No. 1-14-2694

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JAY M. PENSLER,

Plaintiff-Appellee,

v.

FOX TELEVISION STATIONS, INC.; FOX TELEVISION HOLDINGS, INC.; MARK SAXENMEYER; AND DAN SCHWAB,

Defendants-Appellants,

Appeal from the Circuit Court of Cook County, Illinois
No. 2011 L 009425
The Honorable John P. Callahan, Judge Presiding.

BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE AMERICAN SOCIETY OF NEWS EDITORS, INVESTIGATIVE REPORTERS AND EDITORS, INC., THE ONLINE NEWS ASSOCIATION, AND THE SOCIETY OF PROFESSIONAL JOURNALISTS AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS FOX TELEVISION STATIONS, INC., *ET AL*

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POINTS AND AUTHORITIES

STATEMENTS OF INTEREST

The interests of the proposed *amici* ("*Amici*") in this appeal are discussed below.

The Reporters Committee for Freedom of the Press is a voluntary, not-for-profit, unincorporated association of reporters and editors. Founded in 1970, the Reporters Committee is dedicated to preserving the freedom of the press guaranteed by the First Amendment and defending the public's right to be informed, through the media, of the activities of their government and elected representatives. The constituency of the Reporters Committee has a special interest in advocating for the recognition of an attorney-client privilege between reporters and attorneys, as well as expertise in the inner workings of newsrooms that are at the heart of how this privilege should function. As representatives of journalists ranging from large national media organizations to local publications and freelance journalists, the Reporters Committee is uniquely positioned to aid the Court in its understanding of how journalists navigate their relationships with counsel and how a free press depends on application of the attorney-client privilege. A decision against applying the privilege would have very serious negative effects on the ability of both journalists and their counsel to do their jobs.

With some 500 members, The American Society of News Editors ("ASNE") is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to The American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as The American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership, and the credibility of newspapers.

Investigative Reporters and Editors, Inc. ("IRE") is a grassroots nonprofit organization dedicated to improving the quality of investigative reporting. IRE was formed in 1975 to create a forum in which journalists throughout the world could help each other by sharing story ideas, newsgathering techniques, and news sources.

The Online News Association ("ONA") is the world's largest association of online journalists. ONA's mission is to inspire innovation and excellence among journalists to better serve the public. ONA's more than 2,000 members include news writers, producers, designers, editors, bloggers, technologists, photographers, academics, students, and others who produce news for the Internet or other digital delivery systems. ONA hosts the annual Online News Association conference and administers the Online Journalism Awards. ONA is dedicated to advancing the interests of digital journalists and the public generally by encouraging editorial integrity and independence, journalistic excellence, and freedom of expression and access.

The Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists, and protects First Amendment guarantees of freedom of speech and the press.

INTRODUCTION

The case pending before this Court presents an issue of critical importance to news reporters and producers throughout Illinois – whether their communications with

in-house counsel are privileged. The answer to that question has substantial ramifications for the way in which journalists gather and report the news. Journalists across the nation necessarily seek out and rely upon confidential pre-publication legal advice given directly by the in-house attorneys at the news organizations for which they work on a regular basis. Not only is that practice consistent with good journalism and the practical realities of the modern newsroom, it also serves the public's interest in helping to ensure that controversial stories are reported, and in as responsible and timely a manner as possible. That reporters' communications with in-house counsel are protected by the attorney-client privilege in Illinois is, accordingly, of significant interest to *amici* media organizations, which are dedicated to supporting the work of journalists across the country.[1]

Amici agree with the arguments advanced by Defendants-Appellants in the Circuit Court that the attorney-client privilege shields communications between a news organization's in-house attorneys and journalists under Illinois law. *Amici* write separately to emphasize the practical importance of ensuring that reporters have the ability to obtain privileged and confidential legal advice from in-house counsel at the news organizations for which they work, particularly prior to publication. The arguments of *amici* will assist the Court by providing insight into how application of the attorney-client privilege in this context is necessitated by the unique responsibilities that reporters and producers have within their news organizations, and how it can benefit the practice of

[1] *Amici* would like to note that, in matters totally unrelated to the present case, their local counsel, Jenner & Block LLP (1) represents affiliates of Defendant Fox Television Stations, and (2) previously represented Defendant Fox Television Stations.

journalism and, accordingly, the public. For the reasons set forth herein, *amici* urge this Court to reverse the decision of the court below.

SUMMARY OF ARGUMENT

Protecting communications between journalists and in-house attorneys at their news organizations from discovery encourages reporters to seek out, and encourages in-house attorneys to give, candid pre-publication legal advice. When journalists are able to obtain such advice about the stories they are working on before they are published or aired, not only does the potential for litigation arising from those stories decrease, but the quality of the journalists' work can often improve. And, absent the ability to communicate fully and frankly with counsel, reporters may entirely avoid important but controversial stories that could potentially lead to litigation, to the detriment of the public. A reporter on deadline and with potentially limited financial means cannot be—and should not be—expected to retain separate counsel simply to obtain privileged pre-publication review of his or her stories. Without the ability to obtain privileged legal advice from in-house attorneys at the news organizations for which they work, journalists will be less likely to seek pre-publication review in the first place, and the effectiveness of any pre-publication review they do receive from those in-house attorneys will be diminished.

Moreover, application of the attorney-client privilege in this context is consistent with both Illinois law and realities of the newsroom. The "control group test" for evaluating who within a corporation can have privileged communications with in-house counsel encompasses journalists who make key decisions about content. Illinois case law makes clear that the test does not mandate that the control group be limited solely to

senior management. Instead, it can include employees of the company who control or take a substantial part in a decision based on advice of counsel, or without whose advice a decision would not be made. Reporters and producers consult with in-house counsel concerning stories, and are responsible for making editorial decisions, and therefore fall within those categories. It would make no sense in the fast-paced environment of a newsroom to require reporters to go through a member of top management to have their legal questions answered. Nor would such a requirement facilitate the effective provision of full and frank legal advice. The journalists' interest in providing, and the public's interest in receiving, the best news product in a timely manner is best served by encouraging the reporters and producers who are responsible for editorial decisions to communicate directly with in-house counsel regarding potential legal issues. In any event, in this case, Defendant Schwab *is* a member of top management in the newsroom, as an executive producer. His communications with counsel should clearly be protected under the control group test.

ARGUMENT

I. PROTECTING COMMUNICATIONS BETWEEN JOURNALISTS AND IN-HOUSE ATTORNEYS BENEFITS JOURNALIST AND THE PUBLIC, AND FURTHERS THE PURPOSES OF THE ATTORNEY-CLIENT PRIVILEGE.

A rule that would leave communications like those between Defendant Schwab and Fox Television's in-house attorney unprotected by attorney-client privilege would have devastating effects on the ability of journalists in Illinois to consult fully and candidly with their media organizations' lawyers. Given the realities of the fast-paced newsroom and the hierarchy of news organizations, denying the privilege under such circumstances would in essence eviscerate the myriad benefits that pre-publication

review can offer. Attorney review of certain news stories before they are released to the public not only reduces the potential for litigation, but helps to promote responsible, accurate journalism.

A. Pre-publication review is beneficial and should be encouraged.

Attorney review of news media content before it is distributed to the public works as a valuable tool in promoting accuracy, ensuring fair reporting, and avoiding litigation. Journalists and their news organizations can face significant liability arising from claims based on their stories, from libel to invasion of privacy to copyright infringement. *See* New York State Bar Association, *Counseling Content Providers in the Digital Age*, http://www.nysba.org/4063CounselingContentProviders. Thus, as one seminal treatise explains: "The value of pre-publication and pre-broadcast review can hardly be overstated." Bruce W. Sanford, *Libel and Privacy* 3-1 (2014). "Well-conceived procedures for pre-publication review are the ounce of prevention that is worth the pound of cure." *Id.* The duties of counsel in reviewing stories before publication range from pointing out what is libelous to acting like an editor and suggesting language changes. *See id.* at 3-6. The bulk of the lawyer's attention should be focused on "making statements more precise, ensuring that all necessary research has been done, confirming that documentary evidence exists to substantiate all statements of fact, and reviewing the trustworthiness of sources and the integrity of the process that produces the story." *Id.* at 3-6–3-7.

Such meticulous vetting is not only helpful to journalists and media organizations in avoiding future liability, but is also in the interest of subjects of news coverage as well, who presumably would also like to avoid factual errors and misrepresentations that they feel defame them. Moreover, it is in the interest of the public for the news they watch

and read to be accurate. A superior journalistic product as a result of pre-publication review is preferable for all parties.

B. Denying the privilege to these communications would discourage journalists from seeking pre-publication legal advice, and make such review less effective.

If communications between journalists and in-house attorneys are not protected by the attorney-client privilege, journalists and attorneys will not be able to be as candid as they would like to be as they discuss potential legal concerns related to a given story. The inability to fully explore the journalistic process and go over the basis of statements made in the publication with counsel will defeat the goals of pre-publication review. The point of pre-publication review is to aid in forming a higher-quality, more accurate product that leads to neither liability nor sloppy journalism. The topics that journalists discuss with counsel include the accuracy of quotations, how juxtaposition of headlines and photographs can create a false impression, and the loss of clarity when writing is edited and condensed, among many others. *See* Sanford at 3-21. Worries about those discussions not being privileged may prevent the discussions from taking place, meaning that the lawyer cannot offer the valuable advice that protects against liability and imprecise statements.

Furthermore, denying protection in this situation would be inconsistent with the primary justification for why the attorney-client privilege exists in the first place: that only an atmosphere of trust can result in candid communications necessary for effective representation. As the United States Supreme Court outlined in *Trammel v. United States* and echoed in *Jaffee v. Redmond* and many other cases discussing the establishment of privileges, the attorney-client privilege, as well as others, including the physician-patient privilege, is "rooted in the imperative need for confidence and trust." *See Trammel v.*

United States, 445 U.S. 40, 51 (1980); *see also Jaffee v. Redmond*, 518 U.S. 1, 10 (1996). Only in such an environment can the client or patient make a "frank and complete disclosure" of the facts that the advisor needs in order to provide good advice. *See Jaffee*, 518 U.S. at 8. In the case of the media, a "comfortable and trusting working relationship with counsel" is necessary for the journalist to feel at ease divulging the particulars of the reporting and research behind a story. *See* Sanford at 3-4. The journalist in this situation, fearful of the potential exposure to liability, is in the same vulnerable position as any other client who consults an attorney or a patient seeking the advice of a physician for a sensitive problem.

For these reasons, *amici* urge this Court to recognize the great utility that pre-publication review brings to the journalistic process and the importance of protecting those communications in order to promote candid disclosures in the service of accuracy and good reporting.

II. JOURNALISTS MAKING EDITORIAL DECISIONS ARE PART OF THE CONTROL GROUP UNDER ILLINOIS LAW.

Plaintiff-Appellee argued below that the communications between Defendant Schwab and Fox's in-house counsel should not be protected from disclosure under the "control group test" because, as a journalist and executive producer, Defendant Schwab was not a member of the "control group." Under the Illinois courts' interpretation of the control group test, however, the control group encompasses Defendant Schwab as a key decision maker when it comes to the content aired by Fox. Indeed, the practical realities of most newsrooms would make it impossible for legal advice about the content of a given news story to be conveyed if direct, privileged communications between journalists and in-house attorneys could not take place.

A. Illinois case law shaping the control group test leaves flexibility for key decision makers who are not necessarily top management to be members of the control group.

The Illinois appellate court first adopted the "control group test" in 1964 in *Day v. Illinois Power Co.*, 50 Ill. App. 2d 52 (1964).[2] In *Day*, the court quoted approvingly from other case law to define a member of the control group, stating

> [I]f the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply. In all other cases the employee would be merely giving information to the lawyer to enable the latter to advise those in the corporation having the authority to act or refrain from acting on the advice.

Day, 50 Ill. App. 2d at 57, *quoting City of Philadelphia v. Westinghouse Electric Corp.*, 210 F. Supp. 483, 485 (E.D. Pa. 1962).

Illinois courts further fleshed out the control group test in cases such as *Consolidation Coal Co. v. Bycyrus-Erie Co.*, 89 Ill. 2d 103 (1982). In *Consolidation Coal*, the Illinois Supreme Court stated that, when deciding whether someone is a member of a corporation's control group, the factors to be considered include whether the person is a decision maker or substantially influences corporate decisions, and whether that employee had actual authority to make a judgment or decision. *See id.* at 119. The Court cautioned that "as a practical matter, the only communications that are ordinarily held privileged under this test are those made by top management who have the ability to make a final decision, rather than those made by employees whose positions are merely advisory." *Id.* at 120. But the Court additionally clarified,

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[2] It should be noted that Illinois is an outlier in continuing to apply the control group test. Nearly all states and the U.S. Supreme Court have rejected it. *See* Edna Selan Epstein, *Attorney-Client Privilege & the Work-Product Doctrine*, 1.III.E2.A.3.a American Bar Association Section of Litigation, The Attorney-Client Privilege and the Work-Product Doctrine Fifth Ed. (2012).

> 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 in fact forms the basis of any final decision by those with actual authority, is properly within the control group. However, the individuals upon whom he may rely for supplying information are not members of the control group.

Id.

These authorities demonstrate that the control group need not necessarily be limited to members of the "top management," even though in practice when traditional corporations seeking the advice of counsel are at issue, it is usually only those communications that are privileged. When the control group test is applied to news organizations, the control group test is flexible enough to allow journalists who are key decision-makers to have privileged communications with counsel.

B. In the reality of the newsroom, producers and other journalists making key decisions who must communicate with counsel due to the fast-paced nature of the news cycle are members of the control group.

The realities of the newsroom and how media organizations produce and make decisions about stories show that the people who are truly in control of these stories are producers and other journalists making the editorial calls. It is not the top members of the company who are involved in making these decisions, nor is it usually the top editor, either. In the case of broadcast journalism, it is nearly always people like Defendant Schwab, a producer of the piece who also did much of the journalistic legwork. The usual role of an executive producer is to direct the production of content, assigning story ideas and overseeing the overall quality of the production. *See* EXECUTIVE PRODUCER, http://www.media-match.com/usa/jobtypes/executive-producer-jobs-405700.php (last visited Dec. 5, 2014). By doing the research and reporting for this story himself, Defendant Schwab was working in both the roles of an executive producer and a more

general news producer. The news producer usually receives stories from the news director or executive producer and then works to build the newscast, either doing the writing himself or having journalists in the field do the writing. *See* NEWS PRODUCER, http://www.media-match.com/usa/jobtypes/news-producer-jobs-402748.php (last visited Dec. 5, 2014). The role is similar to that of an editor at a newspaper or magazine. It is journalists in either role who make editorial judgments on the stories that are to be published, whether they are doing the writing themselves or supervising the work of others. As part of those judgments, they regularly make decisions based on the advice of counsel without needing to consult with anyone who would traditionally be considered top management.

Thus, such producers and other journalists who are truly guiding the editorial process fall within the definition of the control group as outlined in the cases above. Under the definition in *Day*, these decision makers are in a position to make the judgment call about action the news organization may take upon the advice of an attorney, since they are deciding what to publish based on their discussion with counsel. The journalists are not merely giving information to the lawyer to enable him to advise those who actually have the authority on how to proceed—the journalists are the ones who receive the attorney's advice and often decide how to proceed. Moreover, under *Consolidation Coal*, even if top management were to make a decision on whether to move forward with certain content, the producer or other decision-making journalist certainly has an advisory role "such that a decision would not normally be made without his advice or opinion." *Consolidation Coal*, 89 Ill. 2d at 120. Their work assembling the story makes their input a critical part of deciding whether a story should move forward.

In this case, Defendant Schwab's communications with in-house counsel would be protected even if his title were "news producer" rather than "executive producer" for the above reasons. The fact that Defendant was an executive producer should further strengthen his case for having his communications be privileged. An executive producer is generally the most senior member of the news organization who would regularly be involved in making editorial decisions about content based on the advice of counsel.

Nor does it make sense for journalists like Defendant Schwab to always be required to communicate with counsel through an intermediary who is in the top management. The fast pace with which editorial decisions must be made in the standard newsroom does not allow for such contrived relationships. It is in the public interest for consumers to receive their news in a timely manner; undue delay renders stories redundant or not newsworthy. The Internet in particular is responsible for the rise of the "24-hour news cycle," a phenomenon that also means that news outlets are in fierce competition with each other to be first to publish without losing accuracy. *See* David A. Logan, *All Monica, All of the Time: The 24-Hour News Cycle and the Proof of Culpability in Libel Actions*, 23 U. Ark. Little Rock L. Rev. 201 (2000). The desire to consult with counsel is a critical step in many stories in the effort to get the story right. When news organizations are under tremendous time pressure, it is illogical to throw more obstacles in the way of accuracy by discouraging journalists from speaking candidly with counsel.

Furthermore, journalists' own potential liability shows that it makes sense for them to be the ones to communicate with counsel. As in this case, the journalists who direct and create the content are often named as defendants in resulting lawsuits. They

need to be able to protect themselves against future suits, and if the organization's attorney is not considered their own, it is absurd to require each journalist to hire his or her own counsel for pre-publication review.

In sum, the unique role of producers, editors, and other journalists as key decision makers in news organizations qualifies them as members of the control group.[3] They are entrusted with the power to guide the content that is actually published, with members of top management uninvolved with such on-the-ground decisions that so often require the advice of counsel. It is the realities of operating within the newsroom and the swift news cycle that underscore the need for these journalists to be the ones communicating with the attorney.

[3] Other case law from around the country supports the proposition that communications between journalists and in-house counsel should be privileged. *See, e.g.*, *Herbert v. Lando*, 73 F.R.D. 387, 400 (S.D.N.Y. 1997) (rev'd on other grounds) (forwarding executive producer a legal memo prepared by in-house counsel did not waive the attorney-client privilege under the control group test); *Liberty Lobby, Inc. v. Dow Jones & Co.,* 838 F. 2d 1287, 1303 (D.D.C. 1988) (communications between a Dow Jones editor and in-house counsel were protected by attorney-client privilege). *Amici* acknowledge that there is a lack of case law addressing news organizations under the control group test, but attribute that to the reluctance of other states to adopt the control group test, as well as the possibility that the test was designed for a different type of corporate structure. Despite the latter scenario, *amici* believe that the test is satisfied here and in the cases of other journalists acting as key decision makers.

CONCLUSION

For the foregoing reasons, the Circuit Court's decision to compel disclosure of the protected communications between Defendant Schwab and the Fox Television in-house counsel should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 345, 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 14 pages.

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