

Walking the Line: Government Lawyer Ethics

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I. INTRODUCTION AND OVERVIEW

Government lawyers face a number of challenges today. These lawyers are professionals, with ethical and professional obligations undertaken by oath. They are employees of an organization which is the "client," yet must deal with individuals within the organization on a daily basis. They must deal with outside attorneys on a regular basis, and develop a cooperative and "partnering" relationship with those outside attorneys. They often are required to communicate with other people outside the organization, people who may be confused about the relationship and where the lawyer's duties of loyalty may lie. Additionally, government counsel must sometimes stand by their advice in the face of criticism or worse from agency heads. The government lawyer, then, must walk the line between satisfying client demands and professional ethics. Most of the time, there is no conflict and the line is bright. Sometimes, conflicts arise, making the line difficult to follow.

It is the purpose of this article to address some of these issues and the conflicts that confront a government lawyer today.

First, the "client" of government counsel is the agency, and not its individual constituents. Should a conflict arise between the agency and one of its constituents, no doubt should be left in the mind of either as to whom the counsel represents. This is also true in dealing with those outside the organization.¹ Next, communications between government counsel and an agency client in confidence, for the purpose of giving or seeking legal advice, should be protected

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as privileged. Government counsel need to make sure that appropriate steps are being taken to preserve the privilege,² even in billing statements received from outside counsel.³

II. WHO DOES THE GOVERNMENT COUNSEL REPRESENT?

Unlike the relationship with an individual client, the government lawyer sometimes has to address the issue of who is her client: is it the head of government, the agency director, a department head, or perhaps even an individual hourly employee in one of the agency's departments? While there is no easy answer, some guidance may be found in the caselaw.

A. General Rule

Rule 1.13(a) of the Kansas Rules of Professional Conduct for Attorneys (KRPC) states: "An attorney for a government agency represents the agency. A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."⁴

A well-recognized treatise explains:

Even though the only way to communicate with a juristic entity is through the people who are its constituent parts, the lawyer owes his or her obligations to the organization itself, not [to] any particular individuals. *See, e.g., Cole v. Ruidoso Mun. Sch.*, 43 F.3d 1373 (10th Cir. 1994) (school district's lawyer not representing principal individually when they consulted on personnel issues; therefore, principal not lawyer's former client for purposes of disqualifying lawyer from representing school district in principal's discrimination action); [other citations omitted].⁵

While the Rule is framed from the standpoint of an organization as a business corporation or entity, the duties defined in the Rule apply equally to lawyers for government agencies.⁶ The Comments to KRPC Rule 1.13 state:

The duty defined in this Rule 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.⁷

The reason for this rule is to ensure a lawyer's independence of professional judgment⁸ and to avoid conflicts of interest.⁹

B. Internal Investigations

As the government lawyer represents the agency, communications by an agency employee to an agency attorney are privileged and confidential as to the agency.¹⁰ That does not mean, however, that the lawyer can or should conceal such communications from the agency itself. Indeed, the lawyer has an affirmative obligation to disclose to the client material information known to the lawyer which affects the client.¹¹ Information disclosed to the attorney by a constituent member of an agency is privileged to the agency, and information disclosed to its counsel is deemed to be a disclosure to the agency itself. This includes information gleaned by an internal investigation. The Arizona Supreme Court so held in *Samaritan Foundation v. Goodfarb*.¹²

[W]here an investigation is initiated by the corporation, factual communications from corporate employees to corporate counsel are within the corporation's privilege . . . if they concern the employee's own conduct within the scope of his or her employment and are made to assist counsel in assessing or responding to the legal consequences of that conduct for the corporate client.¹³

When an agency conducts an internal investigation through its inside or outside counsel, there may be confusion. Many people believe that anything they tell a lawyer is confidential, interpreting this to mean that the information will not be disclosed to *anyone*. Obviously, this is a misconception. If the misconception appears to prevail in a

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lawyer's communications with an agency employee, the lawyer has a duty to alleviate that confusion. Rule 1.13(d) of the KRPC provides:

In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.¹⁴

Thus, when dealing with individual employees of an agency, especially where there is actual or potential adversity between that individual and the agency, it is recommended that the discussion be prefaced with the following advice:

- The lawyer represents the agency and not the individual.
- The lawyer is interviewing the individual to assist him or her in giving legal advice to the agency.
- While the information disclosed may initially be treated as confidential as to outsiders, the agency will ultimately determine whether to maintain the confidentiality or to disclose the information to outsiders, including law enforcement agencies.¹⁵

There are some circumstances, such as in adversary proceedings, where an agency head is also a "decision-maker" in the proceeding. Ex parte communication between agency attorneys and the agency head/decision-maker regarding the proceeding can create problems. Agency heads may be non-lawyers who are, of course, not subject to the Model Rules. As noted by Brian Moline in his article for government lawyers, ex parte communications about the proceeding between the agency lawyer and the agency head should be avoided for three main reasons:

1. Ex parte communications deprive the absent party of the right to respond.
2. Ex parte communications can affect the decision-maker's analysis of the case, even if only subconsciously.
3. And, ex parte communications create the appearance of impropriety.¹⁶

Ex parte communications about adversary proceedings, therefore, should be limited to administrative or scheduling details, and should not include substantive discussions.¹⁷

C. Communications with Outsiders.

The same principles apply, perhaps with more force, when dealing with persons outside the organization. Government lawyers may deal with non-lawyer advocates, public officials, and other members of the public. Of course, the lawyer should not knowingly make false statements of material fact or law to the third person,¹⁸ nor fail to disclose material facts when disclosure is necessary to avoid assisting a criminal or

fraudulent act by a client (unless such disclosure is limited by the rule of confidentiality, Rule 1.6).¹⁹

A government lawyer should advise an outsider that he or she represents the government, especially where the outsider may be confused on the subject of who the lawyer represents.²⁰

D. Joint Representation

There are instances in which it is appropriate for agency counsel to represent a constituent member of the agency as well. Rule 1.13(e) of the KRPC permits a lawyer to represent both an organization and one or more of its constituents, subject to the provisions of Rule 1.7, governing conflicts with current clients. Rule 1.13(e) provides:

A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

The principles governing conflicts of interest with a current client are found in Rule 1.7(a), which provides as follows:

- (a) A lawyer shall not represent a client if the representation of that client will be *directly adverse* to another client, *unless*
 - (1) the lawyer reasonably believes the representation will *not adversely affect the relationship* with the other client; *and*
 - (2) each client *consents* after consultation.²¹

Summarized, Rule 1.7(a) prohibits directly adverse representation *unless* (1) the lawyer has the *actual* and *reasonable* belief that the relationship with neither client will be adversely affected, and (2) there is *knowing consent* by both clients, after consultation. "Consultation" is defined by the Model Rules as "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question."²² Naturally, this will be viewed after the fact. A government client may consent to a conflict of interest, abiding by Rule 1.7.²³

While the information imparted in the required consultation will necessarily vary, depending on the situation, to effect an appropriate waiver of a conflict, it is clear that the adverse representation must be disclosed, as well as the risks and advantages resulting from continued representation despite the conflict. For example, in the case of *In re Wilkinson*,²⁴ the lawyer was held to have improperly represented a client in the sale of another client's property without full disclosure, because he did not inform the client of his intention to satisfy his fee claim against the other client from the proceeds of the sale.

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At a minimum, both clients must be informed of the adverse representation, and every effort must be made to foresee and disclose the various alternative results which may arise, and the impact of those results. The more detailed information that is provided, the more likely it is that the consultation will be deemed adequate. The "negative" factors could include the risk of presenting a "joint" position which is inconsistent with the "best" position for one or the other of the clients; the risk of "guilt by association" from one client to the other; and the possible absence of real independent judgment and advice from counsel (especially where one of the clients is paying the lawyer and the other is not.)²⁵ As noted by the Comment to Rule 1.7, as it relates to corporate counsel:

So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

All of these potentially negative factors should be disclosed when venturing into joint representation of a government agency and one or more of its employees.

The "positive" factors from joint representation could include the savings from sharing attorneys' fees and expenses; the benefit of presenting a unified position without cross-fire from a co-party; and the benefit of retaining the initial attorney of one's choosing.

This disclosure may require the imparting of confidential information from the other client, in order to explain the possible adversity or ramifications of various potential results in the matter. In this situation, lawyers must be mindful of Rule 1.6, regarding confidentiality. If the other client does not consent to the release of confidential information to the new client, then an adequate consultation cannot be concluded, and knowing consent cannot be obtained. As noted in the official Comments:

[T]here may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.²⁶

Therefore, express permission should be obtained from one client to disclose confidential information to the other client, in order to explain the potential for conflict

and to obtain knowing consent. Even if disclosure is allowed, Rule 1.6 will still apply. Care should be taken to protect communications from each client as confidential.

Joint representation of an agency and one of its constituent members is fraught with risk. While it may well appear at the outset that the individual acted properly and within the scope of his or her job duties, there is often a later disclosure or discovery of some facts which call that propriety into question. By that point, the lawyer has talked with the individual, obtained confidential information, and perhaps taken action in reliance on it. One may count on the individual's objection if the lawyer later attempts to separate the agency from the individual, at the individual's expense. Thus, it is difficult to come to the actual and reasonable belief that the joint representation will no longer adversely affect the representation with one or the other of the clients (or both). But if that belief be reached, then the clients must both consent after consultation. Their consent should be recorded in a signed writing, to avoid later dispute.

Similarly, joint representation of multiple agencies is also risky and should be avoided. "The State of Kansas does not take the position that the state government is a single entity."²⁷ Thus, separate agencies should be represented by independent counsel, particularly where their interests are actually or potentially at odds.

E. Pro Bono Work

Voluntary pro bono work is recommended by Rule 6.1 of the KRPC. These services should be provided without fee or with a fee reduction, recognizing the critical need for legal services among the disadvantaged. Services can be provided to individuals or organizations, and may consist of a range of activities for the public interest, such as poverty law, civil rights law, public rights law, charitable organization representation and the administration of justice.²⁸

Constitutional, statutory or regulatory restrictions may hinder or prevent government attorneys from performing pro bono services. As alternatives, government attorneys' pro bono service may come within the alternative services of serving on bar association committees or other legal organizations.²⁹

Attorneys may, and should, also contribute financially to programs that provide legal services to the disadvantaged.³⁰ A lawyer's duty to pro bono service is a tradition, rather than an enforceable duty,³¹ and agency lawyers should uphold this responsibility. Agency attorneys can seek out alternatives when restrictions prevent them from providing traditional free legal service. And like any private attorney, government attorneys should follow the Rules of Professional Conduct in their pro bono service, including the guidelines regarding conflicts of interest.

III. THE ATTORNEY-CLIENT PRIVILEGE IN GOVERNMENT

The attorney-client privilege is an essential element of the lawyer-client relationship. When representing government agencies, the question arises as to the nature and scope of that privilege. Recent decisions involving outside counsel fee statements impact that privilege.

A. The History and Basis for the Attorney-Client Privilege

The roots of the attorney-client privilege, on which the Kansas and Missouri statutory provisions are based, have long been a part of Anglo-American law and are recognized as a fundamental legal protection for clients and the public. The privilege is directed to enhancing the effectiveness of legal advice by encouraging clients to confide fully in their lawyers.³²

As Professor Wigmore notes, the history of the attorney-client privilege goes back at least to the reign of Elizabeth I, where the privilege was already unquestioned.³³ Therefore, he says, it is therefore the oldest of the privileges for confidential communications. To support this assertion, Wigmore cites *Dennis v. Codrington*³⁴ for the holding that on a motion to examine one Oldsworth, "touching a matter in variance, wherein he hath been of Counsel, it is ordered *he shall not be compelled by subpoena or otherwise to be examined upon any matter concerning the same*, wherein he the said Mr. Oldsworth was of counsel" (emphasis added).³⁵

Not surprisingly, given the venerable nature of the attorney-client privilege and its significance for the American system of legal representation, prior cases in a variety of jurisdictions have protected communications from attorney to client under most circumstances.

In the more recent case of *Swidler & Berlin v. United States*, the United States Supreme Court held:

The attorney client privilege is one of the oldest recognized privileges for confidential communications The privilege is intended to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice."³⁶

The attorney-client privilege, as well as the related duty of confidentiality under Rule 1.6 of the KRPC, have a public policy basis, founded on a circle of logic: clients must entrust their lawyers with all the facts, so that their lawyers can give good advice. Clients will not give all the facts if they fear that such disclosure will go beyond the attorney-client relationship. Therefore, society encourages full disclosure by protecting disclosures from public scrutiny so clients can get good advice.³⁷

In *Upjohn Co. v. United States*, the Court held that the privilege applies equally to communications with employed counsel inside a corporation, as well as to outside counsel.³⁸ The privilege also generally extends to parent, subsidiary and affiliated corporations.³⁹ The Federal Office of Legal Counsel has recognized that the *Upjohn* analysis is probably appropriate in judging the scope of the attorney-client privilege where the client is a government agency.⁴⁰

B. How is the Privilege Created?

In order to be privileged, the following elements must be present:

1. A communication;
2. Made between privileged persons (such as the attorney and client);
3. In confidence;
4. For the purpose of obtaining or providing legal assistance for the client.⁴¹

The privilege precludes the introduction of testimony or evidence of the privileged communication in any court trial or proceeding. Because it limits access to the truth, the privilege is narrowly construed by the courts and a burden is imposed on the party claiming the privilege to prove its application.⁴²

The privilege belongs to the client, and not to the attorney.⁴³ Because an agency is an artificial person comprised of individual constituents, the identification of the "client" for purposes of the privilege can be difficult. While the privilege previously extended only to those employees of the corporation who could be identified as the "control group,"⁴⁴ that test has generally been rejected in favor of a more liberal test, looking at whether the subject matter of the legal advice concerned an area within the scope of the employee's duties.⁴⁵ This is the test adopted by the Eighth Circuit Court of Appeals in *Diversified Industries, Inc. v. Meredith* in determining privileged communications:⁴⁶

- (1) [T]he communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's legal duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.⁴⁷

The application of the attorney-client privilege to communications between attorneys and government agencies has paralleled the application of the privilege to corporate lawyers.⁴⁸ There is, however, no existing body of case law nor clear principles on which to rely.⁴⁹ What is clear is that an agency lawyer owes the agency the duty of

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confidentiality, and, under *Upjohn*, this privilege should include communications between the lawyers and the agency's employees.⁵⁰

C. How is the Privilege Preserved?

In order to make sure that communications between a government client and his attorney are privileged, the agency lawyer should establish procedures to ensure compliance with the subject matter test. This means that the attorney should make it clear that the request for information was focused on the employee whose duties are within the subject matter of the information needed, and that the employee is seeking legal advice at the direction of the employee's managerial superior to provide the information in confidence for the purpose of obtaining legal advice. It is best if this is recorded as a part of the record of the communication, to ensure the absence of doubt or argument if the communication is later sought in litigation.

D. How Can the Privilege be Waived, Lost or Destroyed?

An essential element of the attorney-client privilege is the need for confidentiality. In order to be privileged, the communication must have been made in confidence.⁵¹ Thus, if a communication, even a clearly privileged communication, is disclosed outside the attorney-client relationship, the privilege is lost.⁵² Thus, serious efforts should be made to ensure that communications between lawyer and client remain confidential. They should not be disclosed to others outside the relationship. The client should be admonished to keep the lawyer's advice confidential. Documents reflecting the advice, as well as the information on which the advice is based, should be maintained in files which have limited access.

It is also important to differentiate between a lawyer's "legal" advice and his/her "business" advice. Just as legal advice is protected by the privilege, business advice is not. In addition, when a communication includes both business advice and legal advice, most authorities will find the communication not to be privileged. Further, agency lawyers should be aware that advice concerning "policy" is not likely protected by the privilege.

Therefore, it is important to separate business and policy from legal communications, including in any written communications or memoranda recording oral communications.

E. The Confidentiality of Communications from Client to Attorney

In addition to the attorney-client privilege, which is an evidentiary exclusionary rule applied in litigation, information which clients impart to their attorneys must also be

maintained as confidential. In addition, documents prepared in anticipation of litigation or in preparation for trial, containing the thoughts, strategies, and mental impressions of counsel, are protected from disclosure.

The attorney work product doctrine was first announced by the United States Supreme Court in the landmark case of *Hickman v. Taylor*.⁵³ There, the Court addressed the scope of discovery under the Federal Rules of Civil Procedure, and held that materials prepared by a lawyer in anticipation of litigation or in preparation for trial need not be produced, holding:

Proper preparation of a client's case demands that [the attorney] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.⁵⁴

As noted by the Eighth Circuit Court of Appeals in the case of *In re Murphy*, there are clear policy reasons for this doctrine:

If unfettered scrutiny of an attorney's private files were allowed, attorneys would be reluctant to reduce their tentative opinions and thought processes to writing, a practice that would ill-serve clients and the cause of justice. Some restrictions on access to attorneys' work product are necessary to avoid [i]nefficiency, unfairness and sharp practices in the delivery of legal services and to prevent a "demoralizing" effect on the legal profession.⁵⁵

The attorney work product doctrine is intended to protect material prepared by counsel with an eye toward litigation,⁵⁶ and it protects from disclosure all materials which were prepared in anticipation of litigation or preparation for trial by a party or that party's representative.⁵⁷ Even where some limited disclosure of work product might be required, attorneys' mental impressions, conclusions, opinions and legal theories, prepared in anticipation of litigation or in preparation for trial, are always to be protected from disclosure or discovery.⁵⁸ Like the attorney-client privilege, the work product nature of attorneys' materials and their protection from disclosure do not cease upon the conclusion of the litigation to which those materials relate.⁵⁹

Thus, the attorney-client privilege and the work product doctrine have their roots in ancient common law, are squarely founded on public policy, and are fundamental to the attorney-client relationship.

Government attorneys again must take steps necessary to keep client information confidential. This is also mandated by the Model Rules of Professional Conduct applicable to lawyers, for example in Missouri⁶⁰ and Kansas.⁶¹ In Kansas, Rule 1.6(a)

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provides that: "A lawyer shall not reveal information relating 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)."⁶² Paragraph (b) authorizes the release of client confidences only to prevent the client from committing a crime, to comply with the rules or order of a tribunal, or to establish a claim or defense in a dispute between the lawyer and the client.

Thus, in order to preserve both the privilege and the work product nature of client communications, they should not be disclosed to others.

F. Privilege, Confidentiality and the Use of Electronic Communications

The increasing use of electronic mail and cellular or wireless telephones as communications devices calls into question the application of the attorney-client privilege to such communications. The law does not currently require encryption of electronic computer communications, but in view of the chance that such communications can be intercepted, common sense dictates communications of an extremely sensitive nature be encrypted or reserved for safer methods of communication.⁶³

In addition, it is highly recommended, and a low-cost measure, for attorney-client electronic communications to bear a legend, notice or warning, advising anyone who intercepts or inadvertently receives such a communication of the privileged nature of the communication. This is similar to the notice or warning which should be included with telephone line facsimile transmissions. One form of such an e-mail legend reads:

*** NOTICE: This electronic mail transmission constitutes an attorney-client communication which is privileged at law. It is not intended for transmission to, or receipt by, any unauthorized persons. If you have received this electronic mail transmission in error, please delete it from your system without copying it, and notify the sender by Reply e-mail or by calling (785) XXX-XXXX, so that our address record can be corrected.***

Similarly, the use of cellular telephones has not yet been proscribed by ethics advisory opinions or case law, since there is still the (supposed) reasonable expectation of privacy from the use of such devices. Therefore, if facsimiles, e-mails or cellular phone calls are intercepted, it is generally held that the privilege has not been waived. On the other hand, it is generally known that communications from wireless telephones operating from a base can be intercepted. Therefore, the interception of privileged communications emanating from such devices will be deemed a waiver of the privilege. Because of this, no privileged or confidential information should be discussed on wireless remote telephones.

G. A Note about the Kansas Open Records Act and Privilege

The Kansas Open Records Act (KORA)⁶⁴ appears to reduce the protections that private attorneys regularly enjoy. Although examined in the context of billing statements in the next section, KORA still provides agency records with protections under the attorney-client and work product privileges, as well as under other exceptions to the Act. Privilege under KORA has yet to be addressed in court decisions; however, a recent Kansas attorney general opinion provides insight into the protections still available to agency records.⁶⁵

The attorney general was asked whether records from an attorney-conducted investigation requested by a community college board were protected by privilege from disclosure.⁶⁶ The attorney claimed that the investigation was conducted "under the threat of litigation" in order to give legal advice to the client.⁶⁷ The opinion stated that Kansas courts would apply a broader rule of the attorney-client privilege.⁶⁸ The broader rule, which prevails in the federal courts, holds that any communication from a lawyer to his client, when made in the course of giving legal advice, is protected from forced disclosure.⁶⁹ The opinion concludes that the documents related to the investigation would be protected from disclosure under KORA by the attorney-client privilege.⁷⁰

Agency lawyers have good reason to be concerned about protection from disclosure under KORA. The indication is that traditional standards of privilege will be applied to agency records. The discussion below concerning billing statements, however, should also be considered when judging the potential for protection under KORA.

IV. A KANSAS OPEN RECORDS ACT CASE—PRIVILEGE AND BILLING STATEMENTS

In an effort to watch costs, many government agencies have adopted stringent requirements for detail in the billing statements submitted by their outside counsel. Some corporations, insurers and public agencies have even adopted a practice of submitting their lawyers' bills to outside auditors to ensure the suitability of the bills received from counsel. At the same time, some public agencies are being requested to produce lawyer billing statements under public records acts, for scrutiny and criticism by the press.

Some courts have actually held that lawyers' narrative descriptions in their fee statements are not protected by the attorney-client privilege. This could pose problems for lawyers and clients, in that narrative recitations of efforts (including discussions with clients about deeply confidential matters) could be disclosed outside the attorney-client relationship, to the detriment of the client.

A. Factual Background

Lawyers who are paid by the hour must justify their fees and explain their charges so that clients understand them. Rule 1.5 of the KRPC requires a lawyer's fees to be reasonable. If the lawyer and client agree for fees to be charged on the basis of an hourly rate, the lawyer should not exploit [the] fee arrangement . . . by using wasteful procedures. The reasonableness of the fee will be measured by the eight factors set forth in Rule 1.5, and will be governed by the circumstances of the particular case.⁷¹

In addition, Rule 1.4 of the KRPC requires a lawyer to keep the client reasonably informed and promptly to comply with reasonable requests for information. This rule mandates, therefore, that the lawyer inform the client of the status and progress of the matter entrusted to him. Many lawyers use their regular billing memoranda as reports on their activities since the last report.

Increasing consumer awareness and heightened competition have made clients cognizant of their right to demand detail and support for the bills they are expected to pay. Many clients are becoming more sophisticated in their dealings with attorneys. Those clients require detailed billing statements. Some even have standard guidelines mandating detailed descriptions of each effort and activity, in order to justify payment.

While clients are certainly concerned about the cost of representation (and they have every right to be), the lawyer also has obligations to represent the client competently⁷² and diligently.⁷³

Placed against this background, modern insurance company and corporate counsel "guidelines" appear to impose conditions and rules on retained outside counsel that might conflict with the lawyer's obligations of competence, commitment, dedication and zeal. These include:

1. Negotiated (or imposed) hourly fee rates.
2. Refusal to pay for costs advanced (such as deposition reporting fees) unless approved in advance.
3. Refusal to pay for motions for summary judgment or other motions unless discussed and approved in advance.
4. Payment of mileage or other travel costs on a set basis rather than on the basis of actual out-of-pocket costs.
5. Refusal to pay for travel time (especially for travel taken after 5:00 p.m.) or imposing a reduced rate for time spent in travel, even if compensable work is performed during travel time.
6. Requiring regular reporting and evaluations of the case;
7. Requiring approved budgets, and then refusing to approve payment for efforts exceeding the budget.
8. Refusing to pay for actual out-of-pocket costs for photocopying and other expenses, but imposing a set approved rate.

The potential for conflict in such situations is obvious.⁷⁴ The Montana Supreme

Court, in an unprecedented action, recently ruled that mandatory billing rules imposed by insurers and other corporate clients, as well as reporting and auditing requirements imposed on attorneys retained for the insureds of the insurers are improper.⁷⁵

As if this friction were not enough, challenges to the attorney-client privilege are being made by those outside the relationship. These challenges take the form of open records requests made to public agencies, subpoenas to lawyers, and discovery requests to parties in civil and criminal litigation. In other circumstances, minority shareholders may claim that attorneys representing the corporation actually represented their interests, thereby entitling the shareholders to the lawyers' work and communications.⁷⁶

B. Some Cases Hold That Fee Statements Are Not Privileged

In the Missouri case of *Tipton v. Barton*⁷⁷ a newspaper tried to obtain billing statements submitted by outside counsel to a city government. After the city refused, and the newspaper filed an open records act suit, the appellate court ruled that the documents should be produced, holding that, because the fee statements were not detailed, they did not contain privileged communications.⁷⁸

In *New Haven v. Freedom of Information Commission*,⁷⁹ plaintiffs requested a city to turn over itemized billings of the attorney who represented certain municipal employees,⁸⁰ claiming that they constituted public records which were subject to disclosure.⁸¹ The Connecticut Court of Appeals found that none of the exemptions provided in the open records statute were applicable,⁸² including the attorney-client privilege.⁸³ The court went so far as to hold that the capacity in which the attorney was retained did not rise to the level of an attorney-client privileged communication.⁸⁴

A similar case is *Hunterdon County Policemen's Benevolent Association v. Township of Franklin*, in New Jersey.⁸⁵ Again, however, the scope of this ruling is somewhat narrow. While the court held that attorneys' fee bills submitted to a city government were subject to disclosure under an open records request, that holding was based on the court's experience that legal bills do not typically set forth confidential communications or detailed descriptions, but rather contain only general descriptions of the work performed.⁸⁶

An open records request was not involved in the New Mexico case of *Schein v. Northern Rio Arriba Elec. Cooperative*,⁸⁷ where a member of the rural electric cooperative filed a suit to require the cooperative to produce billing statements submitted by its attorneys. The New Mexico Supreme Court held that the descriptions of services were not privileged, noting their "general nature."⁸⁸

D. Other Cases Hold That Fee Statements Are Privileged

On the other hand, most cases have concluded that the descriptive entries in such attorneys' fee statements are privileged.

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In the case of *In re RFD, Inc.*,⁸⁹ the Kansas District Court held that there is no dispute that . . . attorney fee statements [for legal services performed] are confidential communications that fall within the scope of the attorney-client privilege, and further held that the client's inadvertent disclosure did not result in a waiver of the attorney-client privilege with respect to the attorney fee statements in that case.⁹⁰

In *Salas v. United States*,⁹¹ the Ninth Circuit held that an open records request for attorney fee statements to a public agency was "an unjustified intrusion into the attorney-client relationship."⁹²

In *Weeks vs. Samsung Heavy Industries, Ltd.*, an Illinois court held that legal bills which reflect specific areas of research and communications between the attorney and client, the nature of the services, the nature of the documents prepared, the issues researched and the matters discussed with a client are clearly protected by the attorney-client privilege.⁹³ The detail provided by the attorneys in the *Weeks* case fits within the parameters of the typical corporate outside counsel guidelines, and the court protected them from disclosure.

In the case of *In re Horn*,⁹⁴ the Ninth Circuit ordered attorney's billing statements not to be produced, because billing records describing the services performed may reveal the client's motivation for seeking legal representation, the nature of the services provided or contemplated, and other confidential information exchanged during the course of the representation.⁹⁵

Redacting privileged communications from fee statements should be permitted, if an open records act request is made for those statements. The Appellate Division of the New York Supreme Court so held in *Teich v. Teich*,⁹⁶ (affirming an order that *to properly safeguard defendant's attorney client privilege defendant should be permitted to redact all material contained in defendant's attorney's bills other than the number of hours worked and the dollar amount charged.*⁹⁷) The same holding was made in *Lathouris v. Norwalk Inn and Conference Center* (Connecticut),⁹⁸ and *Fidelity and Deposit Company of Maryland v. McCullough* (Pennsylvania).⁹⁹ Indeed, in *McCullough* even the redacted bills were not ordered to be produced.

One of the most significant cases to be decided on this issue is *United States of America v. Gonzales*,¹⁰⁰ a Tenth Circuit case holding that, even in the face of an open records act request, the details about an attorney's services are *not* to be produced.¹⁰¹

Therefore, the substantial weight of authority supports the application of the attorney-client privilege to the narrative portions of attorneys' fee statements. But, the existence of those several cases that hold to the contrary represent a reason for real concern.

E. Kansas Open Records Act Case

While going against the trend of cases outlined above, the Kansas Supreme Court decided a case in 2000 that should send warning alarms through the halls of law firms

and corporate and governmental law departments everywhere. In that case, *Cypress Media, Inc. v. City of Overland Park*, the Court held that attorney-to-client fee billing statements are not necessarily privileged communications.¹⁰²

Factually, the plaintiff (owner of *The Kansas City Star* newspaper) had served a request for Open Records on the City of Overland Park, seeking all of the fee billing statements received by the City for a particular year from all of its outside counsel. The City timely responded to the request with the statement that the billing statements represent privileged communications between lawyer and client. The newspaper filed an action under the Open Records Act, and the Court ordered the City to redact those parts of its fee bills that it felt were privileged.

In response to the trial court's order, the City redacted all of the narrative portions of the bills, leaving only the date of each service performed and the amount of time expended. Rather than conduct an *in camera* review to determine the validity of this redaction, the trial court held the privilege log to be insufficient, and ordered production of all the records, unredacted. On appeal, the Kansas Supreme Court affirmed, holding that statements made by attorneys to clients in their fee billing statements are not necessarily privileged.

While the Court's ruling in *Cypress Media* is based on an Open Records Act request, and resulted in the production of records deemed "open" under a public records statute, its ruling goes far beyond that limited application. If all the statements in an attorney's fee billing statements are not privileged, then upon a showing that the information is "relevant" in an ordinary civil action (an extremely low hurdle) an opposing party could obtain production of the opposing party's attorney fee billing statements, even where the opposing party is not a public agency.

F. Waiver—the Outside Auditor

Another concern in the preservation of the attorney-client privilege is waiver. Some clients submit their counsel's bills to an outside auditor for review. This poses a risk. For example, in *United States v. Massachusetts Institute of Technology*,¹⁰³ the First Circuit held that the disclosure of attorneys' bills to an outside auditor may waive the attorney-client privilege.¹⁰⁴

G. Recommendations / Practical Steps

It is important for lawyers to advise their clients: (1) that open records act requests may be made to public agency clients, and (2) that discovery requests could be made by opponents in litigation or criminal investigations which might include attorneys' fee bills.

Lawyers face constant challenges, from adverse parties, from courts, and from

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clients. The able lawyer places the duty to the client foremost and keeps aware of changes and increasing challenges. One of those challenges is the increased use of discovery and other intrusive methods to obtain lawyer-client communications. The profession should be re-committed to the attorney-client privilege, and that privilege should be strengthened, by legislation, rule or common law, to prevent the disclosure of attorneys' narratives in fee statements.

V. CONCLUSION

Representation of a government agency provides interesting and exciting opportunities. However, this representation also imposes special obligations to be observant of the ethical rules imposed upon attorneys when dealing with the governmental client and others.

Notes

1. See section II, *infra*.
2. See *id*.
3. See section IV, *infra*.
4. The Kansas Rules of Professional Conduct [hereinafter KRPC] are derived from the Model Rules of Professional Conduct adopted by the American Bar Association. The Kansas rules govern the conduct of all attorneys licensed in Kansas, and are found at Rule 226, Rules of the Kansas Supreme Court.
5. ANN. MODEL RULES OF PROF'L CONDUCT 198 (4th ed. 1999).
6. See also Brian J. Moline, *Ethical Dilemmas for the Kansas Government Lawyer*, 5 KAN. J.L. & PUB. POL'Y 105 (1995).
7. KRPC 1.13 cmt.
8. See KRPC 2.1.
9. See KRPC 1.7.
10. See Section III, *infra*.
11. Kubin v. Miller, 801 F.Supp. 1101 (S.D.N.Y. 1992).
12. 862 P.2d 870 (Ariz. 1993).
13. *Id.* at 872-74.
14. See also, Rosman v. Shapiro, 653 F. Supp. 1441 (S.D.N.Y. 1987). *But see*, Dalrymple v. Nat'l Bank & Trust Co., 615 F. Supp. 979 (W.D. Mich. 1985) (no duty to clarify representation if it is clear that counsel represents the organization and not the individual).
15. Adapted from Gregory J. Wallace & Jay W. Waks, *Internal Investigation of Suspected Wrongdoing by Corporate Employees*, 1057 PLI/CORP 515, 519 (1998), *quoted in* ANN. MODEL RULES OF PROF'L CONDUCT 204-5 (4th ed. 1999).
16. Moline, *supra* note 6, at 110. The Appearance of impropriety@ standard was a part of the former Model Code of Professional Responsibility, Canon 9. It was not included in the Model Rules. ANN.

- MODEL RULES OF PROF'L CONDUCT 176-7 (4th ed. 1999). However, the concept certainly should be considered by any attorney when making professional or personal decisions. *See Rennie v. Hess Oil Virgin Islands Corp.*, 981 F.Supp. 374 (D.V.I. 1997).
17. Moline, *supra* note 6, at 110.
 18. KRPC 4.1(a).
 19. KRPC 4.1(b).
 20. KRPC 4.3.
 21. KRPC 1.7(a) (emphasis added).
 22. KRPC Terminology.
 23. KBA Ethics Op. 95-11 (1995).
 24. 744 P.2d 1214 (Kan. 1987).
 25. *See* KRPC 1.8(f) (lawyer shall not accept compensation for representing another, unless the client consents after consultation, confidential information is preserved, and there is no interference with the lawyer's independence of professional judgment@)
 26. KRPC 1.7 cmt.
 27. Bruce W. Kent, *Ethics and the Government Lawyer*, 62 J. Kan. B.A. 30, 35 (1993). *See also* KAN. STAT. ANN. ' 45-216 et seq.
 28. KRPC 6.1 cmt.
 29. *See* MODEL RULES OF PROF'L CONDUCT 6.1 cmt. 8 (1999).
 30. *See id.* at cmts. 9-10.
 31. *See* Geoffrey C. Hazard, Jr., *After Professional Virtue*, 1989 SUP. CT. REV. 213.
 32. *Upjohn Co. v. United States*, 449 U.S. 383 (1981), and cases cited therein.
 33. 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW ' 2290, at 542 (McNaughton rev. ed. 1961).
 34. Cary 143, 21 Eng. Rep. 53 (Ch. 1580).
 35. *See* WIGMORE, *supra* note 33, at 542 (emphasis added).
 36. *Swidler & Berlin v. United States*, 524 U.S. 399, 403, 118 S.Ct. 2081, 141 L.Ed.2d 379 (1998) (citing *Upjohn*, 449 U.S. 383).
 37. *See also* ANN. MODEL RULES OF PROF'L CONDUCT 89 (2d ed. 1999). *See also* WIGMORE, *supra* note 33, at 542, noting that the history of the attorney-client privilege "goes back to the reign of Elizabeth I, where the privilege already appears as unquestioned. It is therefore the oldest of the privileges for confidential communications." Wigmore cites as an example *Dennis v. Codrington*, Cary 143, 21 Eng. Rep. 53 (Ch. 1580) (on a motion to examine one Oldsworth, 'touching a matter in variance, wherein he hath been of Counsel, it is ordered *he shall not be compelled by subpoena or otherwise to be examined upon any matter concerning the same*, wherein he the said Mr. Oldsworth was of counsel@) (emphasis added).
 38. *See Upjohn*, 449 U.S. at 395.
 39. *Glidden Company v. Jandernoa*, 173 F.R.D. 459, 472 (W.D. Mich. 1997); *Duplan Corporation v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1184-85 (D. S.C. 1974) ("[T]he fact that the communications are among formally different corporate entities which are under common ownership or control leads this court to treat such inter-related-corporate communications in the same manner as intra-corporate communications.")
 40. *See* 6 U.S. Op. Off. Legal Counsel at 495.
 41. Restatement (Third) of the Law Governing Lawyers ' 118 (Final Draft, 2000).

42. *Marten v. Yellow Freight System, Inc.*, No. 96-2013-GTV. 1998 WL 13244 (D. Kan. Jan. 26, 1998); *Westinghouse Electric Corporation v. Republic of the Philippines*, 951 F.2d 1414, 1423 (3rd Cir. 1991).
43. *In re. Von Bulow*, 828 F.2d 94, 100 (2d Cir. 1987).
44. *Philadelphia v. Westinghouse Electric Corporation*, 210 F. Supp. 483 (E.D. Pa. 1962).
45. *See generally* note 37, at 383.
46. 572 F.2d 596, 609 (8th Cir. 1977).
47. *Id.*
48. *See U.S. v. American Tel. & Tel. Co.*, 86 F.R.D. 603, 621 (D.D.C. 1979).
49. *In re Lindsey*, 148 F.3d 1100, 1108 (D.C.Cir.), cert. denied sub nom. *Office of the President v. Office of the Independent Counsel*, 525 U.S. 996, 119 S.Ct. 466, 142 L.Ed.2d 418 (1998).
50. Michael K. Forde, *The White House Counsel and Whitewater: Government Lawyers and the Scope of Privileged Communications*, 16 YALE L. & POL'Y REV. 109, 128 (1997).
51. *See In re Grand Jury Proceedings*, 727 F.2d 1352, 1356 (4th Cir. 1984).
52. *See Rediker v. Warfield*, 11 F.R.D. 125, 128 (S.D. N.Y. 1951).
53. 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947).
54. *Id.* at 511.
55. *In re Murphy*, 560 F.2d 326, 333-34 (8th Cir. 1977) (citing *Hickman* 329 U.S. 495, 511, 67 S.Ct.385, 91 L.Ed. 451 (1947)).
56. *See generally* *All West Pet Supply Co. v. Hill's Pet Products Div.*, 152 F.R.D. 634 (D. Kan. 1993).
57. *Mackey v. IBP, Inc.*, 167 F.R.D. 186, 200 (D. Kan. 1996); *Jones v. Boeing Co.*, 163 F.R.D. 15, 17 (D. Kan. 1996).
58. *Victor v. Connaught Laboratories, Inc.*, 137 F.R.D. 325, 332 (D. Kan. 1991); *Hilt v. SFC, Inc.*, 170 F.R.D. 182, 188 (D. Kan. 1997).
59. *See In re Murphy*, 560 F.2d 326, 335 (8th Cir. 1997); *United States v. Leggett & Platt, Inc.*, 542 F.2d 655, 659 (6th Cir. 1976), cert. den. 430 U.S. 945.
60. Rule 4, Rules of the Missouri Supreme Court.
61. Rule 226, Rules of the Kansas Supreme Court.
62. KRPC 1.6(a).
63. David M. M. Bell, *Elusive E-mail Ethics Issues*, LAW TECHNOLOGY NEWS, Nov. 2000, at 75.
64. KAN. STAT. ANN. § 45-215 et seq.
65. 1999 Kan. Att'y Gen. 53. .
66. *Id.* at 1.
67. *Id.*
68. *Id.* at 4.
69. *Id.* at 3.
70. *Id.*
71. *Fourchon Docks, Inc. v. Milchem, Inc.*, 849 F.2d 1561, 1568 (5th Cir. 1988).
72. KRPC 1.1. "A lawyer shall provide competent representation of a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."
73. KRPC 1.3. "A lawyer shall act with reasonable diligence and promptness in representing a client. The Official Comments to Rule 1.3 define this diligence as including "commitment," "dedication," and "zeal."

74. In re Rules of Prof'l Conduct & Insurer Imposed Billings Rules & Procedures, 2 P.3d 806, 815 (2000). *See also*, Darryl Van Duch, *Test Case for Insurers= Billing Rules: Montana Supreme Court Case Could Start a Trend*, 20 NAT'L L.J., Jan. 25, 1999, at A1.
75. *Rules Prof'l Conduct* 2 P.3d at 815.
76. Surprisingly, some courts have required production of narrative fee bill statements in these situations.
77. 747 S.W.2d 325 (Mo. App. 1988).
78. *Id.* at 332. It should be noted that, here, the Court acknowledged that the bills were not Adetailed.@ Query whether a different ruling might result if the bills provided detailed descriptions of the lawyer=s activities, as is required by many client standards.
79. 493 A.2d 283 (Conn. App. 1985).
80. *Id.* at 284.
81. *Id.* The Connecticut statute defines "public record" as "any recorded data or information relating to the conduct of the public=s business prepared, owned, used, received or retained by a public agency . . ." *Id.* at n.2 (citing CONN. GEN. STAT. ' 1-18a(d)).
82. *Id.* at 285. This opinion demonstrates the importance of the public agency making an adequate showing to prevent disclosure. In finding that the agency did not meet its burden in *New Haven*, the court held: "Mere speculative and conclusory statements as to the impact of disclosure do not satisfy the [city=s] burden of establishing an adequate record to show why the records are exempt." *Id.*
83. *Id.* at 284-85.
84. *Id.* at 285. Hope for the public agency can be found in the limiting language of this case, in its holding that "general subject matter designations" of work performed should be disclosed. *Id.* Thus, one might argue that more specific descriptions of attorney=s activities should be entitled to more protection.
85. 669 A.2d 299 (N.J. Super. Ct. App. Div. 1996).
86. *Id.* at 302. *See also* *Beavers v. Hobbs*, 176 F.R.D. 562 (S.D.Iowa 1997) (stating that production was apparently ordered because of the absence of detail in the billing records).
87. 932 P.2d 490 (N.M. 1997).
88. *Id.* at 495.
89. 211 B.R. 403 (D. Kan. 1997).
90. *Id.* at 406.
91. 695 F.2d 359 (9th Cir. 1982).
92. *Id.* at 362. .
93. No. 93C4899, 1996 WL 288511 (N.D. Ill, May 3, 1996).
94. 976 F.2d 1314 (9th Cir. 1992).
95. *Id.* at 1317-18. *See also*, *Hyman Companies, Inc. v. Brozost*, No. Civ. A 97-269, 1997 WL 535180 (E.D. Pa. August 8, 1997) (stating bills for attorneys' fees are subject to the attorney-client privilege because they reveal litigation strategy and/or the nature of the services performed).
96. 665 N.Y.S. 2d 859 (N.Y. App. Div. 1997).
97. *Id.* at 859 (emphasis added).
98. No. CV9601514875, 1997 WL 707100 (Conn. Super. Ct. Nov. 4, 1997).
99. 168 F.R.D. 516 (E.D. Pa. 1996).
100. 150 F.3d 1246 (10th Cir. 1998).
101. *Id.* at 1256.

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102. 268 Kan. 407, 997 P.2d 681 (2000).
103. 129 F.3d 681 (1st Cir. 1997).
104. *Id.* at 685-86.