

1 **Privileges and Ethical Considerations** **Every Defense Lawyer Should have** **at their Fingertips**

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2 **Kentucky Privileges**

- ▶ Attorney-Work Product Doctrine
- ▶ Privilege Against Self-Incrimination
- ▶ Statutory Privileges:
 - ▶ Peer Review Privilege – KRS 311.377
 - ▶ Media Confidential Informant – KRS 421.100
 - ▶ Information obtained by a probation, parole, or conditional discharge officer in the course of their official duties – KRS 439.510
 - ▶ Information furnished to Division of Unemployment Insurance – KRS 341.190(3)
 - ▶ Certain reports of law enforcement officers – KRS 189.635; *Weaver v. Commonwealth*, 955 S.W.2d (Ky. 1997)
 - ▶ Sex offender’s disclosures for diagnosis and treatment – KRS 635.527; KRS 197.440
- ▶ Kentucky Evidentiary Rules:
 - ▶ Lawyer-Client Privilege, KRE 503
 - ▶ Husband-Wife Privilege, KRE 504
 - ▶ Religious Privilege, KRE 505
 - ▶ Counselor-Client Privilege, KRE 506
 - ▶ Psychotherapist-Patient Privilege, KRE 507
 - ▶ Identify of Informer, KRE 508

3 **Attorney-Work Product – CR 26.02(3)**

- ▶ Applies to
 - ▶ Documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative
 - ▶ Mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning litigation
- ▶ Theories of a party’s attorney not discoverable – privilege absolute. *Haney v. Yates*, 40 S.W.3d 352 (Ky. 2000).
- ▶ Party must show substantial need for document and that the party is unable without undue hardship to obtain the substantial equivalent by any other means
- ▶ Party or individual may obtain his or her own statement without any showing of need

4 **Attorney-Work Product – CR 26.02(3)**

- ▶ Documents which are primarily factual, non-opinion work product subject to lesser protection
- ▶ Documents prepared for purposes other than litigation not protected
- ▶ Privilege continues after litigation or representation ends
- ▶ Itemization of legal services and fees is not within the protection of the attorney-work product doctrine. *Monin v. Monin*, 156 S.W.3d 309 (Ky. App. 2004), as modified, (Jan. 21, 2005).

5 **KRE 503: Lawyer-Client Privilege**

- ▶ Belongs to client
- ▶ Also recognized by common law. *Dunn v. Commonwealth*, 350 S.W.2d 709 (Ky. 1961).
- ▶ Applies to information disclosed in confidence to an attorney for the purpose of obtaining professional legal services
- ▶ Applies even if attorney declines to undertake representation
- ▶ Survives attorney-client relationship
- ▶

6 **KRE 503: Lawyer-Client Privilege**

- ▶ Exceptions:
 - ▶ Furtherance of crime or fraud
 - ▶ Claimants through same deceased client
 - ▶ Breach of duty by a lawyer or client
 - ▶ Document attested by a lawyer
 - ▶ Joint clients
- ▶ Itemization of legal services and fees is not within the protection of the attorney-client privilege. *Monin v. Monin*, 156 S.W.3d 309 (Ky. App. 2004), as modified, (Jan. 21, 2005).
- ▶ Not apply to:
 - ▶ Identity of client is not a privileged communication
 - ▶ Non-legal business advise
 - ▶ Documents created for another purpose
 - ▶ Voluntary disclosures

7 **Rules of Professional Conduct to Consider when Asserting and Maintaining Privileges**

- ▶ Competency: SCR 3.130(1.1)
- ▶ Diligence: SCR 3.130(1.3)
- ▶ Communications: SCR 3.130(1.4)
- ▶ Confidentiality: SCR 3.130(1.6)
- ▶ Duties to Former Clients: SCR 3.130(1.9)
- ▶ Safekeeping of Client's Property: SCR 3.130(1.15)
- ▶ Communications with Person Represented by Counsel: 3.130(4.2)
- ▶ Supervision of Nonlawyer Assistants: SCR 3.130(5.3)

8 **Kentucky Bar Association Ethics Committee Opinions**

- ▶ The "Rules of Professional Conduct permit the KBA's Ethics Committee to issue both informal and formal ethics opinions to provide clarity to members of the bar regarding what conduct is permissible by a licensed attorney." *U.S., ex rel. U.S. Attorneys ex rel. Eastern, Western Districts of Kentucky v. Kentucky Bar Ass'n*, 439 S.W.3d 136, 141 (Ky. 2014).
- ▶ If an opinion is approved by three-fourths of the Board of Governors, it carries the weight of an advisory opinion. SCR 3.530.
- ▶ Committee is not authorized to provide legal advice and must restrict itself to responding to questions of professional conduct. See KBA E-453, issued March 19, 2021.
- ▶ The Kentucky Supreme Court is the ultimate rulemaking body for ethical attorney conduct. Ky. Const. 116; *Kentucky Bar Ass'n v. Deters*, 406 S.W.3d 812, 822 (Ky. 2013).
- ▶ Ethics Opinions are available at: <https://www.kybar.org/general/custom.asp?page=opinsethics>
- ▶

9 **Ethical Considerations with Confidential Information**

- ▶ Ethics duty of confidentiality broader applications than attorney-work product doctrine or the attorney-client privilege
- ▶ Example:
 - ▶ A lawyer may reveal a client's name and address only if it is obvious that the client does not expect name and address to be confidential.
 - ▶ Clients' names and addresses should be presumed to be confidential.
 - ▶ Kentucky Bar Association Ethics Opinion KBA E-447, issued Jan. 2019
 - ▶ Kentucky Bar Association Ethics Opinion KBA E-253, issued Sept. 1981
- ▶
- ▶

10 **Confidentiality of Information, SCR 3.130(1.6)**

- a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
- b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
 - 1) to prevent reasonably certain death or substantial bodily harm;
 - 2) to secure legal advice about the lawyer's compliance with these Rules;
 - 3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding, including a disciplinary proceeding, concerning the lawyer's representation of the client; or
 - 4) to comply with other law or a court order.

11 **Attorney's Contact with Insurer**

- ▶ Does an attorney violate the Kentucky Rules of Professional Conduct if he discloses information to the Insurer in the course of defending the Insured if that information is damaging to the Insured on the issue of coverage but is not known by the attorney to be damaging when the information is disclosed?
 - ▶ Answer: An attorney must be ever vigilant, pursuant to KRPC 1.1 (competency) and 1.3 (diligence), to identify information that might be disadvantageous to the client Insured and to refrain from disclosing such information absent fully informed client consent. If the attorney is competent and diligent in this regard and yet forwards to the Insurer information not known to the attorney to be damaging, no unethical conduct has occurred.
 - ▶ Kentucky Bar Association Ethics Opinion KBA E-410, issued Sept. 1999

12 **Disclosure of Clients' Bills to Audit Company**

- ▶ Would Law Firm's submitting its Insurance Company bills directly to Audit Company, rather than to Insurance Company, without the law firm's obtaining the fully informed consent of the insured, violate the Kentucky Rules of Professional Conduct?
 - ▶ Answer: Yes (when bills contained detailed information about the services performed pursuant to the representation)
- ▶ Would the Law Firm's submitting other clients' bills to Audit Company violate the Kentucky Rules of Professional Conduct?

- ▶ Answer: Yes (when bills contained detailed information about the services performed pursuant to the representation)

- ▶ Kentucky Bar Association Ethics Opinion KBA E-404, issued June 1998

13 **KRE 504: Husband-Wife Privilege**

- ▶ Spouse of party or party may assert
- ▶ Adverse Testimony Privilege: events occurring after the date of the marriage, KRE 504(a)
 - ▶ Ends with dissolution – *Coursey v. Commonwealth*, 593 S.W.3d 64 (Ky. App. 2019).
 - ▶ Out-of-court statement of a witness asserting privilege admissible if that statement falls within a recognized exception to the hearsay rule and if it does not divulge a confidential marital communication – *Slaven v. Commonwealth*, 962 S.W.2d 845, 853 (Ky. 1997).
- ▶ Confidential Communications Privilege: confidential communications made to the spouse during marriage, KRE 504(b)
 - ▶ Confidential communication: made privately and not intended for disclosure to any other person
 - ▶ Must have positive expectation of confidentiality – *Hall v. Commonwealth*, 468 S.W.3d 814 (Ky. 2015).
 - ▶ Survives dissolution

14 **KRE 504(c): Exceptions to Husband-Wife Privilege**

- ▶ Waiver
- ▶ Criminal cases involving conspiracy or joint acts
- ▶ Wrongful acts against person or property of
 - ▶ spouse,
 - ▶ minor child,
 - ▶ co-inhabitant,
 - ▶ Third person if the wrongful conduct is committed in the course of wrongful conduct against spouse, minor child, or co-inhabitant
- ▶ Spouses adverse parties
- ▶ In the interests of a minor child that may be adversely affected
- ▶ Child abuse – KRS 620.050

15 **KRE 505: Religious Privilege**

- ▶ Communicant, Clergy man (on behalf of communicant), guardian, conservator, or, if deceased, personal representative may assert
- ▶ Applies to
 - ▶ Confidential communications (made privately and not intended for disclosure)
 - ▶ Between the person and a clergyman in his professional character as spiritual adviser
- ▶ Clergyman: minister, priest, rabbi, accredited Christian Science practitioner, other similar functionary of a religious organization, or individual reasonably believed so to be by the person consulting the communicate
- ▶ Privilege inapplicable where a clergyman talked to defendant “in contemplation of testifying” and not as spiritual adviser – *Sanborn v. Commonwealth*, 892 S.W.2d 542, 550 (Ky. 1994).

16 **KRE 506: Counselor-Client Privilege**

- ▶ Client, counselor/counselor’s employer (on behalf of client), guardian, conservator, or, if deceased, personal representative may assert
- ▶ Applies to:

- ▶ Confidential communications
 - ▶ Between client, counselor, persons present at direction of counselor
 - ▶ Made for the purpose of counseling
- ▶ Counselor
 - ▶ Certified School Counselor
 - ▶ Sexual Assault Counselor
 - ▶ Certified Professional Therapist
 - ▶ Licensed Marriage and Family Therapist
 - ▶ Licensed Professional Clinical Counselor or Counselor Associate
 - ▶ Individual who provides Crisis Response Services
 - ▶ Victim Advocate (excluding victim advocates employed by Commonwealth's attorney or a county attorney)
 - ▶ Licensed Pastoral Counselor

17 **KRE 506(d): Exceptions to Counselor-Client Privilege**

- ▶ Waiver
- ▶ Proceedings to hospitalize the patient for mental illness
- ▶ Judge finds that
 - ▶ Substance of communication is relevant to an essential issue in the case,
 - ▶ That there are no available alternate means to obtain the substantial equivalent of the communication, and
 - ▶ That the need for the information outweighs the interest protected by the privilege.
- ▶ Child abuse cases, KRS 620.050

18 **KRE 507: Psychotherapist-Patient Privilege**

- ▶ Patient or authorized representative
- ▶ Applies to
 - ▶ confidential communications made for the purpose of diagnosis or treatment of the patient's mental condition
 - ▶ Between patient, psychotherapist, or persons participating in diagnosis or treatment at direction of psychotherapist
- ▶ Psychotherapist:
 - ▶ Physician
 - ▶ Psychologist
 - ▶ Licensed Clinical Social Worker
 - ▶ Registered Nurse or Advanced Registered Nurse Practitioner

19 **KRE 507(c): Exceptions to Psychotherapist-Patient Privilege**

- ▶ Waiver
- ▶ Proceedings to hospitalize the patient for mental illness
- ▶ Proceedings where the patient's mental condition is an element of a claim or defense
- ▶ Communications made during a court ordered examination after the patient was informed the information would not be privileged
- ▶ Communications made to psychotherapists for unlawfully obtaining a controlled substance, KRS 218A.280
- ▶ Child abuse cases, KRS 620.050

20 **KRE 509: Waiver of Privilege**

- ▶ Voluntary disclosure of any significant part of the privileged matter
- ▶ The rule does not apply if:
 - ▶ the disclosure itself is privileged, or
 - ▶ Communications for the purpose of receiving third-party payment for professional services
- ▶ “Partial Waiver Doctrine” permits an attorney’s client, who has disclosed a portion of privileged communications, to continue asserting the privilege as to the remaining portions of the same communications. *Yung v. Grant Thornton, LLP*, 563 S.W.3d 22 (Ky. 2018).
- ▶ No waiver if disclosure (1) compelled erroneously or (2) made without an opportunity to claim the privilege. KRE 510.

21 **Competence, SCR 3.130(1.1)**

- ▶ A lawyer shall provide competent representation to a client.
- ▶ Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
- ▶ To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject. Comment 6.

22 **Diligence, SCR 3.130(1.3)**

- ▶ A lawyer shall act with reasonable diligence and promptness in representing a client.
- ▶ “A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.” Comment 1.
- ▶ “The attorney representing an Insured must be every vigilant and must abide by KRPC 1.1 and 1.3 with regard to protecting the client’s rights and identifying information that might be harmful to the Insured.” KBA E-410.

23 **Inadvertent Communications**

- ▶ If a lawyer received materials that were not intended for the receiving lawyer, should the lawyer be disciplined if the lawyer attempts to use the documents pursuant to a good faith claim that any privilege or protection that would otherwise have obtained has been waived.
 - ▶ Answer: No. While such conduct is discouraged, a lawyer should not be disciplined if the lawyer is making a good faith legal argument on behalf of the lawyer’s client.
- ▶ If a lawyer received materials under circumstances in which it is clear that they were not intended for the receiving lawyer, should the lawyer refrain from examining the materials, notify the sender, and abide by the instructions of the sender regarding the disposition of the materials.
 - ▶ Answer: Yes.
- ▶ Kentucky Bar Association Ethics Opinion KBA E-374 (Revised), issued Nov. 1995

24 **Technology**

- ▶ Whether an attorney uses email to communicate with clients; e-files documents with the courts; stores client information electronically; shares files with others; employs mobile devices and/or accesses the internet, care must be taken to avoid disclosure of confidential client information. KBA E-446.
- ▶ For an attorney to maintain the ‘requisite knowledge and skill’ required by this provision of the Model Rule, the attorney must keep abreast of the changing risks and benefits of relevant technology. KBA E-446.

- ▶ Attorneys must be competent in the use of technology in their law practices. KBA E-437.
- ▶ A lawyer should not use any particular mode of technology to store or transmit confidential information before considering how secure it is, and whether reasonable precautions such as firewalls, encryption, or password protection could make it more secure. KBA E-446.

25 **Emails with Opposing Counsel and Your Client**

- ▶ When an attorney (Lawyer A) sends an email to another lawyer (Lawyer B) and Lawyer A sends a copy of such communication to Lawyer A's client, should Lawyer A's action be regarded as giving Lawyer B consent to use the "reply all" function when replying to Lawyer A?
 - ▶ Answer: No
- ▶ Kentucky Bar Association Ethics Opinion KBA E-442, issued Nov. 2017
- ▶ SCR 3.530 (4.2) prohibits communications with persons represented by counsel
- ▶ "A lawyer who, without consent, takes advantage of 'reply all' to correspond directly with a represented party violates Rule 4.2." KBA E-442.

26 **Emails with Opposing Counsel and Your Client**

- ▶ When Lawyer A sends an email to Lawyer B with copy of such email being sent to Lawyer A's client, does the act of sending the client a copy of the email reveal "information relating to the representation of the client?"
 - ▶ Answer: Yes
- ▶ Kentucky Bar Association Ethics Opinion KBA E-442, issued Nov. 2017
- ▶ Such an email reveals the following information relating to the lawyer's representation:
 - ▶ 1) the identity of the client; 2) the client received the email including attachments, and 3) in the case of a corporate client, the individuals the lawyer believes are connected to the matters and the corporate client's decision makers.
- ▶ A client may expressly or impliedly consent to such limited disclosure. SCR 3.530(1.6)(a).

27 **Use of the "Reply All" Button**

- ▶ What precautions should an attorney take in using the "reply all" button?
 - ▶ Answer: Attorneys should either forward their emails to their client or use their system's blind carbon copy feature ("bcc"), after first assuring that the "reply all" feature is limited to those in the "cc" line.
- ▶ Kentucky Bar Association Ethics Opinion KBA E-442, issued Nov. 2017
- ▶ The "reply all" button presents a dangerous risk to the sending lawyer because the sender might inadvertently send an embarrassing or harmful email to unintended recipients.

28 **Cloud Computing**

- ▶ Cloud computing is "merely 'a fancy way of saying stuff's not on your computer.'" KBA E-437.
- ▶ Cloud computing is technology that allows a lawyer to store and access software or data though the software or data is stored and/or operated in the cloud—that is, a remote location that is not under the control of the lawyer but is controlled by a third party who provides the storage or other service.
- ▶ Lawyers long have had "a duty to make reasonable judgments when protecting client property and information."

29 **Cloud Computing**

- ▶ May lawyers use cloud computing with clients' confidential information?
 - ▶ Answer: Yes. Lawyers may use cloud computing with clients' confidential information. In so doing, lawyers must follow the Rules of Professional Conduct with regard to:

- ▶ safeguarding client confidential information,
 - ▶ acting competently in using cloud computing,
 - ▶ properly supervising the provider of the cloud service, and
 - ▶ communicating with the client about cloud computing when such communication is necessary due to the nature of the representation.
- ▶ Kentucky Bar Association Ethics Opinion KBA E-437, issued March 2014
 - ▶ SCR 3.130 (1.1 & cmt. 6), (1.4(a) & (b)), (1.6(a) & cmt. 14, 15, & 16), (1.9(c)), (1.15(a)), (1.16), (1.18(b)), (5.3(a) & (b))

30 **Cybersecurity**

- ▶ Does an attorney have an ethical responsibility to implement cybersecurity measures to protect clients' information?
 - ▶ Answer: Yes
- ▶ Does an attorney have an ethical responsibility to advise clients about cyberattacks against the law practice and/or breaches of security?
 - ▶ Answer: Qualified Yes.
- ▶ Can an attorney utilize third parties and/or non-lawyers to plan and implement cybersecurity measures?
 - ▶ Answer: Yes.
- ▶ Does an attorney have an ethical responsibility to ensure that law firm employees, as well as third parties employed by, retained by, or associated with the lawyer, comply with the attorney's cybersecurity measures?
 - ▶ Answer: Yes.
- ▶ Kentucky Bar Association Ethics Opinion KBA E-446, issued July 2018

31 **Cybersecurity**

- ▶ Attorneys must therefore be cognizant of cybersecurity measures that can be employed to preserve their client's information. KBA E-446.
- ▶ Implicates the following Rules of Professional Conduct: competence (SCR 1.1(6)); communications (1.4); confidentiality of information (1.6) and safekeeping of client's property (1.15)
- ▶ Confidentiality of Information "paramount" among these ethical obligations. KBA E-446.
- ▶ Above all, the attorney must use 'reasonable care' to ensure that the client's confidential information is protected, and that the client's property is safeguarded. KBA E-446.
- ▶ SCR 3.130(1.4) does not mandate the disclosure to a client about general cyber attacks against the law firm, or breaches of security within an attorney's computer systems.

32 **Duties to Former Clients: SCR 3.130(1.9)**

- ▶ A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter ... reveal information relating to the representation except as these Rules would permit or require with respect to a client.
- ▶ The obligations of counsel under SCR 3.130(1.9) survive the death of the client. *Turner v. Commonwealth*, 544 S.W.3d 610 (Ky. 2018).
- ▶ The fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client. Cmt. (9)

33 **Retention of Confidential Information After a Client's Death**

- ▶ After the death of a client may an attorney reveal information relating to the representation of

the client?

- ▶ Answer: Yes, if revealing the information is reasonably believed to be necessary to accomplish one of the purposes of the representation
- ▶ Kentucky Bar Association Ethics Opinion KBA E-451, issued July 2020
- ▶ SCR 3.130(1.2), Comment 1 & SCR 3.130(1.6), Comments 5 & 12.
- ▶ Example: The attorney should disclose relevant information in a dispute between claimants based on a transaction in which the decedent was represented by the attorney.

34 **Retention of Confidential Information**

After a Client's Death

- ▶ After the death of a client, may an attorney assert (or waive) the attorney client privilege on behalf of the client?
 - ▶ Answer: Yes.
 - ▶ Kentucky Bar Association Ethics Opinion KBA E-451, issued July 2020
- ▶ SCR 3.130(1.6), Comment 12; KRE 503(c).
- ▶ Both the attorney of a deceased client and the personal representative of the decedent have standing to assert (or waive) the attorney client privilege. KRE 503(c).
- ▶ Attorneys have implied authority to disclose information reasonably believed necessary to carry out the purposes of representation. SCR 3.130(1.2)(a), SCR 3.130(1.6)(a).

35 **Scope of Representation and Allocation of Authority between Client and Lawyer**

- ▶ A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. SCR 3.130(1.2)(a).
- ▶ With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation. SCR 3.130(1.2)(a), Comment 1.
- ▶ General rule that attorney is agent for client, with broad power to act for and on client's behalf. *Clark v. Burden*, 917 S.W.2d 574 (Ky. 1996).

36 **Response to a Former Client's Public Criticism**

- ▶ May a lawyer reveal client confidential information reasonably necessary to respond to a former client's public criticism?
 - ▶ Answer: No.
 - ▶ Kentucky Bar Association Ethics Opinion KBA E-448, issued March 2019
- ▶ SCR 3.130(1.6)(b)(3).

37 **Confidentiality of Information, SCR 3.130(1.6)(b)(3)**

- ▶ A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
 - ▶ (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client ...
- ▶ The self-defense exception to the duty of confidentiality is triggered by claims or disciplinary complaints against a lawyer.
- ▶ The exception does not encompass internet criticism.

38 **Response to a Former Client's Public Criticism**

- ▶ How may a lawyer ethically respond to a former client's public criticism?

- ▶ Answer: In most instances the best advice is to ignore the criticism. For the lawyer who wants to respond, the Committee recommends the following:
 - ▶ My professional and ethical responsibilities do not allow me to reveal confidential client information in response to public criticism
 - ▶ Kentucky Bar Association Ethics Opinion KBA E-448, issued March 2019

39 **Disclosure of Information on Social Media**

- ▶ In a blog or other social media, may a lawyer reveal information relating to the representation of a current or former client without the client's consent?
 - ▶ Answer: No
- ▶ May an attorney reveal the identity of a current or former client in a blog or other social media without the client's consent?
 - ▶ Answer: No.
- ▶ Is there an exception to (1) or (2) for information contained in a public record?
 - ▶ Answer: No.
- ▶ Kentucky Bar Association Ethics Opinion KBA E-447, issued Jan. 2019

40 **Disclosure of Information on Social Media**

- ▶ Unless one of the exceptions in Rule 1.6(b) applies, Rule 1.6(a) requires a lawyer to obtain client consent before revealing any information relating to the client's representation.
- ▶ Absent consent, a lawyer may reveal names and addresses of clients only: 1) where the information is in the public record as a result of the attorney's representation, or 2) where the circumstances make it obvious that the client does not expect confidentiality as to the existence of the attorney client relationship, or 3) where the client has specifically authorized in writing the release of the information. KBA E-253.
- ▶ A lawyer may use information relating to the representation of a former client if the information has become "generally known." See SCR 3.130(1.9)(c)(1).
- ▶ "However, there is no justification for revealing information, without consent, about past or present clients in a blog or other social media." KBA E-447.

41 **Privilege Against Self-Incrimination**

U.S. Const. Amend. V
Ky. Const. Sec. 11

- ▶ Personal to witness
- ▶ Applies to compulsory testimony, not physical examination and testing or physical evidence
- ▶ Waived by testifying with regard to criminal activity or the crime charged

42 **Peer-Review Privilege – KRS 311.377**

- ▶ Applies to proceedings, records, opinions, conclusions, and recommendations of an entity engaged in a designated professional review function
- ▶ Designated Professional Review Function: the designated review function of review of credentials or retrospective review and evaluation of the competency of professional acts or conduct of other health care personnel
- ▶ Entity: committee, board, commission, or other entity duly constituted by a licensed hospital that attests to participating in a patient safety and quality improvement initiative

43 **Other Statutory Privileges**

- ▶ Media Confidential Informant – KRS 421.100
- ▶ Information obtained by a probation, parole, or conditional discharge officer in the course of

their official duties – KRS 439.510

- ▶ Information furnished to Division of Unemployment Insurance – KRS 341.190(3)
- ▶ Certain reports of law enforcement officers – KRS 189.635; *Weaver v. Commonwealth*, 955 S.W.2d (Ky. 1997)
- ▶ Sex offender’s disclosures for diagnosis and treatment – KRS 635.527; KRS 197.440

44 **Prohibition of Comment upon or Inference from Claim of Privilege**

- ▶ KRE 511 prohibits the judge and counsel from making comments or inferences regarding a claim of privilege
- ▶ Jury to remain unaware of any claim of privilege
- ▶ Counsel may comment on privilege when the claim is not invoked
 - ▶ For example, may discuss a spouse’s refusal to testify when neither the party nor the spouse invokes the spousal testimony privilege. *Bixler v. Commonwealth*, 204 S.W.3d 616 (Ky. 2006).
- ▶ Curative Jury Instruction available upon request

45 **Attorney’s Contact with Opposing Party**

- ▶ May an attorney contact an opposing party to obtain information relating to a pending controversy, without the consent of opposing counsel?
 - ▶ Answer: No.
 - ▶ Kentucky Bar Association Ethics Opinion KBA E-65, issued May 1973

46 **Attorney’s Contact with Opposing Party’s Employees**

- ▶ May a lawyer who has a suit pending against a corporation or governmental entity contact the President, General Manager, or other employee having access to confidential matters without prior consent of the other lawyer?
 - ▶ Answer: No.
 - ▶ Kentucky Bar Association Ethics Opinion KBA E-213, issued March 1979

47 **Attorney’s Contact with Opposing Party’s Employees**

- ▶ May a lawyer who is presently suing a corporation or governmental entity contact employees who are not managing agents and hourly wage earners that have no access to privileged or confidential information?
 - ▶ Answer: Yes.
 - ▶ Kentucky Bar Association Ethics Opinion KBA E-213, issued March 1979

48 **Questions**

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