

## When Does Monitoring Defendants and Their Lawyers Cross the Line?

BY PETER A. JOY AND KEVIN C. McMUNIGAL

Recently, government officials have been intruding into attorney-client relationships in unexpected ways. In Kansas, for example, Corrections Corporation of America (CCA), which operates Leavenworth Detention Center, made secret video recordings of attorney-client meetings. When this came to light, the federal public defender for Kansas filed a motion seeking to have the recordings turned over to defense counsel, halt further recording and requested an emergency hearing on the matter, arguing that the recordings interfered with the defendants' right to counsel and intruded on attorney-client privilege. After the initial hearing, an investigation revealed that CCA was also recording attorney-client phone calls. In a subsequent hearing, federal district court judge Julie Robinson appointed a special master to investigate CCA's recordings of attorney-client phone calls and meetings. (Jonathan Shorman, *Federal Judge Chides Prosecutors in Leavenworth CCA Recording Controversy: "You All Need to Get Your Act Together,"* TOPEKA CAPITAL-J., Sept. 7, 2016, <https://perma.cc/J59R-Z86B>.)

After learning about the secret recording in Kansas, the federal public defender for the Western District of Missouri discovered that there was secret taping happening at facilities housing federal detainees in the Western District of Missouri. The public defender alleged violations of the defendants' right to counsel, attorney-client privilege, and client confidentiality.

The U.S. attorney's office and the federal public

defender for the Western District of Missouri reached an agreement, and U.S. district court judge Stephen Bough issued an order that all facilities housing federal detainees in the Western District of Missouri stop recording meetings, videoconferences, and phone calls between clients and their lawyers. (Dan Margolies, *Judge in Missouri Orders Detention Centers to Stop Recording Attorney-Client Meetings*, KCUR89.3 (Aug. 19, 2016), <https://perma.cc/B87M-AL44>.)

In the Southern District of Florida, defense lawyers representing a doctor accused of Medicare fraud alleged that the U.S. attorney's office was spying on its litigation strategy by secretly gaining access to discovery documents the defense team was assembling. An assistant U.S. attorney (AUSA) alerted the defense team that an FBI agent had received duplicate CDs containing discovery files the defense team had selected for scanning from more than 220 boxes of seized records in connection with the fraud case. The owner of the copy service admitted to defense lawyers that he had been routinely providing the FBI with copies of materials requested by defense lawyers in their case and in other cases for at least 10 years. The defense team filed a motion to dismiss the indictment, alleging the government interfered with their client's right to counsel by improperly obtaining defense counsel's work product to gain a tactical advantage, and they requested a taint hearing. (Jacob Gershman, *Lawyers Accuse Federal Prosecutors of Routinely Spying on Defense Strategies*, WALL ST. J., June 3, 2016, <http://tinyurl.com/jhhreq3>.) After several days of hearing on the matter, the defense withdrew its motion when the government entered into favorable plea agreements with all of the defendants. (Dan Christensen, *Accusations of Spying by FBI, U.S. Attorney's Office Dissolve amid Generous Plea Details*, FLA. BULLDOG (Aug. 10, 2016), <http://tinyurl.com/zxpbbce>.)

In another Miami-area case, the defense team representing defendants accused in an alleged international sweepstakes fraud case alleged a violation of their clients' right to counsel due to an "invasion of the defense camp" after learning that one of four defendants in the case entered a secret plea deal with the U.S. attorney's office and participated in defense team strategy sessions as a government informant, obtaining defense documents and listening to privileged discussions about witnesses and defense strategies. The government responded by claiming that the informant never shared privileged information with the government. (Dan Christensen, *Miami U.S. Attorney's Office Accused of Spying: A "Mole" in the Defense Camp?*, FLA. BULLDOG (Aug. 31, 2016), <http://tinyurl.com/joc67ov>.)

These incidents raise important and troubling issues concerning government officials prying into attorney-client relationships and threatening the Sixth Amendment right to counsel. The incidents also raise a number of ethical issues. In this column we explore what is protected by attorney-client privilege, work product, and client confidentiality. We also analyze the obligations of lawyers advising jails, prisons, and other entities or individuals working on behalf of the government concerning client confidentiality, as well as the ethical obligations of prosecutors who come into possession of confidential information.



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## ATTORNEY-CLIENT PRIVILEGE, WORK PRODUCT, AND CONFIDENTIALITY

Attorney-client privilege, work product, and client confidentiality are distinct, though lawyers, judges, and laypeople alike often conflate or confuse them. One of the reasons for this conflation and confusion is that attorney-client privilege, the work product doctrine, and client confidentiality are all based on the assumption that effective legal representation requires free and open communication between client and counsel, and all three are aimed at encouraging such open communication by keeping certain information from one's adversary. Another reason attorney-client privilege, the work product doctrine, and client confidentiality are often confused is that there is frequently significant overlap in the scope of what each covers. Nonetheless, it is important to distinguish among them.

**Attorney-client privilege.** Attorney-client privilege is a rule found in the law of evidence. Depending on the jurisdiction, it may be found in the jurisdiction's rules of evidence, a statute, or the jurisdiction's common law of evidence. The underlying rationale for attorney-client privilege is that protecting communications between a client and his or her lawyer will encourage the client to communicate freely with the lawyer, thereby enabling the lawyer to provide better representation to the client.

The attorney-client privilege is aimed at judges and essentially prevents the use of government power to compel the revelation of privileged communications. It is often triggered in testimonial settings, such as a trial. Civil discovery rules typically incorporate the attorney-client privilege by exempting privileged material from revelation in a deposition or request for document production.

Regardless of where the rule may be found in a particular jurisdiction, the elements of attorney-client privilege are quite uniform under both federal and state evidence law. The Restatement of the Law Governing Lawyers section 68 defines them as follows: "(1) a communication; (2) made between privileged persons; (3) in confidence; and (4) for the purpose of obtaining or providing legal assistance for the client." Under this commonly accepted definition, attorney-client phone calls, e-mails, and communications in meetings made in confidence for the purpose of obtaining or giving legal assistance are covered by attorney-client privilege. Thus, the attorney-client communications recorded in Kansas and the Western District of Missouri, and any notes or statements of the government informant in the Florida case about communications between client and counsel, would be covered by attorney-client privilege.

**Work product doctrine.** The work product doctrine is distinct from attorney-client privilege. It is currently found in rules of civil and criminal procedure. The work product doctrine is traced to the U.S. Supreme Court decision in *Hickman v. Taylor*, 329 U.S. 495, 511 (1947), in which the Court held that materials prepared for litigation are protected from an adversary's discovery request. The Court stated as the rationale for this protection that the proper, careful preparation of a client's case requires that materials prepared by the lawyer be protected from opposing counsel. "Were such

materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten." (*Id.*) In *United States v. Nobles*, 422 U.S. 225, 238 (1975), the Court stated that the work product doctrine was even more important to the proper functioning of the criminal justice system, and "[a]t its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." The Court stated: "The interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case." (*Id.*)

The work product doctrine, like attorney-client privilege, is also aimed at judges and prevents them from compelling the disclosure of work product during discovery. The work product doctrine is codified in both Federal Rule of Civil Procedure 26(b)(3) and Federal Rule of Criminal Procedure 16(a)(2) and (b)(2). Federal Rule of Criminal Procedure 16 exempts from discovery any portion of reports, memoranda, or other documents made by either the government or the defense or agents of the government or defense. States have incorporated the work product doctrine into their discovery rules.

Although the Restatement of the Law Governing Lawyers does not define work product, Federal Rule of Evidence 502(g)(2) provides this definition: "'work-product protection' means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or trial." Thus, work product encompasses documents a lawyer assembles or prepares in anticipation of trial, a lawyer's notes and impressions of evidence, outlines of direct and cross-examinations, and any other materials that a lawyer prepares in anticipation of litigation or trial for a client that reveals the lawyer's thinking, planning, or strategy.

Understanding the work product doctrine, it is easy to see why the defense team in Florida raised concerns about the Florida copy center surreptitiously making duplicate copies of documents that the defense selected in anticipation of trial and giving copies to the FBI. The particular documents the defense selected out of more than 200 boxes of potential evidence could provide the government with insight into what the defense thought was important either as evidence or in preparing direct and cross-examinations. (*See, e.g., United States v. Horn*, 811 F. Supp. 739, 746 (D.N.H. 1992) (holding that "the selection process itself reveals counsel's mental impressions as to how evidence relates to issues and defenses in the litigation").) Similarly, any defense documents prepared in anticipation of trial the government informant obtained in the sweepstakes fraud case would be work product.

**Client confidentiality.** In contrast to both attorney-client privilege and the work product doctrine, which are legal rules or doctrines, client confidentiality is found in legal ethics rules that define a lawyer's duties to clients and regulates lawyer conduct. The client confidentiality duty is found in ABA Model Rule 1.6 and its state counterparts. Model Rule 1.6 states: "A lawyer shall not reveal information relating to the representation of a client" other than with client

consent or if an exception to the rule of confidentiality is met. Comment 3 to Model Rule 1.6 explains that the rule of confidentiality “applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.”

By encompassing all information relating to the representation of a client, client confidentiality covers much more than either attorney-client privilege or the work product doctrine. Communications with witnesses, potential witnesses, and others, and an attorney’s notes and impressions about evidence and drafts of materials prepared on behalf of the client, regardless if prepared in anticipation of litigation or trial, are covered by client confidentiality.

In the recent incidents of the government intruding into the attorney-client relationships in Kansas, Missouri, and Florida, everything the defendants alleged was secretly obtained concerning attorney-client communications and work product would also be covered by client confidentiality.

### REMEDIES FOR GOVERNMENT INTRUSION INTO ATTORNEY-CLIENT RELATIONSHIP

In the cases described at the outset of this column, defense counsel alleged interference with their clients’ Sixth Amendment right to counsel and violations of some combination of attorney-client privilege, client confidentiality, and lawyer work product. Courts have been called upon to consider what, if anything, protects client and attorney communications and information from being obtained surreptitiously by the government.

While the government obtaining this information is clearly contrary to the spirit and rationales underlying attorney-client privilege and the work product doctrine, it doesn’t fall squarely within the prohibitions of either. Attorney-client privilege and the work product doctrine protect critical communications and information from *compelled* disclosure, in either a testimonial or discovery setting. On their own, attorney-client privilege and the work product doctrine do not provide the basis for a remedy beyond a judge ruling that intercepted confidential communications and information are not admissible into evidence. But, as we set forth below, remedies are available under the Sixth Amendment right to counsel and ethics rules protecting the attorney-client relationship.

**Sixth Amendment right to counsel.** There is ample authority that the government’s intrusion into the attorney-client relationship violates a defendant’s constitutional right to counsel. For example, in *Massiah v. United States*, 377 U.S. 201, 202–03 (1964), the Court held that the government violated the defendant’s Sixth Amendment rights by “deliberately elicit[ing]” statements from the defendant, who was represented by counsel, when it surreptitiously monitored conversations between the defendant and a co-defendant who was cooperating with the government. More recently, in *Schillenger v. Haworth*, 70 F.3d 1132 (10th Cir. 1995), the Tenth Circuit Court of Appeals found that a prosecutor who obtained information from a deputy sheriff who eavesdropped on trial preparations between defense counsel and the defendant had directly interfered with the attorney-client relationship and that “such an intrusion must constitute

a per se violation of the Sixth Amendment. (*Id.* at 139-42.) The *Schillenger* court noted that by obtaining information about attorney-client communications and trial strategy the prosecutor undermined “a fair adversary proceeding” guaranteed by the Sixth and Fourteenth Amendments, and “a prejudicial effect on the reliability of the trial process must be presumed.” (*Id.* at 1142.)

Once a violation of the Sixth Amendment is found due to improper government access to client communications with their lawyers, courts have found that there should be a remedy tailored to assure the defendant a fair trial. (*United States v. Morrison*, 449 U.S. 361, 365–66 (1981).) Under a Sixth Amendment analysis, it makes no difference if a nonlawyer or a lawyer is the government actor or government agent who violates a defendant’s Sixth Amendment rights by obtaining attorney-client communications or attorney work product.

As the Court in *Massiah* indicated, a threshold remedy is that the statements must be excluded from use at a trial against the defendant. (*Massiah*, 377 U.S. at 207.) Another remedy may be an order stopping the intrusion, such as the orders entered by the federal district court judges in the U.S. District Court of Kansas and the U.S. District Court for the Western District of Missouri, which halted the secret recording of defendants communicating with their lawyers. (*See also Case v. Andrews*, 603 P.2d 623 (Kan. 1979) (holding that visual monitoring of defendants and their attorneys is unreasonable interference and violates the Sixth Amendment and must stop).) Destruction of the recordings may also be an appropriate remedy.

While some combination of excluding the statements from use at trial, halting secret recording of defendants communicating with their lawyers, and destroying the recordings may be appropriate in some cases, in other cases a court may have to fashion a different remedy to protect a defendant’s Sixth Amendment right. For example, in *State ex rel. Winkler v. Goldman*, 485 S.W.3d 783, 790–91 (Mo. Ct. App. 2016), a Missouri court of appeals required the disqualification of the entire St. Louis County prosecuting attorney’s office because assistant prosecuting attorneys in the office had breached the defendant’s attorney-client privilege and work product privilege. The assistant prosecuting attorneys were on notice that the same lawyer representing the defendant was also representing the defendant’s husband. Nonetheless they questioned the defendant’s husband about the defendant’s statements to her attorney, trial strategy, and defenses. (*Id.* at 786–87.) The court reasoned that because the entire prosecutor’s office had access to privileged materials, there was no other way to remedy the violation of the defendant’s Sixth Amendment rights. (*Id.* at 790–91.)

In some instances, federal and state courts have also held that an appropriate remedy for some intrusions into the attorney-client relationship under the Sixth Amendment is dismissal of the case. For example, in *United States v. Levy*, 577 F.2d 200, 210 (3d Cir. 1978), the Third Circuit Court of Appeals held that when the invasion of the attorney-client relationship discloses confidential information that is released into the public domain, such as in a trial, the only appropriate remedy is dismissal of the indictment if the defendant cannot

receive a fair re-trial. In another case, *State v. Lenarz*, 22 A.3d 536, 542 (Conn. 2011), the Connecticut Supreme Court also directed that a charge for which the defendant was convicted be dismissed after a prosecutor reviewed communications between the defendant and his lawyer, which included discussions of trial strategy. The court held that “because the disclosure of such information is *inherently prejudicial*, prejudice should be presumed, regardless of whether the invasion into the attorney-client privilege was intentional. (*Id.* at 549.) The court also held that “[t]he subjective intent of the government and the identity of the party responsible for the disclosure simply have no bearing” on the question of prejudice to the defendant. (*Id.* at 549–50.)

#### **Ethical rules protecting the attorney-client relationship.**

Ethics rules also protect the attorney-client relationship and confidential communications from intrusions by third parties in some instances. In this section, we consider various scenarios in which a lawyer may violate ethics rules when information protected by attorney-client privilege, work product, and confidentiality.

A prosecutor or lawyer working for a prison or jail violates various ethics rules if he or she directs a government agent to obtain information protected by attorney-client privilege, work product, and confidentiality. ABA Model Rule 4.4(a) states: “In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person *or use methods of obtaining evidence that violate the legal rights of such a person*” (emphasis added). Comment 1 to Model Rule 4.4 explains that zealous advocacy on behalf of a client “does not imply that a lawyer may disregard the rights of third persons.” The comment continues, “It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and *unwarranted intrusions into privileged relationships, such as the client-lawyer relationship*” (emphasis added). In addition, Model Rule 8.4(a) makes it professional misconduct for a lawyer to violate an ethics rule through the acts of another. Thus, directing a government agent to obtain information protected by attorney-client privilege, work product, and confidentiality would be a direct violation of Model Rule 4.4(a).

But, what if a prosecutor or a lawyer working for a prison or jail merely accepts information protected by attorney-client privilege, work product, and confidentiality? There is no ethics rule that directly addresses such a situation. If such material is inadvertently sent to a prosecutor or a lawyer working for a prison or jail, Model Rule 4.4(b) requires the prosecutor or lawyer who receives such information to notify the sender. In considering material that is not inadvertently sent, ABA Formal Op. 06-440 (2006), <http://tinyurl.com/hewuant>, concluded that it “is our opinion that if providing the materials is not the result of the sender’s inadvertence, Rule 4.4(b) does not apply . . . . Whether a lawyer may be required to take any action in such an event is a matter of law beyond the scope of Rule 4.4(b).”

Although Model Rule 4.4(b) does not address confidential material a prosecutor or a lawyer for a prison or jail may receive that was not inadvertently sent, a footnote to ABA

Formal Op. 06-440 makes some relevant observations. First, “[i]f the sender of privileged or confidential material has engaged in tortious or criminal conduct, a lawyer who receives and uses the materials may be subject to sanction by a court.” Secret audio recording of attorney-client communications is likely to be illegal under both federal statutes and state laws that permit taping of conversations as long as one party to the conversation consents. Second, the footnote to ABA Formal Op. 06-440 notes that if the lawyer is involved in criminal conduct, Model Rule 8.4(b) may be implicated. Model Rule 8.4(b) states that it is professional misconduct for a lawyer to “commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” If the conduct involves dishonesty, fraud, deceit, or misrepresentation, there could also be a violation of Model Rule 8.4(c). So, a prosecutor or lawyer for a prison or jail who receives information protected by attorney-client privilege, work product, and confidentiality of a defendant should proceed cautiously and, we believe, notify the lawyer for the defense immediately.

The monitoring of defendants and their lawyers described at the outset of this column also raises the question of whether a prosecutor or lawyer is required to direct and warn government agents not to obtain information protected by attorney-client privilege, work product, and confidentiality. Model Rule 5.3 outlines the responsibilities a lawyer has for nonlawyers “employed or retained by or associated with a lawyer.” Model Rule 5.3 requires a lawyer who has managerial or supervisory authority over a nonlawyer to “make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer.” In light of the instances in which government agents have been monitoring communications between defendants and their lawyers, we believe that a prosecutor or lawyer working for a prison or jail should direct government agents not to obtain information protected by attorney-client privilege, work product, and confidentiality of a defendant.

The possible remedies for violating the ethics rules either directly or through the acts of another include an ethics sanction. As discussed previously, a prosecutor who is involved in obtaining evidence that contains confidential information could be found in violation of a state’s version of Model Rule 4.4(a). For example, a prosecuting attorney and a deputy prosecuting attorney were found to have violated Indiana’s Rule 4.4 for obtaining evidence that violated the rights of a defendant. (*In re Winkler*, 834 N.E.2d 85, 88–89 (Ind. 2005).) During a break in a deposition while defense counsel and the defendant were out of the room, the deputy prosecuting attorney tore a page from a defense lawyer’s legal pad on which the defendant had written notes to his attorney. (*Id.* at 88.) The deputy gave the notes to the prosecuting attorney, who concealed them in a stack of files. The prosecutors wanted the notes to use as a handwriting exemplar. When defense counsel and the defendant returned and began looking for the notes, neither prosecutor advised them that they had the notes. When the defendant saw the edge of a yellow piece of paper protruding out of the stack of files, the prosecuting attorney admitted having the notes and

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- Ft. Lauderdale, Florida
- Prescription for Criminal Justice Forensics: June 2, 2017, New York, New York
- Second Global White Collar Crime Institute: June 7-8, 2017, São Paulo, Brazil
- False Claims Act Trial Institute: June 14-16, 2017, Washington, DC
- CJS Annual Meetings at the ABA Annual Meeting: August

- 10-13, 2017, New York, New York
  - Southeastern White Collar Crime Institute: September 7-8, 2017 Braselton, Georgia
  - Sixth London White Collar Crime Institute: October 9-10, 2017, London, United Kingdom
  - Tenth CJS Fall Institute and Meetings: November 2-5, 2017, Washington, DC
- For more information, see [www.americanbar.org/crimjust](http://www.americanbar.org/crimjust). ■

## ETHICS...

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returned them. (*Id.*) The Indiana Supreme Court found that the prosecutors' actions interfered with the defendant's right to communicate freely with counsel and violated Indiana's Rule 4.4, as well as Indiana's version of Rule 8.4(d), engaging in conduct that is prejudicial to the administration of action. For these violations, and for trying to conceal their behavior, the prosecuting attorney received a six-month suspension from the practice of law, and the deputy prosecuting attorney received a two-month suspension.

Another possible remedy for obtaining information protected by attorney-client privilege, work product, and confidentiality is disqualification. Courts have relied on violations of state versions of Model Rule 4.4(a) to disqualify a lawyer. (*See, Maldonado v. New Jersey*, 225 F.R.D. 120 (D.N.J. 2004).) Once a prosecutor has knowledge of confidential communications between a defendant and his or her defense lawyer, disqualification may be a suitable remedy

to ensure that the confidential information will not be used against the defendant in either pretrial negotiations or at trial.

### CONCLUSION

Recent cases involving the monitoring of attorney-client communications or work product raise ethical red flags for lawyers advising prisons and jails, as well as for prosecutors who come into possession of such material. Lawyers advising prisons and jails should ensure that attorney-client communications are protected and that there is no secret recording. Prosecutors coming into possession of such material should not review it and should, at least, alert the defense. Such corrective action is consistent with protecting the defendant's right to counsel guaranteed under the Sixth Amendment and applicable ethics rules. ■

## FEDERAL SENTENCING...

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Defendants on probation or supervised release must now work at least 30 hours a week, give 10 days' notice before moving or changing employment (or if not possible within 72 hours of the change), and allow probation officers, during location visits, to confiscate any items "prohibited by the defendant's terms of release." (2016 AMENDMENTS, *supra*, at 35, 40, 45 (revised USSG §§ 5B1.3(c)(6), (7); 5D1.3(c)(6), (7)).)

Finally, the Commission clarified conditions relating to a probation officer's duty to "notify others of risks the defendant may pose based on his or her personal history or characteristics" (*id.* at 36, 41, 47 (revised USSG §§ 5B1.3(c)(12); 5D1.3(c)(12))), and made clarifications and amendments to the now special condition regarding support of dependents in light of concerns over clarity raised by the Seventh Circuit in *Kappes*, 782 F.3d at 849, and *United States v. Thompson*, 777 F.3d 368, 379–80 (7th Cir. 2015) (2016 AMENDMENTS,

*supra*, at 36–37, 42, 47 (revised USSG §§ 5B1.3(d)(1); 5D1.3(d)(1))).

### CONCLUSION

The Commission is to be applauded for its continued, progressive approach to the sentencing guidelines. The Commission's express encouragement of the Bureau of Prisons to move more often for compassionate release is most welcomed, as are the steps to clarify the standard conditions of probation and supervised release. Most importantly, the trend toward including scienter requirements in the guidelines to more accurately account for the culpability of the defendant as opposed to simply assessing the seriousness of the offense (often at the expense of measures of culpability) signals a more balanced and indeed fair approach toward sentencing. The authors hope this trend continues. ■