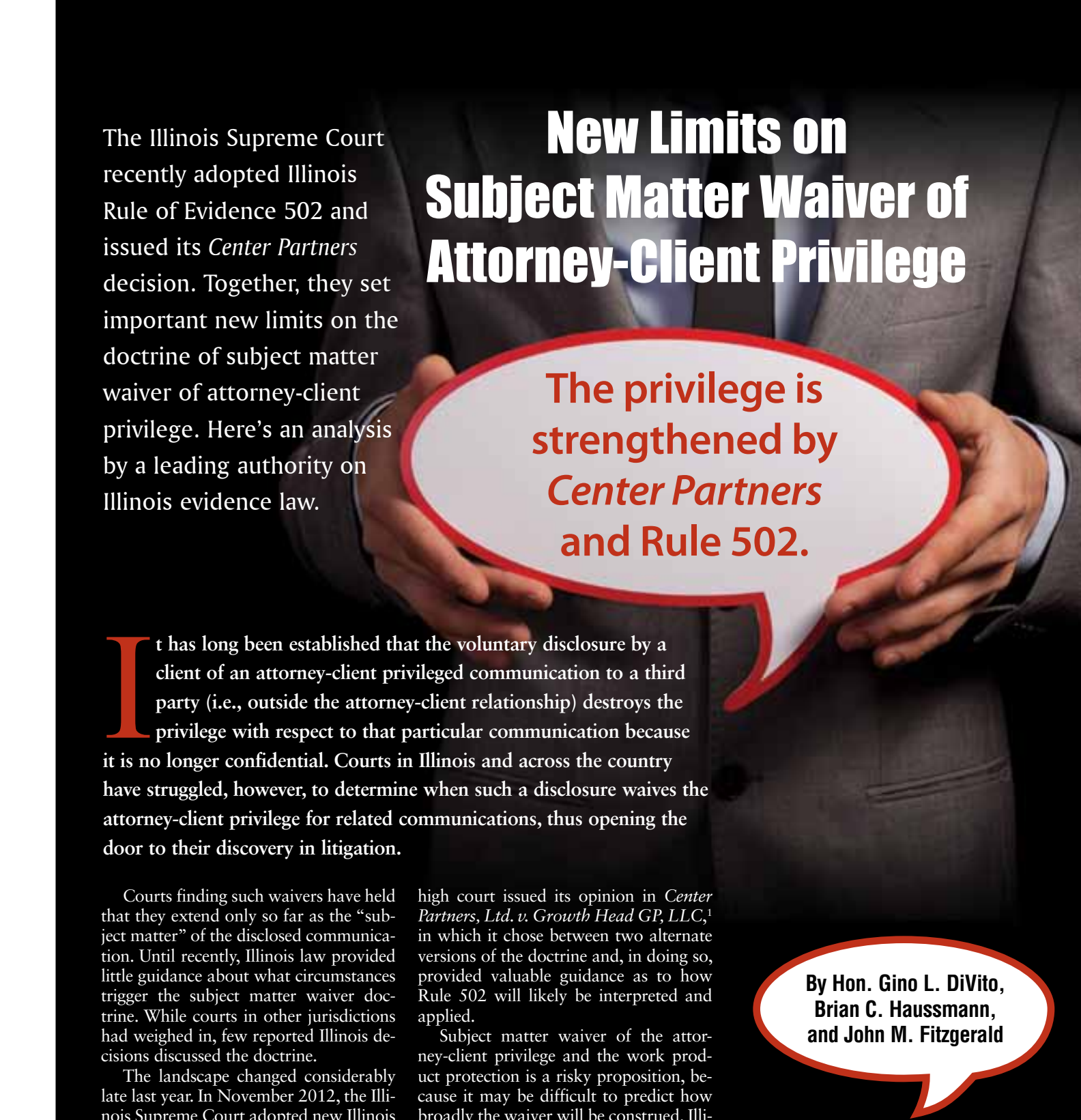
New Limits on Subject Matter Waiver of Attorney-Client Privilege

The Illinois Supreme Court recently adopted Illinois Rule of Evidence 502 and issued its *Center Partners* decision. Together, they set important new limits on the doctrine of subject matter waiver of attorney-client privilege. Here's an analysis by a leading authority on Illinois evidence law.



By Hon. Gino L. DiVito, Brian C. Haussmann, and John M. Fitzgerald

It has long been established that the voluntary disclosure by a client of an attorney-client privileged communication to a third party (i.e., outside the attorney-client relationship) destroys the privilege with respect to that particular communication because it is no longer confidential. Courts in Illinois and across the country have struggled, however, to determine when such a disclosure waives the attorney-client privilege for related communications, thus opening the door to their discovery in litigation.

Courts finding such waivers have held that they extend only so far as the "subject matter" of the disclosed communication. Until recently, Illinois law provided little guidance about what circumstances trigger the subject matter waiver doctrine. While courts in other jurisdictions had weighed in, few reported Illinois decisions discussed the doctrine.

The landscape changed considerably late last year. In November 2012, the Illinois Supreme Court adopted new Illinois Rule of Evidence 502, which is modeled on Federal Rule of Evidence 502 and provides guidelines for applying subject matter waiver. The following day, the high court issued its opinion in *Center Partners, Ltd. v. Growth Head GP, LLC*,[1] in which it chose between two alternate versions of the doctrine and, in doing so, provided valuable guidance as to how Rule 502 will likely be interpreted and applied.

Subject matter waiver of the attorney-client privilege and the work product protection is a risky proposition, because it may be difficult to predict how broadly the waiver will be construed. Illinois practitioners should acquaint themselves with the Illinois Supreme Court

1. 2012 IL 113107, 981 N.E.2d 345.

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guidelines, which are summarized and discussed below.

The supreme court's *Center Partners* decision

In *Center Partners, Ltd. v. Growth Head GP, LLC*, the Illinois Supreme Court was asked to decide "whether the subject matter waiver doctrine extends to disclosures of privileged communications made in an extrajudicial setting."[2] In an extensive and unanimous opinion, the court answered that question in the negative.[3]

Quoting Wigmore, the supreme court stated the general rule of subject matter waiver as follows: "[t]he client's offer of his own or the attorney's testimony as to a *specific communication* to the attorney is a waiver as to all other communications to the attorney on the same matter."[4] The supreme court also recited the more recent formulation of the doctrine by the appellate court: "where a client reveals portions of her conversation with her attorney, those revelations amount to a waiver of the attorney-client privilege as to the remainder of the conversation or communication about the same subject matter."[5]

The doctrine's purpose, the court explained, "is to prevent partial or selective disclosure of favorable material while sequestering the unfavorable."[6] The supreme court used the familiar sword and shield metaphor to explain the role of subject matter waiver: It prevents a litigant from using a portion of an otherwise privileged communication offensively while simultaneously invoking the privilege to block discovery of the remainder of the communication.[7]

At issue in the case was whether, by discussing legal issues with each other in business negotiations, a number of corporate defendants in later litigation had waived the attorney-client privilege over private communications with their attorneys concerning the negotiated business transaction. Such a finding would have required the defendants to produce in the litigation hundreds of privileged documents and to testify about numerous privileged conversations.

With the purpose of the doctrine and this factual background in mind, the supreme court set out to decide "whether the subject matter waiver doctrine extends to disclosures of privileged communications made in an extrajudicial setting."[8] This was an issue of "first impression in Illinois."[9] Having considered conflicting federal cases that addressed this question, the supreme court found the "line of cases declining to extend subject matter waiver to extrajudicial disclosures more persuasive."[10]

The court first reasoned that "limiting application of subject matter waiver to disclosures made in litigation better serves the purpose of the doctrine," which is to "prevent a party from strategically and selectively disclosing partial attorney-client communications with his attorney to use as a sword, and then invoking the privilege as a shield to other communications so as to gain a tactical advantage *in litigation*."[11] That purpose is "not served, however, when the doctrine is expanded to cover disclosures made before litigation is initiated or, in many cases, even contemplated."[12]

When asked "whether the subject matter waiver doctrine extends to disclosures of privileged communications made in an extrajudicial setting," the court unanimously said "no."

The supreme court also simply found the federal cases that limited the doctrine to the context of litigation to be "more thorough and persuasive," particularly because at least one that adopted a broader notion of subject matter waiver seemed to be based upon very broad concerns about fairness, not the very precise concerns about unfair tactical advantages in litigation that animate the doctrine in Illinois.[13]

The supreme court also found "limiting subject matter waiver to the context of judicial disclosures to be sound policy."[14] While the court's holding was expressly not limited to "advice given in business transactions," the court "recognize[d] that the present case involves a business transaction and business negotiations would be uniquely burdened by extending subject matter waiver."[15] Such an extension of subject matter waiver could have a chilling effect on the exchange of information in business transactions and make clients more reluctant to obtain legal advice about business transactions from their attorneys, the court reasoned.[16]

The supreme court also found that the reason for the existence of subject matter waiver simply did not apply to business transactions: "It is of no matter if disclosure made during a business negotiation is done to gain a tactical advantage during the *business negotiation*" because disclosures in business negotiations are "not in the province of this court."[17] In the event that a "disclosure is made during a business negotiation to gain a later tactical advantage in anticipated litigation, subject matter waiver would still apply if such a disclosure is later used by the disclosing party at any point *during the litigation* to gain a tactical advantage."[18] There would be no subject matter waiver unless the disclosure was "later reused during litigation."[19]

Thus, the supreme court held, "subject matter waiver does not apply to the extrajudicial disclosure of attorney-client communications not thereafter used by the client to gain an adversarial advantage in litigation."[20]

The new rule of evidence

The day before releasing its unanimous opinion in *Center Partners*, the Illinois Supreme Court adopted new Illinois Rule of Evidence 502. The new rule took effect on January 1, 2013. In language that mirrors Federal Rule of Evidence

2. *Id.* at ¶ 42, 981 N.E.2d at 358.
3. *Id.* at ¶ 62, 981 N.E.2d at 364.
4. *Id.* at ¶ 37, 981 N.E.2d at 356-57 (quoting 8 John Henry Wigmore, Evidence § 2327, at 638 (McNaughton rev. ed. 1961) (emphasis in original)).
5. *Id.* at ¶ 38, 981 N.E.2d at 357 (quoting *In re Grand Jury January 246*, 272 Ill.App.3d 991, 997 (1995)).
6. *Id.* at ¶ 39, 981 N.E.2d at 357.
7. *Id.*
8. *Id.* at ¶ 42, 981 N.E.2d at 358.
9. *Id.* at ¶ 43, 981 N.E.2d at 359.
10. *Id.* at ¶ 57, 981 N.E.2d at 362.
11. *Id.* (emphasis in original).
12. *Id.* at ¶57, 981 N.E.2d at 363.
13. *Id.* at ¶¶ 58-59, 981 N.E.2d at 363.
14. *Id.* at ¶ 60, 981 N.E.2d at 363.
15. *Id.* at ¶ 61, 981 N.E.2d at 364.
16. *Id.* at ¶¶ 60-61, 981 N.E.2d at 363-64.
17. *Id.* at ¶ 62, 981 N.E.2d at 364 (emphasis in original).
18. *Id.*
19. *Id.* at ¶ 62, 981 N.E.2d at 364.
20. *Id.*

502, the new rule states, in relevant part, as follows:

> The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.
>
> (a) Disclosure Made in an Illinois Proceeding or to an Illinois Office or Agency; Scope of a Waiver. When the disclosure is made in an Illinois proceeding or to an Illinois office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in any proceeding only if:
>
> (1) the waiver is intentional;
>
> (2) the disclosed and undisclosed communications or information concern the same subject matter; and
>
> (3) they ought in fairness to be considered together.[21]

Crucially, as in *Center Partners*, the supreme court in Rule 502 limited the application of subject matter waiver to certain types of disclosures – namely, those made in an "Illinois proceeding or to an Illinois office or agency." While the "Illinois office or agency" prong of this rule may require further explication as to precisely which types of interactions with which types of offices and agencies are covered, the text of Rule 502 shows that subject matter waiver is triggered by, and targeted toward, *judicial* uses of otherwise privileged information.

This is confirmed not only by the supreme court's decision in *Center Partners*, but also by the official commentary to the federal rule on which the new Illinois rule is based. The Advisory Committee Notes to Federal Rule of Evidence 502 explain that subject matter waiver is "limited to situations in which a party intentionally puts protected information *into the litigation* in a selective, misleading and unfair manner."[22]

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Conclusion

Through its unanimous opinion in *Center Partners* and new Illinois Rule of Evidence 502, the Illinois Supreme Court added predictability and definition to the doctrine of subject matter waiver in Illinois. Because subject matter waiver can have severe and wide-ranging consequences, the court appropriately determined that it should be carefully limited. Thus, it can be triggered only by intentional and selective disclosures in the course of litigation, disclosures designed to give the disclosing party an unfair tactical advantage in litigation.

Because of the severe consequences of such a waiver, litigants and counsel should proceed with extreme caution before choosing to inject otherwise privileged attorney-client communications or otherwise protected attorney work product into litigation. Doing so can open the proverbial Pandora's box, and the scope of the resulting waiver may be much broader than anticipated. ■

21. Ill. R. Evid. 502.
22. Fed. R. Evid. 502 advisory committee's note (emphasis added).

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