CHILD VICTIM, ADULT PLAINTIFF: HOW KANSAS ATTORNEY-CLIENT PRIVILEGE LAW CAN HARM TEENS AND THEIR PARENTS

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I. INTRODUCTION

Suppose a sixteen-year-old Kansas girl named Rachel has become the victim of a sexual assault by a trusted neighbor.1 After conducting a lengthy investigation, the county prosecutor concludes that he does not have sufficient evidence to convict the perpetrator under the “beyond a reasonable doubt” criminal standard. He reluctantly informs Rachel that he will not be filing charges. She and her parents are devastated.

Because of budget constraints, under-staffing, and a re-election campaign, the prosecutor’s investigation took almost a year to complete. Rachel is now just a few months shy of her eighteenth birthday. She and her parents immediately begin the process of retaining an experienced attorney to build her case and file a civil lawsuit, where the burden of proof will be more favorable.

Rachel’s mother almost exclusively handles the communication with the attorney they have retained; her father finds it too upsetting and Rachel would prefer to focus on her senior year of high school. Rachel’s mother, however, understands the importance of seeking justice, even if Rachel is too young to understand it now.

Rachel’s mother works diligently with the attorney, collecting and forwarding evidence and documents, suggesting witnesses, interviewing other neighbors, and so on. By the time the case is ready to be filed, Rachel is eighteen. They file a lawsuit in their county courthouse just prior to the running of the two-year statute of limitations, naming Rachel as the sole plaintiff. Rachel’s mother continues to be the attorney’s primary contact during the discovery process, even after Rachel leaves home for college.

Rachel’s attorney withholds from discovery most of the correspondence between himself and Rachel’s mother, asserting attorney-client privilege. Defense counsel moves the court to compel the disclosure of those documents, claiming that Rachel’s mother is not a client and her communications with

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1. This scenario, although not uncommon, is purely hypothetical.
Rachel’s attorney should not be protected. Alternatively, they argue that her presence as a third party destroys the privilege. At minimum, they argue, those documents originating from Rachel’s mother after Rachel’s eighteenth birthday should be disclosed. In Kansas, they are probably right.

This article will argue that when the events giving rise to a civil action occur before the plaintiff reaches the age of majority, the plaintiff’s parents or guardian should be able to act in an agency role on behalf of the plaintiff such that the attorney-client privilege shields their communications with the attorney, even after the plaintiff has attained majority age. Part II provides an overview of the common law underpinnings of the attorney-client privilege, as well as its precise operation under Kansas statutory law. Part II also explores the intersection between principles of agency and the attorney-client privilege, concluding with a summary of the Kansas procedure governing suits initiated by minors. Part III analyzes the shortcomings of Kansas attorney-client privilege law, comparing it with major legal treatises and the laws of other states. Finally, it advocates either a statutory adjustment or a judicial holding declaring that it is reasonably necessary for parents to continue to represent their minor children who have suffered a tortious injury even if the child reaches the age of majority before the legal process has run its course.

II. BACKGROUND

A. The Attorney-Client Privilege

“The attorney-client privilege is perhaps the most sacred of all legally recognized privileges, and its preservation is essential to the just and orderly operation of the legal system.”2 “Among communications privileges, the attorney-client privilege is the only one recognized by every state . . . .”3 Most confidential communications between an attorney and client made for the purpose of obtaining legal advice are protected from disclosure by the privilege.4 “The client in an attorney-client relationship may refuse to disclose the confidential information at trial, and may prevent the attorney or, in most cases, any other person from disclosing such communications at trial.”5

Claims of privilege are often vigorously contested because they seem to run counter to the typical rules favoring admission of all relevant evidence. Privilege rules “exclude relevant evidence in order to promote extrinsic policies unrelated to accurate factfinding. Their primary aim is to protect certain relationships and interests . . . that are deemed of sufficient importance to justify the costs imposed on the judicial process through the loss of useful evidence.”6

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2. 81 AM. JUR. 2D Witnesses § 327 (2004).
3. Id. § 329.
6. ALLEN ET AL., supra note 4, at 787.
Dean Wigmore articulated the traditional justification for the attorney-client privilege, as well as other privileges based on confidential communications. According to Wigmore, the conditions for the establishment of a valid privilege are:

1. the communications must originate in a confidence that they will not be disclosed;
2. the element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
3. the relation must be one that in the opinion of the community ought to be sedulously fostered; and
4. the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation.

In recent years, Wigmore’s confidence-based justifications for the privilege have been further narrowed into two categories: individual privacy interests and the integrity of the judicial process.

An advocate of the privacy rationale would argue, for example, that the existence of a marital communications privilege may have little if any impact on the extent to which spouses engage in confidential communications; nonetheless, the privilege is desirable because it provides some recognition of and protection for the privacy of intimate aspects of the marital relationship.

Similarly, there is a strong societal interest in protecting the privacy of communications between parents and their children.

Others take the position that protection of attorney-client communications benefits the judicial process itself despite blocking relevant evidence from trial. An advocate of this rationale would argue that the promotion of “full and frank communication between attorneys and their clients” by protecting those communications from disclosure allows attorneys to give fully informed legal advice, thereby encouraging “broader public interests in the observance of the law.”

“Protecting confidential communications between an attorney and a client not only facilitates the full development of facts essential to proper representation of a client but also encourages the general public to seek early legal assistance.”

Regardless of the justifications advanced for its application, it is clear that the attorney-client privilege is a fundamental bulwark of the American legal system. Of course, merely the fact that it is well-established does not mean that it is absolute. All privileges are subject to waiver or certain other exceptions. Still, “[c]xceptions to the attorney-client privilege should be made only when the reason for disclosure outweighs the potential chilling of

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7. Id. at 787–88.
8. Id. at 788 (emphasis removed) (citing 8 JOHN HENRY WIGMORE, EVIDENCE § 2285, at 527 (McNaughton ed., 1961)).
9. Id.
11. Id.
essential communications.”

The client may waive the privilege by certain actions or inactions. The client may waive by expressing a desire to do so or, conversely, by failing to invoke its protection or by failing to object to inadvertent disclosure.13 Waiver may occur by “asserting a claim based on privileged information[,]” sometimes called “waiver by claim assertion.”14 Finally, and most relevant here, waiver may occur by the client’s voluntary disclosure to a third party.15 Generally speaking, if the client voluntarily discloses confidential information to unnecessary third parties, the client is deemed to have manifested intent to waive confidentiality.16 In this situation, what would otherwise be privileged information becomes accessible to an adverse party seeking discovery of matters relevant to the litigation.

Although the privilege is a long-standing rule at common law, it is critical to note that statute dictates its precise application in each jurisdiction. “In state courts and in federal cases applying state law, the law of privilege is a varied collection of rules, created mostly by the state legislatures.”17 The Kansas statute governing the rules and exceptions to the attorney-client privilege generally provides that “communications found by the judge to have been between lawyer and his or her client in the course of that relationship and [made] in professional confidence are privileged . . . .”18 In Kansas, “[t]he party claiming attorney-client privilege has the burden of establishing that privilege and must make a ‘clear showing’ [that] it applies.”19 The party must provide a detailed description of each item sought to be protected.20 Because of the privilege’s effect of keeping otherwise relevant information from trial, it is narrowly construed and “extends no further than necessary to accomplish its purpose.”21 “While the privilege protects disclosure of substantive communications between client and attorney, ‘it does not protect disclosure of the underlying facts by those who communicated with the attorney.’”22 The term “client” is statutorily defined as

a person . . . [who] consults a lawyer or lawyer’s representative

12. Id. § 329.
13. ALLEN ET AL., supra note 4, at 795.
14. Id.
15. Id.
17. ALLEN ET AL., supra note 4, at 788.
18. KAN. STAT. ANN. § 60-426(a) (2005). See also SAMPSON & HAYS, supra note 5, § 16.2, at 137.
for the purpose of retaining the lawyer or securing legal service or advice from the lawyer in his or her professional capacity; and includes an incapacitated person who, or whose guardian on behalf of the incapacitated person so consults the lawyer or the lawyer’s representative [o]n behalf of the incapacitated person . . . .23

The statute also provides that “[t]he privilege may be claimed by the client in person or by his or her lawyer, or if an incapacitated person, by either his or her guardian or conservator . . . .”24

**B. The Attorney-Client Privilege and Principles of Agency**

“An agency relationship does not alone equate to waiver” of privilege.25 One may infer from the Kansas statute’s definition of “client” that communications with a lawyer’s representative or agent fall within the privilege. Such a reading is consistent with typical modern privilege jurisprudence, which generally holds that the attorney-client privilege not only shields communications between lawyer and client, but also protects “communications between the client and a representative of the attorney, which is defined as a person who is ‘employed to assist the lawyer in the rendition of professional services.’”26 One influential opinion held that “the attorney-client privilege extends to nonlawyer employees of a law firm so long as the communications relate to legal advice.”27 This broadening of the privilege to include a lawyer’s employees serves the client’s privacy interests and provides valuable assistance to a lawyer seeking to provide effective, informed representation. Among the third parties deemed to be agents of an attorney for purposes of the attorney-client privilege are translators,28 accountants,29 and even public relations professionals.30 The Kansas attorney-client privilege statute seems to accept this expanded meaning of the term “attorney.”

However, Kansas courts have not been so willing to expand the meaning of the term “client” to include agents or representatives of the client. The Kansas statute makes allowance for “authorized representatives” of a “corporation or other association.”31 It also allows for a guardian to claim the privilege on behalf of an “incapacitated person.”32 As will be demonstrated later in this article, the term “incapacitated person” is too limited to properly

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24. Id. § 60-426(a) (emphasis added).
25. 81 AM. JUR. 2D Witnesses § 335 (2004).
26. ALLEN ET AL., supra note 4, at 799 (quoting FED. R. EVID. 503(a)(3) (proposed)).
27. Id. (quoting United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961)).
28. Id.
29. Id. (citing Kovel, 296 F.2d at 922).
30. Id. at 799–800 (citing In re Grand Jury Subpoenas, 265 F. Supp. 2d 321, 330–31 (S.D.N.Y. 2003)).
32. Id.
serve the policy justifications behind the attorney-client privilege.

C. Kansas Procedure Governing Suits Brought by Minors

Kansas law provides that a guardian “may sue or defend on behalf of [a] minor or incapacitated person.” It further provides that in the event that the minor’s natural guardians are unable to represent the minor, or whose interests are adverse to the minor’s, “[t]he court shall appoint a guardian ad litem. . . .” “In other words, ‘[i]n Kansas, a person who is under 18, a minor, may not bring a lawsuit in his or her own name. Instead, if a minor has a cause of action, it must be pursued by a guardian, a conservator, a guardian ad litem, or a “next friend” who is an adult.’” The rationale behind the law is simple: “‘[t]he guardian is the only person with the capacity to make or communicate responsible decisions on behalf of the incompetent or to maintain a suit on behalf of the ward.’”

Despite the fact that it is impossible for a minor to bring a suit in Kansas without an intermediary, the U.S. District Court for the District of Kansas recently noted in C.T. v. Liberal School District that it has failed to locate “any authority in the Tenth Circuit, District of Kansas, or the State of Kansas which has held that a parent can act as an agent for [his or her] child so as to support attorney-client privilege between the parent and the attorney.” To resolve this disconnect between law and practice, the court looked outside the district to Leone v. Fisher, a recent case from the District of Connecticut, which held that the “communications between the parents of a minor child and the child’s attorney were privileged.” The Leone court relied on Grubbs v. K Mart Corp., a Michigan state case which held that “‘[i]t is apparent that [the plaintiff] who was approximately nine years old at the time, was not able to bring suit in her own name. We believe that [the plaintiff’s] parents were, of necessity, acting as her agents in seeking legal advice.’” The C.T. court followed suit, but despite the reasonableness of this approach, expressly limited its finding to the case at hand.

33. Id. § 60-217(c).
34. Id.
37. Id.
41. Id. at *5.
III. KANSAS COURTS SHOULD RECOGNIZE REASONABLY NECESSARY AGENCY RELATIONSHIPS FOR PURPOSES OF THE ATTORNEY-CLIENT PRIVILEGE

The C.T. court expressed some judicial willingness, in certain cases, to recognize an agency relationship between parents and children for purposes of the attorney-client privilege. However, the underlying issue that the court was grappling with was whether the parent of a party may continue in that agency role after the party has attained the age of majority. Answering in the negative, the court hung its hat on the necessity of the agency relationship, again citing Leone for the proposition that “‘in those instances where courts have addressed whether attorney-client privilege protects communications between an individual client’s representative and the client’s attorney, they appear to have required a showing that the representative’s communication was either necessary or could not have been made by the client alone.’”42 The C.T. court held that, although it may have been more convenient for the plaintiff’s father to continue acting as his son’s agent, it was no longer absolutely necessary after the plaintiff turned eighteen.43 The court expressed some anxiety that finding otherwise might open the door for untold numbers of parents to involve themselves in their non-minor children’s legal matters, while expecting the shield of privilege over their communications with their child’s attorney.44 Whatever the wisdom of such a situation, the court fell back on the traditional practice of construing the privilege narrowly.45

The court’s unwillingness to extend a parent’s agency status beyond the child’s eighteenth birthday is grounded at least in part on the language of the Kansas attorney-client privilege statute. As discussed previously, the statute’s language contemplates only two instances where an agent of the client is appropriate in the context of the attorney-client relationship: (1) authorized representatives of corporations or associations and (2) guardians of incapacitated persons.46 The statute makes no mention whatsoever of minors. The C.T. court noted that “the Kansas legislature distinguished between minors and incapacitated persons by identifying them separately in K.S.A. § 60-217(c), the statute governing their respective capacities to sue.”47 Additionally, it noted that the definition of “legally incapacitated person,” as provided by Black’s Law Dictionary, specifically excludes minors.48 From these facts, the C.T. court inferred “that the Kansas legislature specifically omitted ‘minors’ from the language of K.S.A. § 60–426 and did not intend the phrase ‘incapacitated person’ to be inclusive of a minor for purposes of the

42. Id. (quoting Leone, 2006 U.S. Dist. LEXIS 75571, at *12).
43. Id. at *6.
44. Id.
45. Id.
46. See supra notes 31–32 and accompanying text.
47. C.T., 2008 WL217203, at *3.
48. Id. at *3 n.29.
attorney-client privilege.”

Requiring that a client’s agent be absolutely necessary to the successful attorney-client relationship runs counter to the view of major legal treatises. For example, *Wigmore on Evidence* states that “[a] communication . . . by any form of agency employed or set in motion by the client is within the privilege. This of course includes . . . communications originating with the client’s agent and made to the attorney.”

Likewise, the *Restatement (Third) of the Law Governing Lawyers* provides that “[p]rivileged persons within the meaning of [the attorney-client privilege] are the client . . ., the client’s lawyer, [and] agents of either who facilitate communications between them . . . .” That section goes on to comment that “[a] person is a confidential agent for communication if the person’s participation is reasonably necessary to facilitate the client’s communication with a lawyer . . . and if the client reasonably believes that the person will hold the communication in confidence.” *Corpus Juris Secundum* echoes Wigmore by adding that “[c]ommunications between a client and his or her attorney by any form of agency employed or set in motion by the client is within the attorney-client privilege.”

A handful of courts have adopted the “reasonably necessary” standard for making determinations regarding the applicability of the attorney-client privilege to agents of the client. For example, in *State v. Fingers*, the Missouri Court of Appeals held that “[t]here is no destruction of the privilege by reason of the presence of a third person if the circumstances surrounding or necessitating the presence may be such that the communication still retains its confidential character and the attending privilege.” Furthermore, “[i]f the third person present is the confidential agent of either the attorney or the client the privilege is not destroyed.” The court went on to explain that “the presence of third persons, be they relatives or friends of the client, who are not essential to the transmission of information or whose presence is not reasonably necessary for the protection of the client’s interests, will belie the necessary element of confidentiality and vitiate the attorney-client privilege.”

If the precedent set in *C.T. v. Liberal School District* is applied to the hypothetical scenario set out in the introduction, any communication between Rachel’s attorney and Rachel’s mother occurring after Rachel’s...
eighteenth birthday will not be shielded by the attorney-client privilege. The court indicated that because state law would preclude Rachel from filing a lawsuit on her own behalf as a minor, it may be willing to accept that Rachel’s mother acted as a necessary intermediary up until her eighteenth birthday. But as soon as the impediment of minority age is removed, Rachel is on her own, and her mother becomes an unnecessary third party whose knowledge of confidential communications would destroy the privilege.

This result is unjust, and does not comport with Wigmore’s venerated justifications for the attorney-client privilege. The relationship between parent and child is undoubtedly “one that in the opinion of the community ought to be sedulously fostered.”58 Furthermore, the injury to the parent-child relationship created by disclosing their confidential communications is “greater than the benefit thereby gained for the correct disposal of the litigation.”59

It is important to bear in mind that, in this scenario, the injury to the plaintiff occurred when she was a child. Due to the complexities and oddities of our legal system, it is not at all uncommon for legal matters to take years to resolve. When an unjust injury befalls a child, even a late teen, the parent is likely to be heavily involved in crucial activities such as interviewing and retaining counsel, assessing the claim’s likelihood of success in court, collecting evidence, and attempting out-of-court resolution of the matter. It is far too difficult and unwieldy to expect a teenager in this situation to fully take over the management of her case the moment she turns eighteen. It is likewise impossible to imagine the parent who has been managing the case to extricate himself or herself from the matter, so as to protect the attorney-client privilege from being destroyed. A change in Kansas statute or judicial interpretation is warranted to remedy this problem.

The C.T. court’s concern—that the privilege may be stretched too far by allowing parents to act as agents for their children for purposes of the attorney-client privilege—may be allayed by limiting the application to situations in which the events giving rise to the litigation occurred when the plaintiff was a minor. Kansas’s two-year statute of limitations for tort actions60 would provide a natural back-end such that this policy would not be abused. The Kansas Legislature or Kansas courts should recognize that, when a minor child suffers a tort injury, it is reasonably necessary for her parents to continue to advocate for her as long as the legal process requires, even if that time extends beyond the child’s eighteenth birthday.

The Florida statute governing the attorney-client privilege61 is a good model. It provides that a client has a privilege to refuse to disclose the contents of confidential communications, and defines “confidential communications” as those “not intended to be disclosed to third persons other

59. Id.
60. KAN. STAT. ANN. § 60-513(a) (2005).
61. FLA. STAT. § 90.502 (2000).
than: (1) [t] hose to whom disclosure is in furtherance of the rendition of legal services to the client [, and] (2) [t] hose reasonably necessary for the transmission of the communication.”\textsuperscript{62} This “reasonably necessary” standard has led at least one Florida court to find that parents may be reasonably necessary intermediaries for their children such that “[i]t is possible [that] parents will be able to assert the privilege on the theory that they are acting as agents for their [child].”\textsuperscript{63}

IV. CONCLUSION

The Kansas statute of limitations for torts makes it possible that a sixteen or seventeen-year-old tort victim, such as Rachel, might not file an action until after her eighteenth birthday. After relying heavily on her parents to arrange legal representation and prepare her case, such a teen is faced with the prospect of going to trial without the involvement of her parents. In fact, any parental communication with the teen’s attorney, or even the presence of a parent during a conversation between the teen and the attorney, would destroy the privilege and make the otherwise confidential information available to the opposing counsel. This scenario is unjust but easily remedied by either a minor adjustment of statutory language or a broader judicial interpretation of K.S.A. 60-426. Privilege law was developed, at least in part, to protect the integrity of society’s most sacred relationships. In this instance, Kansas is not fulfilling that ideal.

\textsuperscript{62} Id. § 90.502(1)(c).