
Don't Slip Up!

by Brian J. Hunt

Consulting Room

Watch where you tread when it comes to the "Consultant's Privilege".

Consultants often are asked to do difficult and challenging things. Their advice can lead to layoffs, outsourcing, downsizing, or a multitude of other measures (including contractual termination) that may be viewed as somewhat "unsavory."

To encourage the work of consultants and to help protect them from civil liability, Illinois recognizes the "consultant's privilege," which provides legal immunity to consultants with two qualifications: (1) Advice must be given within the scope of the consultant's engagement; and (2) The privilege is forfeited upon giving dishonest advice—in other words, when advice is given for the consultant's benefit (or out of dislike for a target). Here's a case in point:

Laying Down the Law

In a recent decision in the case of *J.D. Edwards & Co. v. Podany*, (168 F. 3d 1020 [7th Cir. 1999]), a client, "SNE," retained J.D. Edwards & Co. to supply software, streamline business practices and obtain necessary computer support. SNE previously had rejected a BPCS software package because it lacked a feature (configurator) to facilitate custom manufacturing.

While Edwards was completing its tasks, one of the client's division heads asked Randy Podany, an employee of Mercer Management Consulting, Inc., to perform a "sniff test" as a quick review of the software Edwards was installing. Bear in mind, however, that Podany was not a software expert.

After meeting with Edwards' managers and spending a day reviewing documents, Podany advised the client that Edwards' "reengineering in parallel" approach (the process of defining business needs and obtaining necessary computer support simultaneously) was unsound. SNE then informed employees that Podany would approve all computer purchases. Podany later advised his client to cease installing Edwards' software altogether, and directed the executive in charge to stop payment. He then replaced the Edwards software package with the only software he was familiar with—BPCS—the package the client had previously rejected. In addition, the software was installed using the same "reengineering in parallel" process Podany previously had advised against. (The software package selected by Podany ultimately was deemed a failure.)

Later, Podany landed a high-paying job with the client's parent organization as director of information services and, during his tenure, gave multiple engagements to his former employer, Mercer, resulting in \$1.6 million worth of billings.

Edwards filed suit in federal court, claiming that Podany and Mercer had tortiously interfered with their client contract. The defendants asserted the protection of the consultant's privilege, which was rejected by the jury. Ultimately, Edwards was awarded \$2.3 million in damages.

The Seventh Circuit Court, in an opinion issued by Judge Posner, affirmed the jury's award. The court held that Podany's advice to stop installing Edwards' software, his direction to stop payment to the company, and even his erroneous or foolish advice could, in theory, be protected by the consultant's privilege. But, the court also held that sufficient evidence existed for the jury to surmise an act of bad faith, and to decide Podany had acted for his own benefit rather than that of his client. These actions, obviously, are not protected by the consultant's privilege.

Protect your actions Podany should sound as a warning to consultants throughout Illinois. First, consider the scope of your engagement as you proceed. Depending on the circumstances, a broad definition of the engagement's content may be preferable. In any event, if the work provided exceeds the scope of the engagement letter, then it likely should be revised.

Second, be ever-cognizant that affected third parties may call your advice into question. Consultants shouldn't try to avoid giving painful advice because of this, but instead should give their advice honestly—with independence in both fact and appearance. In this regard, knowledge of the facts, communication with the client and documentation of all stages of the engagement are crucial.

By keeping these points in mind, consultants can continue to safely pursue the work that is so important to themselves and to their clients.

About the Author

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