lawyers are charged differently than their private counterparts - with duties not only to the client, but an even more robust duty to the public interest they serve. The Seventh Circuit highlighted the following:

> While we recognize the need for full and frank communication between government officials, we are more persuaded by the serious arguments against extending the attorney-client privilege to protect communications between government lawyers and the public officials they serve when criminal proceedings are at issue. First, government lawyers have responsibilities and obligations different from those facing members of the private bar. While the latter are appropriately concerned first and foremost with protecting their clients-even those engaged in wrongdoing- from criminal charges and public exposure, government lawyers have a higher, competing duty to act in the public interest. . . . . They take an oath, separate from their bar oath, to uphold the United States Constitution and the laws of this nation (and usually the laws of the state they serve when . . . they are state employees). Their compensation comes not from a client whose interests they are sworn to protect from the power of the state, but from the state itself and the public fisc. It would be both unseemly and a misuse of public assets to permit a public official to use a taxpayer-provided attorney to conceal from the taxpayers themselves otherwise admissible evidence of financial wrongdoing, official misconduct, or abuse of power. . . . Therefore, when another government lawyer requires information as part of a criminal investigation, the public lawyer is obligated not to protect his governmental client but to ensure its compliance with the law.

… government lawyers have responsibilities and obligations different from those facing members of the private bar.

Id. at 293.

Thus, at least in the context of a criminal proceeding, the Seventh Circuit concluded that the government lawyer represented the agency, not the individual, and that communications between the two were not privileged. In addition to the Seventh Circuit's guidance, the government attorney can look to the law governing their corporate counsel colleagues for guidance.

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Developments in the Prevailing Wage Act

By Tim Bertschy
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Efforts to make meaningful change in the Prevailing Wage Act (PWA) were largely unsuccessful this past year. In particular, proposals to create a minimum threshold before PWA requirements would apply (an overdue and important change) found little support. However, several changes were enacted to the PWA of which governmental officials should be aware.

Public Act 98-0328 amends the PWA to provide that contractors and subcontractors shall make and keep, for a period of not less than five years from the date of the last payment on a contract or subcontract, records of all workers employed on the project and provides that a public body must keep for five years certain payroll records. This changes the prior requirement which had established a record retention period of three years. These records may be retained in paper or electronic format. The change takes place with respect to records submitted after January 1, 2014. The Act also establishes a five year statute of limitations to bring an action for lost wages or compensation.

Public Act 98-0173 provides that governmental bodies are only required to file their yearly ordinances with the Department of Labor, not also with the Illinois Secretary of State. The Act is effective January 1, 2014.

Public Act 98-0482 changes the information required to be kept by contractors under the Act. Now the records to be kept by the contractor are the:

1) Worker's name
2) Worker's address
3) Worker's telephone number when available
4) Worker's social security number
5) Worker's classification or classifications
6) Worker's gross and net wages paid in each period
7) Worker's number of hours worked each day
8) Worker's starting and ending times of work each day
9) Worker's hourly wage rate
10) Worker's hourly overtime wage rate
11) Worker's hourly fringe benefit rates
12) Name and address of each fringe benefit fund
13) Plan sponsor of each fringe benefit, if applicable
14) Plan administrator of each fringe benefit, if applicable.

Items 9-14, however, are only required for a contractor or subcontractor which remits contributions to a fringe benefit fund that is not jointly maintained and jointly governed by one or more employers and one or more labor organizations under the Federal LMRA. Additionally, the time period for filing the certified payroll is moved back to the 15th day of each month from the 10th day of each month. Finally, the Act provides that the Department of Labor shall develop and maintain an electronic database capable of accepting and retaining certified payrolls and that the database shall accept certified payroll forms developed by the Department. This Act is also effective January 1, 2014.

Public Act 98-0109, effective July 25, 2013, requires certifications of PWA compliance in certain UST situations.

Public Act 98-0313, effective August 12, 2013, amends the county code regarding Winnebago County and provides that any sports, arts, or entertainment facilities that receive revenues from certain taxes will be considered to be public works within the meaning of the PWA.

Timothy L. Bertschy is chair of the firm's Governmental practice. He concentrates his practice in the areas of local governmental law, complex commercial litigation and employment. He has litigated cases involving contractual breaches, business torts, partnership and corporate break-ups, stockholder disputes, ERISA, unfair competition, intellectual property, covenants not to compete, lender liability, fraud and misrepresentation, eminent domain (condemnation), computer and software problems, privacy, real estate disputes, zoning issues, and business losses. Tim has represented clients in the business, banking, real estate, stock brokerage, accounting, legal, insurance, governmental, and religious fields.

FOIA UPDATE: WHEN TEXTS AND EMAILS ON YOUR CELL PHONE OR TABLET BECOME PUBLIC RECORDS

By: Stacy E. Crabtree
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Before you think about sending an email or text using your cell phone or tablet during the next board meeting, you should consider a recent court decision in *City of Champaign v. Madigan*, 2013 IL App (4th) 120662. In July of 2013, the Fourth District Court of Appeals was faced with the question as to whether texts and emails that city council members sent and/or received during a city council meeting were public records, which would subject the communications to disclosure under the Freedom of Information Act ("FOIA") (5 ILCS 140/). In its analysis, the court attempted to simplify the definition of "public records" as provided in Section 2(c) of FOIA. The court stated that in order to qualify as a public record, a communication (1) must pertain to the transaction of public business and (2) must have been either (a) prepared by, (b) prepared for, (c) used by, (d) received by, (e) possessed by, or (f) controlled by a public body.

As for the first requirement that a communication pertain to the transaction of public business, the court determined this meant the communication must pertain to business or community interests as opposed to private affairs.

As for the second requirement, the court analyzed the meaning of "public body" and recognized that a city council member cannot on his or her own "convene a meeting, pass ordinances, or approve contracts for the city." Rather, a quorum is necessary to be considered a public body.

The court then went on to make the following distinctions, which should act as guidelines for members of any public body when communicating through cell phones or tablets:

> 1. A message sent to *one* city council member on the city council member's *personal* cell phone or tablet by a constituent is not considered a public record. However, if that city council member forwards the message on to the number of members that would constitute a quorum, then it is a public record subject to disclosure under FOIA. We can also interpret this to mean then that if a constituent sends the original message to the number of members that would constitute a quorum, as opposed to just one city council member, then it is a public record.
>
> 2. If a constituent sends a message to even just one city council member on that city council member's *publicly issued* cell phone or tablet, then the message is possessed by the public body and subject to disclosure under FOIA.
>
> 3. Once a city council meeting has convened, the members are acting in a collective capacity and therefore acting as a public body. As a result, *any communications* sent to city council members *during the meeting* are public records subject to disclosure. This is true regardless of the number of members on the communication and regardless if it is on a personally owned or public issued device.

Notably, (1) through (3) above do not apply unless the communications also pertain to the transaction of public business, as opposed to private affairs. So, if during the next board meeting you text your spouse about plans for the weekend, the text is not a public record. However, if you text even one other board member during a board meeting about something pertaining to public business (e.g. concerns about expenditures, a public contract, or current board leadership), regardless if it is on your personal cell phone or tablet, the text is subject to disclosure. If the public body purchased your cell phone or tablet for you, then anything that you send from that cell phone or tablet pertaining to public business is subject to disclosure under FOIA, regardless if it was sent during a meeting and regardless of the number of recipients.

The court then ended its opinion with the following piece of advice: "local municipalities should consider promulgating their own rules prohibiting city council members from using their personal electronic devices during city council meetings." Although some elected officials may resist such a rule, those elected officials would certainly see the benefit the next time they have to search their personal devices for any texts or emails sent during a meeting.

Stacy E. Crabtree concentrates her practice on governmental affairs as well as tort litigation and representation of corporate and individual clients in the areas of commercial and contract law.

The Statewide Ban on Cell Phones While Driving: Public Act 98-0506

By Chrissie Peterson
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Illinois drivers have been prohibited from texting and driving since 2012. Until recently, however, Illinois drivers were only prohibited from talking and driving in limited circumstances. Prior to the adoption of Public Act 98-0506, drivers 19 years of age or younger were restricted from using both hand-held and hands-free cell phones while driving, except in emergency situations. 625 ILCS 5/12-610.1(b). Drivers in construction and school zones were not allowed to use hand-held cell phones, except in emergencies. 625 ILCS 5/12-610.1(e). The City of Chicago and other municipalities prohibited hand-held cell phone devices, but enforcement was limited by jurisdictional boundaries and often caused confusion for drivers traveling through multiple cities where the ban may or may not have been in place. Beginning on January 1, 2014, all drivers in Illinois will be prohibited from driving and talking on a hand-held cell phone unless they are utilizing the phone in a hands-free mode.

Municipalities have the authority to regulate traffic within their corporate boundaries and may adopt a part or all of the Illinois Traffic Code.

Under the new law, drivers are prohibited from operating a motor vehicle on a roadway while using a hand-held wireless phone. 625 ILCS 5/12-610.2(a-b). The law allows hand-held phones in the following circumstances: for law enforcement officials while performing official duties, for drivers reporting emergencies, for drivers using their phone in hands-free or voice-operated mode, which includes headsets, for drivers parked on the shoulder of a roadway, for drivers stopped due to normal traffic while the vehicle is in neutral or park, for drivers using two-way radios and for drivers utilizing a single button to initiate or terminate a voice communication. 625 ILCS 5/12-610.2(1, 2, 3, 5, 6, 7, 8, 9).

A violation of the law subjects the driver to a $75 fine for the first offense, $100 for the second offense, $125 for the third offense and $150 for the fourth and subsequent offense. 625 ILCS 5/12-601.2(c).

What do these changes mean for local public bodies? First, review your existing policies on cell phone usage. If your public body does not have a policy on the use of cell phones, now is the time to implement one. Second, consider adopting an ordinance on hands-free driving. Municipalities have the authority to regulate traffic within their corporate boundaries and may adopt a part or all of the Illinois Traffic Code. 65 ILCS 5/11-80-20. While some non-home rule municipalities have enforced hands-free driving for years, this legislation is the first grant of authority to non-home rule municipalities to locally prosecute hands-free driving violations.

Chrissie Peterson recently joined the firm's Governmental Practice (see her profile on pg. 2). She formerly served as the City Attorney for Canton, Illinois, where she managed all legal aspects of the municipal corporation including: providing guidance on the Freedom of Information and Open Meetings Acts, construction contracts, franchise agreements, and utility infrastructure, as well as drafting resolutions, ordinances and policy updates, and managing all the legal aspects of economic development.

ETHICAL ISSUES FOR GOVERNMENT ATTORNEYS

CONTINUED FROM PAGE 3…

Upjohn warnings are governed by Rule 1.13 of the Illinois Rules of Professional Conduct. Rule 1.13 states, in relevant part:

> (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
>
> (f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.
>
> (g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7 [regarding conflicts of interest]. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Attorney-Client Privilege & *Upjohn* Warnings

The scope of the federal attorney-client privilege in a corporate context was defined by the United States Supreme Court in *Upjohn Co. v. United States*, 101 S. Ct. 677, 449 U.S. 383 (1981). The attorney-client privilege protects confidential communications between attorney and client made in the course of obtaining professional assistance. In *Upjohn*, the Supreme Court held communications between all corporate employees and its counsel for purposes of securing legal advice from counsel were protected from compelled disclosure under the attorney-client privilege. The Supreme Court's decision was largely premised on the very difficult choice that corporate counsel would face if his or her communications with employees were not protected. For example, an attorney forced to interview only top management would have a difficult time determining what happened in a particular situation. If, on the other hand, he or she interviewed mid-level or lower-level management with knowledge of the situation, the communications would not be privileged. In either case, the attorney's investigation would be hampered under a "control group" scenario.

Since *Upjohn*, courts and commentators have discussed an Upjohn or corporate *Miranda* warning. The need for such warning stems from the fact that corporate counsel's client is the corporation, and not an employee, officer, or director of the corporation. The privilege therefore belongs to, and is controlled by, the corporation, meaning the corporation can elect to waive any privilege that has attached to a communication between the corporate counsel and a corporate employee. If an *Upjohn* warning has not been provided, an employee may believe that he or she is represented by corporate counsel. Counsel who discloses employee-provided information may be subject to employee claims that he or she breached his or her duty of loyalty and confidentiality owed to the client.

The privilege therefore belongs to, and is controlled by, the corporation…

Thus, the attorney representing the municipality is best served to provide an *Upjohn* warning to the person consulting her to make the representation clear.

WHO?

Who does a governmental attorney provide an *Upjohn* warning to? An *Upjohn* warning is generally given to an employee, officer, or director before an interview begins.

WHAT?

What does an *Upjohn* warning contain in the context of a government attorney? An *Upjohn* warning generally consists of the following requirements:

> (1) that the attorney represents the County, City or other unit of government and does not represent the individual personally;
>
> (2) that the communications between the attorney and the individual are privileged;
>
> (3) that the privilege belongs solely to the County, City or other unit of government, which may in its discretion choose to waive the privilege and disclose the communications to third parties; and
>
> (4) that so long as the privilege attaches, the employee may not disclose the communication to third parties.

What does an *Upjohn* warning sound like in the governmental context? The Municipality or County's counsel may phrase an *Upjohn* warning to an employee in the following manner:

> "As counsel for ABC County (or City), I represent the county. I do not represent you individually. The County can decide whether it wishes to waive the attorney-client privilege with regard to what you tell me and disclose it to someone else, including other units of government and regulatory agencies."
>
> "Because I represent ABC City (or County), I represent the city and not you personally."

WHEN?

When should the government counsel provide an *Upjohn* warning? Neither Rule 1.13, nor *Upjohn*, requires County, City or other unit of government counsel to provide an *Upjohn* warning in all cases. Counsel must, however, consider whether such warning should be provided whenever he or she is involved in matters in which the lawyer knows or reasonably should know that the entities interests are adverse to those of the constituents with whom the lawyer is dealing. When the attorney becomes aware that the individual's interest is adverse to that of the corporation, the attorney should advise the individual of the conflict of interest, that the lawyer cannot represent the individual, and that the individual may wish to retain independent counsel.

WHERE?

Where or in what context is an *Upjohn* warning given? An *Upjohn* warning is a verbal warning that the government counsel provides. There is currently no rule requiring that the *Upjohn* warning be given in writing. Depending upon the circumstances, the warning should be documented by a signed acknowledgement, handwritten notes, or a contemporaneous memorandum of the interview.

WHY?

Why is providing an *Upjohn* warning important? In the government context, the attorney's client is the governmental entity he/she represents. The attorney-client privilege belongs to the entity, and the government's counsel should always act in the best interest of the entity. While employee-attorney communications are privileged, the governmental entity can waive the privilege.

Illinois "Control Group Test"

Illinois law is narrower than the broader attorney-client privilege rule from *Upjohn*. Illinois follows the "control group test" from Consolidated Coal Co. v. Bucyrus-Erie Co., 89 Ill. 2d 103, 432 N.E.2d 250, 59 Ill. Dec. 666 (1982). The "control group test" is used to determine whether the attorney-client privilege applies to communications between corporate counsel and the organization's constituents. Under the control group test, the attorney-client privilege only applies to communications between an attorney and members of the control group.

In Consolidated Coal Co., an engineer supplied information to those whose opinions were sought and relied upon by others who occupied an advisory role and substantially contributed to decision making. The court held the engineer was not a member of the control group for purposes of being protected by the attorney-client privilege. Thus, the engineer's report was not privileged and was made available to the coal company in its action against the corporate manufacturer to recover damages sustained when a wheel excavator collapsed in a coal mine.

Who is in the control group?

- **Top Management**

  The only communications that are ordinarily held privileged under the control group test are those made by top management with the ability to make a final decision, rather than communications made by employees whose positions are merely advisory.

- **Employees**

  Who have actual authority to make a judgment or decision; or

  Who are in an advisory role

  - An employee whose advisory role to top management in a particular area is such that a decision would not normally be made without his or her advice or opinion, and whose opinion in fact forms the basis of any final decision by those with actual authority
  - For example, if an employee of the status described is consulted for the purpose of determining what legal action the corporation will pursue, his or her communication is protected from disclosure.
  - However, individuals upon who top management may rely for supplying information are NOT members of the control group.

Keith E. Fruehling is a partner in the firm's Urbana office. He concentrates his practice in civil litigation, including the defense of complex asbestos, employment and civil rights, professional malpractice, local governmental and products liability litigation. He has represented Fortune 500 corporations, universities, state and local governmental units, professionals, and local businesses. He also sits on the Illinois State Bar Association Board of Governors.

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