Nos. 11-3107 & 11-3128

IN THE SUPREME COURT OF ILLINOIS

Center Partners, Ltd., Urban-Water Tower Associates, Miami Associates, L.P. and Old Orchard Limited Partnership, all Illinois limited partnerships, individually and derivatively on behalf of Urban Shopping Centers, L.P., *Plaintiffs-Appellees,* vs. Growth Head GP, LLC, Westfield America Limited Partnership, Westfield America, Inc., Westfield America Trust, Rouse-Urban, LLC TRCGP, Inc., The Rouse Company, L.P., The Rouse Company, Rouse LLC, GGP L.P. and General Growth Properties, Inc., *Defendants-Appellants.* Urban Shopping Centers, L.P., Head Acquisition L.P., SPG Head GP, LLC, Simon Property Group, LP, and Simon Property Group, Inc., *Defendants.*	Appeal from the Appellate Court, of Illinois, First Judicial District, No. 1-11-0381 There Heard on Appeal from the Circuit Court of Cook County, Illinois, County Department, Law Division, No. 04 L 12194 The Honorable **Charles R. Winkler,** Judge Presiding.

BRIEF OF *AMICI CURIAE*, ILLINOIS STATE BAR ASSOCIATION, ASSOCIATION OF CORPORATE COUNSEL, AND ASSOCIATION OF CORPORATE COUNSEL CHICAGO CHAPTER

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BRIEF OF THE ILLINOIS STATE BAR ASSOCIATION, ASSOCIATION OF CORPORATE COUNSEL, AND ASSOCIATION OF CORPORATE COUNSEL CHICAGO CHAPTER AS *AMICI CURIAE*

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POINTS AND AUTHORITIES

INTEREST OF *AMICI CURIAE*

The Illinois State Bar Association is a 134-year-old voluntary bar association organized under the laws of Illinois to promote the interests of the legal profession and improve the administration of justice. It has approximately 35,000 members, including lawyers from every segment of the profession. ISBA members practice as solo practitioners, in large and small law firms, as in-house counsel at corporations, in a multitude of governmental positions, as judges and in other places of employment throughout the State of Illinois.

Association of Corporate Counsel ("ACC") is a bar association for attorneys employed in the legal departments of corporations and private-sector organizations worldwide. ACC has more than 29,000 members in over 75 countries, employed by over 10,000 organizations. Association of Corporate Counsel Chicago Chapter ("ACC Chicago") is the local chapter of the ACC. It has more than 1,800 in-house counsel members representing virtually every leading local, national and international company in the Chicago and surrounding areas ACC regularly files *amicus curiae* briefs and provides testimony and commentary in matters of special interest to in-house counsel and corporate legal practice. This is such a case. The application of the subject matter waiver doctrine to the transactions at issue in this case ignores the true purpose of the waiver doctrine, while undermining the

important role candid communications with counsel play in the negotiation of business relationships in Illinois and around the world.

INTRODUCTION

Amici submit this brief because they believe the appellate court's ruling undermines the durable framework of the attorney-client privilege and thereby weakens a cornerstone of the attorney-client relationship in Illinois. The appellate court's expansion of the subject matter waiver of privilege into the context of business transaction negotiations is contrary to this Court's admonition against creating non-statutory waivers of the privilege. The appellate court's ruling also conflicts with the Illinois Rules of Professional Conduct ("RPC"), as will be demonstrated in the argument, below.

As associations of lawyers representing all aspects of the practice of law, *amici* submit that the following statement from the appellate court will undermine the public policy interests of the legal profession in Illinois, create an impossible environment for business negotiations in Illinois, and unfairly place lawyers into a mine-field of ethical conflicts and potential malpractice claims:

> Once the privileged communication is disclosed to a third party, the privilege is waived, and the scope of the waiver extends to all communications relating to the same subject matter.

Center Partners, Ltd. v. Growth Head GP, LLC, 2011 IL App (1st) 110381, ¶ 16.

If the appellate court's overbroad statement of law is allowed to stand, attorneys and clients will no longer have confidence that undisclosed

attorney-client communications about business transactions will be kept confidential. Attorneys will have a difficult, if not impossible task of instructing clients about the risk of waiver. The appellate court's decision also creates a landscape for future protracted battles over privilege waivers.

The attorney-client privilege is not absolute but it is durable and, up until now, has been reliable as well. It is this durable reliability that helps to engender the public's trust in the legal profession. The free flow of information between a client and his lawyer is of paramount importance to fulfilling the lawyer's ethical obligations to his client. The appellate court's decision imperils the reliability of the attorney-client privilege and can lead to mischievous results to the detriment of the bar and the clients it serves.

ARGUMENT

I. THE APPELLATE COURT'S APPLICATION OF THE SUBJECT MATTER WAIVER DOCTRINE IS INCONSISTENT WITH THIS COURT'S DECISION IN *FISCHEL & KAHN*.

"The purpose of the attorney-client privilege is to encourage and promote full and frank consultation between a client and legal advisor by removing the fear of compelled disclosure of information." *Fischel & Kahn, Ltd. v. van Straaten Gallery, Inc.*, 189 Ill. 2d 579, 585 (2000) (citations omitted). The appellate court's decision in this case sharply undermines this principle. Instead, it chills an attorney's duty to openly communicate with his client by an expansive and totally unexpected interpretation of subject matter waiver of the attorney-client privilege. This is contrary to *Fischel's* narrow interpretation

of subject matter waiver, designed to protect client confidences. It is also contrary to the Rules of Professional Conduct, as set forth in later points of this brief.

In *Fischel*, attorneys were sued for alleged negligent advice that gave rise to a subsequent lawsuit in which the malpractice plaintiff claimed damages as a result of the advice. The attorneys defended on the basis that it was partially the conduct of the malpractice plaintiff and its attorneys in the underlying lawsuit that caused the damages in that case and sought discovery regarding the handling of that case. Despite the fact that the malpractice plaintiff had placed the subject matter of the underlying case directly at issue by virtue of suing for malpractice, this Court declined to extend subject matter waiver of attorney-client privilege to allow discovery, stating:

> To do so would create an intolerable burden upon the attorney-client privilege, making it very difficult for the parties to the relationship to openly discuss matters which might eventually lead to litigation.

189 Ill. 2d at 587.

While the appeal here arises in the context of an underlying business transaction, rather than litigation, the former fact makes the Court's holding in *Fischel* more apropos here. To hold that a client's discussion of some attorney advice he received in conducting a business transaction resulted in a total waiver of attorney-client privilege with respect to all other private advice the

client received is "intolerable," not merely because it is unexpected, but because it makes it impossible for an attorney to openly advise his client.

II. LAWYERS MUST BE ETHICALLY UNFETTERED IN PROVIDING STRAIGHTFORWARD AND CANDID ADVICE UNDER RULE 2.1.

Rule 2.1 states that "[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice." Comments to Rule 2.1 explain that "[a] client is entitled to straightforward advice expressing the lawyer's honest assessment." Rule 2.1, comment 1.

The appellate court's decision interferes with a lawyer's ability to provide straightforward and candid advice in a business transaction negotiation because there is an unacceptable risk that disclosure of some attorney advice or communication by a client will waive the privilege for all communications about the same subject matter. Under Rule 1.6 (discussed in point III, below), attorney-client communications are virtually always privileged and protected from compelled disclosure. Attorneys routinely advise clients about business transactions. It is not unusual for a client to reveal that he consulted a lawyer and how that legal advice has affected the client's business decisions. In the process the client may reveal some confidential information or communication with a third party for the purpose of successfully negotiating a business transaction. An attorney might also discuss material terms of a business negotiation to explain why certain negotiated terms are unacceptable to his client, *e.g.*, a schedule of payments or

adjustable financing terms. Indeed, Rule 2.3 (discussed in point IV, below) specifically contemplates the sharing of some confidential information with third parties, without a subject matter waiver of attorney-client privilege.

Critical to the attorney-client relationship is the trust and candor a client shares with his lawyer. That trust and candor is greatly facilitated by the client's belief that communications with his lawyer are protected from disclosure and that the client has substantial control over whether any of his confidential information is ever revealed. This Court has advised that, "people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private." Preamble to Rules of Professional Conduct, ¶ 8.

The appellate court's ruling undermines Rule 2.1 because it hinders the free flow of the very information the lawyer needs to fulfill his ethical obligations as an advisor under Rule 2.1. The increased risk that, in the course of negotiating a business transaction or discussing terms of a proposed contract, a lawyer or client could waive all communications about a subject, is "an intolerable burden upon the attorney-client privilege, making it very difficult for the parties to the relationship to openly discuss matters which might eventually lead to litigation." *Fischel & Kahn, Ltd. v. van Straaten Gallery, Inc.*, 189 Ill. 2d 579, 587 (2000). Under the burden added by the appellate court's decision here, both attorneys and clients may well be hesitant to freely communicate because of the risk of subject matter waiver of privilege.

III. THE CLIENT CONFIDENTIALITY REQUIRED BY RULE 1.6 IS THE CORNERSTONE FOR CANDOR WITHIN THE ATTORNEY-CLIENT RELATIONSHIP.

The appellate court's ruling compromises the candor between a client and his lawyer by introducing significant uncertainty into the types of information that will remain confidential. That uncertainty, due to the operation of Rule 1.6, will likely breed mistrust in the lawyer-client relationship and encourage the proliferation of disciplinary complaints and malpractice claims.

Rule 1.6 states: "(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b) or required by paragraph (c)." The unequivocal language of this rule, "shall not reveal information," is the backbone of Rule 1.6 upon which a client relies to assure that candid discussions in seeking legal advice shall remain confidential. The comments to Rule 1.6 explain this as follows:

> A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. . . . This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws

> and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

The obligation to safeguard confidential information "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." Rule 1.6, comment 3.

The appellate court's ruling greatly increases the risk of waiving the protection of Rule 1.6 because disclosure of some confidential information or communications on a matter can operate as a waiver of the privilege regarding all communications relating to the same subject matter. The appellate court's ruling curtails a lawyer's ability to fulfill the objectives of representation because Rule 1.6 permits the disclosure of confidential information if it is impliedly authorized to carry out the representation. Comment 5 to Rule 1.6 addresses authorized disclosures, and notes that,

> a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter.

Focusing on the second sentence, "a disclosure that facilitates a satisfactory conclusion to a matter" would include statements made during business negotiations. Rule 1.6 contemplates that, in a business negotiation, an Illinois lawyer may have, or believe to have, authorization to make a disclosure for the purpose of reaching a satisfactory resolution, such as a contract. That disclosure could include the client's position on a negotiated

point, the lawyer's impression as to the legal implication of a proposed contractual term, or the client's "bottom line" on a price being discussed. However, such disclosures would now run the risk of waiving the privilege to all communications relating to the same subject matter. Under the decision on appeal, a lawyer who makes such a disclosure, with express or implied authorization, risks compromising communications that the lawyer did not have express or implied authorization to disclose. If this type of unauthorized disclosure occurs, one can easily imagine the proliferation of disciplinary complaints and malpractice claims to follow.

As mentioned above, the attorney-client privilege is not absolute and Rule 1.6 provides for the circumstances under which confidential information may be revealed by the lawyer. Exceptions to the preservation of confidential information are explained in paragraphs (b) and (c) of Rule 1.6. These exceptions to the rule of confidentiality are necessary, reasonable and serve the interests of justice. For example, under Rule 1.6(b), a lawyer may reveal limited information to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain harm. Comment 14 advises that "[p]aragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. . . . In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose." Rule 1.6, comment 14.

Rule 1.6 (b) does not permit a lawyer to reveal all information about a particular subject, only the information necessary to accomplish a narrow purpose. However, under the decision of the appellate court, any disclosure of information by a lawyer under Rule 1.6(b) would operate as a waiver to all communications relating to the same subject matter. The same unreasonable result would happen if a lawyer was compelled to disclose information under Rule 1.6(c). The revealing of limited information necessary to prevent "reasonably certain death or substantial bodily harm," would now operate as a waiver of all communications relating to the same subject matter. Nowhere in Rule 1.6(b), Rule 1.6(c) or the comments to Rule 1.6, is there any indication that this Court intended a narrow and limited disclosure of confidential information to be transformed into a wholesale waiver of the privilege. Under the appellate court's ruling, Rule 1.6(b) and (c) are triggers for waiving the privilege for all communications and information on the same disclosed subject.

The exceptions explained in Rule 1.6(b) and (c) are clearly articulated so that clients may understand how to avoid the circumstances which would dissolve the confidential seal around certain information communicated to a lawyer. Rule 1.6 provides some certainty and structure to the operation of the attorney-client privilege within the attorney-client relationship. Rule 1.6 is referenced throughout the RPC as one of the fundamental considerations to any ethical decision to be made by an attorney. Those ethical decisions are

unnecessarily multiplied by the appellate court's ruling because the risk of waiving the client's privilege is substantially greater, especially when a lawyer is asked to provide an evaluation, under Rule 2.3, that is intended to be shared with third parties.

IV. THE APPELLATE COURT'S RULING CONFLICTS WITH RULE 2.3.

The appellate court's decision undermines the client's ability to choose what types of confidential information and advice to share with third parties in the course of a negotiation. In stark contrast, the RPC recognize that clients sometimes share counsel opinions with third parties and accommodate that reality, via Rule 2.3, by protecting the confidentiality of information left unshared. The appellate court's decision and the clear import of Rule 2.3 simply cannot be reconciled.

Rule 2.3, entitled "Evaluation for Use by Third Persons," states:

> (a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.
>
> (b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.
>
> (c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

In other words, Rule 2.3 explicitly allows for the preservation of confidential information in the same context where the appellate decision here would find a wholesale waiver of the privilege.

The comments to Rule 2.3 explain that:

> An evaluation may be performed at the client's direction or when impliedly authorized in order to carry out the representation. See Rule 1.2. Such an evaluation may be for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

Rule 2.3, comment 1. The example in the comment of a property title opinion is particularly relevant to the present case because it shows that the application of Rule 2.3 would be appropriate in a non-litigation context, such as a property purchase transaction or a business purchase transaction.

Rule 2.3 clearly indicates that there is a distinction to be drawn between a disclosure during a business negotiation and a disclosure during litigation. However, the appellate court incorrectly concluded that "we find no reason to distinguish between a waiver occurring during the course of litigation or during a business negotiation." *Center Partners, Ltd. v. Growth Head GP, LLC*, 2011 IL App (1st) 110381, ¶ 16. The appellate court was incorrect because Rule 2.3 allows a client and his lawyer to share information with third parties

about a subject in a business negotiation without risking the waiver of the protections of Rule 1.6. The comments to Rule 2.3 further explain that:

> Information relating to an evaluation is protected by Rule 1.6. In many situations, providing an evaluation to a third party poses no significant risk to the client; thus, the lawyer may be impliedly authorized to disclose information to carry out the representation. See Rule 1.6(a). Where, however, it is reasonably likely that providing the evaluation will affect the client's interests materially and adversely, the lawyer must first obtain the client's consent after the client has been adequately informed concerning the important possible effects on the client's interests. See Rules 1.6(a) and 1.0(e).

Rule 2.3, comment 5.

The appellate court's ruling undermines Rule 2.3 because the court's application of the subject matter waiver doctrine means that undisclosed communications and confidential information are no longer protected by Rule 1.6. As a result, lawyers seeking to fulfill the ethical obligations as an advisor under Rule 2.1, and a keeper of confidential information under Rule 1.6, will now be placed into an untenable position of not being able to provide an evaluation under Rule 2.3. This is because Rule 2.3(b) states that "When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent." When the RPC are applied under the appellate court's decision, a Gordian Knot of conflicts is created. How can a lawyer properly advise his client in a business transaction under Rule 2.1, maintain confidential information under Rule 1.6, and provide an evaluation requested by his client under Rule. 2.3, when the very act of

providing that evaluation will waive the Rule 1.6 protection for all communications and information about the subject of the evaluation? If the appellate court's ruling is not reversed, Rule 2.3 and evaluations for third parties will be essentially eviscerated from the lexicon of legal services in Illinois.

The examples from Rule 2.3's comments illustrate the problem caused by the appellate court decision: the disclosure of an evaluation of a property title or a business to be sold would also waive the client's ability to keep other information, advice and communications about the same property or business confidential. The risk of such a wholesale disclosure of otherwise confidential information and communications conflicts directly with the statement of the Preamble to the RPC that "people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private." Preamble to Rules of Professional Conduct, ¶ 8.

Subparagraph (c) of Rule 2.3, which expressly preserves the Rule 1.6 confidentiality of any information not disclosed by an evaluation is a clear indication that this Court, through the RPC, intended to preserve a client's ability to control what confidential information is disclosed. The appellate court's opinion directly conflicts with Rule 2.3(c) because under the opinion, all non-disclosed information, advice and communications relating to the same subject matter of the evaluation are no longer otherwise protected by Rule 1.6 because of the subject matter waiver doctrine.

V. THE APPELLATE COURT'S APPLICATION OF THE SUBJECT MATTER WAIVER DOCTRINE CONFLICTS WITH THE APPROACH TAKEN IN FED. R. EVID. 502, AND IN PROPOSED RULE 502 OF THE ILLINOIS RULES OF EVIDENCE.

Rule 502 of the Federal Rules of Evidence, entitled "Attorney-Client Privilege and Work Product; Limitations on Waiver," in relevant part provides:

> **(a) Disclosure made in a Federal proceeding or to a Federal office or agency; scope of waiver**.—When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if:
>
> (1) the waiver is intentional;
>
> (2) the disclosed and undisclosed communications or information concerns the same subject matter; and
>
> (3) they ought in fairness be considered together.

The Special Supreme Court Committee on Illinois Evidence has proposed a substantively similar rule with respect to disclosures made in the Illinois courts or other governmental proceedings. See copy of proposed Illinois rule 502 in appendix.

The appellate court's decision conflicts with the approach taken by Fed. R. Evid. 502(a) and proposed Illinois rule 502(a) in two respects. First, a disclosure of privileged information in private business negotiations does not result in a waiver of the subject matter under the rule. Only a disclosure in a court or other governmental proceeding can result in a subject matter waiver. Second, rule 502(a) does not contemplate an automatic finding of subject

matter waiver like the appellate court held. Rather, it requires a case-by-case approach, recognizing that a subject matter waiver should only be found when fairness demands that result.

The explanatory notes to federal rule 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." The notes further provide that subject matter waivers are "reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of an adversary."

In the appeal at bar, the appellate court's sweeping application of waiver failed to consider the fairness of its ruling or its impact on the attorney-client relationship. Lay persons are typically not trained in law and would not know or have reason to suspect that a comment could waive privilege as to every other discussion with their attorney.

CONCLUSION

For the foregoing reasons, the Illinois State Bar Association, the Association of Corporate Counsel, and the Association of Corporate Counsel Chicago Chapter, as *amici curiae*, submit that the appellate court's decision holding a subject matter waiver of attorney-client privilege is incorrect.

Respectfully submitted,

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Dated: January 25, 2012

CERTIFICATION OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of the 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, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 17 pages.

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APPENDIX

Proposal 11-01
Creates new Illinois Rule of Evidence 502
Offered by the Special Supreme Court Committee on Illinois Evidence

Evidence Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

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.

(b) Inadvertent Disclosure. When made in an Illinois proceeding or to an Illinois office or agency, the disclosure does not operate as a waiver in any proceeding if:

(1) the disclosure is inadvertent;

(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(3) the holder promptly took reasonable steps to rectify the error, including following Illinois Supreme Court Rule _____. [see Proposal 11-02]

(c) Disclosure Made in a Proceeding in Federal Court or Another State. When the disclosure is made in a proceeding in federal court or another state and is not the subject of a court order concerning waiver, the disclosure does not operate as a waiver in an Illinois proceeding if the disclosure:

(1) would not be a waiver under this rule if it had been made in an Illinois proceeding; or

(2) is not a waiver under the law governing the federal or state proceeding where the disclosure occurred.

(d) Controlling Effect of a Court Order. An Illinois court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court — in which event the disclosure is also not a waiver in any other proceeding.

(e) Controlling Effect of a Party Agreement. An agreement on the effect of disclosure in an Illinois proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Definitions. In this rule:

(1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

(2) work-product protection means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.