IN THE
SUPREME COURT OF MISSOURI

No. SC97165

JEREME J ROESING,

Appellant,

v.

DIRECTOR OF REVENUE,
STATE OF MISSOURI,

Respondent.

Appeal from the Circuit Court of Jackson County, Missouri
Sixteenth Judicial Circuit
The Hon. Robert L. Trout, Associate Circuit Judge

BRIEF OF AMICUS CURIAE MISSOURI ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Respectfully Submitted,

Denise L. Childress, Mo. Bar No. 64779
Missouri Bar No. 64779
Ward & Childress | Trial Lawyers
305 West Fourth Street
Washington, Missouri 63090
Phone: (314) 394-2150
Facsimile: (314) 754-8178
info@stldwis.com

Attorney for Missouri Association of Criminal Defense Lawyers

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Missouri Supreme Court Rules

STATEMENT OF INTEREST

The Missouri Association of Criminal Defense Lawyers (MACDL) is a voluntary association of criminal defense lawyers organized to improve the quality of justice in Missouri by seeking to ensure justice, fairness, due process and equality before the law for persons accused of crime or other misconduct. MACDL is dedicated to protecting the rights of criminally accused through a strong and cohesive criminal defense bar. MACDL also works to improve the criminal justice system to those ends.

MACDL promotes study and research in the field of criminal law to disseminate and advance knowledge of the law in the area of criminal practice. The organization seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner. An organizational objective is promotion of the proper administration of justice. In furtherance of that objective, at times the organization files amicus briefs in both federal and state courts.

MACDLôs interest in this proceeding is to strengthen the rights of an arrestee to personally contact and confidentially communicate with a lawyer in order to make an intentional, voluntary and knowing decision about his rights. MACDLôs interest in this proceed is also to preserve the bright line expectation of privacy between client-lawyer communications to uphold the sanctity of confidentiality and provide clear guidance for the expectation of defense lawyers in Missouri regarding that confidentiality.

STATEMENT OF JURISDICTION AND STATEMENT OF FACTS

Amicus Curiae adopts and incorporates by reference the jurisdictional statement and statement of facts set forth in Appellantôs Substitute Brief.

Pursuant to Missouri Supreme Court Rule 84.05(f)(2), amicus curiae certifies that consent to file this brief was granted by all parties.

ARGUMENT

I. The limited statutory right to a lawyer established in Section 577.041 RSMo., to remain meaningful, implicitly and necessarily includes privacy because confidentiality is a fundamental principle of the client-lawyer relationship, which best serves the public interest by encouraging clients to communicate fully and frankly with the lawyer, even as to embarrassing or legally damaging subject matter, information which the lawyer must learn to give effective legal advice so that the client can make informed decisions.

In the present case, the parties do not dispute that Section 577.041 RSMo creates a limited statutory right to consult with a lawyer and that Roesing invoked that right. The parties do not dispute that Roesingôs lawyer requested privacy, but that the officer remained close to Roesing, actually heard Roesingôs communication to his lawyer, and that the communication was audio and video recorded by law enforcement. At issue in this case is whether the limited statutory right to consult with a lawyer created in Section 577.041 RSMo includes confidentiality in the communication or allows law enforcement officers to listen. Confidentiality is key.

A. A fundamental principle of the attorney-client relationship is confidentiality, which is the societal expectation and is required by the Rules of Professional Conduct.

The principle of confidentiality in the information which the client shares with his lawyer is **fundamental** to the lawyer-client relationship regardless of practice area.[1] The Rules of Professional conduct clearly require that ñ[a] lawyer shall not reveal information relating to the representation of a clientò unless a limited exception applies.[2] Confidentiality is so fundamental that it is not limited to communications between a client and his lawyer, but also applies to communications between even *potential* clients and lawyers.[3]

Generally, ñ[e]ven when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation.ò[4] This is because ñ[p]rospective clients, like clients, may disclose information to a lawyer é or rely on the lawyer's advice. A lawyer's consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further.ò[5]

ñ**[T]he public interest is usually best served by a strict rule requiring lawyers to preserve confidentiality of information,"** although it is subject to ñlimited

[1] Mo. S. Ct. R. 4-1.6.

[2] Mo. S. Ct. R. 4-1.6(a).

[3] Mo. S. Ct. R. 4-1.18.

[4] Mo. S. Ct. R. 4-1.18.

[5] Mo. S. Ct. R. 4-1.18 (Comment 1).

exceptions.ò[6] The purpose and necessity of this fundamental rule of attorney-client confidentiality is made clear in Comment 2 to Rule 4-1.6:

> A fundamental principle in the client-lawyer relationship is that, in the absence of the clientôs informed consent,[7] the lawyer must not reveal information relating to the representation. é ***This contributes to the trust that is the hallmark of the client-lawyer relationship***. The client is thereby encouraged to seek legal assistance and to ***communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively*** and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations,

[6] Mo. S. Ct. R. 1-1.6. (Comment 6) (emphasis added)

[7] In this context, ñinformed consentò denotes ñthe agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.ò Mo. S. Ct. R. 4-1.0(e). It is unreasonable to interpret that Section 577.041 infers the necessary ñinformed consentò to waive confidentiality when the purpose of the statute is to provide the driver access to a lawyer to help make a decision to give ñinformed consentò to or an ñinformed refusalò of chemical testing. As outlined by the Rule, informed decisions based on legal advice require a confidential exchange of information. Uninformed decisions are nonconsensual. *Teson v. Dir. of Revenue*, 937 S.W.2d 195, 197 (Mo. banc 1996). Even the lower majority in this case recognized that a driver would be ñrequired to involuntarily conduct the conversation in the presence of a police officer,ò which is not informed consent or a waiver of confidentiality. See Majority Opinion, p. 11.

deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

Common sense dictates that this fundamental tenant of confidentiality ingrained in the attorney-client relationship cannot be established without the ability to privately communicate information, and especially cannot be established in the presence of an adverse witness such as a law enforcement officer actively investigating the client for alleged wrongdoing.

In the present case, even though the officer could not hear the attorneyôs portion of the communication, he could and did hear the information disclosed by the client to the lawyer. This information *learned in the consultation by the lawyer*, and also by the investigating police officer, is the focus of the Rules of Professional Conduct regarding confidentiality. In an environment where an arresting officer is present, listening, and/or recording the clientôs words spoken to his attorney, the client is instead ***discouraged*** to seek legal assistance or to communicate fully and frankly with the lawyer, ***especially*** as to embarrassing or legally damaging subject matter, and the lawyer is thereby ***deprived*** of information needed to represent the client effectively. This frustrates the attorney-client relationship and renders the intended right meaningless.

B. The fundamental rule of confidentiality has limited express exceptions which allow, but do not require, disclosure of information, and the language of Section 577.041 RSMo does not create any additional express exceptions.

Previously, ñthis Court has adopted an approach to the attorney-client privilege that recognizes the confidentiality of communications between attorney and client as a

fundamental societal policy, to which disclosure is the exception.ò[8] Attorney-client confidentiality is ñabsolute in all but the most extraordinary situations.ò[9] The limited right to consult an attorney established in Section 577.041 RSMo does not involve a most extraordinary situation and is not an express exception to the Rule of Confidentiality.

This Honorable Court expressly established five specific exceptions to the absolute Rule of Confidentiality, other than the clientôs informed consent, in the Rules of Professional Conduct, allowing that:

> A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
> (1) to prevent death or substantial bodily harm that is reasonably certain to occur;
> (2) to secure legal advice about the lawyerôs 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 concerning the lawyerôs representation of the client;
> (4) to comply with other law or a court order; or

---

[8] *State ex rel. Friedman v. Provaznik*, 668 S.W.2d 76, 78 (Mo. 1984); *State ex rel. Great American Co. v. Smith*, 574 S.W.2d 379 (Mo. banc 1978). Although the ñattorney-client privilegeò was at issue in these cases, the ñattorney-client privilegeò is just one of three bodies of law meant to give effect to the fundamental principle of attorney-client confidentiality. Mo. S. Ct. R. 1-1.6 (Comment 3). As such, the analysis of this principle applies in all three bodies of law meant to give it effect, including the Rule of Confidentiality at issue here. See below analysis for further discussion.

[9] *State ex rel. Ford Motor Co. v. Westbrooke*, 151 S.W.3d 364, 366 n.3 (Mo. banc 2004).

> (5) to detect and resolve conflicts of interest arising from the lawyerôs change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.[10]

Even when an exception applies, the Rule of Confidentiality only ñ*permits* but does not *require* disclosure of information.ò[11] Even when an exception applies, this Court promulgated that ñ[w]here practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure.ò[12]

Even when the applicable exception is a court order to reveal confidential information, this Honorable Court has mandated in Comment 11 that ñthe lawyer should assert on behalf of the client all non-frivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law.ò[13] That is, even when faced with a court order to disclose protected information, the lawyer is ethically expected to investigate and ñ***assert*** on behalf of the client ***all*** non-frivolousò challenges to the court order and otherwise attempt to assert the Rule of Confidentiality.[14]

In *Friedman,* this Court examined the attorney-client privilege and weighed the publicôs interest in an efficient and informed grand jury against the publicôs interest in the

---

[10] Mo. S. Ct. R. 4-1.6(b).

[11] Mo. S. Ct. R. 1-1.6 (Comment 13) (emphasis added).

[12] Mo. S. Ct. R. 1-1.6 (Comment 12).

[13] Mo. S. Ct. R. 1-1.6 (Comment 11).

[14] Mo. S. Ct. R. 1-1.6 (Comment 11) (emphasis added).

confidentiality of an attorney-client relationship and, in doing so, determined that it ñmust regard preservation of the societal expectation of confidentiality as a fundamental objective. But the expectation of confidentiality must in turn be viewed in the context of the factual realities of this case.ò[15]

The factual realities of the present case do not outweigh the fundamental objective of societyôs expectation of confidentiality. Officer Clapp arrested Roesing and brought him to a secure jail facility for chemical testing to determine the alcohol content of his blood. When the officer requested he submit to testing, Roesing invoked his statutory right to contact a lawyer for advice. Roesing made contact with his lawyer, who sought to assert the Rule of Confidentiality on Roesingôs behalf when he asked the officer for privacy. Officer Clapp did not allow the communication to be private and in fact listened to Roesingôs communication to his lawyer. This communication occurred during Officer Clappôs active investigation into Roesing for which Roesing was seeking legal advice.

[15] *State ex rel. Friedman v. Provaznik*, 668 S.W.2d 76, 78 (Mo. 1984) In *Friedman,* a grand jury investigating Friedman for improper billing to a client school district subpoenaed information which would have included the identities of Friedmanôs unrelated clients for comparison of time and billing. Friedman asserted attorney-client privilege in the identity of his unrelated clients. The Court determined that the objective of producing comparison material which does not reveal confidential information regarding the unrelated clients could be met by an in camera inspection to mask the confidential portions of the material from disclosure.

Further exacerbating the problem, the law enforcement agency video and audio recorded the information conveyed from Roesing to his lawyer.

Interpreting the limited statutory right to counsel created by the Legislature to mean that communications between the attorney and client do not require privacy from third parties is to determine that the Legislature intended to carve out an additional exception to the Missouri Supreme Court Rules of Professional Conduct regarding attorney-client confidentiality and to the ñfundamental society policy, to which disclosure is the exceptionò without expressly stating this new exception in the language of the statute.

Additionally, interpreting that the statutory right to counsel does not include privacy unreasonably places lawyers in a real ethical dilemma. The Rules of Professional Conduct require that ñ[a] lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client.ò[16] Under the lower courtôs interpretation, the statute would require that, upon request, drivers must be given the ability to attempt to communicate with a lawyer, while simultaneously limiting the lawyerôs ethical ability to communicate with the driver.

Such an interpretation is simply unreasonable in light of the statuteôs intended purpose, which is to create an additional protection for the apparently inebriated driver by

[16] Rule 4-1.6(c).

allowing him the limited opportunity to attempt to obtain legal advice in order to make an informed decision.[17]

C. Even though the attorney-client privilege is not triggered because the confidential information was not offered at trial, the fundamental principle of confidentiality is given effect by three bodies of law, including the Rule of Confidentiality, which should be analyzed to determine whether Roesing's statutory right to consult a lawyer was violated.

Below, the appellate court concluded that ñRoesingôs conversation with his attorney was a privileged communication,ò which may be voluntarily waived.[18] The appellate court further concluded below that ñ[t]he privilege that attaches to any attorney-client communication which occurs after exercising the limited statutory right to attempt to contact counsel as set forth in section 577.041 is not waived merely because a driver is required to involuntarily conduct the conversation in the presence of a police officer.ò[19] It stands to follow, then, that Roesing did not waive the privileged communication in this case. The court then determined that the privilege is inapplicable to the facts in this case because the matter is civil and not criminal and the Director did not seek to admit any content of the privileged communication at trial.[20]

---

[17] *Norris v. Dir. of Revenue*, 304 S.W.3d 724, 726-27 (Mo 2010).

[18] Majority Opinion, p. 10.

[19] Majority Opinion, p. 10-11.

[20] Majority Opinion, p. 10-11.

However, this holding misunderstands the fundamental principle of client-lawyer confidentiality, only focuses on one body of law meant to give that principle effect, and wholly ignores the rule of confidentiality established by this Court in the Rules of Professional Conduct.

Nothing in Rule 4-1.6 requires that confidentiality depends only upon whether privileged communications are sought to be admitted at trial as suggested by the appellate court. In fact, the Court explains in Comment [3] of Rule 1-1.6 that

> The fundamental principle of client-lawyer confidentiality is *given effect* by related bodies of law: the attorney-client privilege, the work-product doctrine, and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, not only applies to matters communicated in confidence by the client, but also to all information relating to the representation, whatever its source.[21]

Additionally, Comment [15] to Rule 1-1.6 explains that the Rule ñrequires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyerôs supervision.ò[22] This duty also applies to and

[21] Mo. S. Ct. R. 1-1.6 (Comment 3).

[22] Mo. S. Ct. R. 1-1.6 (Comment 15).

prohibits disclosures by a lawyer ñthat do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person.ò[23]

Under the lower courtôs interpretation that the limited statutory right does not require privacy, not only does the lawyer finds himself failing to make reasonable efforts to prevent unauthorized or inadvertent disclosure or access to the confidential information by third parties, but he finds himself actually facilitating this instead. Here, the officer is a third person who was clearly not participating in the representation of Roesing. Officer Clapp is not bound by the attorney-client confidentiality rule and was in fact actively investigating Roesing in the matter for which he sought legal advice. Roesingôs lawyer needed to elicit information in order to give the necessary legal advice; however, he was unable to ethically safeguard the information when denied privacy in the communication. Neither could Roesing share any information in confidence to his lawyer. In fact, upon his lawyerôs prompting, Roesing likely found himself making disclosures that may not in themselves have revealed protected information but reasonably could have led Officer Clap to the discovery of such information.

If this fundamental principal were only given effect by the doctrine of attorney-client privilege, the Honorable Judge Wittôs suggestion in his dissenting opinion below that ñthe State would be free to eavesdrop and record conversations with attorneys and clients with impunity so long as they only used the conversations to gain an advantage

[23] Mo. S. Ct. R. 1-1.6 (Comment 4).

but did not admit the contents of the conversations at trialò[24] may reasonably become a reality. Fortunately, as he points out, ñ[t]his is not the state of the law. If a client cannot speak with his attorney with candor and clarity to obtain honest and comprehensive advice then it cannot be said that they were given an opportunity to consult with an attorney.ò[25] Any other conclusion would lead to an absurd result that must be outweighed by the fundamental societal expectation of confidentiality in attorney-client communications.

In determining that *Healea* has no application to the present case, the majority opinion states that ñno attorney-client privileged communication is alleged to have been disclosed.ò[26] However, that analysis is not entirely accurate. While the information was not sought to be used at trial, privileged communications were alleged to have been disclosed, and actually were recorded and disclosed through discovery.[27] The attorney-client privilege, one of three bodies of law meant to give effect to attorney-client confidentiality, seeks to protect against the use, or ñdisclosure,ò of confidential information *at trial*. However, the Rule of Confidentiality, another of the three bodies of law meant to give effect to attorney-client confidentiality, seeks to protect against the disclosure of information to unauthorized third parties in the first place.

---

[24] Dissenting Opinion, p. 13.

[25] Dissenting Opinion, p. 13.

[26] P. 12.

[27] *Healea v. Tucker*, SC96601, p 3-4 (Mo. May 1, 2018).

Here, Officer Clapp is not a party to the attorney-client relationship and is therefore an unauthorized third party. Officer Clapp listened to the information Roesing sought to share with his lawyer in confidence. Furthermore, the law enforcement agency audio and video recorded the information Roesing sought to share with his attorney in confidence. There is no dispute about these facts. This is the point of unauthorized disclosure upon which the Courtôs analysis should focus.

II. In order to be meaningful, the limited statutory right to a lawyer created by Section 577.041 RSMo implicitly and necessarily includes privacy in the communication because the two consequences – both civil and criminal in nature – are hopelessly entwined and a lawyer cannot reasonably advise the client in a manner so as to ensure an intentional, knowing and voluntary decision without eliciting potentially incriminating information.

The Legislature intended that law enforcement would have probable cause that the arrested individual contemplating the decision of whether to consent to or refuse chemical testing is intoxicated.[28] As such, the analysis regarding the practical implementation of the limited statutory right understands that the driver seeking advice is meant to be under arrest for suspicion of criminal wrongdoing and apparently inebriated at the time of consultation.[29]

---

[28] Mo. Rev. Stat. § 577.020 (2016); *White v. Director of Revenue*, 321 S.W.3d 298 (Mo 2010); *Callendar v. Dir. of Revenue*, 44 S.W.3d 866, 869-70 (Mo.Ct.App. 2001).

[29] *Teson v Dir. of Revenue,* 937 S.W.2d 195, 197 (Mo. 1996).

Simultaneous to the limited statutory right to counsel created by Section 577.041 RSMo., the Fifth and Fourteenth Amendments to the United States Constitution, as well as Article 1, Section 19 of the Missouri Constitution, guarantee that the driver not be compelled in a criminal case to be a witness against himself. Our Missouri Legislature was well aware of this fundamental constitutional right when it enacted Section 577.041 RSMo. requiring law enforcement to allow an arrested driver the limited opportunity to consult with counsel upon request. Although the present case contemplates the limited statutory right to an attorney as applied in a civil context, the analysis of whether the statutory right includes privacy between attorney and client upon successful contact cannot be separated between civil and criminal concerns.

When an apparently inebriated driver finds himself arrested upon suspicion of DWI, a law enforcement officer is required to inform him of the Missouri Implied Consent Law prior to requesting a chemical test to determine his blood alcohol content.[30] The Missouri Department of Revenue, Driverôs License Bureau, Form 2389, titled ñAlcohol Influence Report,ò used by most law enforcement officers during a DWI arrest, lists the Implied Consent warnings on page 2 to be read verbatim to an arrestee as follows:

[30] *Id.* Mo. Rev. Stat. § 577.041 (2016).

> 1. You are under arrest and I have reasonable grounds[31] to believe you were driving a motor vehicle while you were in an intoxicated or drugged condition;
>
> 2. To determine the alcohol or drug content of your blood, I am requesting that you submit to a chemical test of your [breath, blood, or other];
>
> 3. If you refuse to take this test, your license will immediately be revoked for one year;
>
> 4. Evidence of your refusal to take the test may be used against you in a prosecution in a court of law;
>
> 5. Having been informed of the reasons for requesting the test, will you take the test?

That is, while in police custody, the apparently inebriated driver has just been told that if he refuses to give evidence of his blood alcohol content, his driverôs license will be revoked for one year **and** the refusal will be used against him in a criminal prosecution.[32]

> The purpose of the warning provided in section 577.041.1 is to inform an apparently inebriated driver of the consequences that follow a refusal to consent to a chemical test to determine blood alcohol content. Ignoring the internal inconsistency of a system that demands that inebriated persons be given information from which to render an informed decision, the statute demands that a law enforcement officer provide an arrestee with information upon which the arrestee may make a voluntary, intentional and informed decision as to whether or not to submit to the chemical test. é Uninformed decisions are non-consensual.[33]

Section 577.041 also provides that if a driver requests a lawyer, he must be allowed twenty minutes after being read the Implied Consent warnings to attempt to

---

[31] Reasonable grounds is virtually synonymous with probable cause. *Holloway v. Dir. of Revenue*, 324 S.W.3d 768, 773 n.5 (Mo.Ct.App. 2010).

[32] Mo. Rev. Stat. § 577.041 (2016).

[33] *Teson v Dir. of Revenue*, 937 S.W.2d 195, 197 (Mo. 1996).

contact one.[34] ñIt is the exchange of information that permits the driver to make a voluntary, intentional, and informed decision as to whether (non-refusal) or not (refusal) to submit to the chemical test.ò[35]

The question before the Court is whether or not the Legislatureôs creation of this limited right to attempt to contact a lawyer includes privacy during the ensuing conversation if contact has been made. The only reasonable answer to that question is yes.

Confidentiality is imperative for this exchange of information between attorney and client to be meaningful. A driver cannot obtain legal advice to make an informed decision without divulging potentially incriminating information within earshot of the law enforcement officer who is presently investigating him for wrongdoing. An attorney cannot give effective legal advice without eliciting particularized and potentially incriminating information from the driver.

The stickiest question DWI attorneys field at social gatherings is: to blow or not to blow? That is the question. Unfortunately, this answer is not a simple one and turns on an extremely fact specific analysis requiring detailed information about the individual seeking advice and the circumstances of the night in question. Typically, those facts cannot be learned by the lawyer until he is awakened in the early morning hours fielding questions from an apparently inebriated driver.

---

[34] *Norris v. Dir. of Revenue*, 304 S.W.3d 724, 726-27 (Mo 2010).

[35] *Riley v. Dir. of Revenue*, 378 S.W.3d 432, 439 (Mo. App. 2012).

A. The Civil and Criminal consequences cannot be reasonably separated from the decision to consent or refuse and an Attorney's advice must cover both, requiring a driver disclose potentially incriminating information.

Below, the appellate court dismissed Roesing's argument regarding the risk of eliciting inculpatory statements, reasoning the argument was inapplicable because the Director did not attempt to admit the content of the conversation at trial and the criminal proceeding was not before the court.[36] However, neither Roesing nor his lawyer was in a position to make such a distinction between the two matters when discussing and contemplating Roesing's decision during the allotted twenty minute period.[37] Roesing's one decision regarding whether or not to withdraw his implied consent materially impacts both criminal and civil matters, both of which carry serious potential consequences, and therefore the decision-making process and the legal advice it relies on, must contemplate both.[38]

The lawyer has no way of knowing at the time of this exchange whether, at a later trial, opposing counsel will seek to use the statements he is about to elicit. An effective

[36] Majority Opinion, P. 12.

[37] Majority Opinion, P. 12.

[38] For the various consequences of refusal and submitting a chemical test above the legal limit, see generally: Mo. Rev. Stat. § 577.041 (2016). This penalty section has been moved to 302.574, effective January 1, 2017; Mo. Rev. Stat. § 577.037 (2016); Mo. Rev. Stat. § 577.010 (2016); Mo. Rev. Stat. § 577.020 (2016).

lawyer can only in good practice assume he or she will. Regardless of the likelihood of opposing counselôs use of the information at a later trial, the lawyer should at the very least know that he is about to elicit potentially incriminating information in the presence of a law enforcement officer currently investigating his client for wrongdoing. In this case, Roesingôs lawyer did know that the communications were even being recorded. Any lawyer who does not assume that any information heard and recorded by law enforcement would be used against his client would be reckless at best and wholly incompetent at worst. As such, Roesingôs lawyerôs ability to obtain vital information was necessarily limited by the officerôs presence making his decision to refuse an uninformed, and therefore invalid, one.[39]

All lawyers have a duty to act competently, which duty requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.[40] ñCompetent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem.ò[41] Because of the hopelessly

---

[39] This situation is especially concerning in light of Roesingôs right against self-incrimination because law enforcement created a situation that compelled Roesing to choose between disclosing otherwise confidential and incriminating information to his lawyer in the officerôs presence or not exercising his right to consult with his lawyer in a meaningful manner.

[40] Mo. S. Ct. R. 4-1.1.

[41] Mo. S. Ct. Rule. 4-1.1 (Comment 5).

intertwined nature of the decision, this inquiry requires learning information that would impact the driverôs decision-making process, including information related to both civil and criminal penalties. As suggested by the Honorable Judge Witt in the dissenting opinion below, an attorney may be ñcommitting malpractice to only advise his or her client regarding the civil license suspension and ignore the potential criminal charges that may be brought and the impact of the chemical test on those potential charges.ò[42]

Sometimes the criminal and civil consequences of a refusal may be worse than consenting to take the test. Consider the hypothetical where Driver Aôs blood alcohol content is actually under the legal limit. If Driver A consents, he will not face any license sanction and may not face any criminal charges for driving while intoxicated.[43] If Driver A refuses, he will deprive himself of exculpatory evidence and in fact create incriminating evidence - the refusal - automatically leading to license sanctions and criminal charges. Having just been arrested and told that a trained police officer believes

[42] Dissenting Opinion, P. 2. See generally: *Padilla v. Kentucky*, 559 U.S. 356, 363-64 (2009)(analyzing whether effective counsel must advise clients regarding civil deportation consequences of the decision to plead guilty in a criminal case when those consequences are practically inevitable). Here, the civil and criminal consequences are similarly uneasy to divorce and are practically inevitable as a consequence of a driverôs decision to consent or refuse.

[43] Depending on the facts of the case and the blood alcohol level, the prosecuting attorney may still be able to bring a criminal charge for driving while intoxicated.

he is intoxicated, Driver A believes he should refuse the test but is unsure since he does not feel drunk.

Driver A calls a lawyer, who knows nothing about his night until the in-custody phone call. To determine that Driver A should consent to a breath test because he is sober, the lawyer needs to know detailed information about when the driver started drinking, when the driver stopped drinking, how many drinks the driver consumed, what type of alcohol the driver consumed, as well as other factors such as food consumption, and height and weight.[44] In order to obtain this information, the lawyer finds herself in a tough position: elicit potentially incriminating information in front of the arresting/testing officer (because she cannot yet know the client is sober) or give uninformed, incomplete and incompetent legal advice, potentially committing malpractice.

Similarly, consider the hypothetical where Driver B is allegedly under the influence of drugs and not alcohol. If Driver B consents to a blood draw, he will face no civil license sanction.[45] In the criminal case, the prosecuting attorney has the more difficult task of connecting the perceived impairment with the particularly detected

[44] This list is not meant to encompass the total information needed in this situation.

[45] Mo. Rev. Stat. § 302.505 (2016), but see Mo. Rev. Stat. § 302.405 (2016) (Adult Abuse and Lose Law). Again, there is no information in the implied consent about consequences of taking the test and Driver B may incorrectly believe he faces an immediate license sanction if drugs are detected in his blood.

drug.[46] However, if Driver B refuses the test, he will have his license revoked for one year when he otherwise may not have had any license sanction and he incriminates himself by easing the prosecuting attorneyôs burden of proving that he was impaired by the particular drug.

In order to give competent advice in this situation, the lawyer needs to elicit information regarding Driver Bôs drug use and its intoxicating effects, including possibly sensitive and embarrassing medical information of diagnoses, treatment, and prescription dosage, which may lead to incriminating information that may not otherwise have been learned by law enforcement. However, without informed legal advice, Driver B cannot make a voluntary, intentional and informed decision.

Other times, the consequences of consenting to take the test may be worse than refusing. Consider the hypothetical where Driver C has a blood alcohol content above the legal limit. Driver C was arrested for DWI within the past five years. In the prior case, Driver C consented to take the test and was over the legal limit. Driver C lost her license for 90 days as a result of the prior civil case and pled guilty to DWI.[47] Because Implied

[46] Section 577.037 RSMo provides that a blood alcohol content of 0.08% or above is ñper seò evidence of alcohol intoxication. There is no such statutory equivalent for impairment by drugs.

[47] Mo. Rev. Stat. § 302.525.2 (2016). For simplicity, this hypothetical ignores the assessment of points and the resulting point suspension of driving privileges regarding the prior conviction.

Consent is silent on the issue of consent, Driver C incorrectly believes from experience that if she consents she will receive a 90 day suspension. However, this time, whether Driver C consents or refuses to take the test, the civil penalty will be a one year license revocation.[48] Additionally, Driver C incorrectly believes that she will be facing a lower DWI charge, when she will be facing an enhanced charge with an enhanced range of punishment if the existence of the prior is discovered.[49] If she consents, she will be handing the prosecuting attorney admissible ñprima facie evidenceò of her intoxication.[50] Driver Cõs lawyer needs to elicit incriminating information to determine that she is intoxicated, as well as information about the existence and results of her prior arrest, in order to give full and complete legal advice so that the driver can make a voluntary, intentional and informed decision.

The examples are infinite and the potential for circumstances aggravating the severity of potential criminal consequences are numerous.[51] Certain aggravated criminal charges related to DWI carry potential prison sentences with mandatory minimums to serve before eligibility for parole or even probation.[52] Furthermore, the level of blood alcohol content itself may aggravate the criminal consequences imposed, creating even

[48] Mo. Rev. Stat. § 302.525.2 (2016).

[49] Mo. Rev. Stat. § 577.010 (2016).

[50] Mo. Rev. Stat. § 577.037 (2016).

[51] See Mo. Rev. Stat. § 577.010 (2016).

[52] Mo. Rev. Stat. § 577.010 (2016).

more relevance to a lawyerôs need to elicit detailed incriminating information.[53] Obviously, as the seriousness of the consequences enhances, the hypothetical scenarios become more detailed and the legal advice necessarily changes.

While the above hypotheticals are not presented by the facts before this Court, one must only imagine a few scenarios value the need for privacy to ensure the free flow of potentially incriminating information from the apparently inebriated driver to the uninformed lawyer. With this understanding it becomes apparent that the Legislative mandate creating a limited statutory right to consult counsel necessarily implies privacy. To hold otherwise would place an undue burden on the driver and attorney, wholly defeat the purpose of the statute, and invalidate a driverôs desire to consult a lawyer for advice.

B. Giving 20 minutes of privacy is not impractical or unreasonable under all the circumstances.

The limited right to consult with an attorney created in Section 577.041 RSMo is just that: limited. Generally, it only attaches when a driver who has been *arrested* upon suspicion of DWI, has been asked to take a chemical test to determine the alcohol or drug content of his or her blood, and requests a lawyer.[54] The limit right begins running at the time implied consent has been read to the in-custody driver and only lasts for twenty minutes.[55]

---

[53] Mo. Rev. Stat. § 577.010 (2016).

[54] Mo. Rev. Stat. § 577.020 (2016); *Norris*, 304 S.W.3d at 726-27.

[55] Mo. Rev. Stat. § 577.041 (2016); *Norris*, 304 S.W.3d at 726-27.

In determining that Section 577.041 RSMo does not require private attorney-client communication, the majority below looked to both *Clardy v. Director of Revenue*, 896 S.W.2d 53 (Mo.Ct.App. 1995) and *In Interest of J.P.B.*, 509 S.W.3d 84 (Mo. banc 2017).[56]

The majority relied on this Courtôs finding in *In Interest of J.P.B.* that ña parent does not have to be able to communicate at all with counsel during trial, let alone confidentially, for counsel to be effective,ò and reasoned that if a father does not have a right to confidentiality in a parental rights termination, neither does a driver arrested on suspicion of DWI.[57] Such reliance, however, is misplaced and inapplicable to the unique circumstances envisioned by the statutory right to counsel granted by Section 577.041 RSMo.

Section 211.462.2 RSMo conveys to parents a right to counsel in all actions related to the termination of parental rights.[58] In *In Interest of J.P.B.*, the father challenged his inability to communicate *in real time* with his lawyer *during the trial*.[59] His challenge was not that he was unable to communicate confidentially with his attorney

[56] Majority Opinion, P. 9-10.

[57] Majority Opinion, p. 10 (quoting *In Interest of J.P.B.*, 509 S.W.3d 84, 97 (Mo. banc 2017)).

[58] *In Interest of J.P.B*, 509 S.W.3d at 97.

[59] *Id.*

at all.[60] Therefore, the Court did not address whether fatherôs statutory right to counsel was violated due to a denial of the ability to confidentially communicate with his lawyer at all, thus effectively denying him counsel.[61] In particular, the Court did not address whether father communicated confidentially with his lawyer *in preparation for* trial.

Presumably, to be effective and to act competently in accordance with Rule 4-1.1, the fatherôs lawyer made inquiry into and analysis of the factual and legal elements of the problem in preparation for trial, which would necessarily include consulting with the father.[62] That is, the challenge to the privacyôs *timing* is paramount to the decision in *In Interest of J.P.B.*. The Court did not determine that communications with counsel need

---

[60] *Id.* As noted by this Court in its opinion, that challenge was brief and seemingly in passing. ñThe argument section of Father's brief makes a passing reference to his inability to communicate confidentially with counsel during trial and then immediately proceeds to mention his inability to give real-time feedback during trial. Considering his point relied on argues his inability to give real-time feedback during trial infringed upon his right to effective assistance of counsel, the most that could be generously gleaned from Father's brief is that he is arguing his inability to communicate confidentially with counsel during trial likewise infringed upon his right to effective assistance of counsel.ò *Id.*

[61] *Id.*

[62] Mo. S. Ct. Rule. 4-1-1 (Comment 5).

not be private for the statute to be satisfied as the majority below reasons.[63] Rather, the Court determined that the statute did not require private consultations *in real time during trial* for counsel to be effective.[64]

In contrast to Section 211.462ôs broad right to counsel in termination of parental rights proceedings, driverôs Section 577.041 right to consult a lawyer is extremely limited in time and circumstance. This right only exists after an officer has developed probable cause to believe a driver committed a drug or alcohol related driving offense, after the driver has been arrested, after the driver has been read the implied consent warnings, and after the driver requests an attorney to trigger the rightôs applicability. Furthermore, this right *only exists for twenty minutes* after the driver is read the implied consent warnings. Unlike the father in *In interest of J.P.B.*, at no other time may the driver exercise this statutory right to consult with his lawyer.

When applying *Clardy*, the majority concluded that an officerôs failure to give the driver privacy ñunder all the circumstances did not effectively deprive [the driver] of his right to counsel.ò[65] ñThe referenced circumstances include that when a breathalyzer is used as the chemical test, the accused must be observed for fifteen minutes prior to the

[63] *In Interest of J.P.B.*, 509 S.W.3d at 97.

[64] *Id.*

[65] Majority Opinion, P. 9.

test. Clearly the officers were required to keep the suspect under observation.ò[66] However, this one circumstance is unpersuasive when compared to all the circumstances.

If the fifteen minute observation period is broken, say to give the driver twenty minutes to privately consult with a lawyer, the officer need only restart the fifteen minute observation period.[67] As such, admissible evidence does not require that the suspect be kept under observation such that privacy is unobtainable as suggested in *Clardy*. ñThe relationship and the continued existence of the giving of legal advice by persons accurately and effectively trained in the law is of greater societal value than the admissibility of a given piece of evidence in a particular lawsuit.ò[68]

In *Missouri v. McNeely*, the U.S. Supreme Court determined that the metabolization of blood alcohol evidence is not an exigent circumstance justifying a warrantless blood draw where an officer can reasonably obtain a subpoena without undermining the efficacy of the evidence.[69] Common sense dictates that obtaining a subpoena takes longer than fifteen minutes. Therefore, delaying the required fifteen-minute observation period for twenty minutes in order to facilitate a private attorney-client consultation does not undermine the efficacy of the evidence and therefore does not

---

[66] Majority Opinion, P. 9, FN 11.

[67] Mo. Rev. Stat. § 577.037 (2016), 19 CSR 25-30.060(4)-(7) and 19 CSR 25-30.011(2)(H).

[68] *State ex rel. Behrendt v. Neill*, 337 S.W.3d 727, 729 (Mo.Ct.App. 2011)

[69] 569 U.S. 141, 154 (2013).

outweigh the greater societal value of confidentiality in the attorney-client relationship and in giving accurate and effective legal advice.[70]

Additionally, Section 600.048.3 imposes a duty on law enforcement to ñmake a room or place available therein where any person held in custody under a charge or suspicion of a crime will be able to talk privately with his or her lawyerò in specified facilities meant for detainment. Here, Officer Clapp testified that such a room was, in fact, available. It cannot therefore be concluded here that ñunder all circumstancesò it was reasonable for Officer Clapp to deny Roesing privacy in his communication with his lawyer.

III. Holding that the purpose of 577.041 is sufficiently satisfied if the person successfully attempts to contact an attorney, regardless of whether the ensuing conversation is private, creates an absurd and confusing result for both the driver and the law enforcement officers investigating the case.

The majority below reasoned that the plain language of the statute ñdoes not afford a person the right to confer privately with an attorney if the attempt to contact an attorney is unsuccessful,ò and concluded that it ñhad no authority to engraft upon the limited statutory right to attempt to contact counsel described in section 577.041.1 a right to

[70] Presumably, the Legislature understood the risk of metabolization of blood alcohol when they limited this statutory right in time ï allowing only twenty minutes for contact.

private consultation with counsel if the attempt to contact is successful.ò[71] The court further reasoned that, ñ[i]f it is sufficient to satisfy the purpose of the [sic] section 577.041.1 to afford a person twenty minutes to unsuccessfully attempt to contact an attorney, then it is certainly sufficient to satisfy the purpose of the statute to afford a person twenty minutes to successfully attempt to contact an attorney, regardless whether the ensuing conversation is private.ò[72]

However, the language of the statute does not explicitly mention any ñensuing conversationò or ñconsultationò with an attorney because the plain language is silent on what happens after a successful ñattempt to contact an attorney.ò If the reasoning behind the majorityôs analysis is faithfully followed, it could just as easily have concluded that ñ[i]f it is sufficient to satisfy the purpose of the section 577.041.1 to afford a person twenty minutes to unsuccessfully contact an attorney, then it is certainly sufficient to satisfy the purpose of the statute to afford a person twenty minutes to successfully attempt to contact and attorney, regardless whetherò **any ensuing conversation is allowed.**[73]

The court did not so conclude because this, of course, is an unreasonable interpretation leading to absurd results where the rule will be deemed satisfied even if the client is prevented from speaking with the attorney in any meaningful manner, so long as

[71] Majority Opinion, p. 8.

[72] Majority Opinion, p. 8.

[73] Majority Opinion, p. 8

he ñsuccessfully contactedò a lawyer. ñSuccessfully contactedò could me a simple greeting, after which an officer may deem the rule satisfied and end the contact prior to any consultation. This result would invalidate the statuteôs purpose.

Denying private communications is confusing for the driver who likely expects the fundamental notion that any discussion of his legal predicament with his lawyer is confidential. Denying private communications is unworkable for an attorney when she is attempting to elicit information from an apparently inebriated driver in a manner in which to obtain vital information without the trained officer obtaining the same vital, and likely incriminating, information.

Denying private communications is confusing for the law enforcement officer who may believe that the incriminating information which he learns during this exchange is in fact admissible during the criminal proceedings, even though the lower court acknowledges admissibility may be inappropriate due violations of attorney-client privilege. A law enforcement officer may be confused what, if any, information learned during these conversations can be used to lead him to discover other potential incriminating evidence that will remain admissible in criminal proceedings. Surely the Legislature did not intend to create a situation where law enforcement learns vital information pertaining to its investigation that will later be deemed inadmissible due to Fifth Amendment or attorney-client privilege concerns.

Furthermore, holding that in this case, under these facts, that an officer actually listening to a clientôs communications to his attorney, creates audio and video recorded evidence of these communications, and actually learns information from these

communications during an active investigation would mean that Missouriôs highest court sanctions the ongoing temptation of law enforcement officers to listen to, record, disclose, and use attorney-client jail communications as evidence in a legal proceeding that have recently been coming to light in pop culture. Such a holding would be an affront to the basic tenant of the attorney-client relationship and to the accusedôs right against self-incrimination.

CONCLUSION

WHEREFORE Amicus requests that this Honorable Court determine that the limited statutory right provided by Section 577.041 RSMo. necessarily and implicitly includes the right to privacy in the attorney-client communications, that the officer violated this right in Roesingôs case by refusing privacy in the attorney-client communications, that due to this violation, Roesingôs decision to refuse was not intentional, knowing or voluntary, and that Roesingôs refusal was therefore invalid. Amicus respectfully requests that this Honorable Court reverse the trial courtôs judgment, order that the suspension, revocation, and/or disqualification of Appellantôs driving privileges be set aside and held for naught, order Respondent remove all such administrative actions from Appellantôs driving record, and to reinstate his driving privileges to the extent he is otherwise eligible.

Respectfully Submitted,

/s/ Denise L. Childress

Denise L. Childress, Mo. Bar No. 64779
Missouri Bar No. 64779
Ward & Childress | Trial Lawyers
305 West Fourth Street
Washington, Missouri 63090
Phone: (314) 394-2150
Facsimile: (314) 754-8178
info@stldwis.com

Attorney for Missouri Association of Criminal Defense Lawyers

Certificate of Service and Compliance

The undersigned hereby certifies that on October 29, 2018, the foregoing amicus brief was filed electronically and served automatically on counsel for all parties.

The undersigned further certifies that pursuant to Rule 84.06(c), this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06; and (3) contains 9756 words, as determined using the word-count feature on Microsoft Office Word. Finally, the undersigned certifies that the electronically filed brief was scanned and found to be virus-free.

/s/ Denise L. Childress