

## Not Any Ordinary Agent, Not Any Ordinary Attorney: The Government Lawyer and Confidentiality

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The relationship of attorney-client ... is generally that of principal and agent; however, the attorney is vested with powers superior to those of any ordinary agent because of the attorney's quasi-judicial status as an officer of the court; thus the attorney is responsible for the administration of justice in the public interest, a higher duty than any ordinary agent owes his principal.<sup>1</sup>

[G]overnment lawyers have responsibilities and obligations different from those facing members of the private bar. While the latter are appropriately concerned first and foremost with protecting their clients – even those engaged in wrongdoing – from criminal charges and public exposure, government lawyers have a higher, competing duty to act in the public interest.<sup>2</sup>

Kentucky cases consistently affirm that an attorney is an agent of the client, but Kentucky courts, as the opening quotation from *Daugherty* reflects, view an attorney as more than an ordinary agent.<sup>3</sup> Thus far, however, the attorneys about whom the Kentucky cases and courts were speaking were private, not government, lawyers. Even so, no one would expect a government lawyer to be any less “superior” an agent than is a private lawyer. The question is whether the government lawyer is any more so. As the second quotation above reflects, recent cases in the federal courts answer that a government attorney is different from an ordinary attorney as well.<sup>4</sup> Kentucky courts have yet to directly address the question, although the invocation of the public interest in *Daugherty* hints at the prospect that Kentucky courts might arrive at a similar answer.

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<sup>1</sup> *Daugherty v. Runner*, 581 S.W.2d 12, 16 (Ky. Ct. App. 1978).

<sup>2</sup> *In re Witness before Special Grand Jury*, 288 F.3d 289, 293 (7<sup>th</sup> Cir. 2002). *Accord*, *In re Lindsey*, 158 F.3d 1263, 1273 (D.C. Cir. 1998) (“Unlike a private practitioner, the loyalties of a government lawyer therefore cannot and must not lie solely with his or her client agency.”).

<sup>3</sup> *See, e.g.*, *Clark v. Burden*, 917 S.W.2d 574 (Ky. 1996); *Daugherty v. Runner*, 581 S.W.2d 12 (Ky. Ct. App. 1978). *Cf.* *Natural Resources & Environmental Protection Cabinet v. Pinnacle Coal Corporation*, 729 S.W.2d 438, 439 (Ky. 1987) (holding invalid a regulation allowing service upon a party’s attorney rather than upon the party). “It is a fundamental principle of Kentucky law that an attorney is an agent for his client.” *Id.* at 439 (Lambert, J., dissenting).

<sup>4</sup> In this context I equate an ordinary attorney with a member of the private bar because, as I explain below, that is the model of the lawyer-client relationship that underlies the rules of professional conduct.

At the least, a government lawyer is subject to the same duties of loyalty that every agent owes to the principal.<sup>5</sup> This includes the duty not to use or disclose confidential information.<sup>6</sup> For attorneys, the duty of confidentiality has at least three aspects: the ethical duty to preserve client confidences, the attorney-client privilege, and the work product privilege.<sup>7</sup> While each derives from the agency relationship, each aspect is distinct from the others and has its own characteristics, consequences, and elements.<sup>8</sup> This paper considers some applications of the duty of confidentiality to lawyers in the government setting, paying particular attention to practices in Kentucky and the Sixth Circuit.

## I. Two Approaches

Before considering the duty of confidentiality itself, it is worth considering what the courts might mean when they invoke the public interest in connection with the duties of the government lawyer. In the broadest sense, there are two possibilities.

While the government lawyer owes the same duties of loyalty as the ordinary agent or ordinary attorney, it is harder to figure out to whom the government lawyer owes those duties. Among government lawyers at least, the identity of the client of the government lawyer is the subject of perennial debate.<sup>9</sup> Many writers have offered suggestions as to the identity of the government lawyer's client, among them Professor Cramton who sums up the possibilities as "(1) the public (2) the government as a whole (3) the branch of government in which the lawyer is employed (4) the particular agency or department in which the lawyer works and (5) the responsible officers who make decisions for the agency."<sup>10</sup> As the Restatement (Third) of the Law Governing Lawyers acknowledges, no universal definition of the client of a government lawyer is possible.<sup>11</sup>

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<sup>5</sup> RESTATEMENT (THIRD) OF THE LAW OF AGENCY §§ 8.02-8.06. See Ronald D. Rotunda and John S. Dzienkowski, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY ("LEGAL ETHICS DESKBOOK") 211 (2006).

<sup>6</sup> RESTATEMENT (THIRD) OF THE LAW OF AGENCY § 8.05.

<sup>7</sup> Kentucky Rules of Professional Conduct ("KRPC"), Ky. R. Sup. Ct. Rule 3.130(1.6), Comment 5; MODEL RULES OF PROFESSIONAL CONDUCT ("MRPC") Rule 1.6 Comment 3 (2006). The comments to the Kentucky and model rules refer to the work product "doctrine," as do many cases. See, e.g., *Hiatt v. Clark*, 194 S.W.3d 324 (Ky. 2006). I use the term work product "privilege" to emphasize its more limited scope when compared to the duty of confidentiality, its kinship to the attorney-client privilege, and its treatment as a species of privileged matter under Ky. R. Civ. Proc. Rule 26.02.

<sup>8</sup> See generally Thomas D. Morgan, LAWYER LAW 243-370 (2005).

<sup>9</sup> Marcia A. Mulkey, *A Crisis of Conscience and the Government Lawyer*, 14 Temp. Pol. & Civ. Rts. L. Rev. 649, 649-50 (2005).

<sup>10</sup> Roger C. Cramton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer*, 5 GEO. J. LEGAL ETHICS 291, 296 (1991). See also Catherine J. Lanctot, *The Duty of Zealous Advocacy and Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. Cal. L. Rev. 951, 1004 (1991) (listing possible clients as the agency official, the agency itself, the government, and "the people."); Robert P. Lawry, *Who is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question*, 37 FED. B.J. 61 (1978), and Robert P. Lawry, *Confidences and the Government Lawyer*, 57 N.C.L. REV. 625 (1978-79).

<sup>11</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 97, cmt c.

The default answer, at least as reflected in the Restatement, is that the client is the agency that employs the lawyer.<sup>12</sup>

The default answer reflects one approach to government lawyer ethics, the agency (as in law of agency rather than government agency) approach. It resembles the client-centered approach applicable to ordinary lawyers in private practice.<sup>13</sup> In this view the government lawyer is, like his counterpart in private practice, simply a “hired gun.” Among the benefits of the agency approach are easy applicability of the ethics codes, clearer lines of authority, and increased democratic accountability.<sup>14</sup> The agency approach does not disregard the public interest, but it does not elevate it above the core duties of loyalty.<sup>15</sup>

An alternative approach is the public interest approach.<sup>16</sup> Compared to the agency approach, “the public interest approach places relatively greater weight on the duties of the lawyer to the courts and to innocent third parties.... [I]t makes serving the public good the attorney’s primary duty.”<sup>17</sup> Among the benefits of the public interest approach are that it is consistent with most government lawyers’ recognition that they owe a higher duty to “the people,” and it provides constraints that may prevent abuses of the lawyer’s position.<sup>18</sup> The public interest approach finds considerable support in the federal courts<sup>19</sup> and some support in the Kentucky courts as well, at least in the criminal arena.<sup>20</sup>

## II. The Duty of Confidentiality

The ethical duty to preserve client confidences finds expression in Kentucky Rules of Professional Conduct Rule 1.6(a): A lawyer shall not reveal information relating

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<sup>12</sup> “For many purposes, the preferable approach on the question presented is to regard the respective agencies as the clients and to regard the lawyers working for the agencies as subject to the direction of those officers authorized to act in the matter involved in the representation.” *Id. But compare* Ky. R. Sup. Ct. 3.130(1.13) cmt. 7 (“Although in some circumstances the client may be a specific agency, it is generally the government as a whole.”). This reflects the usual focus on the lawyer in the executive branch. For a discussion of the issue as applied to the lawyer in the legislative branch, see Michael J. Glennon, *Who’s the Client? Legislative Lawyering through the Rear-View Mirror*, 61 L. Cont. Prob. 21 (1998) (asserting that traditional notions of attorney-client relations do not apply and that the concept of a client is of scant practical utility in the legislative process).

<sup>13</sup> Jesselyn Radack, *Tortured Legal Ethics: The Role of the Government Advisor in the War on Terror*, 77 U. Colo. L. Rev. 1, 6 (2006).

<sup>14</sup> *Id.* at 8.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* See also, Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 797-802 (2000).

<sup>17</sup> Radack, *supra* note 13, at 9.

<sup>18</sup> *Id.* at 13.

<sup>19</sup> *Id.* at 11-13.

<sup>20</sup> See, e.g., *Herndon v. Com.*, No. 2000-CA-002734-MR, 2004 WL 2634420 (Ky. Ct. App. 2004) (“This Court finds it necessary to remind the Commonwealth that its goal at trial ‘is not that it shall win a case, but that justice shall be done.’ The purpose of trial is as much to acquit the innocent as to convict the guilty.”) (internal citations omitted). See also *Keith v. Com.*, 189 S.W.2d 673 (Ky. 1945) (commending the Attorney General’s office for taking the position that it had the duty to see that justice was done rather than see a conviction upheld). “A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.” Ky. R. Sup. Ct. Rule 3.130(3.8), cmt.1.

to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).<sup>21</sup> This ethical duty and the attorney-client privilege are so closely related that the terms “privileged” and “confidential” are often used interchangeably.<sup>22</sup> The commentary on the rules distinguishes the ethical obligation from the attorney-client privilege and work product privilege.

The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.<sup>23</sup>

As this shows, the ethical duty is broader than either the attorney-client privilege or the work product privilege.<sup>24</sup> Attorneys have an ethical obligation to maintain client confidences even if they are not privileged.<sup>25</sup> The purpose of the broader ethical rule is to encourage the client to speak freely with the lawyer and to encourage the lawyer to obtain information beyond that offered by the client.<sup>26</sup>

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<sup>21</sup> MRPC Rule 1.6(a) reads, “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).” The Kentucky version of the rule dates to 1990. Model Rule 1.6 underwent changes in 2002 and again in 2003 in the wake of the Enron bankruptcy and other corporate scandals. MRPC Rule 1.6(b) permits more disclosure than does its Kentucky analog. See LEGAL ETHICS DESKBOOK, *supra* note 5, at 207-10 and Amanda Vance and Randi Wallach, *Updating Confidentiality: An Overview of the Recent Changes to Model Rule 1.6*, 17 GEO. J. LEGAL ETHICS 1003 (2004).

<sup>22</sup> Am. Bar Ass’n, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT (5th ed. 2003).

<sup>23</sup> MRPC Rule 1.6, Comment 3. *Accord*, Ky. R. Sup. Ct. Rule 3.130(1.6), cmt.5. See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59. The Model Rules and the Restatement are largely consistent in their discussion of the protected information.

<sup>24</sup> LEGAL ETHICS DESKBOOK, *supra* note 5, 212 (2006). Virtually all information relating to the representation is initially within Rule 1.6. Rule 1.6 protects all information relating to the representation unless the disclosures are impliedly authorized, or falls within certain named exceptions, or the client waives his rights

<sup>25</sup> Edna Selan Epstein, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 15 (4<sup>th</sup> ed. 2001) (“Epstein”).

<sup>26</sup> LEGAL ETHICS DESKBOOK, *supra* note 5, at 214.

The obligations imposed by Rule 1.6 apply to attorneys for the government as well as to attorneys in private practice.<sup>27</sup> However, the lawyer with a government client is, or soon becomes, keenly aware that his or her situation differs markedly from the lawyer with a private client, even where the private client is an organization.<sup>28</sup> The Kentucky Rules and the Model Rules themselves recognize this.

The duty defined in this Rule [1.13] applies to governmental organizations. *However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved.* In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the government as a whole may be the client for purpose of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This Rule does not limit that authority. (Emphasis added.)<sup>29</sup>

This need for a different balance leads Professor James Moliterno to observe that the government lawyer's duty of confidentiality "is much more modest in scope and perhaps even different in kind."<sup>30</sup> As Professor Moliterno's observation suggests, the law of legal ethics as constituted for the private lawyer is not necessarily a reliable and effective guide for the public lawyer.<sup>31</sup> Professor Patterson explains why: "The ultimate source of the rules of legal ethics is the lawyer-client relationship. The paradigm of that relationship is one lawyer, one client and the lawyer's first duty is to serve and protect the interests of that client.... The structure of the lawyer's relationship to the government client is not so simple."<sup>32</sup> This less than perfect fit between the Rules of Professional Conduct and the situation of the government lawyer is exacerbated by the fact that the Rules of Professional Conduct as a whole tend to emphasize the role of lawyer as

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<sup>27</sup> LEGAL ETHICS DESKBOOK, *supra* note 5, at 223. *See also* Ky. Sup. Ct. R. 3.130(1.6), Comment 6 ("The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.").

<sup>28</sup> *See* Ky. Sup. Ct. R. 3.130(1.13); MRPC Rule 1.13 (Organization as Client).

<sup>29</sup> Ky. Sup. Ct. Rule 3.130(1.13), Comment 7; *see also* MRPC Rule 1.13, Comment 9.

<sup>30</sup> James E. Moliterno, *The Federal Government Lawyer's Duty to Breach Confidentiality*, 14 TEMPLE POL. AND CIVIL RIGHTS L. REV. 633, 633 (2005) (arguing that policies such as open records and open meetings laws militate in favor of a weaker duty of confidentiality and a weaker attorney-client privilege).

<sup>31</sup> L. Ray Patterson, LEGAL ETHICS: THE LAW OF PROFESSIONAL RESPONSIBILITY, Pt.III-4 (1982).

<sup>32</sup> *Id.* at Pt.III-3 (1982).

advocate and downplay the role of lawyer as counselor.<sup>33</sup> Rule 1.6 is no exception. Nevertheless, the common assumption is that the government lawyer represents his or her client in much the same way a private lawyer represents the individual client and that the rules of ethics apply in much the same way as well.

Government lawyers striving to fulfill their ethical responsibility of confidentiality face two distinct kinds of problems. One pertains to the nature of the work performed; the other pertains to the question of to whom they owe the duty.

Lawyers in government often perform functions outside the traditional role of the lawyer. They may hold office, advise on matters of policy, and advise on matters of politics. Indeed, even the lawyer employed in the traditional lawyer's role seldom has the luxury to give only legal advice. The threshold question therefore becomes whether the rules governing lawyer conduct apply to the conduct of lawyers when performing these non-traditional roles. The Preamble to the Model Rules answers the question in the affirmative.<sup>34</sup> The next question concerns the applicability of the rules to non-adversarial functions. As noted above, the rules tend to downplay this aspect of legal practice. Nevertheless, it is generally accepted that the rules apply to lawyers acting in non-adversarial roles.<sup>35</sup>

Clients may always waive their confidentiality rights.<sup>36</sup> As already discussed, ascertaining the identity of the client of the government lawyer is a perennial problem. If one starts at the bottom of Professor Cramton's list of possible clients with the decision making officers, it is easy to see how the agency approach makes for an easier application of the Rule 1.6. Working upward through the list makes it increasingly difficult to figure out who has the power to consent to disclosures of confidential information. By the time one gets to the public as client at the top of the list, the question becomes whether there is really much that can be truly confidential and whether there is anything to waive.<sup>37</sup>

### III. The Attorney-Client Privilege

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<sup>33</sup> Note, *Rethinking the Professional Responsibilities of Federal Agency Lawyers*, 115 HARV. L. REV. 1184 (2001). For a discussion of the role of attorney-advisers and their ethical responsibilities, see Neil M. Peretz, *The Limits of Outsourcing: Ethical Responsibilities of Federal Government Attorneys Advising Executive Branch Officials*, 6 Conn. Pub. Int. L.J. 23 (2006).

<sup>34</sup> "[T]here are rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity." MRPC pmb. ¶3. Model Rule 8.4, for example, states it is professional misconduct to state or imply an ability to influence improperly a government agency or official. The rationale is that abuses in the nonprofessional context can suggest an inability to fulfill the professional role of lawyers. See Kristina Hammond, Note, *Plugging the Leaks: Applying the Model Rules to Leaks Made by Government Lawyers*, 18 GEO. J. LEGAL ETHICS 783, 787-88 (2005).

<sup>35</sup> See Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 393 cited in David Lew, Note, *Revised Model Rule 1.6: What Effect Will the New Rule Have on Practicing Attorneys?*, 18 GEO. J. LEGAL ETHICS 881, 887 (reporting that a real estate lawyer did not think that confidentiality rules applied to his practice because it did not involve litigation).

<sup>36</sup> LEGAL ETHICS DESKBOOK, *supra* note 5, at 251.

<sup>37</sup> Hammond, *supra* note 34, at 790-91.

The duty of confidentiality is an ethical rule; the attorney-client privilege is an evidentiary rule.<sup>38</sup> In common with the ethical obligation to maintain confidentiality, the attorney-client privilege reflects a deep and long-standing societal commitment to promoting free communication between lawyers and their clients.<sup>39</sup> However, because the attorney-client privilege exists in tension with the adversarial system's search for truth, much which is covered by the ethical duty of confidentiality will not necessarily fall within the evidentiary privilege.<sup>40</sup> Courts construe the attorney-client privilege strictly.<sup>41</sup>

There is no tradition of a government attorney-client privilege.<sup>42</sup> The impetus to recognize a government privilege traces to the advent of the Freedom of Information Act. The Proposed Federal Rules of Evidence and, more recently, the Restatement (Third) of the Law Governing Lawyers provided additional impetus.<sup>43</sup> Nevertheless, courts and practitioners commonly assumed that the attorney-client privilege should apply to government clients.<sup>44</sup> They further assumed that government could assert the attorney-client privilege in much the same way that corporations and other organizational clients could.<sup>45</sup> Some courts and commentators have cautioned against broadly applying the privilege to governmental entities.<sup>46</sup> Others, however, argue for a strong governmental attorney-client privilege.<sup>47</sup>

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<sup>38</sup> Ky. R. Evid. Rule 503.

<sup>39</sup> See generally Epstein, *supra* note 25. Epstein warns, however, "As the fundamental trust that a society reposes in lawyers erodes, so too will the protection afforded by the attorney-client privilege." *Id.* at 2. The privilege is the oldest of the privileges at common law, dating to the sixteenth century. Originally, the privilege was the attorney's, and its purpose was to protect his honor as a gentleman. The modern privilege is the client's, and its purpose is to promote freedom of consultation. See *Upjohn Co. v. United States*, 449 U.S. 383 (1991).

<sup>40</sup> Epstein, *supra* note 25, at 12.

<sup>41</sup> *Id.*

<sup>42</sup> Bryan S. Gowdy, Note, *Should the Federal Government Have an Attorney-Client Privilege?*, 51 FLA. L. REV. 695, 706 (1999). Prior to 1963 only two courts had held that communications between government employees and government attorneys could be protected by the attorney-client privilege. Melanie B. Leslie, *Government Officials as Attorneys and Clients: Why Privilege the Privileged?*, 77 IND. L.J. 469, 476 (2002)

<sup>43</sup> Leslie, *supra* note 42, at 474.

<sup>44</sup> Leslie, *supra* note 42, at 476 citing Charles Alan Wright and Kenneth W. Graham, Jr., FEDERAL PRACTICE AND PROCEDURE § 5474. In Ky. Op. Atty. Gen. 97-ORD-127, the Attorney General emphasized that a public agency can be a client and that agency lawyers can function as attorneys within the relationship contemplated by the attorney-client privilege.

<sup>45</sup> See MRPC 1.13 and Epstein, *supra* note 25, at 126-131. See generally, Jeffrey L. Goodman and Jason Zabokrtsky, *The Attorney-Client Privilege and the Municipal Lawyer*, 48 DRAKE L. REV. 655 (2000); Walter Pincus, *No Clear Legal Answer: The Uncertain State of the Government Attorney-Client Privilege*, 4 Green Bag 2d 269 (2001); Patricia E. Salkin, *Beware: What You Say to Your [Government] Lawyer May Be Held Against You – The Erosion of Government Attorney-Client Confidentiality*, 35 THE URBAN LAWYER 283 (2003). Compare Melanie B. Leslie, *Government Officials as Attorneys and Clients: Why Privilege the Privileged?*, 77 IND. L.J. 469, 481-94 (2002) (arguing that the analogy of government to corporation does not hold). Professor Leslie accepts the need for a limited privilege to allow the government to protect its interests in litigation or administrative proceedings.

<sup>46</sup> Epstein *supra* note 25 at 129; Leslie, *supra* note 42; Paul R. Rice, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES 129 (2d ed. 1999) ([T]here would be great confusion in the application of the attorney-client privilege to government agencies if the protection turned on perceived parallels between the legal needs of government agencies and private clients.); In re Witness before Special Grand Jury 2000-2, 288

Kentucky Rule of Evidence 503 establishes the availability of the privilege in Kentucky.<sup>48</sup> Kentucky's rule creates a broad governmental attorney-client privilege

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F.3d 289 (7<sup>th</sup> Cir. 2002); In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8<sup>th</sup> Cir. 1997); In re Lindsey, 158 F.3d 1263 (D.C. Cir. 1998).

<sup>47</sup> See Patricia E. Salkin and Allyson Phillips, *Eliminating Political Maneuvering: A Light in the Tunnel for the Government Attorney-Client Privilege*, 39 IND. L. REV. 561 (2006) and the sources collected at Leslie, *supra* note 42, at 470-72, notes 7 and 8.

<sup>48</sup> Ky. R. Evid. Rule 503 Lawyer-Client Privilege.

(a) Definitions. As used in this rule:

(1) "Client" means a person, including a *public officer*, corporation, association, or *other organization or entity*, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.

(2) "Representative of the client" means:

(A) A person having authority to obtain professional legal services, or to act on advice thereby rendered on behalf of the client; or

(B) Any employee or representative of the client who makes or receives a confidential communication:

(i) In the course and scope of his or her employment;

(ii) Concerning the subject matter of his or her employment; and

(iii) To effectuate legal representation for the client.

(3) "Lawyer" means a person authorized, or reasonably believed by the client to be authorized to engage in the practice of law in any state or nation.

(4) "Representative of the lawyer" means a person employed by the lawyer to assist the lawyer in rendering professional legal services.

(5) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client:

(1) Between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(2) Between the lawyer and a representative of the lawyer;

(3) By the client or a representative of the client or the client's lawyer or a representative of the lawyer representing another party in a pending action and concerning a matter of common interest therein;

(4) Between representatives of the client or between the client and a representative of the client; or

(5) Among lawyers and their representatives representing the same client.

(c) Who may claim the privilege. The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

(d) Exceptions. There is no privilege under this rule:

(1) Furtherance of crime or fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by transaction *inter vivos*;

(3) Breach of duty by a lawyer or client. As to a communication relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer;

(4) Document attested by a lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; and



modeled on Proposed Federal Rule of Evidence 503.<sup>49</sup> Kentucky's Open Records Act<sup>50</sup> extends the privilege by excepting from the reach of the act "[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly."<sup>51</sup> The protections afforded by the attorney-client privilege are thus incorporated into the statute.<sup>52</sup>

The availability of the privilege in the federal courts is less clear. While many states besides Kentucky codified the privilege, Congress rejected Proposed Federal Rule of Evidence 503 and left the development of the privilege to case law.<sup>53</sup> Federal courts, however, came to regard the proposed rule as a restatement of federal common law. Since then, the general assumption among writers<sup>54</sup> and courts<sup>55</sup> has been that the attorney-client privilege protects communications between government agencies and legal counsel. The Restatement also adopts this view:

Unless applicable law otherwise provides, the attorney-client privilege extends to a communication of a governmental organization as stated in § 73 and of an individual employee or other agency of a governmental organization as a client with respect to his or her personal interest as stated in §§ 68-72.<sup>56</sup>

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(5) Joint clients. As to a communication relevant to a matter of common interest between or among two (2) or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients. (Emphasis added.)

<sup>49</sup> A model existed for a more limited recognition of the government attorney client privilege in Uniform Rules of Evidence § 502. Leslie, *supra* note 42, at 480.

<sup>50</sup> Ky. Rev. Stat. §§ 61.870-61.884 (Michie 2004).

<sup>51</sup> Ky. Rev. Stat. § 61.878(1)(l).

<sup>52</sup> See Hahn v. University of Louisville, 80 S.W.3d 771, 774 (Ky. Ct. App. 2001); Ky. Op. Atty. Gen. 08-ORD-089 (2008). Broad claims of attorney-client privilege are common in the context of the Open Records Act. However, the privilege does not apply to all communications between an attorney and a client. To fall under the privilege, a communication must be confidential, related to the rendition of legal services, and outside the exceptions in Ky. R. Evid. Rule 503 (set out *supra* n. 48). Com. v. Scorsone, \_\_\_ S.W.3d \_\_\_, 2008 WL 399332 at \*1-2 (Ky. Ct. App. 2008). See also Ky. Op. Atty. Gen. 08-ORD-065 (April 2, 2008).

<sup>53</sup> Epstein, *supra* note 25, at 16.

<sup>54</sup> See Rice, *supra* note 46, at 124; LEGAL ETHICS DESKBOOK, *supra* note 5, at 240 (2006). "The general principle is that government lawyers have an attorney-client privilege with their client, but the client is the 'government,' and not a particular governmental official. The government attorney may assert the attorney-client privilege to third parties, but he or she may not validly assert it when it is the government itself that is seeking the information. Thus, a government lawyer cannot refuse to divulge information relevant to a criminal investigation on the grounds that another government official confided in her, because the government lawyer represents the government, not any official in his or her personal capacity. In short, a government lawyer may not assert the government attorney-client privilege against the government." *Id.* at 241.

<sup>55</sup> See, e.g., Lexington-Fayette Urban County Government v. Clark, 2005 WL 387434 (Ky. 2005) (implicitly acknowledging existence of government attorney-client privilege); Hahn v. University of Louisville, 80 S.W.3d 771 (Ky. Ct. App. 2001) (recognizing that Kentucky's Open Records Act protects a governmental attorney-client privilege).

<sup>56</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 74.

Like many other courts, the Sixth Circuit assumed without deciding that government could assert the attorney-client privilege.<sup>57</sup> *Reed v. Baxter*,<sup>58</sup> for example, involved a claim of attorney-client privilege in a municipal setting. Although the court was willing to assume that the privilege applied, it found that the facts would not support the claim. In *Reed* the presence of third parties destroyed the confidence for purposes of the privilege.<sup>59</sup>

In *Ross v. City of Memphis*, the Sixth Circuit held squarely “that a government entity can assert attorney-client privilege in the civil context.”<sup>60</sup> *Ross* arose out of a suit brought against the city and its former director of police, Walter Crews, who was sued in his individual capacity. Crews raised the advice of counsel as the basis of his qualified immunity defense. The court had to determine whether invocation of the advice of counsel impliedly waived the attorney-client privilege. To answer that question, the court first had to decide if the city could hold the privilege.

In deciding that a city could hold the privilege, the court reviewed the decisions in other circuits and outside authority. The little case law the court found generally assumed the existence of a governmental attorney-client privilege in civil suits between government agencies and private litigants.<sup>61</sup> The court then looked to Proposed Federal Rule of Evidence 503. Like other courts, it accepted the proposed rule as a restatement of federal common law and noted that under the rule a city would have been entitled to the privilege.<sup>62</sup> The court took further note of the fact that the Restatement (Third) of the Law Governing Lawyers §74 recognizes the existence of a governmental attorney-client privilege. The court found these authorities persuasive.

Outside the civil context, however, the court noted that a split recently emerged among the circuits as to the availability of the privilege in grand jury proceedings. *In re Grand Jury Investigation*<sup>63</sup> held that the Connecticut governor’s office could assert attorney-client privilege in grand jury proceedings. The Second Circuit reasoned that “the traditional rationale for the privilege applies with special force in the government context.”<sup>64</sup> That decision contrasts with *In re Witness Before Special Grand Jury 2000-2*,<sup>65</sup> *In re Grand Jury Subpoena Duces Tecum* (the Whitewater Development Corporation case),<sup>66</sup> and *In re Lindsey* (concerning allegations of sexual harassment in the White House).<sup>67</sup> The Sixth Circuit expressed no opinion on the question dividing the circuits, noting only that “much of the reasoning deployed against recognizing a governmental

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<sup>57</sup> *Ross v. City of Memphis*, 423 F.3d 596, 600 (6<sup>th</sup> Cir. 2005) citing *Reed v. Baxter*, 134 F.3d 351, 356 (6<sup>th</sup> Cir. 1998) and *In re Grand Jury Subpoena* (United States v. Doe), 886 F.2d 135, 137-9 (6<sup>th</sup> Cir. 1983).

<sup>58</sup> 134 F.3d 351 (6<sup>th</sup> Cir. 1998).

<sup>59</sup> *Id.* at 356-58. For a discussion of *Reed v. Baxter*, see Jeffrey L. Goodman and Jason Zabokrtsky, *The Attorney-Client Privilege and the Municipal Lawyer*, 48 Drake L. Rev. 655, 667-72 (2000).

<sup>60</sup> 423 F.3d at 601.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> 399 F.3d 527 (2<sup>nd</sup> Cir. 2005).

<sup>64</sup> *Id.* at 534.

<sup>65</sup> 288 F.3d 289 (7<sup>th</sup> Cir. 2002).

<sup>66</sup> 112 F.3d 910 (8<sup>th</sup> Cir. 1997).

<sup>67</sup> 158 F.3d 1263 (D.C. Cir. 1998).

attorney-client privilege in grand jury proceedings supports its recognition in the civil context.”<sup>68</sup> “The risk of extensive civil liability is particularly acute for municipalities, which do not enjoy sovereign immunity. Thus, in the civil context, government entities are well-served by the privilege, which allows them to investigate potential wrongdoing more fully and, equally important, pursue remedial options.”<sup>69</sup>

Once one accepts that the privilege exists, the question becomes under what circumstances the privilege might be waived. The privilege, of course, belongs to the client. However, when the client is not a natural person, the problem becomes which individuals ought to be treated as holding the privilege.<sup>70</sup> The difficulty, as was the case with the duty of confidentiality, is in identifying the client. In *Ross* the district court concluded that Crews himself stood “somewhat in the nature of a client with respect to the advice he received from the City’s attorneys.”<sup>71</sup> Therefore, it held, Crews could disclose that information in his defense. The court of appeals disagreed.

The appellate court saw what the district court did as balancing the importance of the privileged communications to the defense against the city’s interest in maintaining the privilege.<sup>72</sup> “Making the City’s ability to invoke attorney-client privilege contingent on litigation choices made by one of its former employees renders the privilege intolerably uncertain.”<sup>73</sup> In *Ross*, the privilege is the city’s to assert. That is not to say that in some instances the individual could not hold the privilege. The court acknowledges that a public officer might claim a personal privilege, but to do so it must be clear that the sought the legal advice in his individual capacity. “Requiring an individual officer to clearly announce a desire for individual advice is critical; it allows the attorney to gauge whether it would be appropriate to advise the individual given the attorney’s obligations concerning representation of the [organization.]”<sup>74</sup>

There are, of course, other matters associated with the privilege not at issue in *Ross* to which the government attorney should be alert. The privilege has eight elements:

- (1) Where legal advice of any kind is sought
- (2) from a professional legal adviser in his capacity as such,
- (3) the communications relating to that purpose
- (4) made in confidence
- (5) by the client,
- (6) are at his instance permanently protected
- (7) from disclosure by himself or by the legal advisor

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<sup>68</sup> *Ross v. City of Memphis*, 423 F.3d at 602.

<sup>69</sup> *Id.* at 603.

<sup>70</sup> Epstein, *supra* note 25, at 272-4 (regarding corporate management).

<sup>71</sup> *Id.* at 603.

<sup>72</sup> *But see* Lisa Plush, Note, *A Balanced Approach to Government Attorney-Client Privilege in the Confirmation Setting*, 19 GEO. J. LEGAL ETHICS 907 (2006) (arguing for a balancing test in a non-judicial context).

<sup>73</sup> *Id.* at 604.

<sup>74</sup> *Id.*

(8) except the protection be waived.<sup>75</sup>

The discussion above has already noted the problematic nature of the first and fifth elements for the government attorney. *Reed v. Baxter* addressed the fourth, and *Ross* addressed the eighth.

Recently, the Second Circuit had occasion to address the third. In *In re County of Erie*,<sup>76</sup> the issue concerned policy advice rendered by a government lawyer. The case involved a suit over the practice of strip searching detainees entering the county jail without regard to individualized suspicion or the offense alleged. In the course of discovery the county withheld various documents as privileged attorney-client communications. They reviewed the law concerning strip searches of detainees, assessed the county's current search policy, recommended alternative policies, and monitored the implementation of those policy changes. After *in camera* review, the trial judge ordered the documents disclosed. The county appealed.

Citing the Sixth Circuit's decision in *Ross*, the Second Circuit said:

In civil suits between private litigants and government agencies, the attorney-client privilege protects most confidential communications between government counsel and their clients that are made for the purpose of obtaining or providing legal assistance.... At least in civil litigation between a government agency and private litigants, the government's claim to the protections of the attorney-client privilege is on par with the claim of an individual or a corporate entity.<sup>77</sup>

The issue here was whether the communications were made for the purpose of obtaining or providing legal advice, as opposed to advice on policy.

The court noted that a parallel issue arises in the context of communications to and from in-house lawyers who also serve as business executives. The question is whether the communication was generated for the purpose of obtaining and providing legal advice as opposed to business advice. The usual statement of the rule is that to qualify as privileged, the communication must be only for the purpose of obtaining or providing legal assistance.<sup>78</sup> The trial judge reasoned that the communications went beyond legal analysis and ventured into policymaking, thus losing the claimed privilege.<sup>79</sup> The Second Circuit decided that the appropriate standard was whether the predominant purpose was to render or solicit legal advice.<sup>80</sup>

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<sup>75</sup> *Reed v. Baxter*, 134 F.3d 351, 355-56 citing *Fausek v. White*, 965 F.2d 126, 129 (6<sup>th</sup> Cir. 1992).

<sup>76</sup> 473 F.3d 413 (2d. Cir. 2007).

<sup>77</sup> *Id.* at 418.

<sup>78</sup> *Id.* at 419.

<sup>79</sup> *Id.* at 422.

<sup>80</sup> *Id.* at 420.

The complete lawyer may well promote and reinforce the legal advice given, weigh it, and lay out its ramifications by explaining: how the advice is feasible and can be implemented; the legal downsides, risks and costs of taking the advice or doing otherwise; what alternatives exist to present measures or the measures advised; what other persons are doing or thinking about the matter; or the collateral benefits, risks or costs in terms of expense, politics, insurance, commerce, morals, and appearances. So long as the predominant purpose of the communication is legal advice, these considerations and caveats are not other than legal advice or severable from it. The predominant purpose of a communication cannot be ascertained by quantification or classification of one passage or another; it should be assessed dynamically and in light of the advice being sought or rendered, as well as the relationship between advice that can be rendered only by consulting the legal authorities and advice that can be given by a non-lawyer. The more careful the lawyer, the more likely it is that the legal advice will entail follow-through by facilitation, encouragement and monitoring.<sup>81</sup>

Even after *County of Erie*, it remains important to separate legal advice from policy and political advice. The court reiterated that “general policy or political advice” remains unprotected. The lesson of the case is that, in the context of government, the notion of what constitutes legal advice is broad and not bounded by a bright line. “[A] lawyer’s recommendation of a policy that complies with [a] legal obligation – or that advocates and promotes compliance, or oversees implementation of compliance measures – is legal advice.”<sup>82</sup>

#### IV. Attorney Work Product Privilege

Where the attorney-client privilege finds its expression in a rule of evidence, the work product privilege finds its expression in a rule of civil procedure.<sup>83</sup> While the attorney-client privilege is the oldest privilege, the attorney work product privilege is among the newest.<sup>84</sup> It has its genesis in *Hickman v. Taylor*.<sup>85</sup> Since *Hickman*, both

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<sup>81</sup> *Id.* at 420-21. The rules of professional conduct recognize that a lawyer’s advice is not necessarily limited to advice about the law. See Ky. R. Sup. Ct. Rule 3.130(2.1) (“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”). “Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.” *Id.*, cmt. 2. *Accord*, MRPC Rule 2.1 and cmt. 2.

<sup>82</sup> *Id.* at 422.

<sup>83</sup> Ky. R. Civ. Proc. Rule 26.02 (the rule governs discovery).

<sup>84</sup> See Edna Selan Epstein, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE (4<sup>th</sup> ed. 2001). On the work product doctrine in a government context, see Marion J. Radson and Elizabeth Waratuke, *The Attorney-Client and Work Product Privileges of Government Entities*, 30 STETSON L. REV. 799, 825-35 (2001). See also Virginia H. Underwood and Richard H. Underwood, *The Attorney-Client and*

federal and state courts have adopted rules of procedure codifying the principles of that case.<sup>86</sup> “Strong public policy” considerations underlie the privilege.<sup>87</sup> Even those critical of a broad attorney-client privilege accept the need for a limited privilege to allow the government to protect its interests in litigation or administrative proceedings.<sup>88</sup>

Like the attorney-client privilege, the attorney work product privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. Kentucky Rule of Civil Procedure 26.02 protects against the discovery of “documents and tangible things ... prepared in anticipation of litigation or for trial.” The rule cloaks them with a qualified privilege against disclosure unless they disclose “the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.” In that event, the documents and things are absolutely privileged.<sup>89</sup> Thus not every document prepared by an attorney is attorney work product, not even every document prepared in anticipation of litigation. *Transit Authority of River City v. Vinson*<sup>90</sup> (“TARC”) illustrates some of the limits of the attorney work product privilege.

*TARC* was a suit for personal injuries arising out of a bus accident. Through discovery Vinson learned that TARC had hired a private investigator to observe him. After taking the investigator's deposition, Vinson called the investigator as a witness. TARC claimed it was unfairly prejudiced by this testimony and the introduction into evidence of the investigator's surveillance photographs and reports. In response to TARC's assertions that the findings and reports were protected work product, the court said, “TARC seeks to stretch the work product protection of CR 26.02(3)(a) far beyond its limits.”

The court agreed that the reports and photographs were “documents and tangible things ... prepared in anticipation of litigation.” However, they did not reflect “mental impressions, conclusions, opinions, and legal theories.” They were simply evidence of events that occurred during the litigation for which there was no statutory evidentiary privilege.<sup>91</sup> Said the court, “Work product which is primarily factual in nature is not absolutely immune from discovery under [CR 26.02(3)(a)]. At best, it receives a qualified protection which is overcome if the opposing party shows substantial need of the material and inability to obtain it elsewhere without undue hardship.”<sup>92</sup> The court saw the reports and photographs as examples of work product that is discoverable under the rule.

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*Work Product Privileges: The Case for Protecting Internal Investigations on the University Campus*, 90 KY. L.J. 531, 565-66 (2001).

<sup>85</sup> 329 U.S. 495, 510-12 (1947).

<sup>86</sup> See Fed. R. Civ. Proc. Rule 26(b)(3); Ky. R. Civ. Proc. Rule 26.02(3).

<sup>87</sup> *Upjohn Co. v. United States*, 449 U.S. 383, 398 (1988).

<sup>88</sup> Melanie B. Leslie, *Government Officials as Attorneys and Clients: Why Privilege the Privileged?*, 77 IND. L.J. 469, 481-94 (2002).

<sup>89</sup> See *Haney v. Yates*, 40 S.W.3d 352, 356 (Ky. 2000).

<sup>90</sup> 703 S.W.2d 482 (Ky. Ct. App. 1985).

<sup>91</sup> *Id.* at 486.

<sup>92</sup> *Id.*

Outside the litigation context, the work product privilege sometimes comes into play under the Kentucky Open Records Act.<sup>93</sup> Like information subject to the attorney-client privilege, attorney work product is excluded from the application of the Open Records Act as “information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly.”<sup>94</sup> A review of appeals to the Attorney General under the Open Records Act reveals that agencies claim the exemption with some regularity. As in *TARC*, the claim is occasionally broader than is the scope of the privilege.

Such aggressive assertion of the privilege is consistent with the agency model described above. However, the Open Records Act “exhibits a general bias favoring disclosure.”<sup>95</sup> Under the public interest model, however, the relatively greater weight placed on the lawyer’s serving the public good means that every government lawyer, not just those handling open records appeals in the Attorney General’s office, has a duty to advance that bias in favor of disclosure.

## V. Conclusion

As noted, the application of the attorney-client privilege in the government context tends to parallel the applications of the corporate attorney-client privilege. However, the government attorney must be vigilant against taking the parallel too far.

Partly, the reasons for this are purely practical. For example, in *Upjohn Co. v. United States*<sup>96</sup> the Supreme Court rejected the use of the “control group” test with respect to the corporate privilege. Yet, in *Reed v. Baxter*<sup>97</sup> the Sixth Circuit did not follow *Upjohn*. Further, given the nature of government work, both the recipient of the advice and the lawyer must guard against inadvertent disclosure to others within the organization.

Partly, the reasons run deeper. An attorney is not just an ordinary agent, and a government lawyer is not just an ordinary attorney. Even the ordinary attorney must at a certain level weigh the duties owed to the client against the responsibilities all attorneys share for the administration of justice. But prudent government attorneys, conscious of the fact that federal courts do and Kentucky courts may hold them to an even higher standard, will be mindful of the higher duty to act in the public interest.

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<sup>93</sup> Ky. Rev. Stat. Ann. § 61.870 *et seq.* (Michie 2007).

<sup>94</sup> Ky. Rev. Stat. Ann. § 61.878(1)(l) (Michie 2007).

<sup>95</sup> Ky. Bd. Exam. of Psychologists v. Courier-Journal, 826 S.W.3d 324, 327 (Ky. 1992).

<sup>96</sup> See *Upjohn Co. v. United States*, 449 U.S. 383 (1988).

<sup>97</sup> *Reed v. Baxter*, 134 F.3d 351 (1998).