



## Applying Attorney-Client Privilege in Human Trafficking Cases by E. Kelly Conway

### Summary

This paper explains why attorney-client privilege should apply broadly in cases of human trafficking to include individuals working collaboratively with the attorney. Courts should recognize these individuals as agents of the attorney, since they provide a vital array of services that assist the attorney in providing legal services. Section 1 provides a background on privilege, how it is founded in the law, and the roles of lawyers and social workers. Section 2 discusses current case law regarding attorney-client privilege, how the law should apply to cases of human trafficking, why the law should be interpreted to include individuals such as social service providers as agents of the attorney, and what communications would be included. Section 3 explains the roles of attorneys and social workers and the importance of collaboration.

### Thesis

In cases of human trafficking, attorney-client privilege should include the attorney, survivor, and individuals working with the attorney to provide services to the survivor, not solely the attorney and client.<sup>1</sup> Survivors of human trafficking have many needs, including comprehensive medical and legal services. These individuals have a host of issues that require a

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<sup>1</sup> I will use the word “survivor” when referring to victims of human trafficking, as the word connotes more positivity and capabilities of the individual who truly survived the trauma of being trafficked. *Citing Heather Moore, [How Strong Collaboration Between Legal and Social Service Professionals Will Improve Outcomes for Trafficking Survivors and the Anti-Trafficking Movement](https://www.stu.edu/Portals/Law/docs/human-rights/ihr/r/volumes/1/157-184), The Intercultural Human Rights Law Review (June 5, 2006), available at <https://www.stu.edu/Portals/Law/docs/human-rights/ihr/r/volumes/1/157-184> [HeatherMooreHowStrongCollaborationbetweenLegalandSocialService-ProfessionalsWillImproveOutcomesforTraffickingSurvivorsandtheAnti-TraffickingMovement.pdf](https://www.stu.edu/Portals/Law/docs/human-rights/ihr/r/volumes/1/157-184).*

team of individuals to work collaboratively on a single case. Teams often include attorneys, social workers, doctors, and others, depending on the circumstances. All of these individuals play a vital role in holistic treatment for a survivor of human trafficking. To best help the survivor, it would be beneficial for the individuals involved in the case to participate in frank conversations in how to best assist the survivor.

In having these collaborative discussions, however, legal issues in court proceedings may result, such as whether the communications should remain privileged. Since various individuals like attorneys, social workers, doctors, and caseworkers can become involved in a case, opposing counsel may request the individual to testify to the information obtained in these communications. The collaborative discussions are best for the survivor, but not when the information will be used against her. Therefore, the goal is to keep the information privileged, or in other words, confidential.

Lawyers are required to keep client communications confidential. This paper addresses the unknown answers to questions involving privilege of communications when collaborative efforts are taken on behalf of a survivor. What happens when individuals working collaboratively with the attorney, join the conversation? Are these individuals considered agents of the attorney? What types of communications are covered? Does the substance of the communication matter? This paper will delve into these grey areas of undeveloped law and argue for an expansive understanding of attorney-client privilege relating to human trafficking cases so the survivor can benefit from a team of professionals providing services.

## **I. The Basics**

In this paper, I argue attorney-client privilege should apply broadly to communications involving a survivor, her attorney, and individuals assisting the survivor (e.g. social service providers helping the survivor). In applying attorney-client privilege to cases of human trafficking, it is important to understand: (a) the background of the privilege; (b) the special need for the privilege in these cases; (c) how the privilege is invoked; and (d) what constitutes a waiver of the privilege. This section examines each of these preliminary issues in turn.

### **A. The Background of Attorney-Client Privilege**

Attorney-client privilege is the oldest common law privilege and it protects confidential communications between an attorney and client by allowing these communications to remain confidential, or in other words, the opposing party cannot use the communications against the client.<sup>2</sup> The privilege fosters a relationship between the attorney and client by encouraging full and frank communications.<sup>3</sup> These frank conversations are necessary in providing zealous representation to a client, which serves the “broader public interests of observance of law and administration of justice.”<sup>4</sup> By being fully informed, the attorney can provide effective assistance of counsel to the survivor while ensuring communications remain protected under attorney-client privilege.<sup>5</sup>

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<sup>2</sup> Chandran, Nisha (May 2015), The Privilege of PR: Extending the Attorney Client Privilege to Crisis Communications Consultants, The Illinois Law Review, 1289 available at <https://illinoislawreview.org/wp-content/ilr-content/articles/2015/3/Chandran.pdf>.

<sup>3</sup> Dages v. Carbon County, 44 A.3d 89 (Pa. 2012).

<sup>4</sup> Id.

<sup>5</sup> Chandran, supra at 1289.

Attorney-client privilege benefits the client, who is the holder of the privilege.<sup>6</sup> The client is the holder of the privilege and has the control to waive the privilege. Privilege not only protects communications from client to lawyer, but also the communications made from lawyer to client, based on “underlying confidential client-to-lawyer communication.”<sup>7</sup> Through this privilege, a client and attorney would not be compelled to testify to these confidential communications in court.<sup>8</sup> Under the Federal Rules of Evidence and as promulgated by each state’s Rules of Evidence, privileged communications are protected from disclosure.

The confidentiality of communications is governed by statute in Pennsylvania. These statutes explain, “counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client.”<sup>9</sup> Thus, attorney-client privilege is established in law and legally binds attorneys to keep information privileged.

Although lawyers are held legally to attorney-client privilege within these statutes, the legal profession as a whole is also governed by Rules of Professional Conduct. Each state promulgates its own professional rules, which includes attorney-client privilege. In Pennsylvania, the Supreme Court of Pennsylvania enforces the Rules of Professional Conduct.<sup>10</sup> Within the comments to the rule on confidential information, the comment discusses how attorney-client confidentiality “is given effect” through the attorney-client privilege and the work product doctrine enforced by the Rules of Evidence, and the rule of confidentiality in

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<sup>6</sup> 8 Wigmore, Evidence § 232 (McNaughten rev. 1961).

<sup>7</sup> U.S. v. Singhal, 800 F.Supp.2d 1, 8 (2011).

<sup>8</sup> 42 Pa.C.S.A. § 5916.

<sup>9</sup> Id.

<sup>10</sup> Disciplinary Board of the Supreme Court of Pennsylvania, available at <http://www.padisciplinaryboard.org/attorneys/rules/>.

professional ethics enforced by professional responsibility.<sup>11</sup> Both attorney-client and work product privilege apply in proceedings when an attorney is called to testify or to produce evidence about a client.<sup>12</sup>

## **B. The Special Need for Attorney-Client Privilege in Human Trafficking Cases**

Although human trafficking is not a new crime, with revamped laws and stronger efforts to hold traffickers responsible, cases of human trafficking are prosecuted today more than ever. Robust case law on these prosecutions involving attorney-client privilege, however, does not exist, as courts have yet to address this issue in the context of human trafficking. One way a court may be presented with the issue of attorney-client privilege in human trafficking is if opposing counsel attempts to compel an individual working on behalf of a survivor to disclose communications. For example, if a social worker and attorney discuss the survivor's culpability in a robbery she witnessed her trafficker commit, opposing counsel may argue no attorney-client privilege exists because the client was not involved in the conversation. Opposing counsel wants to know what the communications consisted of in regards to the robbery example. Opposing counsel may also attempt to compel information the survivor communicated to the attorney or social worker regarding her love for her trafficker and denial of being a trafficking victim. These arguments should be unsuccessful, because the social worker is considered an agent of the attorney, helping the attorney navigate and best represent the survivor.

A special need exists for the privilege in these cases, as human trafficking cases are unique and complicated, frequently infused with great trauma. Attorneys play an important role

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<sup>11</sup> The Pennsylvania Code, § 81.4 Rules of Professional Conduct, available at <http://www.pacode.com/secure/data/204/chapter81/s1.6.html>.

<sup>12</sup> The work product privilege works similarly to the attorney-client privilege but focuses on documents and materials produced. The work product privilege protects documents from discovery that were prepared in course of representing a client, especially in preparing for litigation, citing [https://www.law.cornell.edu/wex/attorney\\_work\\_product\\_privilege](https://www.law.cornell.edu/wex/attorney_work_product_privilege).

in telling a survivor's story, since the attorney is the advocate for survivors in a courtroom setting. Attorneys need the ability to have open and frank conversations with the survivor to identify issues that may come up in litigation, such as potential crimes the survivor is responsible for such as theft or drug crimes or the survivor's current status of relationship with the trafficker. Having open discussions with the survivor will lead to efficient legal representation and increased chances in success for the survivor. In order for the attorney to understand the client's story, the attorney may need the help of various individuals such as therapists, social service providers, and doctors.

By extension of the attorney-client privilege to agents assisting the attorney in representing the client, crucial communications with these agents will also be protected, and this is essential. It is with these frank and honest communications the survivor receives the best advocating, leading to her best chance at success. Section three of this paper will elaborate on how the survivor benefits from this work.

### **C. Invoking and Waiving Privilege**

Communications remain protected by the attorney-client privilege laws when four elements are present. To successfully invoke the privilege,

- “(1) the asserted holder of the privilege is or sought to become a client;
- (2) the person to whom the communication was made is a member of the bar of a court or a subordinate;
- (3) the communication relates to a fact of which the attorney was informed by the client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services, or assistance in a legal matter, and not for the purpose of committing a crime or tort; and
- (4) the privilege has been claimed and is not waived by the client.”<sup>13</sup>

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<sup>13</sup> 27 Standard Pennsylvania Practice 2d § 136:45, Scope of Privilege, Witnesses and Depositions in Criminal Proceedings, *as cited in In re Chevron Corp.*, 650 F.3d 276 (3d Cir. 2011).

Claiming privilege is not a formal process and communications are often deemed privileged by implication. To invoke the privilege, the client must communicate with a privileged person and with an expectation of confidentiality. Courts will examine the client's intent to keep information confidential if there is any question as to whether the communication should be deemed privileged.<sup>14</sup> While no precise formula exists to determine if privilege was waived, if the holder of the privilege deliberately and knowingly fails to claim the privilege, then privilege is waived.<sup>15</sup>

Although the client is the holder of the privilege, other individuals may waive it. If, for example, the client allows her attorney to control what information is shared with opposing counsel, if disclosed, privilege to that information is waived.<sup>16</sup> As a general rule, once a party shares "otherwise privileged communications with an outsider," the privilege is waived because the communication is disabled from the intended confidentiality.<sup>17</sup> Once a disclosure is made tending to show the information is not confidential, privilege is waived. This proves privilege is precious, and all parties involved in confidential communications must be aware of their responsibility to protect the confidentiality of communications.

#### **D. What Constitutes a Waiver**

At its core and on its face, attorney-client privilege protects the very individuals mentioned in privilege – the attorney and the client. Additionally, courts acknowledge and draw inclusion for agents; therefore, privilege may include a third party. As defined, "an agent is one

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<sup>14</sup> Pratt v. State, 387 A.2d 779, 783 (Md. 1978).

<sup>15</sup> Maleski v. Corporate Life Ins. Co., 646 A.2d 1, 4, 165 (Pa. 1994) *citing* Steen v. First National Bank, 298 F. 36 (8th Cir.1924).

<sup>16</sup> Audrey Rogers (April 1995), New Insights on Waiver and the Inadvertent Disclosure of Privileged Materials: Attorney Responsibility as the Governing Precept, The Florida Law Review, available at <http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1317&context=lawfaculty>.

<sup>17</sup> Schaeffler v. United States, 806 F.3d 34, 40 (2d Cir. 2015).

who, acting under authority from another, transacts business for him, and a true agency requires that the agent's function be the carrying out of the principal's affairs."<sup>18</sup> For example, individuals working in an attorney's office, like paralegals, receptionists, and investigators, would be included in the privilege.<sup>19</sup> But how far does agency extend? In considering and balancing the public good of allowing communications to remain privileged with the right to confront witnesses, courts have adopted case-by-case analyses to determine which communications involving purported "agents" should be deemed to fall within the attorney-client privilege. In some cases, courts extend the privilege while other cases take a narrow approach.

### **Broad Interpretation**

Many cases extend attorney-client privilege to include various third-party participants, in other words, agents. Courts have extended the attorney-client privilege to people like accountants<sup>20</sup>, PR consultants<sup>21</sup>, psychotherapists<sup>22</sup>, bankers<sup>23</sup>, and parents.<sup>24</sup> To determine whether the privilege should be extended to a third party (that is, whether the third party should be recognized as an agent), the court decides whether the third party's involvement in the communication facilitated "the attorney's ability to provide legal advice."<sup>25</sup> In cases where courts have recognized third party individuals as agents, courts have analyzed the relationship

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<sup>18</sup> Lang v. Consumers Ins. Serv., Inc., 583 N.E.2d 1147 (Ill. 1991).

<sup>19</sup> Dabney v. Investment Corp. of America, 82 F.R.D. 464, 465 (Pa. 1979).

<sup>20</sup> United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961)).

<sup>21</sup> In re Grand Jury Subpoenas Dated March 24, 2003, 265 F. Supp. 2d 321, 326 (N.Y. 2003).

<sup>22</sup> Elijah W. v. Superior Court, 78 Cal.Rptr.2d 311 (Cal. 1998).

<sup>23</sup> Michelle DeStefeno (2014), Claim Funders and Commercial Claim Holders: A Common Interest or a Common Problem?, DePaul Law Review, available at <http://via.library.depaul.edu/cgi/viewcontent.cgi?-article=1011-&context=law-review>.

<sup>24</sup> Dempsey v. Bucknell University, 296 F.R.D. 323, 329 (Pa. 2013)

<sup>25</sup> Chandran, supra at 1292.



between the attorney and third party to determine whether the agent was involved in “client communications” to provide legal services.<sup>26</sup>

Identifying third parties as agents was first born in U.S. v. Kovel, when the court recognized a lawyer sometimes “needs outside help.”<sup>27</sup> This is occasionally referred to as the Kovel agency exception.<sup>28</sup> In Kovel, the court deemed an accountant as an agent after focusing on the relationship between the attorney and third-party and whether the attorney needed the assistance from the agent to provide legal advice.<sup>29</sup> Kovel further noted how “the complexities of modern existence prevent attorneys from effectively handling clients’ affairs without the help of others.”

Building upon Kovel, in In re Grand Jury Subpoenas, the court deemed public relations consultants as agents and recognized how an attorney’s duties extend beyond the courtroom and how outside factors may influence the implementation of legal advice.<sup>30</sup> If the court did not recognize the consultants as agents, the “most fundamental client functions—such as (a) advising the client of the legal risks of speaking publicly and of the likely legal impact of possible alternative expressions, (b) seeking to avoid or narrow charges brought against the client, and (c) zealously seeking acquittal or vindication—would be undermined,” because the attorney would not be able “to engage in frank discussions of facts and strategies” with the third party.<sup>31</sup>

These cases show how courts recognize the interconnectedness of services to a client, as an attorney specializes in law and will need assistance from other professionals when

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<sup>26</sup> Gillard v. AIG Ins. Co., 15 A.3d 44 (Pa. 2011).

<sup>27</sup> DeStefano, supra at 335.

<sup>28</sup> Id.

<sup>29</sup> In U.S. v. Kovel, the court deemed an accountant an agent of the attorney because the attorney needed help from a third-party to “provide more effective legal advice and services.” DeStefano quoting United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961).

<sup>30</sup> DeStefano supra at 336.

<sup>31</sup> In re Grand Jury Subpoenas Dated March 24, 2003, 265 F. Supp. 2d 321, 326 (N.Y. 2003).

representing clients. These conversations cannot waive privilege, since it would undermine the attorney's role. By consulting with a third-party, the lawyer will obtain a better understanding of issues and then advise the client efficiently.

### **Narrow Interpretation**

Although many courts interpret attorney-client privilege broadly, some courts limit extending the privilege. Courts are challenged with tension between the Sixth Amendment right to confront witnesses and public good of holding the attorney-client privilege.<sup>32</sup> In Pennsylvania, for example, the court in Van Hine v. Department of State Commonwealth stated that Pennsylvania “does not favor evidentiary privileges.”<sup>33</sup> The privilege should be limited to the “extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.”<sup>34</sup> Van Hine illustrates the presumption against privilege and importance of the Sixth Amendment right to confront witnesses.

Yet, it is important to note that the Van Hine court was not addressing privilege in a case dealing with sex crimes or deep trauma. Rather, Van Hine merely involved a whistleblower plaintiff in a civil suit. The plaintiff sought investigative reports from an agency used by the government. The court did not find a public interest in keeping the information privileged and did not identify how the disclosure would negatively affect the defendant.<sup>35</sup> This case illustrates why the facts, circumstances, and role of key individuals are important in applying attorney-

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<sup>32</sup> The Sixth Amendment confrontation right is only relevant in criminal cases.

<sup>33</sup> Van Hine v. Department of State of Com., 856 A.2d 204 (Pa. 2004).

<sup>34</sup> Id.

<sup>35</sup> Id.

client privilege. In Van Hine, no physical harm was committed, the court was not dealing with an individual's emotional well-being or a defendant's violent crime, and the analysis did not apply to anything close to a case involving sex crimes. Sex crimes leave a victim deeply harmed, impacted and traumatized, which are not quickly resolved. These are not crimes of financial loss easily fixed with a check. Sex crimes are unique and deserve a broader application of attorney-client privilege over non-violent cases. A victim of such crime should have the privilege in engaging in frank discussions with people such as therapists, doctors, and caseworkers working to overcome the trauma without the fear of the conversations being discussed in court and therefore being exploited once again.

## **II. Attorney-client Privilege: Privileged Individuals and Information**

Attorney-client privilege should be extended broadly to include attorneys, caseworkers, social workers, and others working with the attorney to advise a survivor. As discussed above in the section dedicated to the special need for attorney-client privilege in human trafficking cases, however, the question of whether attorney-client privilege exists between attorneys and others working on a survivors case has not been analyzed. Although this question has not been addressed in a human trafficking context, the extension of attorney-client privilege to include third parties has been applied in other types of cases. The very nature of human trafficking cases is incredibly complex and concerns a survivor's well-being after severe trauma occurred. Therefore, privilege should also be extended here. In this next part, I will provide examples of potential issues of attorney-client privilege relating to these collaborative efforts and the existing laws and undetermined areas.

### **A. Hypothetical #1**

Police officers recover a survivor from a sting operation. Shortly after the recovery, the survivor becomes a client of a social services agency employed to assist in providing life necessities. After all, she has no clothes, housing, or income. The survivor has an open misdemeanor case involving a retail theft, so a social worker at the agency refers the survivor to an attorney offering pro bono services. The social worker provides the attorney with a brief overview of the case and the survivor's background. The survivor meets with the attorney and becomes a client. The attorney believes the retail theft case will be dismissed and relays this information to the social worker. In the same conversation, the social worker provides information learned from the survivor regarding her well-being, including the fact that the survivor is back with her trafficker, how she is resistant to sharing information and becomes nervous discussing the case, and she did admit to stealing the merchandise at issue in the retail theft criminal case. Additionally, the social worker informs the attorney that the survivor's trafficker is being charged and prosecutors want her to testify against him at his trial.

Should attorney-client privilege be extended to the information shared by the social worker to the attorney? In this hypothetical, privilege may be at issue if the prosecutor calls a social worker to testify to the survivor's confession to the retail theft. I argue attorney-client privileged should be extended to the communications between the attorney, social worker and survivor, because both the attorney and social worker efforts go toward providing effective legal counsel for the survivor. Following is an analysis of why individuals involved in assisting a survivor, like a social worker, should be considered agents of the attorney, which leads to information remaining privileged.

### **1. Why Social Workers Should Be Included as Agents under the Attorney-Client Privilege in Specified Circumstances**

In analyzing attorney-client privilege, keeping communications *confidential* is a vital part of invoking privilege.<sup>36</sup> In invoking attorney-client privilege between an attorney and client, several factors must be analyzed. Applying the factors to Hypothetical One, the survivor is a client of the attorney, the attorney received the information, the communication relates to facts of the survivor and was provided confidentially, and the client implicitly claimed privilege by becoming nervous and resistant at sharing information about any detail of her case.<sup>37</sup> As long as these factors are satisfied, communications between an attorney and client will remain privileged. In adding an attorney's agent, however, an additional element is added. The communication must relate to legal services. The significance the court holds on relating to the legal services will be explained further below.

## **2. Agents for Public Good**

Attorney-client privilege allows for an attorney to zealously represent a client by having frank conversations that will remain confidential.<sup>38</sup> This accomplishes a broad public interest, as it allows an attorney to zealously represent without fearing disclosure of conversations. Additionally, attorney-client privilege combined with rules of professionalism governing lawyers allows for the administration of justice, since frank conversations are encouraged. In cases such as In re Grand Jury Subpoenas as discussed above, public relations consultants were deemed agents of the attorney and thus included in attorney client privilege. If a public relations consultant may be deemed an agent of an attorney, then in cases of human trafficking, social workers, caseworkers, and others working on behalf of a survivor's well-being (therefore leading to more effective legal advice from the attorney) should be considered agents of the attorney.

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<sup>36</sup> Com. v. Flor, 136 A.3d 150 (Pa. 2016).

<sup>37</sup> 27 Standard Pennsylvania Practice 2d § 136:45, Scope of Privilege, Witnesses and Depositions in Criminal Proceedings, *as cited in In re Chevron Corp.*, 650 F.3d 276 (3d Cir. 2011).

<sup>38</sup> Dages v. Carbon County, 44 A.3d 89 (Pa. 2012).

## **B. Hypothetical Continued: Determining What Communications are Privileged**

Since courts have held an individual is an agent of the attorney if the service relates to the legal services provided to the client and is kept confidential, the next inquiry is to determine the type of information covered under the attorney-client privilege.<sup>39</sup> Although, as stated above, the argument could be made that all communications between social services providing to a survivor could be covered, courts would likely hesitate on a blanket exception for social service workers through attorney-client privilege.

Going back to the hypothetical above about the recovered survivor, let's now say social services sets her up with her first doctor's appointment ever. This is a big accomplishment, and in a conversation with her lawyer, the social service provider mentions this appointment and provides the place, date and time. Does a lawyer knowing about a doctor's appointment relate to legal services? An issue of privilege may result if the doctor's appointment is at issue. For example, if a victim is murdered close to the doctor's office shortly after the social worker separated from the survivor, a prosecutor may attempt to call the attorney or social worker to testify to the facts of the date, time and location of the appointment. Will the fact of the doctor's appointment remain privileged? Or will the court consider privilege waived since the appointment did not remain confidential? Will it matter if the survivor is investigated for the murder or if the testimony is solely to implicate another individual? The answer to this will depend on how broadly or narrowly common law is applied. I argue attorney-client privilege should broadly apply to social service providers as agents, and therefore the substance of this communication should also be privileged. Following is an analysis of how current law can be interpreted to include social service providers as agents in various communications.

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<sup>39</sup> United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961).

## **1. Waiving Privilege**

Regardless of an agent involved in the communication, courts have found communications are not privileged when those knowing the information do not keep it confidential.<sup>40</sup> Once the communication is not confidential, privilege is waived. Waiving privilege is an extensive topic, therefore this only serves as a highlight of the issue. For example, when a defendant hung a letter on his cell wall containing once privileged information, the court found the defendant waived privilege.<sup>41</sup> In another case, when the defendant executed his own documents without the assistance of counsel and sent them to a district attorney's office, attorney-client privilege did not apply.<sup>42</sup> If steps were taken to protect the information from disclosure, the substance would remain confidential. In these instances, however, communications were not kept confidential; therefore the privilege did not remain.

## **2. Substance of Communication**

As discussed above, a social worker may be considered an agent of the attorney and be included in attorney-client privilege. The communications may be deemed privileged if they are kept confidential *and* relate to legal services. Context and circumstances surrounding the communication help in deciding if the information shall remain privileged. This becomes a case-by-case analysis in looking at the communication and relationship to legal services.

Not only must a communication with an agent remain confidential, but the communication also must relate to legal services. For example, in a case where an attorney and a state psychiatrist met several years prior to the attorney's client committing a crime and discussed the client's mental competency, the court found attorney-client privilege did not apply

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<sup>40</sup> United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961)).

<sup>41</sup> Com. v. Boyd, 580 A.2d 393, 394 (Pa.Super.,1990).

<sup>42</sup> Com. v. Kimbrough, 872 A.2d 1244 (Pa. Super., 2005).

because the attorney was not consulting the psychiatrist for legal services.<sup>43</sup> Since the crime did not occur yet, the attorney could not be consulting the psychiatrist for assistance in an insanity defense. But, in another case, when inculpatory statements were reiterated to an investigator from a public defender's office, the statement remained privileged, because the investigator was an agent of the public defender, the communication was confidential, and it related to the legal services.<sup>44</sup>

It is clear that the communication must relate to legal services, but how far have courts been willing to extend what counts as a communication relating to legal services? Many courts have taken a broader approach in applying agency to communications.<sup>45</sup> In re Grand Jury Subpoenas, for example, provides an extensive interpretation of the agency exception and substance of the communication included.<sup>46</sup> In this case, the lawyer hired public relations consultants to assist in the proceedings.<sup>47</sup> The court deemed the PR consulting firm agents of the lawyer.<sup>48</sup> The PR firm assisted in providing legal advice by navigating public relations.<sup>49</sup> The PR firm had a close relationship to the attorney in advocating for the client and participated in attorney client meetings.<sup>50</sup> The court held that as long as communications between the agent and attorney "were for the purpose of giving or obtaining legal advice," these communications would remain privileged.<sup>51</sup> The consultants were close to the attorney's role in advocating and were included as agents in a broad extension of substance of communications.<sup>52</sup>

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<sup>43</sup> Com. v. DuPont, 730 A.2d 970 (Pa. Super. 1999).

<sup>44</sup> Com. v. Hutchinson, 434 A.2d 740, 744 (1981).

<sup>45</sup> DeStefeno, *supra* at 334.

<sup>46</sup> In re Grand Jury Subpoenas Dated March 24, 2003, 265 F. Supp. 2d at 331.

<sup>47</sup> Id.

<sup>48</sup> Id.

<sup>49</sup> Id.

<sup>50</sup> Id.

<sup>51</sup> Id.

<sup>52</sup> Id.



In re Grand Jury Subpoenas applied the agency exception broadly to the PR firm, and communications were held privileged when directed at giving legal advice.<sup>53</sup> Citing Kovel, the court recognized “it would be mere formalism to extend the privilege” to the agent, as long as the purpose of the confidential communication is to obtain legal advice.<sup>54</sup> Kovel further explained when an attorney directs a client to talk and provide information to another individual, “who is then to interpret it so that the lawyer may better give legal advice, communications by the client **reasonably related** to that purpose ought fall within the privilege.” Additionally, the court noted, “what is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer.”<sup>55</sup>

Therefore, communications between the agent and attorney reasonably relating to legal advice fall within the privilege. Communications between the agent and client must also be made for legal advice, but the details of the communications are more closely scrutinized.<sup>56</sup> In analyzing the communications in In re Grand Jury Subpoenas, the court did not find two conversations between the client and the PR firm privileged, because they did not relate to the legal services. These conversations involved opinions of the coverage of a news story and a wire service story. Although the communications related to the case, they did not involve legal services of the attorney who was not present. In the communications between the lawyer and agent, the entirety of the communication was not analyzed in applying privilege because the court noted the communications were confidential and deemed them reasonably relating to the legal services. But when the attorney was not included, the court did not allow communications covered under attorney-client privilege.

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<sup>53</sup> Id.

<sup>54</sup> Id.

<sup>55</sup> Id. quoting United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961).

<sup>56</sup> Id.

In re Grand Jury Subpoenas shows how a court may perform a detailed analysis into the communications to determine whether they should be deemed privileged. The court scrutinized the communications between the agent and client and did not deem all privileged. The communications in In re Grand Jury Subpoenas differ considerably from communications in cases of human trafficking. The communications deemed not privileged were opinions on news stories, while cases of human trafficking relate to the well-being of a person. In broadening the privilege in cases of human trafficking, the court would protect the very purpose of attorney-client privilege to encourage frank conversations with attorneys to provide effective legal advice.

### **3. Uncharted Waters As Applied to Human Trafficking**

Applying these notions to cases of human trafficking is uncharted waters. Issues of attorney-client privilege in a human trafficking context have not been addressed in court opinions as of yet, but it is foreseeable. Human trafficking cases are complex in various ways, and the survivor comes with her own host of issues. In response to this complexity, several groups often work together on one particular survivor's needs – both legally and socially. I suspect the courts have not addressed this type of issue yet due to the recent revising of human trafficking laws, but with the increase in prosecuting buyers and traffickers, the issue may come up. Therefore, since confidentiality is a priority when dealing with clients and an attorney or social worker testifying against a survivor in court would be a terribly negative experience for the survivor, I am arguing for the broad application, as the issue is foreseeable.

#### **4. Application to Human Trafficking Cases**

In applying how other courts addressed attorney-client privilege with agents such as the PR firm in In re Grand Jury Subpoena, obvious differences show how it is difficult to directly apply the same principles. The existing cases discuss companies and accounting, while in application here, human trafficking cases involve deep personal emotions and traumatic human being experiences. These issues are incredibly sensitive and the survivor faces complex difficulties in recovering. Therefore, privilege should be extended more broadly in cases of human trafficking.

As stated in Kovel, attorneys in cases of human trafficking “need outside help,” or in other words, social service provider expertise advocating on behalf of life necessities and assisting navigating the troubled waters of a survivor understanding the legal process.<sup>57</sup> A strong nexus exists between social service providers and attorneys, as an attorney needs this outside help to zealously represent the client. In In re Grand Jury Subpoena, the court considered a PR consulting firm an agent of the attorney since the firm assisted with legal services by dealing with the public pressure. If the attorney-client privilege extends to an instance like this, attorney-client privilege should extend to social service providers assisting attorneys.

But as the court explained in In re Grand Jury Subpoena, the application of attorney-client privilege did not apply to every communication. In analyzing privilege applicable to the example herein, an attorney discussing with a social service provider doctors appointments, status of mental health, etc., all relates to how the attorney will best proceed with the case. Therefore, it relates to legal services. The agent is working with and for the attorney, and by working together, the survivor receives the benefit. The team of individuals is collaborating and

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<sup>57</sup> In re Grand Jury Subpoenas Dated March 24, 2003, 265 F. Supp. 2d at 331.

using resources to the best of their abilities by taking the value each provides the survivor. It is strong public interest to cultivate the relationship and not sever it.

Additionally, the communication analyzed here all involves the attorney, as the discussion occurred between the attorney and agent. As stated in In re Grand Jury Subpoena, when addressing communications between attorney and agent, the privilege extended if it reasonably related to, was directed at, or was for the purpose of giving legal advice.<sup>58</sup> The court did not overly scrutinize the exact communications between the two, since the attorney participated in and obtained outside help in learning about the survivor and thus best proceeding with the case.

Communications between the agent and survivor will be scrutinized more closely since the communications must relate to legal services. In In re Grand Jury Subpoena, the court compared an agent and client speaking to a client and secretary, and essentially noted it would be a waste of time for the attorney to sit in only for the sake of being present. Therefore, when someone like a social service provider speaks with a survivor to prepare the survivor to testify or assist in how to speak with an attorney, these communications are directly relating to the legal services as the social service provider is acting as the attorney's agent. But again, in cases of human trafficking, the court is dealing with the well-being of a survivor, not protecting the image of a company.

However, when the social service provider is working with a survivor to do something like obtain housing, this arguably does ultimately relate to the legal services of the attorney. The social service provider is assisting the survivor in fulfilling a life necessity, but the nexus of the attorney to agent is not as close. The social service provider is doing her job and therefore it is

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<sup>58</sup> Id.

difficult to extend *attorney-client* privilege when the attorney is not associated with the communication.

### **III. Best Practices: Collaboration is Key**

#### **A. Differing Roles between Social Workers and Lawyers**

For a survivor recovering from human trafficking, collaboration is key. When lawyers and social workers are both involved, each follow separate rules of professionalism however. Since the rules differ, both overlap and tension in obligations results. Understanding the professions and purposes, acknowledging the differences, and acting in a proactive manner to keep information confidential may keep this tension at a minimum.

According to the National Association of Social Workers (NASW), the purpose of social work is to “enhance human well-being” and assist clients in obtaining the basic needs of life.<sup>59</sup> This purpose is achieved by following a set of core values, including service, social justice, dignity and worth of the person, importance of human relationships, integrity and competence.<sup>60</sup> Lawyers on the other hand are a part of the legal system. The American Bar Association commissions responsibilities for attorneys to follow. In its Preamble to the Rules of Professional Responsibility, the rules discuss how lawyers are responsible for the “quality of justice” and should seek to improve the law, access to the legal system, and quality of services rendered.<sup>61</sup> While keeping these responsibilities in mind, a lawyer serves a client in the capacity of various positions such as an advisor, advocate, negotiator, evaluator, or a neutral third-party. For example, as an advisor, the lawyer informs a client of legal rights, obligations, and implications,

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<sup>59</sup> Code of Ethics National Association of Social Workers. <https://www.socialworkers.org/pubs/code/-code.asp>.

<sup>60</sup> *Id.*

<sup>61</sup> The American Bar Association Model Rules of Professional Conduct Preamble - MODEL RULES OF PROF'L CONDUCT. [http://www.americanbar.org/groups/professional\\_responsibility/publications-/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_preamble\\_scope.html](http://www.americanbar.org/groups/professional_responsibility/publications-/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html).

and as an advocate, the lawyer zealously advocates for the client. Although both have responsibilities to the client, significant differences appear as the lawyer focuses on the law and social worker focuses on well-being and safeguarding interests.

Part of the tension between the duties of social workers and lawyers involves mandatory reporting and confidentiality. As explained above, lawyers are legally bound under professional rules of conduct and statutes to keep communications with clients confidential. Although social workers must also hold communications confidential under their professional conduct rules, social workers are mandatory reporters and are obligated to report child or elder abuse. Lawyers, on the other hand, in most jurisdictions are required to disclose confidential information only if to prevent death or substantial bodily harm.<sup>62</sup> When working together and disclosing information back and forth, this may become an issue as professional obligations mix. Attorneys and social workers should discuss and formally address potential conflicts at the onset of representation, prior to these issues becoming apparent.<sup>63</sup> Although these issues may become present in cases of human trafficking and both professions should screen cases for potential issues, human trafficking cases typically do not trigger mandatory reporting obligations, as this issue is more frequently seen in domestic violence cases.

## **B. The Importance of Collaboration**

Collaboration is key – but why? In understanding these cases, it is essential to note many survivors do not have financial or family support. And even if they do have some support, many

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<sup>62</sup> National Association of Social Workers, [https://www.socialworkers.org/ldf/legal\\_issue/200801-.asp?back=yes&print=1](https://www.socialworkers.org/ldf/legal_issue/200801-.asp?back=yes&print=1).

<sup>63</sup> Id.

experience several complex issues, therefore requiring a great deal of time and resources.<sup>64</sup> Due to time and financial constraints, one single organization cannot be the only support. Individuals who have been trafficked often experience many issues simultaneously, requiring medical, legal, and social services. Social services may assist in daily life needs, such as making doctors appointments, finding housing, and figuring out how to live. Lawyers may represent clients as petitioners in immigration cases, as plaintiffs in civil cases against their traffickers, and as witnesses testifying against their traffickers in criminal cases. Therefore, a survivor often receives services from a multitude of resources, and their quality of service provided increases with collaborative efforts.

Heather Moore, M.S.S.W., explained how a client benefits from these collaborative efforts through combining parts of multiple cases and creating a case study.<sup>65</sup> In her example, a survivor was recovered from her trafficker and suffered from severe depression and became suicidal.<sup>66</sup> The survivor's case manager and social worker assisted in helping her overcome the crisis, and while doing so explained to legal counsel and prosecutors that the survivor would be unable to participate in any legal matters until she became more stable.<sup>67</sup> The attorneys took the social worker's and case manager's advice and gave the survivor time to recover.<sup>68</sup> By doing so, the survivor was given the time needed to recover, and the survivor gained trust in the attorneys as they showed sincere interest in her well-being by giving her the necessary time.<sup>69</sup> This led to stronger relationships between the attorneys, case managers, social workers, and survivor, as

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<sup>64</sup> Moore, Heather (June 2006), [How Strong Collaboration Between Legal and Social Service Professionals Will Improve Outcomes for Trafficking Survivors and the Anti-Trafficking Movement](https://www.stu.edu/Portals/Law/docs/human-rights/ihr/r/volumes/1/157-184-HeatherMooreHowStrongCollaborationbetweenLegalandSocialServiceProfessionalsWillImproveOutcomesforTraffickingSurvivorsandtheAnti-TraffickingMovement.pdf), The Intercultural Human Rights Law Review <https://www.stu.edu/Portals/Law/docs/human-rights/ihr/r/volumes/1/157-184-HeatherMooreHowStrongCollaborationbetweenLegalandSocialServiceProfessionalsWillImproveOutcomesforTraffickingSurvivorsandtheAnti-TraffickingMovement.pdf>

<sup>65</sup> Moore used various parts of different cases in order to allow names to remain anonymous.

<sup>66</sup> Id. at 157.

<sup>67</sup> Id. at 157-58.

<sup>68</sup> Id.

<sup>69</sup> Id.

they worked together on behalf of the survivor over the following three years navigating the best decisions for the survivor.<sup>70</sup> The case managers and social workers assisted attorneys in educating and advising her on legal issues such as immigration and public benefits, and the survivor benefited from the combined efforts of working toward the same goals simultaneously.<sup>71</sup>

As illustrated, inter-professional collaborations have a positive impact on the survivor and representation received. Survivors who receive services from several agencies are working with many different people. When these people communicate, the survivor has a team of individuals working on her behalf.

This increase in quality outweighs possible challenges encountered by the professional collaborations.<sup>72</sup> In Moore's article, she discusses at length the benefits of collaboration. When working with survivors of human trafficking, Moore writes, it is critical to understand "the deep interconnectedness between the survivor's ability to self-stabilize, build life skills, and develop positive coping mechanisms, and the nature of his or her interactions with these various systems." In this interconnectedness, it is essential for the various members working on behalf of the client to collaborate and provide consistency. By working collaboratively and understanding the client's needs, the survivor will be provided the strongest services leading to better outcomes.

These results are seen in a survivor's involvement in the legal system. Studies performed on the effects of the criminal justice system on survivors of rape and assault show that positive interactions with the system will produce positive results for the survivors well-being, and also

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<sup>70</sup> Id.

<sup>71</sup> Id.

<sup>72</sup> Id.



positive results in the case itself.<sup>73</sup> Additionally, Moore reports studies show treating a survivor with dignity and respect and including them in the process of seeking justice improves their ability to be witnesses.<sup>74</sup> As noted in Moore's case study above, the survivor is more trusting of attorneys and feels various individuals have her well-being in best interest.<sup>75</sup> All of this leads to one conclusion: collaboration will improve the system's response, increasing the chance at the ultimate goal of seeking justice.<sup>76</sup>

## **Conclusion**

Courts have not yet addressed issues of attorney-client privilege in the context of human trafficking where social workers and other collaborative partners might be regarded as "agents" of the attorney. But with the increase in cases and the change of laws, the issue of how attorney-client privilege applies when multiple people collaborate to benefit the survivor may come up soon. By being aware of this privilege, protecting the confidences of communications, and ensuring all collaborators are aware of the sensitive nature of communication, this issue may be avoided. Agencies should take preventative measures in protecting information, and by doing so, they will provide effective services to the survivor.

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<sup>73</sup> Moore, supra at 162.

<sup>74</sup> Id.

<sup>75</sup> Id. at 158-59.

<sup>76</sup> Id. at 162.