

2003

## Beware: What You Say to Your [Government] Lawyer May Be Held Against You - The Erosion of Government Attorney-Client Confidentiality

Patricia E. Salkin

*Touro Law Center*, [psalkin@tourolaw.edu](mailto:psalkin@tourolaw.edu)

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/scholarlyworks>



Part of the [Legal Ethics and Professional Responsibility Commons](#)

---

### Recommended Citation

35 Urb. Law. 283 (2003)

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ Touro Law Center. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ Touro Law Center. For more information, please contact [lross@tourolaw.edu](mailto:lross@tourolaw.edu).

# Beware: What You Say to Your [Government] Lawyer May Be Held Against You—The Erosion of Government Attorney-Client Confidentiality

Patricia E. Salkin\*

## I. Introduction

IT IS A BASIC RULE OF EVIDENCE, so common that the American public watching “made for TV lawyering” knows it is true; conversations between lawyers and clients are afforded the privilege of confidentiality.<sup>1</sup> During the last five years, however, this notion has not only been challenged, but to some extent, it has been turned upside down with respect to conversations between government lawyers and their clients.<sup>2</sup> While many see this as a legacy of the Whitewater investigation and the Clinton White House, the phenomenon has manifested itself at the state and local level and has resulted in decisions in the Sixth, Seventh, Eighth, and Ninth Circuit Courts of Appeals.<sup>3</sup> The privilege extended to attorney-client relationships in the government setting is confusing and not as clear-cut as the privilege in other attorney-client settings.<sup>4</sup> In fact, one reporter has commented that in the area of government attorney-client privilege, “government attorneys are in a legal no-man’s land.”<sup>5</sup> The pattern emerging in cases involving government lawyers and their government clients is a different set of rules for the applica-

---

\*Patricia E. Salkin is Associate Dean, Professor of Government Law, and Director of the Government Law Center of Albany Law School. The author is grateful for the research assistance provided by Albany Law School student David Lampman.

1. *E.g.*, *Swindler & Berlin v. United States*, 524 U.S. 399, 403 (1998) (declaring that “[t]he attorney client privilege is one of the oldest recognized privileges for confidential communications”).

2. *See* Amanda J. Dickmann, Note, *In re Lindsey: A Needless Void in the Government Attorney-Client Privilege*, 33 IND. L. REV. 291, 299–310 (1999).

3. *E.g.*, *In re A Witness Before the Special Grand Jury 2000–2*, 288 F.3d 289 (7th Cir. 2002); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997).

4. *See* Todd A. Ellinwood, “*In the Light of Reason and Experience*”: *The Case for a Strong Attorney-Client Privilege*, 2001 WIS. L. REV. 1291 (2001).

5. Walter Pincus, *No Clear Legal Answer: The Uncertain State of the Government Attorney-Client Privilege*, 4 GREEN BAG 2D 269, 269 (2001).

bility of the attorney-client privilege in the criminal activity arena.<sup>6</sup> These decisions, as well as a general discussion of the reasons for and against recognizing a privilege for government attorney-client conversations, are discussed below.

## II. Overview of Attorney-Client Privilege

### A. Purpose of the Privilege

Dating back to the sixteenth century, the attorney-client privilege is the oldest of the privileges in an attorney-client relationship.<sup>7</sup> It was created for the purpose of protecting the oath and honor of the attorney.<sup>8</sup> Thus, in its earliest form, the privilege could only be waived by the attorney.<sup>9</sup> Of course, the policy reasons for the privilege have since changed.<sup>10</sup> Today the privilege is designed to promote freedom of consultation between the client and attorney.<sup>11</sup> To achieve its goal of freedom of consultation, the privilege requires that all communications between the attorney and the client must be kept confidential, absent the client's consent.<sup>12</sup> One rationale for the attorney-client privilege is that pro-

---

6. In the most recent case on point, the Seventh Circuit stated, "There is surprisingly little case law on whether a government agency may also be a client for purposes of this privilege, but both parties here concede that, at least in the civil and regulatory context, the government is entitled to the same attorney-client privilege as any other client." *In re A Witness before the Special Grand Jury 2000-2*, 288 F.3d 289, 291 (7th Cir. 2002) (citing *Green v. IRS*, 556 F. Supp. 79, 85 (N.D. Ind. 1982), *aff'd*, 734 F.2d 18 (7th Cir. 1984); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 74 (2000)).

7. Marion J. Radson & Elizabeth A. Waratuke, *The Attorney-Client and Work Product Privileges of Government Entities*, 30 STETSON L. REV. 799, 801 (2001); see *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). See also 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290, at 542 (McNaughton rev. 1961).

8. See Bryan S. Gowdy, Note, *Should the Federal Government Have an Attorney-Client Privilege?*, 51 FLA. L. REV. 695, 698 (1999) (citing WIGMORE, *supra* note 7); see also Katherine L. Kendall, Note, *In re Grand Jury Subpoena Duces Tecum: Destruction of the Attorney-Client Privilege in the Government Realm?*, 1998 UTAH L. REV. 421, 421-22 (1998).

9. See, e.g., Kendall, *supra* note 8, at 422; Gowdy, *supra* note 8, at 697-698; WIGMORE, *supra* note 7, at 545.

10. See Kendall, *supra* note 8, at 423 (noting that the change occurred because of the increase in legal business, and the increase in the complexity of legal matters that lead to a greater demand for representation).

11. Gowdy, *supra* note 8, at 698 (noting that the privilege began to take its modern form in the eighteenth century). See also *Hunt v. Blackburn*, 128 U.S. 464, 479 (1888) (holding that the privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.").

12. See Gowdy, *supra* note 8, at 698; see also Radson & Waratuke, *supra* note 7, at 799 (stating that "[t]he confidentiality inherent in the privilege lies at the heart of the American judicial system.").

moting freedom of consultation “encourages full and frank communication between attorneys and their clients”<sup>13</sup> enabling an attorney to properly represent the client because it is more likely that the client will disclose all relevant facts.<sup>14</sup> The freedom of consultation is also designed to encourage clients to seek legal counsel in the earliest stage of their conflict.<sup>15</sup> Perhaps the most compelling justification for the privilege is that it “promote[s] broader public interests in the observance of law and administration of justice”<sup>16</sup> by recognizing that sound legal advice “depends upon the lawyer being fully informed by the client.”<sup>17</sup>

### B. *Defining the Scope of the Privilege*

In his treatise on evidence, Wigmore organizes the privilege into eight elements:

- [1] Where legal advice of any kind is sought
- [2] from a professional legal adviser in his capacity as such,
- [3] the communications relating to that purpose,
- [4] made in confidence
- [5] by the client,
- [6] are at his instance permanently protected
- [7] from disclosure by himself or by the legal adviser,
- [8] except the protection be waived.<sup>18</sup>

The first element, “legal advice,” is a sticky issue for government lawyers who at times are providing legal advice but at other times may be providing policy advice and political or strategic advice. The latter type of exchange might not be covered by the privilege.<sup>19</sup> The fifth element, that the advice be sought “by the client,” is also problematic in the government context because it is often unclear if the represented party is an individual or the office that is held. If it is the latter, what happens if during the representation a new person is elected or appointed to that office? Although those issues are not the focus of this article, they are mentioned briefly in Section IV.

### C. *The Traditional Privilege: The Private Corporate Setting*

Many courts have analogized that the attorney-client privilege in the private corporate setting can serve as a template for courts that are faced

---

13. *Upjohn*, 449 U.S. at 389.

14. See Kendall, *supra* note 8, at 423 (quoting MODEL CODE OF PROF'L RESPONSIBILITY EC 4-1 (1995)).

15. See *id.*

16. *Upjohn*, 449 U.S. at 389.

17. *Id.*

18. WIGMORE, *supra* note 7, at 554.

19. See Ellinwood, *supra* note 4, at 1298.

with the challenge of interpreting the privilege in the government context.<sup>20</sup> Considering this relationship can be helpful since both private corporations and government agencies are entities.<sup>21</sup> The Supreme Court has long held that the attorney-client privilege exists in the corporate setting.<sup>22</sup> The issue that arises in these cases is often the identity of the attorney's client.<sup>23</sup> Lower courts often use the "control group" test to determine if the privilege applies to the corporate employee.<sup>24</sup> This test examines whether the employee was "in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney."<sup>25</sup> Other courts have applied the "subject matter" test.<sup>26</sup> This test seeks to reveal whether the employee was:

[S]ufficiently identified with the corporation so that his communication to the corporation's lawyer is privileged where the employee made the communication at the direction of his superiors and where the subject matter upon which the lawyer's advice was sought by the corporation and dealt with in the communication was within the performance by the employee of the duties of his employment.<sup>27</sup>

In *Upjohn Co. v. United States*,<sup>28</sup> the Supreme Court noted the importance of a robust attorney-client privilege.<sup>29</sup> It also criticized the control group test as "frustrating the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice."<sup>30</sup>

Analogizing the attorney-client privilege in the government setting to the privilege in the corporate setting raises significant issues given current events and public investigations into financial scandals that have plagued corporate America. Government lawyers desiring to protect and preserve any existing privilege through the corporate analysis must be mindful of the extent of congressional and Securities and Ex-

---

20. *Id.* at 1303; *see also* Gowdy, *supra* note 8, at 702; *but see* Lory A. Barsdate, Note, *The Republican Civic Tradition: Attorney-Client Privilege for the Government Entity*, 97 YALE L.J. 1725, 1738-42 (1998) (explaining the limitations of this analogy).

21. Gowdy, *supra* note 8, at 702.

22. *See, e.g.,* *United States v. Louisville & Nashville R.R. Co.*, 236 U.S. 318, 336-227 (1915).

23. *See* Gowdy, *supra* note 8, at 701.

24. *See, e.g.,* *Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483, 485 (E.D. Pa. 1962).

25. *Id.* at 485.

26. *See, e.g.,* *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 602 (8th Cir. 1997) (citing *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 491-92 (7th Cir. 1970)).

27. *Id.*

28. 449 U.S. 383 (1981).

29. *See id.* at 393.

30. *Id.* at 392; *see also* Gowdy, *supra* note 8, at 703 (noting that the court did not adopt the subject matter test).

change Commission hearings and investigations into the inside operations, decisions, and policies of corporate giants. Public sentiment that calls for corporate accountability resonates with the public trust that government officials are sworn to uphold. Public pressure for “truth-finding” in the corporate setting may be a signal that courts will retrench to the control group test, thus limiting the number of employees that the attorney-client privilege will cover. Similarly, the government attorney should be mindful that the attorney-client privilege may not apply to all parties.

### III. Privilege in the Government Setting

#### A. *Brief History of Government Privilege*

Although most courts agree that there is a government attorney-client privilege<sup>31</sup> there is no clear precedent for courts to use in determining its scope.<sup>32</sup> Unlike the private attorney-client privilege, there is no legal tradition of a government privilege.<sup>33</sup> In fact, there was little application of the privilege applied to governments<sup>34</sup> prior to 1967 when Congress passed the Freedom of Information Act (FOIA).<sup>35</sup> The FOIA sought “to permit access to official information long shielded unnecessarily from public view and attempt[ed] to create a judicially enforceable public right to secure such information from possibly unwilling official hands.”<sup>36</sup> Congress created nine exceptions to the FOIA, however, that allow the government to keep documents from the public.<sup>37</sup> The inclusion of these exceptions in the FOIA may arguably serve as evidence that Congress intended for the attorney-client privilege to extend to the government in certain circumstances.<sup>38</sup>

---

31. 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5475, at 125 (1986); *see also* Gowdy, *supra* note 8, at 696 n.4.

32. Jeffrey L. Goodman & Jason Zabokrtsky, *The Attorney-Client Privilege and the Municipal Lawyer*, 48 *DRAKE L. REV.* 655, 658 (2000); *see also* Gowdy, *supra* note 8, at 705–06.

33. Gowdy, *supra* note 8, at 706.

34. *See, e.g.,* *United States v. Anderson*, 34 F.R.D. 518, 523 (D. Colo. 1963) (holding that the privilege applied to the government). In applying the standards that were typically used to evaluate a corporate privilege, the Court failed to make a distinction between corporate and government entities. *See id.*

35. Gowdy, *supra* note 8, at 706.

36. *EPA v. Mink*, 410 U.S. 73, 80 (1973). Mink was the first FOIA case heard by the Supreme Court.

37. *See* 5 U.S.C. § 522(b)(2002); *see also* Gowdy, *supra* note 8, at 707 (noting that these exceptions were created because some lawmakers feared that the FOIA had the potential to impede upon the “full and frank exchange of opinions” between government agents) (citing H.R. REP. NO. 89–1497, at 10 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2427).

38. *See* Gowdy, *supra* note 8, at 708.



*B. Reasons for the Attorney-Client Privilege in the Government Setting*

The most compelling argument in favor of the government attorney-client privilege is the necessity of ensuring that there will be full and frank communication between government lawyers and their clients thereby promoting the broader public interests in the observance of law and the administration of justice.<sup>39</sup> Similar to the private sector, if there were no guarantee that these conversations would be protected as confidential, lawyers would not have access to all of the detailed information needed to zealously represent clients and to uphold the law.<sup>40</sup> In the government context, it has been argued that if government officials know that conversations with their legal counsel are not privileged, public officials might avoid discussing sensitive matters with counsel, which could lead to legal violations and corruption.<sup>41</sup> It has been further suggested that uninformed public officials would be afraid to obtain legal advice and could be unable to effectively carry out their policy objectives, hampering the implementation of government programs.<sup>42</sup> Ultimately, proponents of the privilege assert that absent a privilege, people might be unwilling to serve in public office.<sup>43</sup>

One leading treatise on federal practice offers the following rationale in support of government attorney-client privilege:

1) other governmental privileges do not deal with the unique requirements of attorney confidentiality; 2) the court's ability to apply the privilege to private parties may be a better source of regulation than expanding other government privileges; 3) denying elected officials open discussions about pending litigation with counsel would be detrimental to society as a whole; 4) full and frank disclosure is just as important in the public context as it is in the private context; 5) without the privilege, government may be required to fight with one hand behind its back; and 6) when a municipality has its own staff of lawyers, courts may analogize the privilege as applied to in-house corporate counsel.<sup>44</sup>

*C. Reasons to Restrict the Attorney-Client Privilege in the Government Setting*

Generally, application of the attorney-client privilege may result in the exclusion of relevant evidence; therefore, it stands "in derogation of

---

39. See *Upjohn v. United States*, 449 U.S. 383, 289 (1981).

40. See *Radson & Waratuke*, *supra* note 7, at 821; see also *Swindler & Berlin v. United States*, 524 U.S. 399, 412 (1998).

41. *In re A Witness Before the Special Grand Jury 2000-2*, 288 F.3d at 293 (citing *In re Lindsey*, 158 F.3d 1263, 1286-87 (D.C. Cir. 1998)).

42. *Id.* (citing Judge Kopf's dissenting opinion in *In re Grand Jury Subpoena Duces Tecum*, 122 F.3d 910, 932 (8th Cir. 1997)).

43. *Id.* at 293.

44. See *WRIGHT & GRAHAM*, *supra* note 31, § 5475, at 127-28.

the search for truth.”<sup>45</sup> The most persuasive argument against extending the privilege to government lawyers-clients is that in the public practice of law, the ultimate client might be the general public and not the public official.<sup>46</sup> A discussion of “who is the client of the government lawyer” is also fraught with legal uncertainty and remains somewhat unsettled in judicial opinions and law review commentaries.

Rather, in the context of discussing whether a privilege of confidentiality ought to attach in the government setting, the courts have not looked to clearly define the “client” of the government lawyer, but have carved out a “higher duty” of government lawyers to act in the public interest.<sup>47</sup> It has been argued that public officials are not the same as ordinary citizen-clients because public officials are empowered to exercise the power of government. With this responsibility comes a duty to act in the public interest and “[i]t follows that . . . [a] government lawyer [is] duty-bound to report internal criminal violations, not to shield them from public exposure.”<sup>48</sup> Lastly, following the spirit of the Freedom of Information laws at the federal and state levels, there is a strongly held belief that government information should be open and available to the public<sup>49</sup> and that such openness in government protects the people from a potentially corruptible government. Of course, government officials may always retain, at their own expense, a nongovernment lawyer and presumably any and all conversations would be entitled to the traditional attorney-client privilege.

#### D. *The Civil/Criminal Distinction of the Government Privilege*

Courts have recently made a sharp distinction of the attorney-client privilege as applied to criminal and civil cases in the government context.<sup>50</sup> In *Jaffe v. Redmond*,<sup>51</sup> the Supreme Court noted that:

---

45. *United States v. Nixon*, 418 U.S. 683, 710 (1974).

46. *Ellinwood*, *supra* note 4, at 1315.

47. *In re A Witness Before the Special Grand Jury 2000-2*, 288 F.3d at 293 (citing *Lindsey*, 158 F.3d 1263, 1273 (D.C. Cir. 1998)); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. (2001) (noting “government lawyers may have higher duty to rectify wrongful official acts despite general rule of confidentiality.”).

48. *Id.* (citing *Nixon*, 418 U.S. at 712-13; *Lindsey*, 158 F.3d at 1273).

49. *See Lindsey*, 158 F.3d at 1274 (citing *In re Sealed Case (Espy)*, 121 F.3d at 749).

50. *See Lindsey*, 158 F.3d at 1278 (declaring that government attorneys may not rely on the government attorney-client privilege when it would be used to screen information concerning criminal activities from a grand jury); *see infra* notes 82-101 and accompanying text providing a full discussion of *Lindsey*; *see also In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 921 (8th Cir. 1997) [hereinafter *Duces Tecum*] (proclaiming that “to allow any part of the federal government to use its in-house attorneys as a shield against the production of information relevant to a federal criminal investigation would represent a gross misuse of public assets”); *see infra* notes 89-97 and accompanying text providing a full discussion of *Duces Tecum*; *see also infra* note 98.

51. 518 U.S. 1 (1996).



if the purpose of the privilege is to be served, the participants in the confidential conversation "must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."<sup>52</sup>

In spite of this caveat, holdings in recent cases have rendered the government attorney-client privilege an uncertain privilege.<sup>53</sup> Uncertain because these holdings seem to be in conflict with *Swidler & Berlin v. United States*<sup>54</sup> in which the Supreme Court held that the attorney-client privilege is not to be applied differently in a civil context versus a criminal context.<sup>55</sup> Although *Swidler* dealt with an attorney working in the private setting,<sup>56</sup> it is important to note that *Lindsey* was argued four days after the Supreme Court decided *Swidler*, and it contains only three references to the *Swidler* holding.<sup>57</sup> Conversely, *In re A Witness Before the Special Grand Jury 2000-2*,<sup>58</sup> a case decided in April 2002, the Court paid more attention to *Swidler*. In this case, the Court rejected the claim that *Swidler* compelled the Court to find an absolute privilege in the government criminal context simply because there is a government attorney-client privilege in the civil arena.<sup>59</sup> The Court noted that the pedigree of the *Swidler* privilege was much different than the government privilege.<sup>60</sup> Thus, this case holds that in light of *Swidler*, there is a distinction between civil and criminal litigation on the government level of privilege.<sup>61</sup> The impact of the inconsistency caused by these lower court decisions may be far reaching since it is likely that the lower courts will follow the lead of *In re: A Witness Before the Special*

---

52. *Id.* at 18 (citing *Upjohn*, 449 U.S. at 393).

53. See Note, *Maintaining Confidence in Confidentiality: The Application of the Attorney-Client Privilege to Government*, 112 HARV. L. REV. 1995, 2006-08 (1999) [hereinafter *Maintaining Confidence*]; see also Pincus, *supra* note 5, at 274; Goodman & Zabokrtsky, *supra* note 32, at 672-75.

54. 524 U.S. 399 (1988). As part of the investigation of the dismissal of White House Travel Office employees, the independent counsel subpoenaed the handwritten notes taken by Vincent Foster's attorney during a private meeting between the two. Nine days after the meeting, Vincent Foster committed suicide. The independent counsel argued that the attorney-client privilege ended with Mr. Foster's death because of the possible evidentiary value of the notes in an ongoing criminal investigation.

55. *Id.* at 408-09.

56. *Id.* at 401.

57. See Pincus, *supra* note 5, at 274.

58. 288 F.3d 289 (7th Cir. 2002); see *infra* notes 119-26 and accompanying text providing a full discussion of the case.

59. *Id.* at 292.

60. *Id.*

61. *Id.*

*Grand Jury* in applying *Lindsey* and *Duces Tecum* to cases concerning state and local officials in spite of the *Swidler* holding.<sup>62</sup>

E. *Examining “The Client” in the Government Setting*

The fifth factor in Wigmore’s analysis,<sup>63</sup> that the privilege is “by the client,” poses significant challenges for government lawyers seeking to identify exactly who the client is. Many of the cases discussed below that deal specifically with the question of government attorney-client confidentiality rely on the language of proposed Federal Rule of Evidence 503, which, if enacted, would have defined “client” to include “a person, public officer, or corporation, association, or other organization or entity, either public or private.”<sup>64</sup> With a wealth of literature discussing who is the client of the government lawyer, offering various approaches and answers to this question, there are five possible clients of the government lawyer: “1) the responsible official; 2) the government agency (the White House [or a particular agency such as the Department of Environmental Conservation]); 3) the branch of govern-

---

62. *Id.* at 291–92. There is ample precedent of federal and state courts extending the privilege to governments on the state and municipal level. *See United States v. AT&T*, 86 F.R.D. 603, 621 (D.D.C. 1970) (noting that the government attorney-client privilege should be held to the same standard as the privilege applied to corporations); *see also Boyer v. Board of County Comm’rs*, 162 F.R.D. 687, 690 (D. Kan. 1995) (stating that the attorney-client privilege covers communications between a county employee and a county attorney). *See Markowski v. City of Marlin*, 940 S.W.2d 720, 726 (Tex. App. 1997) (holding that the privilege extends to governmental entities to conduct a closed meeting because “a governmental body has as much right as an individual to consult with its attorney without risking the disclosure of important confidential information.”). The Texas court reasoned that because a governing body may consult privately with its attorney, logic prescribes that the information disclosed should be protected. *Id.* at 727. However, the court directed that a “checking” mechanism be applied to claims of the government attorney-client privilege. *Id.* In order to justify the privilege, the court required the proponents to submit the alleged privileged documents or communications to an *in camera* inspection. *Id.* *See Maxwell v. Freedom of Info. Comm’n*, 794 A.2d 535, 537 (Conn. 2002) (“In any civil or criminal case or proceeding or in any legislative or administrative proceeding, all confidential communications shall be privileged and a government attorney shall not disclose any such communications unless an authorized representative of the public agency consents to waive the privilege and allow such disclosure.”) (citing CONN. GEN. STAT. § 52–146r (4)(b)). *See also Prior Lake Am. v. Mader*, 642 N.W.2d 729, 731 (Minn. 2002) (holding that the public’s right to access information outweighed the need for the privilege); *but cf. Reed v. Baxter* 134 F.3d 351, 358 (6th Cir. 1998) (narrowing the privilege on the municipal level); *see infra* notes 128–135 and accompanying text for a full discussion of *Reed*.

63. WIGMORE, *supra* note 7, at 554.

64. PROPOSED FED. R. EVID. 503(a)(1), *reprinted in* 56 F.R.D. 183, 235 (1972). “Although Proposed Federal Rule of Evidence 503 was among the privilege rules for which Congress substituted the general Rule 501, the proposed rule remains a source for defining the federal common law of the attorney-client privilege. Barsdate, *supra* note 20, at 1744 n.2; *see, e.g., Tennenbaum v. Deloitte & Touche*, 77 F.3d 337, 340 (9th Cir. 1996) (noting that the court would use Proposed Rule 503 as a comprehensive guide to federal law of privilege).

ment (i.e., executive branch or legislative branch); 4) the government as a whole (including all of the above); or 5) the public.”<sup>65</sup>

The complexity of determining who is the client of a government lawyer is best illustrated in *Brown & Williamson Tobacco Corp. v. Pataki*.<sup>66</sup> In February 2001, the federal District Court for the Southern District of New York had occasion to consider for the first time the question of who is the client of the government for purposes of a conflict of interest analysis (not for purposes of privilege).<sup>67</sup> Like other courts before it, this court remarked that “[a]scertaining who the client really is can be a complex affair when a governmental entity is involved.”<sup>68</sup> This case involved the law firm of Covington & Burling (C&B), which was under contract for approximately twenty-five years with the State of New York to provide representation for a variety of social welfare programs.<sup>69</sup> The law firm worked under contract with the Division of the Budget, and through this contract, worked with several state agencies including the Office of Mental Retardation and Developmental Disabilities (OMRDD), the Office of Mental Health (OMH), the Office of Temporary and Disability Assistance (OTADA), the Department of Social Services (DSS), and the Department of Health (DOH).<sup>70</sup> Among the various projects C&B was working on was Medicaid reimbursement.<sup>71</sup> At the same time, C&B represented a variety of “private” clients including the Tobacco Institute and Brown & Williamson Tobacco Corporation.<sup>72</sup> While C&B was suing the federal government on behalf of the State of New York, C&B was also suing the State of New York on behalf of client Brown & Williamson Tobacco.<sup>73</sup> The Attorney General filed a motion to disqualify C&B from representing Brown & Williamson Tobacco on the grounds that its client was not the Division of the Budget and through it, OTADA, but rather the state as a whole.<sup>74</sup>

---

65. See Ellinwood, *supra* note 4, at 1315 (citing GEOFFREY C. HAZARD, JR. ET. AL., *THE LAW AND ETHICS OF LAWYERING* 769, 787 (3d ed. 1999)).

66. 152 F. Supp. 2d 276 (S.D.N.Y. 2001).

67. *Id.*

68. *Id.* at 282 (citing *Gray v. Rhode Island Dep’t of Children, Youth and Families*, 937 F. Supp. 153, 157–8 (D.R.I. 1996)). Wherein the Rhode Island District Court also added, “The definition of ‘client’ may differ depending on whether the lawyer is representing an individual or an agency, and whose interests are being served by the legal advice.” *Id.*

69. *Brown*, 152 F. Supp. 2d at 278.

70. *Id.*

71. *Id.*

72. *Id.* at 279.

73. *Id.*

74. *Brown*, 152 F. Supp. 2d at 277, 284.

The state relied on ABA Model Rule 1.13 and Comment 6, which provides that a lawyer employed or retained by an organization (e.g., the state) represents the organization.<sup>75</sup> Read in conjunction with an opinion from the ABA holding that a lawyer representing the government may, under certain circumstances “represent a client against another government entity in the same jurisdiction in an unrelated matter, as long as the two government entities are not considered the same client,”<sup>76</sup> there was a case in controversy over the C&B representation. C&B relied on a then recent opinion of the Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York, which held that “treating different governmental departments or agencies as separate clients for the application of conflicts rules is in keeping with recent opinions treating separate corporate entities in the private sector as distinct clients for conflicts purposes.”<sup>77</sup>

The state proceeded to point to a laundry list of items, activities, and connections that might suggest an attorney-client relationship between the law firm and the state government as a whole.<sup>78</sup> The court did not find persuasive the state’s argument that since C&B consulted with the general counsel of various state agencies, who in turn consulted with the counsel to the governor, that this was evidence that C&B represented the state as a whole.<sup>79</sup> The court also failed to buy into the state’s argument that since the Division of the Budget is an executive branch agency, it would follow that C&B represented the executive branch as a whole.<sup>80</sup> The fact that C&B bills were paid using state funds was alone not enough to support a finding that the state as a whole was a client.<sup>81</sup> Although the court found that the client of C&B was not the state as a whole, the court went on to apply the substantial relationship test to determine whether C&B’s representation of Brown & Williamson Tobacco was adverse to the interests of their government representation.<sup>82</sup> The court found that the representation was not adverse, and

---

75. *Id.* at 284. MODEL RULES OF PROF’L CONDUCT R. 1.13 cmt. 6 (1999). “[D]efining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole.” *Id.*

76. *Id.* (quoting ABA Comm. on Prof’l Ethics and Grievances, Formal Op. 97-405 (Apr 17, 1997)).

77. *Id.* at 285.

78. *Id.* at 285-87.

79. *Brown*, F. Supp. 2d at 285-86 (noting that in fact, the court noted that C&B’s contract with the Division of the Budget specifically stated that C&B “shall advise, assist and represent appropriate State officials’ in connection with welfare matters.”).

80. *Id.* at 286.

81. *Id.* at 287.

82. *Id.* at 287-88.



further, there was no confidential information C&B gleaned from the state that could be used against the state in its current representation of Brown & Williamson.<sup>83</sup>

This case, while important, still has not answered the question of whether an individual public official can ever be considered a "client" of a government lawyer. The cases that follow also fail to specifically address this crucial issue. If government lawyers do not or cannot represent individual government officials, then there can be no privilege.

#### **IV. Narrowing the Scope of the Government Attorney-Client Privilege: The Decisions Are in**

##### *A. Criminal Prosecutions During the Clinton Years*

The Clinton White House gave rise to a number of decisions that have shaped the attorney-client privilege for government attorneys and government clients. On June 21, 1996, Independent Counsel Kenneth Starr served a grand jury subpoena on the White House requiring the production of all Whitewater relevant documents/notes created during meetings attended by any attorney from the Office of Counsel to the President and the First Lady, Hillary Clinton (whether or not any other person was present).<sup>84</sup> The Independent Counsel was seeking the production of notes taken by counsel regarding the First Lady's actions following the death of Vincent Foster and the notes regarding billing information of the Rose Law Firm.<sup>85</sup> The White House claimed that such documents were privileged, citing the attorney-client privilege and the belief between both counsel and the First Lady that such conversations were confidential.<sup>86</sup> The court concluded that whether or not a government attorney-client privilege exists at all, "the White House may not use the privilege to withhold potentially relevant information from a federal grand jury."<sup>87</sup> In reviewing prior decisions, the court distinguished the role of the government lawyer from the role of the corporate lawyer and noted the requirement that executive branch employees, including lawyers, are duty bound to report criminal wrongdoing.<sup>88</sup> In essence, in the criminal setting, the court maintained that "the government's need for confidentiality may be subordinated to the needs of the government's own criminal justice processes."<sup>89</sup>

---

83. *Id.* at 289.

84. *Duces Tecum*, 112 F.3d at 913.

85. *See Maintaining Confidence*, *supra* note 53, at 1998.

86. *Duces Tecum*, 112 F.3d at 913-14.

87. *Id.* at 915 (noting that they "need not decide whether the government attorney-client privilege exists in other contexts").

88. *Id.* at 915-21.

89. *Id.* at 919.



When Independent Counsel Kenneth Starr's investigation into President Clinton's involvement in Whitewater was expanded to include an inquiry into the Monica Lewinsky scandal, the grand jury issued a subpoena to Bruce Lindsey compelling him to testify.<sup>90</sup> At the time, Lindsey held two positions—Deputy White House Counsel and Assistant to the President. While Lindsey did appear before the grand jury, at times he refused to answer certain questions invoking an attorney-client privilege.<sup>91</sup> The independent counsel then sought a court order requiring Lindsey to disclose the requested information.<sup>92</sup> It is important to note that the executive privilege was not argued in this case, only the attorney-client privilege was appealed.<sup>93</sup>

This decision is significant for a number of reasons. First, while acknowledging that “[c]ourts, commentators, and government lawyers have long recognized a government attorney-client privilege in several contexts,”<sup>94</sup> the majority went on to admonish that this privilege “is not recognized in the same way as the personal attorney-client privilege.”<sup>95</sup> The court developed its analysis to define the “particular contours of the government attorney-client privilege.”<sup>96</sup>

The D.C. Circuit Court began its analysis of the government attorney-client privilege with a discussion of the development of this privilege in the public sector context through requests made for information exempted by the federal Freedom of Information Act.<sup>97</sup> This statutory exemption protects from disclosure intra-agency memoranda or letters that would normally be protected under the attorney-client privilege.<sup>98</sup> The court noted that this exemption did not itself create a government attorney-client privilege, it was rather the intent of Congress that the enactment of the Freedom of Information law should not cause a loss of protection traditionally afforded through rules of evidence.<sup>99</sup> Citing a prior opinion of the Department of Justice that reasoned that the attorney-client privilege “functions to protect communications between government attorneys and client agencies or

---

90. *Lindsey*, 158 F.3d at 1267; see also Dickmann, *supra* note 2, at 299 (stating that prior to *Lindsey* courts applied a broad interpretation of the government attorney-client privilege). *Lindsey* held that the privilege would never apply in a grand jury investigation of a government employee. 158 F.3d at 1278.

91. *Lindsey*, 158 F.3d at 1267.

92. Dickmann, *supra* note 2, at 301.

93. *Lindsey*, 158 F.3d at 1267.

94. *Id.* at 1268.

95. *Id.* at 1272; see also *Maintaining Confidence*, *supra* note 53, at 2005.

96. *Lindsey*, 158 F.3d at 1272.

97. See 5 U.S.C. § 552(b)(5); see also *Lindsey*, 158 F.3d at 1268.

98. See *Lindsey*, 158 F.3d at 1268.

99. *Id.* at 1268–69.

departments. . . ,”<sup>100</sup> the court stated, “[r]ecognizing that a government attorney-client privilege exists is one thing. Finding that the Office of the President is entitled to assert it here is quite another.”<sup>101</sup>

The court reviewed a number of types of communications between government lawyers and their clients. The court noted that a government lawyer’s “advice on political, strategic, or policy issues, valuable as it may have been, would not be shielded from disclosure by the attorney-client privilege.”<sup>102</sup> The court also asserted that the burden is on the party claiming the privilege to prove that such conversations fall within the scope of protection.<sup>103</sup> Focusing next on the facts of the case, the court turned to the question of “whether an attorney-client privilege permits a government lawyer to withhold from a grand jury information relating to the commission of possible crimes by government officials and others . . .” while noting that this was a case of first impression.<sup>104</sup>

The court relied upon compelling public policy arguments to support their decision compelling Bruce Lindsey to testify.<sup>105</sup> They reasoned that, “[w]hen an executive branch attorney is called before a federal grand jury to give evidence about alleged crimes within the executive branch, reason and experience, duty and tradition dictate that the attorney shall provide that evidence.”<sup>106</sup> The court further described the responsibility of the “public trust” that government lawyers are bound

---

100. *Id.* at 1269 (citing Theodore B. Olsen, Assistant Attorney General, Office of Legal Counsel, *Confidentiality of the Attorney General’s Communications in Counseling the President*, 6 Op. Off. Legal Counsel 481 (1982)).

101. *Id.* at 1270. The court later goes on to chastise government lawyers who hold the belief that such a privilege exists. The court states that

[o]nly a certain conceit among those admitted to the bar could explain why legal advice should be on a higher plane than advice about policy, politics or why a President’s conversation with the most junior lawyer in the White House Counsel’s Office is deserving of more protection from disclosure in a grand jury investigation than a President’s discussions with his Vice President or a Cabinet Secretary. In short, we do not believe that lawyers are more important to the operations of Government than all other officials or that the advice lawyers render is more crucial to the functioning of the Presidency than the advice coming from all other quarters.

*Id.* at 1278.

102. *Id.* at 1270 (relying on the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. c. (proposed final draft No. 1, 1996), which offers, “consultation with one admitted to the bar but not in that other person’s role as lawyer is not protected.” *Id.*

103. *Lindsey*, 158 F.3d at 1270. The court continued that since this has not occurred in the present case as the arguments centered to date on whether any attorney-client privilege existed to protect the conversations, not on whether, if the privilege could be invoked, the conversations were covered by it; therefore Lindsey would have to return to grand jury anyway should the court find a privilege could exist. *Id.*

104. *Lindsey*, 158 F.3d at 1271–72.

105. *Id.*

106. *Id.* at 1272.

to uphold, stopping short of suggesting that the public is the client of the government lawyer,<sup>107</sup> yet contemplating that the “proper allegiance of the government lawyer is complemented by the public’s interest in uncovering illegality among its elected and appointed officials.”<sup>108</sup>

As to the question of who is the client of the government lawyer, the court noted that in the client “may be the agency and the attorney may be an agency lawyer.”<sup>109</sup> They went on to state, however, that “[u]nlike a private practitioner, the loyalties of a government lawyer therefore cannot and must not lie solely with his or her client agency.”<sup>110</sup> Particularly in the criminal context, the court found significant authority in federal law requiring federal government lawyers to report information about violations of Federal Criminal Code Title 18.<sup>111</sup>

Although the President attempted to argue that Lindsey served a dual role as his personal counsel, the court noted that while it is true that public officials are entitled to personal counsel and that conversations between the public official and personal counsel could be privileged, in the present case, Lindsey’s personal client overlaps with his public client in his official capacity, and as such, the conversations at issue could not be protected.<sup>112</sup>

### *B. More Recent Opinions Further Erode the Privilege*

Many public sector lawyers had rationalized the holdings in the foregoing cases as ones reasoned to address a highly public, closely scrutinized, and intensely political investigation of the White House. Based on these beliefs, it was thought that the holding was limited to criminal

---

107. *Id.* at 1272–73. The court stated that “we do not suggest, however, that the public is the client as the client concept is usually understood. It is to say that the lawyer’s employment requires him to observe in the performance of his professional responsibility the public interest sought to be served by the governmental organization of which he is a part.” *Id.* at 1273.

108. *Id.* at 1273.

109. *Lindsey*, 158 F.3d at 1268 (citing *Tax Analysts v. IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997); and *Brinton v. Department of State*, 636 F.2d 600, 603–04 (D.C. Cir. 1980)).

110. *Id.* at 1273. In a footnote, the court argues that government lawyers take an additional oath when they assume public office and that this action demonstrates that government lawyers are held to additional standards in the execution of their duties. *See id.* at n.3.

111. *See id.* at 1274–75. The court cited to former White House Counsel Lloyd Cutler, who in speech to the Association of the Bar of the City of New York almost 20 years earlier stated, “When you hear of a charge and talk to someone in the White House . . . about some allegation of misconduct, almost the first thing you have to say is, ‘I really want to know about this, but anything you tell me I’ll have to report of the Attorney General.’” Lloyd N. Cutler, *The Role of the Counsel to the President of the United States*, 35 REC. OF THE ASS’N OF THE BAR OF THE CITY OF NEW YORK No. 8, at 470, 472 (1980).

112. *Id.* at 1279.

investigations where there is a grand jury subpoena and that the cases could be viewed narrowly as applying only to the White House. Perhaps this was wishful thinking in an effort to continue to hold on to the hope that there could be more to the privilege for communications between government lawyers and their individual clients. Since then, however, more cases have been decided, gradually eroding the privilege in the government context and demonstrating that these limitations are not just imposed upon the federal government; thus, raising a specter of interesting fact patterns that prevent the privilege from being effectively invoked. These cases are discussed below.

On April 23, 2002, the Seventh Circuit reiterated that government lawyers may not exercise an attorney-client privilege in an effort to shield information from a grand jury.<sup>113</sup> The government lawyer owes ultimate allegiance to the public, as represented by the grand jury.<sup>114</sup> Attorney Roger Bickel was employed as chief legal counsel to the Secretary of State's office when Illinois Governor George Ryan was Secretary of State.<sup>115</sup> Since at least 1989, Bickel also served as a personal lawyer to Ryan, Ryan's wife, and to Ryan's campaign committee.<sup>116</sup> The federal government was investigating "Operation Safe Road," an alleged "licenses for bribes" scandal in the Secretary of State's office.<sup>117</sup> Federal prosecutors sought to interview Bickel since he had advised Governor Ryan when Ryan was Secretary of State. Governor Ryan objected and stated that he would not waive his attorney-client privilege.<sup>118</sup> Bickel was eventually served with a grand jury subpoena to appear and testify about all conversations he had with Ryan while serving in his official capacity as general counsel to the Secretary of State. In addition, the federal government obtained a letter from the now current Secretary of State, which "... purported to waive the Office's attorney-client privilege as to all of Bickel's official conversations with 'all personnel and officials of the Secretary of State, regardless of their particular position or office.'"<sup>119</sup>

---

113. *In re A Witness Before the Special Grand Jury 2000-2*, 288 F.3d 289 (7th Cir. 2002).

114. *Id.* at 294.

115. *Id.* at 290. In this capacity, "Bickel provided legal counsel and advice to Ryan and other Secretary of State officials as they carried out their public duties." *Id.*

116. *Id.*

117. *Id.* at 290. "The alleged (and in some instances admitted) corruption extends to the improper issuance of drivers' licenses, specialty license plates, leases, and other contracts; the improper use of campaign funds for the personal benefit of the Secretary of State employees; and obstruction of justice in connection with internal office investigations." *Id.*

118. *In re A Witness Before the Special Grand Jury 2000-2*, 288 F.3d at 291.

119. *Id.* at 291.



In a decision from the District Court for the Northern District of Illinois, Bickel was compelled to testify as the court held that no attorney-client privilege attached to the communications at issue. The district court also held that even if a privilege had attached, it was in essence waived by the current Secretary of State.

In applying the two earlier circuit cases addressing attorney-client privilege in the context of the U.S. President,<sup>120</sup> the Seventh Circuit affirmed the district court's finding that attorney-client privilege does not attach for a government lawyer and his or her official client where there are criminal proceedings.<sup>121</sup> The court noted that its decision "must rest on whether the policy reasons for recognizing an attorney-client privilege in other contexts apply equally when the United States seeks information from a government lawyer."<sup>122</sup> In finding no privilege in the criminal context and finding that public lawyers are obligated *not* to protect a governmental client over ensuring compliance with the law, the court concluded that "[i]t would be both unseemly and a misuse of public assets to permit a public official to use a taxpayer-provided attorney to conceal from the taxpayers themselves otherwise admissible evidence of financial wrongdoing, official misconduct, or abuse of power."<sup>123</sup> The court noted that for state agencies, the attorney-client privilege runs between the attorney and the agency itself and it does not extend to individual employees and officeholders in that agency.<sup>124</sup>

Lastly, the court held that notions of federalism did not prevent them from recognizing as relevant the recent cases that held that there was no privilege in the criminal context between a federal government lawyer and a federal public official as applied to the current case involving a state government lawyer and a state public official.<sup>125</sup>

In a footnote the court contemplated whether a public official might access legal representation/counsel when a privilege could attach. The court observed in dictum:

[O]f course, a state may provide an officeholder with an individual taxpayer-provided attorney to represent her in, for example, a Bivens action or an independent counsel investigation and could perhaps even specify by statute that the first duty of an agency's general counsel ran always to the head of the agency as individual rather than officer. Here, however, there is no indication that Illinois has

---

120. See generally *Lindsey*, 158 F.3d at 1263 (D.C. Cir. 1998); and *Duces Tecum*, 122 F.3d at 910.

121. *In re A Witness before the Special Grand Jury 2000-2*, 288 F.3d at 294.

122. *Id.* at 292-93.

123. *Id.* at 293.

124. *Id.* at 294.

125. *Id.* at 295.



abrogated the traditional understanding than an organizational attorney's client is the organization.<sup>126</sup>

This is consistent with the D.C. Circuit Court's suggestion in *Lindsey* that, "nothing prevents government officials who seek completely confidential communications with attorneys from consulting personal counsel."<sup>127</sup> Finally, the circuit court expressed no opinion as to whether the purported waiver of the privilege by the current Secretary of State on behalf of the office and the former secretary was valid.

### C. *Noncriminal Prosecutions*

In 1998 the U.S. Court of Appeals for the Sixth Circuit handed down a decision further narrowing the scope of the government attorney-client privilege. *Reed v. Baxter* held that conversations between a city attorney and members of the city council were not privileged.<sup>128</sup> The underlying facts in the case involved a grievance over the testing and selection of a new fire chief for the city. Plaintiffs filed a reverse-discrimination lawsuit alleging a violation of Title VII alleging that the city had promoted a less qualified African-American to the position of captain on the basis of race.<sup>129</sup> Plaintiffs issued a subpoena to depose the city attorney regarding a conversation he had with two council members, the city manager, and the fire chief while acting in his official capacity.<sup>130</sup> In finding that this conversation was not protected under the attorney-client privilege, the court noted that the common law privilege is typically extended to cover two or more clients with a common interest in the matter, but that here, "[t]he interests of the councilmen and the interests of the city executives were not the same. The councilmen were not clients at a meeting with their lawyer. Rather, they were elected officials investigating the reasons for executive behavior."<sup>131</sup> The court concluded that the interests of the council members were actually adverse to the interests of the executive; therefore, their participation in the meeting in question placed them in the role of third parties, eliminating any confidentiality that might have otherwise attached to the conversation.<sup>132</sup>

The Sixth Circuit clearly narrowed its holding to the facts in this particular case, noting:

---

126. *In re A Witness Before the Special Grand Jury 2000-2*, 288 F.3d at 293, n.2.

127. *Lindsey*, 158 F.3d at 1276.

128. 134 F.3d 351 (6th Cir. 1998).

129. *Id.* at 352.

130. *Id.* at 354.

131. *Id.* at 357.

132. *Id.* at 358.

Although we have assumed that a governmental entity such as a municipal corporation may invoke the attorney-client privilege, see *In re Grand Jury Subpoena (United States v. Doe)*, 886 F.2d 135 (6th Cir. 1989), we have never explicitly so decided. Because we find that the requirements of the privilege have not been satisfied in the present case, we need not resolve this question today.<sup>133</sup>

The only other case to address a municipal government attorney-client privilege was decided by the same Sixth Circuit in 1989. *In re Grand Jury Subpoena*, the court held that under the facts of the case, both the Detroit city council and the city administration were clients of the city attorney, and the city council could invoke the attorney-client privilege when the city attorney called meetings of the full council pursuant to a provision of the city code providing for formal council approval of condemnation proceedings.<sup>134</sup> The court distinguished these two cases because the later case did not involve a full meeting of the city council called pursuant to city code. The dissent, however, relied on the 1989 opinion arguing that the city council is a client of the city attorney and reasoned that according to the majority opinion, “[a] city council member, then would only be able to seek confidential legal advice in a private meeting with the city attorney, such as the meeting between the councilmen and the city attorney in this case. This majority, however, would prevent such a meeting from being covered by the attorney-client privilege.”<sup>135</sup>

It is important to note that, again, neither of these two cases squarely addressed the question of who is the client of the government lawyer. Rather, the cases focused on whether, under the circumstances of the conversation and individuals present in the room, the attorney-client privilege attached. The cases did not hold that a city council was the exclusive client, nor that the executive employees were the exclusive client of a city attorney.<sup>136</sup> It can be assumed that for different purposes, all may be fairly viewed as clients of the government lawyer.

## V. Practical Advice for Government Lawyers

First and foremost, government lawyers must identify their client. This may be easier said than done depending upon the facts and circumstances of the action/transaction at issue. The government lawyer must take charge of the situation, being clear to identify his or her role as an

---

133. *Id.* at 356.

134. *Reed*, 886 F.2d at 356.

135. *Reed*, 134 F.3d at 360 (Jones, J., dissenting).

136. In fact, in the Detroit case, the court held that “the district court’s finding that the City Council was not a client of the corporation counsel is clearly erroneous.” *Duces Tecum*, 886 F.2d at 138.

attorney to all who seek to engage the counsel in conversation. Some lessons learned from *Reed* include before saying anything, consider who you are talking to, and do not say anything you would not want repeated. Be mindful of the differences between a witness and a client. In conversations about strategy and the situation, invite only those officials-clients who are essential to the decision-making. Consider and decide whether there is a commonality of interest and whenever possible, meet in executive session if the meeting involves the legislative body.<sup>137</sup>

Although commentators have suggested that it is not prudent for the courts to make criminal and civil distinctions in determining the availability of the government attorney-client privilege,<sup>138</sup> the fact remains that the circuit courts continue to follow the path set forth in the *Lindsey* case and government lawyers would be well advised to caution their government clients, particularly if the client is believed to be an individual public official, about the uncertainty of the privilege for what may be about to be disclosed.

## VI. Conclusion

The cases remain troubling for government lawyers who are charged with representing their clients zealously and who seek truth and to simply "do the right thing." It seems as though government lawyers may not always be able to pick their clients, but savvy government officials should be careful to pick and choose what lawyer (public or private) they choose to confide in. This comes, of course, at a cost—to the public official should he or she choose to retain private outside counsel and to the public because it could hamper the efficient and effective operation of government and presents a potential for underutilization of the government lawyer. Furthermore, if public officials are forced to retain private outside legal counsel, the billing for such services could meet or exceed the public official's salary, making public service unattractive. This remains an area of ethics law ripe for discus-

---

137. These strategies are based upon a discussion at a 1999 program, *Nuts & Bolts of Municipal Law Practice 1999*, ABA Section on State and Local Government Law, Kansas City, Missouri, Oct 15, 1999.

138. See, e.g., *Maintaining Confidences*, *supra* note 53, at 2007 (noting three reasons why this distinction is problematic: (1) historically, the availability of the privilege never depended upon the nature of the proceeding, and in fact has been historically used (by private attorneys) in the criminal context; (2) although the public interest does support uncovering wrongdoing in government, this is outweighed by the public interest supporting full and frank communications between the lawyer and the client; and (3) the civil-criminal distinction unjustifiably diminishes the privilege.). *Id.*

sion, clarification, and perhaps reform. Judge Tatel's dissent in *Lindsey* offers a judicial alternative to the quagmire. He suggests a balancing test of sorts that would have the court weigh the government attorney-client privilege with the public's right to know based upon evidence submitted in camera to the court.<sup>139</sup> Others have argued that courts should make a factual inquiry into whether the government official was acting in a public or private matter in deciding whether to attach the privilege.<sup>140</sup> Both a statutory solution and modifications to the *Rules of Evidence* and to the *Code or Rules of Professional Conduct* are warranted to provide a clear and consistent path. This is a debate that compels the dialogue and engaged debate of the public, not solely the private bar.

---

139. *Lindsey*, 158 F.3d at 1285.

140. See Adam M. Chud, *In Defense of the Government Attorney-Client Privilege*, 84 CORNELL L. REV. 1682, 1728-29 (1999).

