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# The Duty of Confidentiality and the Attorney-Client Privilege: Sorting Out the Concepts

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— *INSIDE* —

ETHICS

# THE DUTY OF CONFIDENTIALITY AND THE ATTORNEY-CLIENT PRIVILEGE: SORTING OUT THE CONCEPTS

By: Grace M. Giesel

Attorneys often confuse the ethical concept of the duty of confidentiality and the evidence concept of the attorney-client privilege. It is not at all unusual to hear attorneys talk of information being "privileged" when the information might be protected by the duty of confidentiality but is in no way protected by the attorney-client privilege. Sometimes lawyers are simply misusing the word "privilege," but understand the difference between the two concepts. Other times, however, attorneys are, as one of my students recently phrased her own understanding, "a little fuzzy on that." So let's clear up some of that fuzziness!

As a general matter, both the duty of confidentiality and the attorney-client privilege encourage clients to trust their lawyers. The attorney-client privilege, especially, encourages clients to tell their lawyers everything, though the duty of confidentiality does this as well. With complete information, lawyers can provide the best and most appropriate advice.

The duty of confidentiality places ethical restrictions on a lawyer's disclosure of information relating to the representation of the client. Supreme Court Rule (SCR) 3.130(1.6) sets forth the parameters of the duty.

In contrast, the evidentiary principle of the attorney-client privilege is a creature of Rule 503 of the Kentucky Rules of Evidence (KRE). That rule generally states that the privilege applies to confidential communications between an attorney and a client, or their respective representatives, made for the purpose of obtaining or rendering legal services and not in furtherance of a crime or fraud. Rule 503 states that if the privilege applies to a communication, disclosure of that communication cannot be compelled. While the attorney-client privilege is a creature of Rule 503, in other jurisdictions and as a matter of federal law, it is often a creature of the common law, defined by judicial opinion without the benefit of a rule.<sup>1</sup>

While the concepts are similar, they are not the same. A lawyer may have a duty of

confidentiality with regard to information about his or her representation of a client, but because the information is not a part of a confidential communication, it does not benefit from the protection of the privilege. A court could compel the client or the lawyer to disclose that information.

## THE DUTY OF CONFIDENTIALITY

### The Basic Rule: SCR 3.130(1.6)

Rule 3.130 contains the Rules of Professional Conduct that govern the conduct of lawyers practicing law in Kentucky. Rule 3.130(1.6) deals with a lawyer's duty of confidentiality. The rule's basic statement regarding confidentiality is as follows:

(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).

This duty has broad application. A lawyer who represents a client in a divorce matter and who discovers information about the client's relationship with the client's wife while talking to the client's neighbor has a duty to keep that information confidential.

This general confidentiality principal continues after the

representation ends and applies to information received about prospective clients as well.<sup>2</sup>

The duty of confidentiality not only forbids revealing information, but also proscribes a lawyer's use of confidential information about a client to the disadvantage of that client.<sup>3</sup> With regard to former or prospective clients, a lawyer may not use confidential information to the disadvantage of a former or prospective client unless that information has become "generally known."<sup>4</sup>

## Disclosure "Impliedly Authorized" or with Informed Consent

Of course, a client may give informed consent to a disclosure of otherwise confidential information. Informed consent requires that the lawyer explain to the client the risks that accompany such a disclosure as well as the alternative to such a disclosure.<sup>5</sup> In addition, the rule allows disclosures that are "impliedly authorized" in order to carry out the representation.<sup>6</sup> A client who is represented by a lawyer who practices in a firm with other lawyers, absent contrary indication, impliedly authorizes the lawyer to share confidential information with other lawyers in the firm.<sup>6</sup>

## Other Permitted or Required Disclosures: SCR 3.130(1.6(b))

Rule 3.130(1.6(b)) identifies four situations in which a lawyer may disclose confidential information even though the client does not consent to the disclosure and does not authorize it.

A lawyer may reveal information:

1. to prevent reasonably certain death or substantial bodily harm; 2. to obtain ethics advice; 3. to establish a claim or defense on behalf of the lawyer; and 4. to comply with other law or a court order. With regard to each exception, a lawyer may disclose only the information reasonably necessary to meet the underlying purpose.<sup>7</sup>

### • To Prevent Reasonably Certain Death or Substantial Bodily Harm

Rule 3.130(1.6(b)(1)) allows a lawyer to disclose confidential information "to the

extent the lawyer reasonably believes necessary" to avoid

"reasonably certain death or substantial bodily harm." If, for example, a lawyer, in the course of representing a client in a child custody matter, learns from a third party that his client has expressed an intent to drown her children in the river, that lawyer may disclose such information to the authorities.

### • To Obtain Ethics Advice

In order to encourage lawyers to consult

PRIVILEGE

with others about the ethically proper path, Rule 3.130(1.6(b)(2)) allows a lawyer to disclose confidential information to obtain "legal advice about the lawyer's compliance with these Rules."

- **To Establish a Claim or Defense on Behalf of the Lawyer**

Rule 3.130(1.6(b)(3)) allows a lawyer to disclose information to defend herself. If a client makes a claim against a lawyer for malpractice, the lawyer can disclose confidential information to defend herself. If the lawyer has been charged criminally or is subject to civil liability or disciplinary action or any other adverse proceeding in relation to the lawyer's representation of the client, the lawyer may disclose confidential information to defend herself.

In addition, a comment to Rule 3.130(1.6) clarifies that an attorney may disclose information to establish entitlement to a fee in a collection action.<sup>8</sup>

- **To Comply with Other Law or Court Order**

Rule 3.130(1.6(b)(4)) allows a lawyer to disclose confidential information if a court orders the disclosure or if other law demands such disclosure. For example, a state might have a statute that requires reporting of child abuse and specifically states that it applies to lawyers. A lawyer could abide by the statute without violating the duty of confidentiality.

- **Other Permitted or Required Disclosure: Other Rules**

Rule 3.130(1.13), which addresses representation of an organization, also contains a provision for a permitted disclosure. Section (c) of Rule 3.130(1.13) permits a lawyer to disclose confidential information outside the organization, but only if (1) the lawyer has followed the internal reporting procedure provided by Rule 3.130(1.13), (2) the lawyer believes the situation to be harmful to the organization and a clear violation of law and (3) the "highest authority" in the organization has failed to

address the problem in an "appropriate manner." Even so, the lawyer may disclose confidential information only if the lawyer reasonably believes the situation "is reasonably certain to result in substantial injury to the organization."

Rule 3.130(3.3), which deals with candor to the tribunal, is a bit different in that it mandates disclosure of otherwise confidential information as part of the lawyer's duty to be absolutely candid with the court. For example, if a lawyer, the lawyer's client, or a witness called by the lawyer, offers evidence that the lawyer later learns is false, that lawyer has a duty to "take reasonable remedial

measures, including, if necessary, disclosure to the tribunal."<sup>9</sup> Likewise, "[a] lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."<sup>10</sup> Part (c) of Rule 3.130(3.3) clarifies that the duties under Rule 3.130(3.3) apply "even if compliance requires disclosure of information otherwise protected by Rule 1.6." Several other rules require disclosure of information but state that a lawyer need not disclose unless Rule 3.130(1.6) permits the disclosure. For example, Rule 3.130(8.3) requires a lawyer to report misconduct of another lawyer unless the information is protected by Rule 3.130(1.6) or other law.<sup>11</sup>

## **THE ATTORNEY-CLIENT PRIVILEGE**

### **The Basic Rule**

In contrast to the duty of confidentiality, the attorney-client privilege, contained in KRE 503, is the evidentiary principle that confidential communications between attorneys and their representatives and clients and their representatives and even prospective clients that are made for the purpose of obtaining or rendering legal

service, and not in furtherance of a crime or fraud, cannot be compelled.<sup>12</sup> The privilege is the client's, though the client's lawyer, acting as the client's agent, can waive the privilege or assert it.

A "representative of the lawyer" is "a person employed by the lawyer to assist the lawyer in rendering professional legal services."<sup>13</sup> The "representative of the client" is a more complex concept because clients who are organizations must act through individuals but yet not all individuals involved with an organization

should be seen as having the power to engage with the lawyer so as to invoke the privilege. Rule 503 defines a "representative of the client" as a person who has the "authority to obtain professional legal services" or to act on legal advice given to the client. In addition, a "representative of the client" is anyone who is a party to a confidential communication: "(i) [i]n the course and scope of his or her employment; (ii) [c]oncerning the subject matter of his or her employment; and (iii) [t]o effectuate legal representation for the client."<sup>14</sup>

### **Absolute Protection**

While a court may order disclosure of information clearly within the bounds of a lawyer's duty of confidentiality, if a court determines that the attorney-client privilege applies to a communication, the communication cannot be compelled; in other words, the protection is absolute.<sup>15</sup>

This absolute protection is also in contrast to the application of the work product doctrine set forth in Kentucky Rules of Civil Procedure Rule 26.02(3), which protects from disclosure material prepared in anticipation of litigation. Even if a court determines that material is work product, a court can compel the production of work product if the opposing party proves substantial need for the material and undue hardship in accessing the virtual equivalent of the materials through other means.<sup>16</sup>

### **Narrow Interpretation**

The United States Supreme Court in *Upjohn Company v. United States* stated that the privilege's "purpose is to encourage full and frank communication

between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.<sup>17</sup> Though this rationale of the privilege is laudable, because the privilege keeps relevant information out of the hands of the truth-finder, courts apply it narrowly.<sup>18</sup>

### Protects Confidential Communications

The attorney-client privilege applies only to communications; it does not apply to the underlying information. So, for example, a lawyer might ask a deponent, "What did you tell your lawyer about what you did that day?" Opposing counsel should object on the basis that the answer to the question would require disclosure of a privileged communication. The questioning lawyer could ask a query aimed to elicit the underlying information as follows: "What did you do that day?" The deponent could answer this question without disclosing an attorney-client privileged communication.

If a lawyer is asked to produce the lawyer's notes about a conversation with the client's neighbor in which the lawyer and the neighbor discussed the subject of the representation, the notes may be work product and protected by that doctrine. The duty of confidentiality also protects the information relating to the conversation with the neighbor about the client, but those notes are not protected by the attorney-client privilege and can be compelled by a court. Recall that the duty of confidentiality allows a lawyer to disclose confidential information to comply with a court order. That provision of the duty of confidentiality would apply in this situation.<sup>19</sup>

In addition, the communication must be intended to be confidential. A communication between lawyer and client with other, unnecessary third parties present is not privileged because the presence of the unnecessary third parties implies a lack of intent to have a confidential communication.<sup>20</sup> Rule 503 specifically states that the privilege applies to communications that involve not only the lawyer and the client but also "representatives" of each.<sup>21</sup> So the presence of "representatives" does not destroy the privilege.

If the lawyer represents several clients jointly, the privilege applies to conversations among the clients and the lawyer.<sup>22</sup> Since only attorneys and clients and their representatives are included in the communication, there are no unnecessary third parties present and thus no negative implication for confidentiality.

A corollary to that principle is that one joint client cannot assert privilege in a matter in which the joint client is adverse to the other joint client relating to the common representation.<sup>23</sup>

Rule 503 also provides that the privilege applies in the "common interest" setting, thus making clear that parties who do not share counsel but who have a "common interest" may communicate with each other without losing the protection of the privilege.<sup>24</sup> What exactly suffices as a "common interest" is not clear in Kentucky or elsewhere.<sup>25</sup>

Likewise, a client who discloses to others an attorney-client communication that was confidential when it occurred may be held to have waived the privilege by the disclosure to others. The disclosure indicates that the client no longer desires that the communication remain confidential.<sup>26</sup>

### • Communication Made for the Purpose of Facilitating the Rendition of Professional Legal Services to the Client

For the privilege to apply, Rule 503(b) requires that the communication be "made for the purpose of facilitating the rendition of professional legal services to the client." Occasionally, a client consults with a lawyer about more than legal issues and matters. A client might value the judgment of the lawyer on business issues as well as legal issues. The attorney-client privilege, however, does not apply to communications that do not relate to legal advice.

### • Exception for a Communication In Furtherance of a Crime or Fraud

If a client consults with a lawyer and then uses the lawyer's advice to commit a crime or fraud, the communication is not privileged. This is true whether or not the lawyer knew of the client's purpose at the time of the communication. Of course, a lawyer who knowingly assists a crime or fraud has violated Rule 3.130(1.2(d)), which forbids such misconduct.<sup>27</sup>

### • Other Exceptions

Rule 503 also provides that the privilege does not apply in a few other situations. The privilege does not apply to communications relevant to an issue between parties who make claims through the same deceased client, "to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness," and to a communication related to an issue of breach of duty by the lawyer to the client or vice-versa.<sup>28</sup>

### • Waiver

Generally, a client's disclosure of otherwise privileged communications to someone outside the attorney and client circle of confidentiality destroys the privilege. A client also can waive the privilege by putting a communication at issue. For example, a client cannot claim an advice of counsel defense and then maintain that the communications containing the advice are privileged.

A lawyer can waive the privilege on behalf of the client if the lawyer is acting in the role of client's agent. So, for example, a lawyer who fails to object in a timely manner to disclosure can be held to have waived the client's privilege.

Inadvertent disclosures, such as when a document production includes a privileged document that mistakenly was left in the collection of materials to be produced, may or may not waive the privilege. Kentucky has not yet spoken on the issue as to whether an inadvertent disclosure is a waiver of privilege. Federal Rule of Evidence 502 provides that when the inadvertent disclosure occurs in a federal setting, the disclosure does not waive the privilege if: "the holder of the privilege or protection took reasonable steps to prevent disclosure; and ... the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B)."<sup>29</sup>

### CONCLUSION

While both the ethical duty of confidentiality and the evidentiary principle of the attorney-client privilege relate to information held by a lawyer, they are distinct concepts with separate parameters. Because of the duty of confidentiality, a lawyer has an obligation not to disclose information relating to the representation of the client, though, as discussed above, the rules are rife with exceptions. The attorney-client privilege protects only confidential communications between attorney and client that are made to facilitate the rendition of legal services. While the duty of confidentiality allows disclosure in certain situations, such as when disclosure is necessary to abide by a court order, the privilege, if it applies to a communication, prevents court compulsion. Each doctrine has its exceptions and nuances different from those of the other doctrine.

It is easy to conflate these doctrines. A careful lawyer will give proper attention to his or her ethical duty of confidentiality as well as be mindful of the application of the attorney-client privilege. **BEB**



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responsibility, and contract drafting. Professor Giesel holds a B.A. in economics from Yale University and a J.D. from Emory University School of Law, where she graduated with distinction and as a member of the Order of the Coif. Professor Giesel is the chair of the KBA Ethics Committee and is the author of many articles on professional responsibility and contracts topics. She is a member of the Louisville, Kentucky, and American Bar associations.

garded as a lawyer-client relationship but also "a person ...who consults with a lawyer with a view to obtaining professional legal services from the lawyer." KRE 503(a)(1). Thus, there can be attorney-client privilege in communications with a prospective client.

- <sup>13</sup> KRE 503(a)(4); see also *Wal-Mart Stores, Inc. v. Dickinson*, 29 S.W.3d 796, 804 (Ky. 2000) (privilege applies to paralegals).
- <sup>14</sup> KRE 503(a)(2).
- <sup>15</sup> See *Collins v. Braden*, 384 S.W.3d 154, 159 (Ky. 2012) ("Unlike other, qualified privileges, such as the work-product privilege, great need and hardship cannot even begin to obviate the absolute attorney-client privilege."); *St. Luke Hosps., Inc. v. Kopowski*, 160 S.W.3d 771, 777 (Ky. 2005) (privilege is absolute).

- <sup>16</sup> CR 26.02(3)(a).
- <sup>17</sup> 449 U.S. 383, 389 (1981).
- <sup>18</sup> See *Collins*, 384 S.W.3d at 159 ("The analysis in any privilege case begins with the almost universally accepted rule that testimonial privileges are generally disfavored and should be strictly construed.") (quoting *Stidham v. Clark*, 74 S.W.3d 719, 722 (Ky. 2002)).

- <sup>19</sup> The *Collins* court provided the following example: "[I]f a physician employee had admitted fault to the attorney investigator, the communication of the fault (and any recording of it, written or oral) would be protected. The privilege, however, would not prevent plaintiff's counsel from deposing the physician employee and asking whether he was at fault." *Collins*, 384 S.W.3d at 159.

- <sup>20</sup> See *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 361 (3d Cir. 2007) ("if persons other than the client, its attorney, or their agents are present, the communication is not made in confidence, and the privilege does not attach").

- <sup>21</sup> KRE 503(b).
- <sup>22</sup> See *Rice v. Rice*, 53 Ky. (14 B. Mon.) 335, 336 (1854); see also *Magnetar Techs. Corp. v. Six Flags Theme Park Inc.*, 886 F. Supp. 2d 466, 478 (D. Del. 2012) ("The rules governing attorney-client privilege have evolved to cover the representation of two or more people by a single lawyer, a joint representation. In a joint representation, the joint privilege applies when multiple clients hire the same counsel to represent them on a matter of common interest.")

- <sup>23</sup> KRE 503(d)(5).
- <sup>24</sup> KRE 503(b)(3) provides that the privilege applies to communications "[b]y the client or a representative of the client or the client's lawyer or a representative of the lawyer to a lawyer or representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein."

- <sup>25</sup> For a discussion of the common interest exception, see Grace M. Giesel, *End the Experiment: The Attorney-Client Privilege Should Not Protect Communications in the Allied Lawyer Setting*, 95 Marq. L. Rev. 475 (2011-2012).

- <sup>26</sup> See *In re Pac. Pictures Corp.*, 679 F.3d 1121, 1126-27 (9th Cir. 2012) ("voluntarily disclosing privileged documents to third parties will generally destroy the privilege"); *In re Grand Jury Proceedings Oct. 12, 1995*, 78 F.3d 251, 254 (6th Cir. 1996) ("By voluntarily disclosing her attorney's advice to a third party, ... a client is held to have waived the privilege because the disclosure runs counter to the notion of confidentiality.").

- <sup>27</sup> SCR 3.130(1.2)(d) states: A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

- <sup>28</sup> See KRE 503(d)(2)-(4).
- <sup>29</sup> Fed. R. Evid. 502(b). Federal Rule of Civil Procedure 26(b)(5)(B) states:

If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified, and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

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