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ATTORNEY-CLIENT PRIVILEGE AND THE GOVERNMENT LAWYER: DEVELOPMENTS IN THE LAW

INTRODUCTION

The attorney client privilege is traditionally described as one of the oldest privileges for confidential communications recognized at common law. *Swidler & Berlin v. United States*, 118 S.Ct. 2081, 2084-85 (1998). Yet, the application of the privilege to the communications of government attorneys and their clients has received relatively little attention either in the case law or the academic literature. As any public lawyer recognizes, there are unique aspects of government practice that complicate application to government lawyers of privilege rules designed for private practitioners. For example, even identifying the government lawyer's client in a particular setting can be problematic. Is a city attorney's client the city, the department to which the lawyer is assigned, or an individual public official? Does the identity of the client depend upon the particular legal issue being addressed? The role of the government lawyer also can be very different from the role of a private practitioner in an analogous setting. It is generally thought that a public lawyer has a special responsibility to temper the interest in attaining a client's goal with assuring that the public interest is served. These differences have affected the way in which courts have applied the attorney-client privilege to communications between government lawyers and public officials and others.

In three recent cases, the federal courts of appeals have addressed questions presented by government claims of attorney-client privilege and resolved them in ways that could have important implications for the way in which government attorneys practice. Those cases, *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir.), *cert. denied*, *Office of President v. Office of Independent Counsel*, 521 U.S. 1105 (1997); *In re Bruce Lindsey*, 148 F.3d 1100 (D.C.Cir.)(*per curiam*), *cert. denied*, *Office of President v. Office of Independent Counsel*, 119 S.Ct. 466 (1998) and *Reed v. Baxter*, 134 F.3d 351 (6th Cir.), *cert. denied*, 119 S.Ct. 61 (1998), call into question some assumptions about the extent to which the attorney-client privilege protects communications between government lawyers and their clients. While the first two cases arose out of the unique context of a federal grand jury investigation of federal officials, the holdings in those cases may have broader implications. The third case, *Reed v. Baxter*, addresses a more common circumstance -- the assertion of attorney-client privilege for communications with multiple representatives of a public entity about a matter that could result in liability for the entity. If widely followed, *Baxter* has even more significant implications for the relationships between city attorneys and their clients.

This paper describes these recent developments in the law of attorney-client privilege and outlines some of their potential implications for city attorneys. While the paper does not provide answers, it seeks to identify some of the questions and dilemmas that these cases may present for city attorneys.

I. THE ATTORNEY-CLIENT PRIVILEGE

Although there is debate about the origins and pedigree of the attorney-client privilege, the privilege is generally considered to have a venerable history. Under the traditional statement of the common law doctrine of attorney-client privilege, the elements of the privilege are:

- (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.

8 John Henry Wigmore, *Evidence in Trials at Common Law* 2292 (1961). Proposed Rule of Evidence 503, which was rejected by Congress, provides a somewhat different test, and is frequently relied upon by Courts as a starting point for defining the scope of the privilege. See, e.g., *Tennenbaum v. Deloitte & Touche*, 77 F.3d 337, 340 (9th Cir. 1996). Under the current federal rules, the attorney client privilege, like other common law privileges, is somewhat fluid in that it must be interpreted “by the courts of the United States in light of reason and experience.” Fed.Rule Evid. 501. In California, the privilege is defined by statute. Under Evidence Code § 954, a “client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer,” subject to exceptions provided in Evidence Code §§ 950-962.

The traditional utilitarian rationale for the attorney-client privilege is that the privilege will encourage “full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” *Swidler v. Berlin*, 118 S.Ct. At 2084 (quoting *Upjohn Co. v. United States*, 449 U.S. at 389); see also *Developments in the Law--Privileged Communications*, 98 Harv.L.Rev. 1450, 1472 (1985). Put another way, the privilege is based on the view that without the promise of confidentiality, clients will not be candid with their attorneys. A fully informed lawyer, it is believed, can both more effectively serve his or her client and help to ensure that the law is observed. Other noninstrumental justifications for the privilege are sometimes cited. The privilege is sometimes explained as essential because of the duty of “loyalty” a lawyer owes a client or necessary because “privacy” or “fairness” dictates that a client should not be required to divulge information imparted in confidence. See generally Charles A. Wright and Kenneth W. Graham Jr., 24 Fed. Prac. and Proc.: Evid. § 5472 (1986).

The privilege is traditionally framed in terms that appear to address individuals, but an organization, like a corporation, can also be a client for purposes of the attorney-client privilege. *Upjohn Co. v. United States*, 449 U.S. 385 (1981). Proposed Rule of Evidence 503 would have extended this notion of the entity as client to municipal corporations and other governmental entities by defining “client” to include “a person, public officer, or corporation, association, or other organization or entity, either public or private.” Proposed Fed.R.Evid. 503(a)(1), reprinted in 3 Jack B. Weinstein & Margaret A. Berger, *Weinstein’s Fed. Evid.* § 503-1 (2d ed. 1997); see also Restatement (Third) of the Law Governing Lawyers § 124 (Proposed Final Draft 1, 1996)(“[T]he attorney-client privilege extends to a communication of a governmental organization.”). The California Rules of Evidence also contemplate that a client can be a government entity. See Cal. Evid. Code § 951 (client means a “person”); § 175 (person includes a “public entity”).

II. THE UNIQUE ROLE OF THE GOVERNMENT LAWYER

The application of the privilege to government lawyers presents some unique questions because the public lawyer’s role is not directly analogous to his or her private counterpart in at least two important respects. First, the identity of the government lawyer’s client is not always obvious. Second, it may be that the public interest in a particular situation outweighs any perceived need for confidentiality.

A. Who is the Client of the Government Attorney?

The question “whom do I represent?” rarely arises for the private practitioner. In the case of a public lawyer, however, the identity of the client is often unclear. The alternatives suggested by various commentators and courts include: the government as a whole, the particular agency that employs the individual, the public official who represents the agency, the law office for which the individual works, the public or some or all of those. See generally *Wearing Many Hats: Confidentiality and Conflicts of Interest Issues for the California Public Lawyer*, 25 Sw. U. L. Rev. 266, 272 (1996).

The California case law addressing the identity of the government attorney’s client has not provided clear guidance. For example, in *Ward v. Superior Court*, 70 Cal.App.3d 23, 32 (1977), the Court of Appeals concluded that a county counsel has only one client -- the county, represented by various agencies and officials, and does not have a separate attorney-client relationship with the public official who acts on behalf of the county. In *Civil Service Commission v. Superior Court*, 163 Cal.App.3d 70 (1984), however, the Court suggested that there may be more than one client in particular situations. *Id.* (county counsel may develop a separate attorney-client relationship with agencies that have independent authority); see also California

State Bar, Proposed Formal Opinion, No. 93-0004 (Re: City Attorney Conflicts of Interest)(July 11, 1997)(endorsing view that independent entities may form separate attorney-client relationship with a city attorney). In *People ex rel. Deukmejian v. Brown*, 29 Cal.3d 150 (1981), the Court found that the Attorney General may develop a relationship with an individual agency that precludes the Attorney General from taking action in the name of another governmental client adverse to the agency.

The California Rules of Professional Conduct currently provide that where an organization is a client, “a member shall conform his or her representation to the concept that the client is the organization itself acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement.” Rule 3-600, Cal. Rules of Prof. Conduct. The rules also caution lawyers to inform representatives of the organization that the lawyer represents the organization, not the individual, “whenever it is or becomes apparent that the organization’s interests are or may become adverse to those of the constituent(s) with whom the member is dealing.” *Id.* While this rule provides guidance, in practice public lawyers may find it difficult to identify the “highest authorized. . .body. . .overseeing the particular engagement.” In the context of providing conflict of interest advice, the application of this rule is particularly problematic.

B. The Special Obligations of the Government Attorney

The Preamble to the Model Rules of Professional Conduct explains that a lawyer has a responsibility to zealously represent a client’s interests within the bounds of the adversary system. *Preamble, A Lawyer’s Responsibilities*, ABA Model Rules of Professional Conduct. In the context of a government attorney, this responsibility may be tempered by an obligation to the public that employs the lawyer and entrusts the lawyer with significant power. This obligation is most frequently referred to in the context of prosecutors, who are admonished that their function is not only to win a case but to see that justice is done. *Berger v. United States*, 295 U.S. 78, 88 (1935). A similar obligation is thought to extend in some degree to other public lawyers. The Federal Bar Association has stated that a government attorney has an obligation to serve the public:

[W]e 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.

Opinion 73-1, 32 Fed.B.J. 71, 72 (1973).

In the day to day work of a public lawyer, there may be no conflict between zealously representing a client and serving the public interest. When a government attorney obtains information about potential wrongdoing by a public official, those obligations tend to clash. It is that clash of obligations that presented the occasion for two significant decisions involving government claims of attorney-client privilege, which are described in the next section.

III. RECENT DEVELOPMENTS IN THE CASE LAW

Three recent opinions by the federal courts of appeals, have addressed with the implications of applying the attorney-client privilege to communications between public lawyers and the officials they advise.

A. *In re Grand Jury Duces Tecum*, 112 F.3d 910 (8th Cir.), *cert. denied*, *Office of the President v. Office of the Independent Counsel*, 521 U.S. 1105 (1997)

In *In re Grand Jury Duces Tecum*, 112 F.3d 910 (8th Cir.), the United States Court of Appeals for the Eighth Circuit rejected the argument that in the context of a federal grand jury criminal investigation, the attorney-client privilege protects conversations between government attorneys and a public official regarding the public official’s personal conduct, even when that conduct has implications for the functioning of the government office.

The case arose out of the “Whitewater” investigation of the Office of Independent Counsel (“OIC”). As part of that investigation, the OIC sought documents created during meetings that were attended by an attorney from the Office of Counsel to the President and the First Lady, Hillary Rodham Clinton and that pertained to several Whitewater-related subjects. The White House identified nine sets of notes responsive to the subpoena, but refused to produce the notes on the grounds that the notes were protected under executive privilege, attorney-client privilege and attorney work product doctrine.

The OIC moved to compel the production of two sets of the notes identified by the White House. The first set of documents the OIC sought were notes taken by an Associate Counsel to the president at a meeting attended by Mrs. Clinton, Mrs. Clinton’s personal attorney, and the Special Counsel to the President. The subject of the meeting was Mrs. Clinton’s activities following the death of Deputy Counsel to the President, Vincent Foster, Jr.

The second set of documents the OIC sought were notes taken by the President’s Special Counsel during meetings attended by Mrs. Clinton, two of Mrs. Clinton’s personal attorneys, and Counsel to the President. These meetings took place during breaks in and immediately after Mrs. Clinton’s testimony before a federal grand jury concerning the discovery in the White House residence of certain billing records from her former law firm.

In the district court, the White House relied solely on the attorney-client privilege and the work product doctrine as bases for withholding the documents. Mrs. Clinton also asserted her personal attorney-client privilege. The OIC urged the district court to view the question as whether a federal government entity may ever assert the attorney-client privilege or the work product doctrine in response to a subpoena by a federal grand jury. Rejecting that approach, the district court found that because Mrs. Clinton and the White House had a “genuine and reasonable (whether or not mistaken)” belief that the conversations at issue were privileged, the attorney-client privilege applied. The district court also held that the work product doctrine prevented disclosure of the notes to the grand jury. The OIC appealed.

The Eighth Circuit decided to address the “broad question” presented by the OIC, but not addressed by the district court.¹ Focusing on that question, the Court decided that the White House may not use the privilege to withhold potentially relevant information subpoenaed by a federal grand jury. 112 F.3d at 915.

Citing a lack of relevant precedent on this issue, the Eighth Circuit looked to “general principles” regarding the law of privilege to analyze the question. The first such principle the Court considered was that privileges are an exception to the “general rule” that the public is entitled to “every man’s evidence.” Because privileges are in derogation of the search for the truth, they should be recognized only when recognizing the privilege “has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.” *Id.* at 918 (citation omitted).

The second “general principle” considered by the Court was the importance of grand jury investigations. In the Court’s view, the importance of enforcing the rule of law and serving the goals of criminal justice were “strong factors” that weighed against applying the privilege. *Id.* at 919.

Finally, the Court considered the unique role of the government attorney significant. The Court observed that federal officials are required by law to report criminal wrongdoing, and more generally, have a special role in ensuring that the laws are observed:

We believe the strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served by recognition of a governmental attorney-client privilege applicable in criminal proceedings inquiring into the actions of public officials. We also believe 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.

Id. at 921.²

The Court rejected the White House's proposed analogy to a private corporation, which has an attorney-client privilege for discussions between in-house counsel and various representatives of the corporation. The Court noted that in contrast to employees of a private corporation, federal officials could not expose the entity for which they worked to criminal liability, and no suggestion had been made in the case that civil liability for the entity was at issue. In addition, the Court observed that the public interest favoring disclosure over "concealment" alone may distinguish the government from a private corporation. *Id.* at 920.

The Court also rejected the government's argument, grounded in the traditional view of the attorney-client privilege, that failure to uphold the privilege would lead government clients to avoid seeking advice from government lawyers. Noting that it had not said that the privilege does not exist for government officials in other areas, the Court concluded that confidentiality would suffer only in those situations that a grand jury might later choose to investigate -- namely, discussions about possible criminal misconduct. In the Court's view, "an official who fears he or she may have violated the criminal law and wishes to speak with an attorney in confidence should speak with a private attorney, not a government attorney." *Id.* at 921. The Court also did not believe that failure to recognize the privilege would complicate the role of the government attorney in providing advice to an official contemplating a future course of conduct. In the Court's view "[I]f the attorney explains the law accurately and the official follows that advice, no harm can come from later disclosure of the advice, which would be unlikely anyway." *Id.*

Finally, the Court rejected the claim of the White House and Mrs. Clinton that the "common-interest" doctrine protected conversations between counsel for different clients. *Id.* at 922. The common-interest doctrine extends the protection of the attorney-client privilege to communications among clients and lawyers sharing a "common interest." The Court concluded that Mrs. Clinton, whose interest was in avoiding personal criminal liability, did not share a common legal interest with the White House. *Id.* at 922-23. In the Court's view, neither the White House's interest in "understanding" the facts underlying the OIC's investigation, nor the White House's concern about political harm, was adequate to implicate the common-interest doctrine. The Court concluded that in the context of a grand jury subpoena to government officials, no public interest warranted recognition of the privilege.

Judge Kopf dissented. 112 F.3d at 926. He would have found that the White House did have an attorney-client privilege for the conversations at issue, but that that privilege gives way to a grand jury investigation where there is a showing of specific need, relevance, and admissibility. In addition, he would not have applied this rule for the first time to Mrs. Clinton.

B. *In re Lindsey*, 148 F.3d 1100 (D.C.Cir.)(*per curiam*), cert. denied, *Office of the President v. Office of the Independent Counsel*, 119 S. Ct. 466 (1998)

In re Lindsey also arose out of the OIC's Whitewater investigation, but the issues the Eighth Circuit addressed were brought into sharper focus. In *Lindsey*, the grand jury sought testimony of the Deputy White House counsel regarding conversations with a public official about legal advice regarding conduct by the official during the official's term in office.

Following the expansion of the OIC's investigation to include allegations of perjury and obstruction of justice by Monica Lewinsky and others, the grand jury subpoenaed Bruce Lindsey, who was Deputy White House Counsel and Assistant to the President. Lindsey refused to answer certain questions, citing the attorney-client and executive privileges, and the OIC moved to compel the testimony. The District Court rejected Lindsey's claims of attorney-client privilege, holding that while the President possesses an attorney-client privilege when consulting in his official capacity with White House Counsel, that privilege is qualified in the grand jury context and may be overcome upon a sufficient showing of need for the subpoenaed communications and unavailability from other sources. The Office of the President appealed the ruling on attorney-client privilege.

The Court of Appeals for the District of Columbia Circuit framed the question before it as whether a government attorney may withhold from a grand jury information relating to the possible commission of a crime by a government official. In the D.C. Circuit's view,

To state the question is to suggest the answer, for the Office of the President is a part of the federal government, consisting of government employees doing government business, and neither legal authority nor policy nor experience suggests that a federal government entity can maintain the ordinary common law privilege to withhold information relating to a federal criminal offense.

148 F.3d. at 1102.

While the Court considered it settled that the attorney-client privilege is available to government entities, it determined that the unique context of one agency of government claiming privilege against another agency, and in particular the nation's chief law enforcement officer, counsel against extending the privilege to all governmental entities in all cases.³ Like the Eighth Circuit, the D.C. Circuit determined that the privilege could not be asserted by Lindsey in response to the grand jury subpoena for two reasons. First, the Court focused on the special role of the government lawyer. In the Court's view, government lawyers have a unique role in upholding the law. "Their duty is not to defend clients against criminal charges and it is not to protect wrongdoers from public exposure. Unlike a private practitioner, the loyalties of a government lawyer therefore cannot and must not lie solely with his or her client agency." *Id.* at 1108. Second, the Court concluded that the public interest in uncovering illegality among its elected and appointed officials counsels in favor of not recognizing the privilege in the context of a grand jury investigation. Quoting the Eighth Circuit, the Court concluded 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.", *Id.* at 1110 (quoting *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 921 (8th Cir.), *cert. denied*, 521 U.S. 1105 2482 (1997)).

The Court noted that the practice of the White House had been to adhere to the requirement applicable to other federal entities that all information relating to possible violations of federal criminal law be reported to the Attorney General. *Id.* at 1110 (citing 28 U.S.C. § 535(b)). The Court noted that lawyers in the White House had in the past informed public officials that they could not keep in confidence information about evidence of crimes committed by government officials. *Id.* at 1110 (quoting observations of White House counsel who advise public officials that they will have to turn over any information about wrongdoing that they receive). As one White House counsel had explained, when hearing a charge of misconduct from personnel in the White House, "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 to the Attorney General.'" *Id.* at 1111.

The Court rejected the White House's two arguments in support of the privilege. First, the Court rejected the White House contention, based on the traditional justification for the attorney-client privilege, that the values of candor and frank communications would be served by recognizing the privilege. The White House argued that government officials need accurate advice from government attorneys, as much as private individuals need accurate advice from their attorneys, but will be inclined to discuss their legal problems honestly with their attorneys only if they know that their communications will be confidential. Like the Eighth Circuit, the D.C. Circuit concluded that government officials would be chilled in their communications only to the extent they wanted to communicate information relating to possible criminal wrongdoing. In addition, the Court stated that nothing prevents government officials who seek completely confidential communications with attorneys from consulting personal counsel. *Id.* at 1112.

Judge Tatel dissented. 148 F.3d at 1118. He agreed with the majority that the attorney-client privilege does not protect communications with a public official concerning personal legal advice. *Id.* He disagreed with the majority that the rule announced -- no government attorney-client privilege in the face of a grand jury subpoena -- would inevitably chill the communications between government officials and their counsel. In his view, public officials would avoid confiding in government lawyers because they could never know in advance whether some information they might share, no matter how innocent, would later be pertinent to a criminal investigation. As a result, Presidents "may well shift their trust on all but the most routine legal matters from White House counsel, who undertake to serve the Presidency, to private counsel who represent its occupant." *Id.* at 1119.

C. Reed v. Baxter, 134 F.3d 351 (6th Cir.), *cert. denied*, 119 S.Ct. 61 (1998).

In a case involving a more routine matter, but that could have even broader consequences, the Sixth Circuit rejected a City's claim of attorney-client privilege for meetings between the city attorney and several city officials. Unlike the cases involving the Office of the President, this case involved a claim of government attorney-client privilege made in the context of civil litigation brought by a private individual.

In *Reed v. Baxter*, two white firefighters appealed the dismissal of their Title VII claims against the City of Murfreesboro, Tennessee and the City's fire chief. The firefighters had alleged that the City unlawfully promoted African American firefighters to the rank of captain without regard to the respective qualifications of candidates. The firefighters alleged that the district court improperly rejected their claim that a meeting among the City attorney and other City officials was not protected by the attorney-client privilege, and that this ruling excluded crucial evidence that would have allowed them to prevail at trial. The appellate court agreed.

The controversy over the attorney-client privilege concerned a meeting between the City Attorney, the City Manager, and the fire chief. Two members of the City council also attended the meeting to learn about the circumstances surrounding the promotion of an African American firefighter to fill a slot vacated when another African American firefighter had been terminated. The terminated employee had a pending EEOC claim regarding his termination. The City argued that the meeting had involved legal advice from the city attorney to the city manager and the fire chief regarding the promotion. The firefighters contended that the meeting was not protected by attorney-client privilege because the members of the City Council attended as "third parties," not as clients. The firefighters argued that because the communications were not made in confidence between a lawyer and a client, the privilege did not apply.

The Court of Appeals noted that the attorney-client privilege does not shield from disclosure statements made by a client to his or her attorney in the presence of a third party. The court expressed uncertainty, however, about who was the client in the context of an organization. While noting that in a prior case, it had found that the full Detroit City Council was a client of the City Attorney with respect to closed condemnation hearings held pursuant to city code, *In re Grand Jury Subpoena (United States v. Doe)*, 886 F.3d 135 (6th Cir. 1989), the Court concluded that this case did not apply to the City of Murfreesboro. In the Court's view, the meeting was called by the city council members not to receive advice from an attorney, but in response to complaints received from constituents about the promotion process. The Court concluded that the interests of the members of the City Council and the interests of the city executives who participated in the decision about the promotion were not the same. The City Council members were investigating the reasons for the behavior of executive officials, not seeking legal advice. The court therefore rejected that the councilmen were the city attorney's clients for purposes of the meeting. 134 F.3d at 357.

Importantly, the Court viewed the Eighth Circuit's decision regarding the White House's assertion of privilege for conversations with Mrs. Clinton and her lawyer as supporting this conclusion. The Court noted that the Eighth Circuit had concluded that Mrs. Clinton and the White House did not have a common interest that would justify the extension of the privilege to the meeting. Similarly, in the Court's view, because the city council members and the city manager did not share the same interests, the privilege was not applicable. *Id.* at 357-58.

Judge Nathaniel Jones dissented. 134 F.3d at 358. He rejected the notion that the members of the City Council could be considered "third parties" rather than agents of the City. Drawing an analogy to a corporation, in which all employees communicating with a corporate attorney about matters within the scope of their corporate duties are covered by the privilege, he would have concluded that the city council members were agents of the corporation and covered by the attorney-client privilege. Although the councilmen were not directly involved in the promotions at issue, all hiring and firing decisions were subject to appeal to the city council. If the promotion had been contested, the City Council would discuss the legal issues relevant to that determination. In the dissenting judge's view, the fact that the full council was not present did not take the conversation outside the privilege. Because most city council meetings are open to the public, where confidential attorney client conversations cannot occur, the only time such communications tend to take place is when only some members are present.

IV. QUESTIONS FOR THE FUTURE

The three recent federal cases potentially complicate the role of city attorneys in providing advice to their client or clients. Because these cases involved the application of the federal common law of privilege, their value as precedents for situations confronting local government attorneys and decided under state law is unclear. It is possible, however, that state courts will follow the reasoning reflected in these cases. That reasoning suggests that city attorneys should carefully consider their practices in situations that may involve the revelation of information about possible misconduct by public officials. In addition, *In re Grand Jury* and *Reed v. Baxter* suggest that city attorneys should pay close attention to situations in which their legal advice is communicated to individuals who may not share the same legal interests as the City.

A. Advising Public Officials About Conflicts of Interest

One area of practice the decisions in the Eighth and D.C. Circuits may call into question is the provision of conflict of interest advice to city officials. The California Attorney General has opined that city attorneys may advise public officials about conflicts of interest under the Political Reform Act, provided that where a city attorney does so, the city attorney may not prosecute the official for wrongdoing. 71 Cal. Ops. Atty.Gen. 255 (1988). In many cities, the city attorney performs this function, and in some circumstances effectively becomes a lawyer for an individual public official. Under these circumstances, disclosure of information imparted in confidence could violate ethical obligations to the public official. See, e.g., *In re Calvin Hamilton*, No. HC 205678 (Super. Ct. May 1984) (holding that county counsel had improperly provided to a grand jury information imparted to him by a city official regarding the official's conflict of interest). The rationale behind this approach is the traditional justification for the attorney-client privilege: the promise of confidentiality will encourage public officials to be candid, which will enable public attorneys to provide the best advice and ensure compliance with the law.

Under the reasoning of the cases involving the Office of the President, however, the public interest in ensuring lawful conduct by public officials would likely outweigh the interest of public officials in a confidential attorney-client relationship with a government attorney. Under the reasoning in those cases, the various scenarios involving conflicts advice to a public official do not justify maintaining the confidence of the communication with the public official at least in situations where the government itself is seeking the information. As the D.C. Circuit and Eighth Circuit opined: where the official receives correct advice and follows it, there should be no concern about disclosure; where the official receives incorrect advice, even the official may favor disclosure, and where the official receives correct advice but declines to follow it, there is arguably little public interest in maintaining confidentiality.

It seems possible that failure to recognize an absolute privilege for communications between a public official and a city attorney about potential conflicts of interest would have a chilling effect on public officials, who may decline to seek advice, or fail to provide adequate information so that good advice can be provided. Certainly public officials often describe the existence of the privilege as a significant motivation for confiding in a public attorney. It is also possible that this concern is overstated. Many officials may still choose to seek assistance in complying with the law, whether or not their communications with a government attorney are confidential. Moreover, it is not clear that even with the promise of confidentiality public officials are in fact as candid as they need to be to ensure good advice. Even with a promise of confidentiality, clients not infrequently ask for advice after they have already engaged in conduct. It also seems relatively common for clients to ask for advice without providing all of the relevant information.

Even if it could be demonstrated empirically that public officials are more candid with their lawyers as a result of enjoying a confidential attorney-client relationship with a public official and that compliance with the law is thereby enhanced, the public interest is not necessarily best served by that arrangement. Where a public official confides in a government lawyer that he or she may have engaged in criminal misconduct, it is difficult to justify withholding that information from the government itself.

The solution proposed by the federal courts -- that a public official concerned about confidentiality should consult a private lawyer -- certainly has its downsides. Few public officials are in a position to spend money on private counsel to obtain legal advice. There may be, however, some alternatives between the extremes of public officials not receiving advice and public officials having an attorney-client privilege with a

government lawyer that may result in the lawyer withholding from the government significant information about wrongdoing by a public official.

One alternative may be to have government lawyers provide information about the application of conflicts laws without creating an attorney-client relationship. For example, the Fair Political Practices Commission provides advice to public officials about how a complex law -- the Political Reform Act -- applies to their conduct. A public official contacting the FPPC will undoubtedly receive conservative advice about how to comply with the law, and not necessarily receive advice about how to accomplish the official's goals within the bounds of the law. It is the latter type of advice that is frequently sought in confidence from a lawyer. In the absence of such assistance, it may be that prudent public officials will err on the side of being cautious, which is not necessarily a bad outcome. That is, what the system sacrifices in candor from public officials to help them comply with conflict of interest rules, may be gained in having them draw a wider line around particular prohibited conduct.

The correct result for a particular city attorney and her clients may depend upon local law, and the responsibilities assigned to, or assumed by, the City Attorney. For example, some charters may impose special obligations upon their city attorneys to provide conflict of interest advice to public officials.

At present, *In re Grand Jury* and *In re Lindsey* suggest at a minimum that city attorneys should review their policies for handling advice in areas that could involve the revelation of information about potential wrongdoing by public officials. Depending upon the requirements of local law, the role of providing advice in situations where the attorney may learn of wrongdoing by a public official may need to be reevaluated. It may be appropriate to put in place procedures that ensure that public officials are not misled into thinking they have a completely confidential relationship with a city attorney when they do not. It may also be useful to develop procedures to ensure that information about potential misconduct is brought to the immediate attention of lead attorneys in the office who can determine whether discussions about the potential misconduct are subject to the attorney client privilege.

B. Common Interests

In re Grand Jury and *Reed v. Baxter* also raise questions about the extent to which the attorney-client privilege shields communications involving multiple representatives of a city who may not share the same legal interest. Although the decision in *Reed v. Baxter* -- that the members of the City Council did not share the same interests as the city executives -- seems incorrect, the case suggests that close attention must be paid to the nature of the legal interests of individuals who participate in meetings where legal advice is communicated. While it is the case that the City can act only through its officials and that in some sense all city officials should be considered clients, there may be times when some of those officials have interests that are not parallel to the City's interests. *Baxter* suggests that it would be prudent for city attorneys to create a record of the need for legal advice for each of the officials who attend a meeting with a city attorney for the receipt of legal advice. In addition, care should be taken to ensure that tangentially interested parties not be included in such meetings. These issues can arise frequently in the context of employment litigation (as in *Baxter* itself), as well as when representatives of various interest groups are invited to discuss the resolution of a particular legal issue. The mere presence of a city attorney providing advice in such a situation is not adequate to ensure that the communications are privileged from disclosure in subsequent civil litigation brought by a private party.

In re Grand Jury also suggests that in the context of the potential misconduct of a public official, it is not safe to assume that the government lawyer's conversations with that individual or his or her lawyer will be privileged, at least when that information is sought by another arm of the government charged with investigating misconduct. While this scenario is less likely to arise than the scenario that gave rise to *Baxter*, city attorneys meeting with public officials under investigation for potential misconduct should think through the purpose of the meeting and the extent to which the privilege may or may not be available. The public official, and his or her attorney, should also be advised of the nature of the meeting, so that they are not misled into thinking a privilege exists when it does not.

CONCLUSION

While it is too soon to determine what impact the recent federal decisions involving government attorney-client privilege may have on city attorneys, the cases clearly stress the importance of considering the unique role of the government lawyer when evaluating the application of the attorney-client privilege. At least some communications that are clearly privileged for private entities and their counsel, may not be protected when they involve government attorneys and public officials because of the overriding public interest in ensuring adherence to the law.

ENDNOTES:

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1/ The Court noted that it was not addressing the attorney-client relationship between Mrs. Clinton and her personal lawyers, as the government had defended withholding the notes on the grounds that the *government's* attorney-client privilege was at stake. 112 F.3d at 915.

2/ The Court distinguished the case of a government attorney representing a government official sued in his or her individual capacity. In such a case, the court observed, the government attorney typically enters into a personal attorney client relationship with the individual defendant and the usual privilege applies. No such personal attorney-client relationship existed between Mrs. Clinton and the White House attorneys. *Id.* at 921, n.10.

3/ The Court assumed that at least one of the conversations involved concerned Lindsey's legal advice to the President. The Court also noted that under traditional application of attorney-client privilege, conversations between Lindsey and the President regarding a private lawsuit in which the President was named and political advice were not covered by the privilege. *Id.* at 1106.