ELIMINATING POLITICAL MANEUVERING: A LIGHT IN THE TUNNEL FOR THE GOVERNMENT ATTORNEY-CLIENT PRIVILEGE

PATRICIA E. SALKIN*
ALLYSON PHILLIPS**

INTRODUCTION

The art of lawmaking is a political process engaging elected representatives and appointed officials in public policy debates over issues currently in need of attention. When judges decide cases, the rule of precedence dictates that the common law be followed. The United States has long recognized the common law privilege afforded to certain conversations between attorneys and their clients, and the American Bar Association and states across the country have advanced rules of professional conduct for attorneys that include as a foundational concept the necessity of preserving the confidentiality of information communicated from a client to his or her attorney. Whether this privilege is equally applicable in both the public and private sectors remains controversial at best, and it has been used as political leverage in attempts to uncover what might otherwise be confidential information, leaving government lawyers and their clients with a level of unreasonable uncertainty regarding the sanctity and security of their professional relationship.

Federal court cases from 1997 to 2002 cast a significant shadow of doubt on the existence of the attorney-client privilege in the government context.[1] These cases, all involving high ranking elected government officials or their offices, shared at least one significant common element: in each case a government lawyer was subpoenaed to testify before a federal grand jury regarding alleged criminal wrongdoing on the part of an individual government official, and in each case the attorney refused to testify, citing, among other issues, the attorney-client privilege. It was not until 2005 that one federal circuit court broke rank with three other circuit courts, stating emphatically that indeed such a privilege of confidentiality exists, and that it is alive and well in the public sector, or at least in the public sector in the Second Circuit.[2]

This Article builds upon previous work examining the existence of the government attorney-client privilege.[3] In addition to reintroducing the historical

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* Associate Dean, Professor of Law, and Director of the Government Law Center of Albany Law School.

** J.D. Candidate, 2006, Albany Law School; research assistant at the Government Law Center.

1. *See In re* Witness Before the Special Grand Jury, 288 F.3d 289 (7th Cir. 2002); *In re* Lindsey, 158 F.3d 1263 (D.C. Cir. 1998); *In re* Grand Jury Subpoena Duces Tecum, 122 F.3d 910 (8th Cir. 1997).

2. *In re* Grand Jury Investigation, 399 F.3d 527 (2d Cir. 2005).

3. *See* Patricia E. Salkin, *Beware: What You Say to Your [Government] Lawyer May Be Held Against You—The Erosion of Government Attorney-Client Confidentiality*, 35 URB. LAW. 283 (2003).

debate to set the context for an analysis of the Second Circuit decision in *In re Grand Jury Investigation*,[4] this Article offers a new analysis in support of the existence of both a privilege and an ethical duty to maintain client confidences, regardless of whether an attorney's compensation is derived from a private client or a public client. Part I begins with a brief overview of the attorney-client privilege in general. This is followed by a discussion of the privilege in the public sector context, with a particular focus on the recent Second Circuit ruling. Part II focuses on professional responsibility, an area that has been overlooked as a source of authority, for the expectation that attorney-client communications will be kept confidential regardless of whether the client is a government actor or a private individual. In Part III, the work product doctrine is offered as another avenue of authority suggesting the protection of confidential information between attorneys and clients, even in the government context. Part IV provides recommendations for potential state and federal legislation to clarify the privilege statutorily, as well as potential reforms to rules of professional conduct for lawyers and a roadmap for a possible future decision from the U.S. Supreme Court.

I. OVERVIEW OF THE ATTORNEY-CLIENT PRIVILEGE

A. Purpose of the Privilege[5]

Dating back to the sixteenth century, the attorney-client privilege is the oldest of the privileges in an attorney-client relationship.[6] It was created for the purpose of protecting the oath and honor of the attorney.[7] As a result, in its earliest form, the privilege could only be waived by the attorney.[8]

Over time, the policy reasons for the privilege have changed.[9] Today the privilege is promoted as necessary to ensure "freedom of consultation between

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4. 399 F.3d 527 (2d Cir. 2005).

5. The following sections dealing with the historical development of the attorney-client privilege were first discussed in Salkin, *supra* note 3.

6. Salkin, *supra* note 3, at 284; 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).

7. Salkin, *supra* note 3, at 284; *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 6); *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, 422.

8. Salkin, *supra* note 3, at 284; *see, e.g.*, 8 WIGMORE, *supra* note 6; Gowdy, *supra* note 7, at 697–98; Kendall, *supra* note 7, at 422.

9. Salkin, *supra* note 3, at 284; *see* Kendall, *supra* note 7, at 422 (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).

the client and attorney."[10] To achieve this goal, the privilege requires that all communications between the attorney and the client be kept confidential absent the client's consent.[11] One rationale for the attorney-client privilege is that promoting freedom of consultation "encourages full and frank communication between attorneys and their clients[,]" enabling an attorney to properly represent a client because it is more likely that the client will disclose all relevant facts.[12] The freedom of consultation is also designed to encourage clients to seek legal counsel in the earliest stage of their conflict.[13] 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 [by] recogniz[ing] that sound legal advice . . . depends upon the lawyer being fully informed by the client."[14]

B. Defining the Scope of the Privilege

In his treatise on evidence, Wigmore organizes the privilege into the following eight elements, all of which are required for the privilege to attach:

> [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.[15]

At times, government lawyers may have difficulty in satisfying each of these elements because of the nature of the work performed by lawyers in the public sector. For example, the first element requires that the lawyer must be providing legal advice. Although government lawyers are often called upon to interpret constitutions, statutes, and caselaw, government lawyers—particularly in the executive and legislative branches—may also function as political and policy advisors, offering strategic advice on how to design specific initiatives to ensure

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10. Salkin, *supra* note 3, at 284; Gowdy, *supra* note 7, at 698 (internal quotation marks and citation omitted) (noting that the privilege began to take its modern form in the eighteenth century); *see also* Hunt v. Blackburn, 128 U.S. 464, 470 (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").

11. Salkin, *supra* note 3, at 284; *see* Gowdy, *supra* note 7, at 698; *see also* Radson & Waratuke, *supra* note 6, at 799 (stating that "[t]he confidentiality inherent in the privilege lies at the heart of the American judicial system").

12. Salkin, *supra* note 3, at 284-85; Upjohn v. United States, 449 U.S. 383, 389 (1981).

13. Salkin, *supra* note 3, at 285; *see Upjohn*, 449 U.S. at 389.

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

15. Salkin, *supra* note 3, at 285; 8 WIGMORE, *supra* note 6, § 2292, at 554.

maximum political support while, of course, ensuring legality. Where counsel relates to non-substantive legal matters, these conversations might not be covered by the privilege.[16] Similar analysis might pertain to the second element if, arguably, lawyers do not function as a "legal adviser" when offering strategic policy advice rather than substantive legal analysis. The fifth element, that the advice be sought "by the client," can also be problematic in the government context as government lawyers constantly struggle to define with precision who is the client of the government lawyer. The literature is full of robust debate on this point with arguments advanced that the client can be an individual public official, an agency or department within the government, the government as a whole, or the public at large.[17]

C. Privilege in the Government Setting

1. Brief History of Government Attorney-Client Privilege.—Although courts throughout the country recognize the existence of the attorney-client privilege,[18] there has been more reluctance among the courts to define this privilege in the government context because of the lack of caselaw precedent examining the issue.[19] Thus, although there is a rich legal history examining and interpreting the scope of the attorney-client privilege in the private context, there is nothing akin to this body of authority that would necessarily be applicable to the government lawyer.[20] In fact, prior to 1967 and the passage of the Freedom of Information Act ("FOIA"), there was little application of the privilege in the government context at all.[21] In adopting FOIA, Congress 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

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16. *See generally* Todd A. Ellinwood, *"In the Light of Reason and Experience": The Case for a Strong Government Attorney-Client Privilege*, 2001 WIS. L. REV. 1291.

17. *See, e.g.*, JEFFERY ROSENTHAL, ETHICAL STANDARDS IN THE PUBLIC SECTOR: A GUIDE FOR GOVERNMENT LAWYERS, CLIENTS, AND PUBLIC OFFICIALS (ABA 1999); Melanie B. Leslie, *Government Officials as Attorneys and Clients: Why Privilege the Privileged?*, 77 IND. L. J. 469 (2002); Michael Stokes Paulsen, *Who "Owns" the Government's Attorney-Client Privilege?*, 83 MINN. L. REV. 473 (1998); Gowdy, *supra* note 7, at 698; Jesselyn Radack, *Government Attorney-Whistleblower and the Rule of Confidentiality: Compatible at Last*, 17 GEO. J. LEGAL ETHICS 125 (2003).

18. *See* 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5475, at 125 (1986); Gowdy, *supra* note 7, at 696 n.4.

19. *See* Jeffrey L. Goodman & Jason Zabokrtsky, *The Attorney-Client Privilege and the Municipal Lawyer*, 48 DRAKE L. REV. 655, 658-59 (2000); *see also* Gowdy, *supra* note 7, at 705-06.

20. Salkin, *supra* note 3, at 287; *see* Gowdy, *supra* note 7, at 706.

21. Salkin, *supra* note 3, at 287; *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. *Anderson*, 34 F.R.D. at 523; Gowdy, *supra* note 7, at 706.

possibly unwilling official hands."[22] Despite the importance placed on access to public information, Congress did create nine exceptions to FOIA which would allow the government to keep documents from the public in certain limited circumstances.[23] The inclusion of these exceptions, it has been argued, evidenced the intent of Congress to preserve the attorney-client privilege in spite of the FOIA mandate, and thus extend the privilege to government agencies and their attorneys at times when confidentiality is needed most.[24]

2. Reasons for the Attorney-Client Privilege in the Government Setting.—As previously mentioned, the most compelling argument in support of the government attorney-client privilege is the necessity of ensuring that there will be "full and frank communication between [all lawyers] and their clients [(public or private), ultimately] promot[ing] broader public interests in the observance of law and administration of justice."[25] Just as private practitioners would be impaired by a lack of detailed information if they could not guarantee that their client's communications would remain protected, government attorneys are hampered by the uncertainty that surrounds the application of the privilege in the public sector, leaving them unable to zealously represent their clients or to uphold the law effectively.[26] More specifically, some have argued that if government officials know that there is a chance that their conversations with their legal counsel are not privileged, and, thus, subject to potential disclosure, they will avoid discussing sensitive matters with counsel, which could lead to legal violations and increased incidences of corruption.[27] Furthermore, it has been suggested that public officials would refrain from seeking legal advice, leaving them unable to effectively carry out their official responsibilities and policy objectives or to implement needed government programs.[28] In one of the most sobering predictions, some assert that absent a privilege in the government context, people might be unwilling to serve in public office in the years to come.[29]

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22. Environmental Protection Agency v. Mink, 410 U.S. 73, 80 (1973), *superseded by statute*, Freedom of Information Act, Pub. L. No. 93-502, § 2(a), 88 Stat. 1563 (1973). Mink was the first FOIA case heard by the Supreme Court.

23. *See* 5 U.S.C. § 522(b) (2000); *see also* Gowdy, *supra* note 7, 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), *as reprinted in* 1966 U.S.C.C.A.N. 2418, 2427)).

24. *See* Gowdy, *supra* note 7, at 708.

25. Salkin, *supra* note 3, at 288; Upjohn v. United States, 449 U.S. 383, 389 (1981).

26. Salkin, *supra* note 3, at 288; *see also* Swidler & Berlin v. United States, 524 U.S. 399, 412 (1998) (O'Connor, J., dissenting).

27. *In re* Witness Before the Special Grand Jury, 288 F.3d 289, 293 (7th Cir. 2002) (citing *In re* Lindsey, 158 F.3d 1263, 1286-87 (D.C. Cir. 1998)).

28. *Id.* (citing *In re* Grand Jury Subpoena Duces Tecum, 122 F.3d 910, 932 (8th Cir. 1997) (Kopf, J., dissenting)).

29. *See also* WRIGHT & GRAHAM, *supra* note 18, § 5475, at 127-28. In this leading treatise on federal practice, the authors offer the following rationale in support of government attorney-client privilege: 1) other governmental privileges do not deal with the unique requirements of

3. Reasons to Restrict the Attorney-Client Privilege in the Government Setting.—Some argue that because the application of the attorney-client privilege may result in the exclusion of relevant evidence, it stands "in derogation of the search for truth."[30] And, in the government context, the privilege becomes less tolerable. Therefore, the most persuasive argument against extending the privilege to the government context is that the general public, and not the agency or official, might be the ultimate client.[31] As shown by the fact that a discussion regarding "who is the client of the government lawyer" is fraught with legal uncertainty, unsettled in judicial opinions and law review commentaries, courts have been unwilling to clearly define the "client" of the government lawyer, choosing instead, at times, to carve out a "higher duty" standard for government lawyers to act in the public interest.[32] Accordingly, it has been argued that public officials are not the same as ordinary citizen-clients because public officials are bestowed with the authority to govern. With this authority comes a duty to act in the best interest of the public, and thus "[i]t follows that . . . [a] government lawyer [is] duty-bound to report internal criminal violations, not to shield them from public exposure."[33] Closely aligned with this position is a strong belief that, pursuant to the underlying goals of the FOIA, government information should be open and available to the public at large,[34] and that such openness in government protects the people against corruption and waste. Lastly, those who favor restricting the attorney-client privilege in the government setting assert that it is not needed because government officials may always retain private counsel at their own expense.[35] This last argument is short-sighted, however, since most government officials could not afford private legal counsel for what may be nothing more than routine law and policy matters. This approach could also unfairly lead to private attorneys being paid to do the work of a public attorney.

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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. *Id.*

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

31. Salkin, *supra* note 3, at 289; Ellinwood, *supra* note 16, at 1315.

32. *In re Witness Before the Special Grand Jury*, 288 F.3d at 293 (citing *In re Lindsey*, 158 F.3d at 1273); *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").

33. *In re Witness Before the Special Grand Jury*, 288 F.3d at 293 (citing *Nixon*, 418 U.S. at 712-13; *In re Lindsey*, 158 F.3d at 1273).

34. Salkin, *supra* note 3, at 289; *see In re Lindsey*, 158 F.3d at 1274 (citing *In re* Sealed Case, 121 F.3d 729, 749 (D.C. Cir. 1997)).

35. *See* Salkin, *supra* note 3, at 289.

4. The Civil/Criminal Distinction of the Government Privilege.—In recent years, courts around the country have drawn a sharp distinction between the attorney-client privilege as it applies in civil versus criminal matters, and this distinction has featured prominently in recent cases examining the scope of the government attorney-client privilege.[36] In *Jaffee v. Redmond*,[37] the Supreme Court noted that:

> 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; . . . [a]n 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.[38]

Despite this warning, holdings from jurisdictions around the country have left the government attorney-client privilege in an uncertain state,[39] a result the Supreme Court sought to avoid by explicitly stating in *Swidler & Berlin v. United States*[40] that the privilege should not be applied differently in the civil and criminal contexts.[41]

Although the case involved an attorney working in the private setting,[42] it is important to note that the D.C. Circuit's holding in *In re Lindsey*[43] only contained three references to the Supreme Court's holding in *Swidler*, despite the fact that

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36. *See id.*; *In re Lindsey*, 158 F.3d at 1278 (holding 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); *infra* notes 101-18 and accompanying text providing a full discussion of *In re Lindsey*; *see also In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 921 (8th Cir. 1997) (holding 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"); *infra* notes 72-100 and accompanying text providing a full discussion of *In re Grand Jury Subpoena Duces Tecum*; *infra* note 103.

37. 518 U.S. 1 (1996).

38. *Id.* at 18 (citing Upjohn Co. v. United States, 449 U.S. 383, 393 (1981)).

39. *See* Note, *Maintaining Confidence in Confidentiality: The Application of the Attorney-Client Privilege to Government Counsel*, 112 HARV. L. REV. 1995, 2006-07 (1999) (regarding the problems with a distinction between civil and criminal cases); *see also* Goodman & Zabokrtsky, *supra* note 19, at 672-75.

40. 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. *Id.* 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. *Id.*

41. *Id.* at 408-09.

42. *Id.* at 401.

43. 158 F.3d 1263 (D.C. Cir. 1998); *see infra* Part II.

In re Lindsey was argued only four days later.[44] Conversely, in considering *In re Witness Before the Special Grand Jury*,[45] a case decided in April 2002, the Seventh Circuit did pay more attention to the Supreme Court's holding in *Swidler,* but ultimately refused to accept the argument that the decision 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.[46] In reaching this conclusion, the court noted that the pedigree of the *Swidler* privilege was much different than the government privilege.[47]

5. Examining "The Client" in the Government Setting: Disclosure in Recent Senate Confirmation Hearings.—The fifth factor in Wigmore's analysis, which states that the privilege is assertable "by the client," poses significant challenges for government lawyers seeking to identify exactly who the client is.[48] The recent controversies surrounding President Bush's nominations to the United States Court of Appeals and the United States Supreme Court continue to highlight the uncertainties and ambiguities involved in trying to figure out who the client is in the government setting for purposes of invoking the attorney-client privilege. Although one could argue that these battles have been waged along partisan lines, they have nonetheless exposed a lack of direction and guidance on the application of the attorney-client privilege as it relates to attorneys employed to represent different government entities.[49] The debate over one nominee, Miguel Estrada, whose Court of Appeals nomination was blocked by a Senate filibuster, provided a catalyst for this new discourse,[50] and now provides a useful context in which to discuss the most recent controversy that surrounded the Senate Judiciary Committee's request for the production of memos written by Chief Justice John Roberts during his tenure as the top deputy to Solicitor General Kenneth W. Starr.

At the center of the debate over the confirmation of Miguel Estrada were memoranda that he wrote while working in the Solicitor General's Office of the Department of Justice "on matters such as appeal, certiorari, and amicus

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44. *See* Pincus, *supra* note 6, at 274.

45. 288 F.3d 289 (7th Cir. 2002); *see infra* notes 119-28 and accompanying text providing a full discussion of the case.

46. Salkin, *supra* note 3, at 290; *In re Witness Before the Special Grand Jury*, 288 F.3d at 292.

47. *In re Witness Before the Special Grand Jury*, 288 F.3d at 292.

48. 8 WIGMORE, *supra* note 6, § 2293, at 554.

49. *See* David G. Savage, *Privilege Claim May Not Apply to Roberts Papers*, L.A. TIMES, July 29, 2005, at A22; CBS News, *Tussle over Roberts' Documents*, July 26, 2005, *available at* http://www.cbsnews.com/stories/2005/07/26/supremecourt/main711851.shtml; MSNBC, *Bush Won't Release All Roberts Documents*, July 24, 2005, *available at* http://www.msnbc.msn.com/id/8689573.

50. *See generally* Joshua Panas, Note, *The Miguel Estrada Confirmation Hearings and the Client of a Government Lawyer*, 17 GEO. J. LEGAL ETHICS 541 (2004) (arguing that the confirmation debates have "raised issues of particular importance for the field of professional responsibility").

recommendations."[51] Although some of Estrada's opponents argued that the memoranda would "provide . . . evidence of [his] strong conservative convictions," others "couch[ed their requests] in less political terms" and "argue[d] that such memoranda should be part of the nomination process as useful windows into a candidate's jurisprudence."[52] The White House, on the other hand, refused to release the documents, arguing that the documents were protected by the attorney-client privilege.[53]

The White House's refusal to release the memoranda set off a firestorm of criticism from law makers around the country and resulted in several public pronouncements theorizing on the scope of the government attorney-client privilege.[54] Senator Charles Schumer of New York responded to the White House's invocation of the attorney-client privilege by asserting that "[Estrada] was not just a lawyer serving a client. He was an employee of the government serving the Constitution. And it's our job to figure out how he interprets the Constitution."[55] Many Congressional Democrats followed suit, proclaiming that the client of an attorney working for the federal government is some "amorphous" body such as the "people of the United States."[56]

In response to these general pronouncements, seven former Solicitors-General, who had served under both Democratic and Republican administrations,[57] wrote a letter to Senator Patrick Leahy of Vermont, Chairman of the Senate Judiciary Committee, to defend the White House's position with regard to disclosure of the Estrada memoranda, stating in part:

> [W]e can attest to the vital importance of candor and confidentiality in the Solicitor General's decisionmaking process. . . . Our decisionmaking process require[s] the unbridled, open exchange of ideas—an exchange that simply cannot take place if attorneys have reason to fear that their private recommendations are not private at all, but vulnerable to public disclosure. Attorneys inevitably will hesitate before giving their honest, independent analysis if their opinions are not safeguarded from future disclosure. High-level decisionmaking requires candor, and candor in turn requires confidentiality.[58]

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51. *Id.*

52. *Id.*

53. *Id.*

54. *See* Savage, *supra* note 49, at A22; MSNBC, *supra* note 49.

55. Panas, *supra* note 50, at 541-42.

56. *Id.* at 541; MSNBC, *supra* note 49 (claiming that leading Senate Democrats have described the White House's argument as a "Red Herring"). Some Democrats, however, offered veiled support for the White House's position, joining Senate Republicans who argued that it would be "unwise to insist on disclosure of memos written by lawyers in the Solicitor General's Office." Savage, *supra* note 49, at A22.

57. Signatories included Archibald Cox, who had served under President Kennedy, and Robert H. Bork, who held the post under President Nixon. Savage, *supra* note 49, at A22.

58. Letter from Seth P. Waxman et al., Wilmer, Cutler & Pickering, to Patrick Leahy,

The letter further warned that, "Any attempt to intrude into the Office's highly privileged deliberations would come at a cost of the Solicitor General's ability to defend vigorously the United States' litigation interests—a cost that also would be borne by Congress itself."[59] The authors concluded the letter by asserting that "the confidentiality and integrity of internal deliberations [should not] be sacrificed in the process" of obtaining information on Estrada's views.[60]

The long stalemate that resulted from the White House's refusal to disclose the memos written by Miguel Estrada ultimately contributed to Estrada withdrawing his nomination for the Court of Appeals.[61] The drama that engulfed the Miguel Estrada confirmation hearings was replayed in recent months during the controversy surrounding John G. Roberts, Jr.'s Supreme Court confirmation hearings. Again, the Senate Judiciary Committee demanded the production of memoranda that were written by Roberts during his time as a deputy Solicitor General under Kenneth W. Starr, and again, the White House asserted the attorney-client privilege to prevent disclosure of the documents.[62]

The White House's position with respect to memoranda written by Estrada and Roberts during their time with the Solicitor General's Office attracted fierce criticism. In particular, the White House was criticized for asserting the attorney-client privilege, especially considering that during the "Whitewater" investigations of the Clinton years, Estrada and Roberts' boss, Solicitor General Kenneth Starr, aggressively challenged the notion that White House lawyers who worked for Clinton could invoke the attorney-client privilege; at the time, Starr argued that government lawyers represented the people of the United States, and not the President.[63] Roberts' own views at the time seemed to accord with his boss, having then stated just five years earlier that "[w]hen I served as principle solicitor general, my sole client was the United States."[64]

Unlike with the Estrada disclosure controversy, the dispute surrounding the nomination of John Roberts did not derail his assent to the Supreme Court. With a Republican controlled Senate firmly in place, the White House was never pushed to disclose the documents that were requested by the Senate Judiciary Committee.[65] In fact, in the days and weeks leading up to Roberts' confirmation,

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Chairman, Senate Comm. on the Judiciary 1 (June 24, 2002), *available at* http://www.usdoj.gov/olp/solicitorsletter.pdf.

59. *Id.*

60. *Id.* at 2.

61. Savage, *supra* note 49, at A22.

62. *Id.*

63. *Id.*; *see In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 915 (8th Cir. 1997); discussion *infra* notes 119-28 and accompanying text.

64. Savage, *supra* note 49, at A22.

65. During the Estrada Confirmation Hearings, the Democrats were "clinging to a narrow majority in the Senate when they said they needed to know more about Estrada's thinking before confirming him." *Id.* Furthermore, the Democrats on the Senate Judiciary Committee said that they would make a "'limited and targeted' request for documents on a few of the cases during

the White House appeared keen to avoid any further controversy, and stated, through Attorney General Alberto Gonzales, that all requests for documents from the Senate Judiciary Committee would be considered on a case-by-case basis.[66]

This change in position did not blunt the criticism from leading Senate Democrats, such as John Kerry of Massachusetts and Patrick Leahy of Vermont, who continued to demand disclosure of all the documents in their entirety.[67] After pointing out that other Supreme Court nominees had disclosed such documents in the past, Senator Leahy even went so far as to say, "It's a total red herring to say 'Oh, we can't show this.' And of course there is no lawyer-client privilege. Those working in the solicitor general's office are not working for the president. They're working for you and me and all the American people."[68] Trying to take a pragmatic approach, Senator John McCain of Arizona "said he thought the documents about work Roberts did in the solicitor general's office probably could be turned over, but not material when he was one of the lawyers for the first President Bush."[69] In a statement that summed up the major issue implicated in a narrow interpretation of the government attorney-client privilege, Senator McCain asserted that

> If we're going to set a precedent that those communications between someone who works for the president and the president of the United States are some day going to be made public, I think it could have a real chilling effect on the kind of candor in communications that people would have with the president.[70]

These recent events demonstrate the unfortunate politicization of the government attorney-client privilege. The privilege is too important to be used as a tennis ball lobbed back-and-forth over the net from Democrats to Republicans, depending upon who is in political power. Although the decision from the D.C. Circuit[71] may fuel the firestorm in Washington, D.C., Part II demonstrates that the circuit courts are in conflict, and that the current situation begs for either a final pronouncement from the U.S. Supreme Court, or a statutory approach that would be consistent with the American Bar Association's Model Rules of Professional Conduct and the rules and codes of attorney professional responsibility that have been adopted by each state.

Roberts' time at the solicitor general's office." *Id.*

66. MSNBC, *supra* note 49. As Republican Senator Fred D. Thomas of Tennessee put it, "We hope we don't get into a situation where documents are asked for that folks know will not be forthcoming and we get all hung up on that." *Id.*

67. *Id.*

68. *Id.* (asserting that the statements were made by Senator Leahy on ABC's "This Week").

69. *Id.*

70. *Id.*

71. *See infra* notes 111-18 and accompanying text.

D. Narrowing the Scope of the Government Attorney-Client Privilege: The Decisions Are in

As the public debate among politicians and pundits played out on television screens and in newspapers across America, courts around the country were already embroiled in the controversy surrounding the scope of the attorney-client privilege in the public sphere, and more specifically whether it existed or could be invoked in the context of a grand jury proceeding.

1. The Eighth Circuit Court of Appeals.—The first in a recent string of circuit court decisions struggling with whether or not the attorney-client privilege should be applied in the government context revealed a hostility toward both the general common law privilege and the attorney work product doctrine in the public sector, specifically with respect to the existence of the privilege in the context of a federal grand jury investigation. In *In re Grand Jury Subpoena Duces Tecum*, the Eighth Circuit explicitly held that the attorney-client privilege could not be invoked to prevent the disclosure of certain notes taken by counsel for the White House that concerned an investigation conducted by the Office of Independent Counsel ("OIC").[72]

In June 1996, the OIC, led by Independent Counsel Kenneth W. Starr, directed a grand jury subpoena to be served on the White House requesting the production of "[a]ll documents created during meetings attended by any attorney from the Office of Counsel to the President and Hillary Rodham Clinton (regardless whether any other person was present)" that pertained to the Clintons' "Whitewater" real estate deal.[73] The White House refused to produce the notes, citing the attorney-client privilege and the work product doctrine as justification. While the OIC argued that "recognizing an attorney-client privilege in these circumstances would be tantamount to establishing a new privilege," the White House argued that "the attorney-client privilege is already the best-established of the common-law privileges and that, furthermore, it is an absolute privilege."[74]

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72. *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 913 (8th Cir. 1997). The investigation, overseen by Independent Counsel Kenneth W. Starr, focused on matters "relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc." *Id.*

73. The documents at issue in this appeal consisted of notes taken by Associate Counsel to the President Miriam Nemetz on July 11, 1995, at a meeting attended by First Lady Hillary Rodham Clinton, Special Counsel to the President Jane Sherburne, and Mrs. Clinton's personal attorney, David Kendall. The subject of the meeting was Mrs. Clinton's activities following the death of Deputy Counsel to the President Vincent W. Foster, Jr. *Id.* at 914. And notes taken by Ms. Sherburne on January 26, 1996, during meetings attended by Mrs. Clinton, Mr. Kendall, and at times, John Quinn, Counsel to the President, which took place during breaks in and immediately following Mrs. Clinton's testimony before a federal grand jury in Washington, D.C., concerning the discovery of certain billing records from the Rose Law Firm in the residence area of the White House. *Id.*

74. *Id.* at 915.

The District Court for the Eastern District of Arkansas, agreed with the White House, and "concluded 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."[75] The OIC appealed the district court's decision, calling upon the Eighth Circuit to decide whether an entity of the federal government may use the attorney-client privilege to avoid complying with a subpoena by a federal grand jury.[76]

The Eighth Circuit began its analysis by asserting that "[w]e need not decide whether a governmental attorney-client privilege exists in other contexts," and reiterated that its holding would only be applicable where the attorney-client privilege is invoked in the context of a federal grand jury investigation.[77] To aid in its analysis, the court looked to Proposed Federal Rule of Evidence 503[78] and its accompanying commentary as "'a useful starting place' for an examination of the federal common law of attorney-client privilege," but the court quickly concluded that these resources did not speak to the central issue of the case.[79] Next, the court focused on federal and state caselaw precedent cited by the White House in support of the argument that a government attorney-client privilege exists in the context of a federal grand jury investigation.[80] The court examined the cases cited by the White House, but ultimately concluded that their holdings were unpersuasive because none of them actually applied a governmental attorney-client privilege to block a grand-jury investigation.[81] The court next

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75. *Id.* at 914.

76. *Id.* at 915.

77. *Id.*

78. Proposed Federal Rule of Evidence 503, which was not formally adopted, expressly includes governmental entities within the definition of "clients" entitled to assert the privilege and would extend the privilege to all types of government legal consultation. PROPOSED FED. R. EVID. 503(a)(1) (defining "client" as "a person, public officer, corporation, association, or other organization or entity, either public or private").

79. *In re Grand Jury*, 112 F.3d at 915-16 (quoting *In re* Beiter Co., 16 F.3d 929, 935 (8th Cir. 1994)) (asserting that the proposed rule and its accompanying commentary "represent only the broad proposition that a governmental body may be a client for purposes of the attorney-client privilege"). The court also looked at other compilations of the general law, such as the Restatement (Third) of the Law Governing Lawyers § 124 (1996) (stating that "[t]he attorney-client privilege extends to a communication of a governmental organization") and Uniform Rule of Evidence 502 (defining "client" in terms similar to Proposed Federal Rule of Evidence 503), but ultimately concluded that these authorities did not advocate a broad application of the privilege to governmental entities. *Id.* at 916.

80. *Id.* According to the Eighth Circuit, the White House "located only two cases involving a clash between a grand jury and a claim of governmental attorney-client privilege." *Id.*; *In re* Grand Jury Supeonas Duces Tecum (Faber), 241 N.J. Super. 18, 574 A.2d 449 (N.J. App. Div. 1989); *In re* Grand Jury Subpoena (Doe), 886 F.2d 136 (6th Cir. 1989).

81. *In re Grand Jury*, 112 F.3d at 917 (pointing out that the New Jersey and Sixth Circuit cases cited by the White House were ultimately remanded for further proceedings, and that there were "several significant factual distinctions").

examined a number of cases, cited by the White House, which held that a governmental attorney-client privilege existed and could be invoked in the context of a civil action. Again, the court found these opinions to be unpersuasive in the context of the present factual scenario.[82]

After the court determined that no "persuasive direction" could be discerned from the caselaw,[83] the court announced that federal common law only recognizes a privilege in "rare situations" and that it should be recognized "'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'"[84] Furthermore, the court stressed that although the Supreme Court has upheld a broad interpretation of the attorney-client privilege in the past, which extended the privilege to communications between attorneys and lower-level employees possessing relevant information,[85] the court refused to apply this precedent to attorneys representing clients in the public sector after finding that "the private-attorney analogy is inapposite."[86]

Ultimately, the court concluded that "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."[87] Furthermore, the court asserted that it would be a "gross misuse of public assets" if the court allowed any part of the government "to use its in-house attorneys as a shield against the production of information relevant to a federal criminal investigation."[88] In holding that the attorney-client privilege could not be invoked in the context of a federal grand jury investigation, the court stressed that its decision "does not make the duties of government attorneys significantly more difficult,"[89] and admonished that "[a]n official who fears he or she may have

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82. *Id.* at 917-18.

83. *Id.* at 918.

84. *Id.* (internal quotation marks omitted) (quoting Trammel v. United States, 445 U.S. 40, 50 (1980)).

85. *In re Grand Jury*, 112 F.3d at 920-21. In *Upjohn v. United States*, 449 U.S. 383 (1981), the Supreme Court did not specifically identify the outer perimeters of the attorney-client privilege, but they did reject the "control group" test as unnecessarily restrictive, and ultimately concluded that if the privilege was to have any value, it should encompass conversations between a corporate attorney and mid- to low-level employees. *Id.* at 396.

86. More specifically, the court asserted that "important differences between the governmental and nongovernmental organizations such as business corporations weigh against the application of the principles of *Upjohn* in this case." *In re Grand Jury*, 112 F.3d at 919-20.

87. *Id.* at 921.

88. *Id.*

89. *Id.* The court explained that

> [a]ssuming arguendo that there is a governmental attorney-client privilege in other circumstances, confidentiality will suffer only in those situations that a grand jury might later see fit to investigate. Because agencies and entities of the government are not themselves subject to criminal liability, a government attorney is free to discuss

violated the criminal law and wishes to speak with an attorney in confidence should speak with a private attorney, not a government attorney."[90]

Before concluding that the White House could not invoke the attorney-client privilege to defeat a grand jury subpoena, the court did consider the assertions advanced by the White House, and then First Lady Hillary Rodham Clinton, that the presence of her private attorney during the meetings should be further grounds to invoke the privilege.[91] The White House relied on the common-interest doctrine,[92] which expands attorney-client privilege in certain situations, but, after finding that there was no common interest between Mrs. Clinton and the White House "either legal, factual, or strategic in character," the court ultimately rejected this argument as well.[93]

Finally, after finding that the attorney-client privilege could not be invoked to prevent disclosure of certain notes taken by a White House attorney, the Eighth Circuit also held that the work product doctrine could not be used to thwart the grand jury subpoena.[94] In reaching this conclusion, the court focused on the fact that the White House was preparing for a government investigation at the time the notes were taken, not an adversarial proceeding, to support their holding that the notes fell outside the scope of the privilege.[95] The Eighth Circuit made it quite clear that, when government investigations are at issue, the application of the work product privilege is necessarily limited because it is the individual acts of public officials that are being investigated, not the White House itself.[96] Thus, after finding that "no authority allow[s] a client such as the White House to claim work product immunity for materials merely because they were prepared while some other person, such as Mrs. Clinton, was anticipating litigation," the Court limited the application of the attorney work product privilege with regard to

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> anything with a governmental official—except for potential criminal wrongdoing by that official—without fearing later revelation of the conversation.

Id.

90. *Id.*

91. *Id.* at 921-22.

92. The Common Interest Doctrine has been described in these terms:

> If two or more clients with a common interest in a litigated or non-litigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged . . . that relates to the matter is privileged as against third persons.

Id. at 922 (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 126(1) (Proposed Final Draft No. 1, 1996)).

93. *Id.* at 922-23 (asserting that the incidental effects on the White House resulting from the OIC investigation are not sufficient to place the governmental institution "in the same canoe as Mrs. Clinton, whose personal liberty is potentially at stake").

94. *Id.* at 924-25.

95. *Id.* (citing FED. R. CIV. P. 26(b)(3), which states that the work product doctrine limits access to materials "prepared in anticipation of litigation or for trial").

96. *Id.* (asserting that the work product privilege unreasonably interferes with the conduct of government investigations and grand jury proceedings).

government attorneys representing "non-parties" in federal grand jury investigations.[97]

In deciding whether or not the privilege should extend to attorney work product compiled in anticipation of a federal grand jury proceeding, the court also focused on the nature of the "advice" sought in concluding that the attorney work product privilege did not apply. Even if it could be said that the White House anticipated a congressional investigation at the time the notes were taken, and that a congressional investigation could constitute an adversarial proceeding for the purposes of the attorney work product privilege,[98] the court reasoned that the only harm that could come to the White House as a result of such investigation was political in nature, and that the only advice that could be sought from the government attorney on the matter would necessarily be political in nature as well.[99] Therefore, in refusing to endorse the arguments advanced by the White House in support of the privilege, the court took the position that any advice dealing with "political concerns" falls outside the scope of the work product doctrine.[100]

2. D.C. Circuit Court of Appeals.—One year after the Eighth Circuit decided *In re Grand Jury*, the Court of Appeals for the District of Columbia was also called on to examine whether a governmental attorney-client privilege could be invoked in the context of a grand jury proceeding. In *In re Bruce Lindsey*,[101] the D.C. Circuit considered whether or not an attorney in the Office of the President may refuse to respond to a grand jury subpoena seeking information about possible criminal conduct by governmental officials by invoking the attorney-client privilege.[102]

The Office of the President and the OIC offered the same conflicting arguments that guided the Eighth Circuit's analysis in *In re Grand Jury*, and again, the court began its opinion by stressing that "federal courts do not recognize evidentiary privileges unless doing so 'promotes sufficiently important interests to outweigh the need for probative evidence.'"[103] The court focused on

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97. *Id.* (citing *In re* Cal. Pub. Util. Comm'n, 892 F.2d 778, 781 (9th Cir. 1989) (concluding that non-party to litigation may not assert work product doctrine)).

98. The court noted that the Restatement seems to include congressional hearings within its definition of anticipated litigation. *Id.* at 924 (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 136 (Proposed Final Draft No. 1, 1996), which states that litigation includes "a proceeding such as a grand jury or a coroner's inquiry or an investigative legislative hearing").

99. *Id.* at 924-25.

100. This holding reiterated the Eighth Circuit's disdain toward the invocation of confidentiality privileges by government attorneys and its refusal to apply caselaw involving private parties to cases involving attorneys practicing in the public domain. *See, e.g.*, United States v. Adlman, 134 F.3d 1194 (2d Cir. 1998) (holding that communications and notes involving business advice are within the scope of the attorney work product privilege).

101. 158 F.3d 1263 (D.C. Cir. 1998).

102. *Id.* at 1268.

103. *Id.* (quoting Trammel v. United States, 445 U.S. 40, 50 (1980)).

the nature of the governmental attorney-client relationship, and specifically looked to caselaw developed in litigation over exemption five of the Freedom of Information Act (FOIA) as a guide.[104] The Court noted that the exemption "'protects, as a general rule, materials which would be protected under the attorney-client privilege,'"[105] and that "'in the government context the "client" may be the agency and the attorney may be an agency lawyer.'"[106] Despite recognition of the existence of the privilege and its insertion into a federal statute, the D.C. Circuit maintained that "[e]xemption five does not itself create a government attorney-client privilege"; it merely ensures that governmental agencies do not lose the traditional protection of evidentiary privileges due to the enactment of FOIA.[107]

After examining caselaw under FOIA, the court turned to the Proposed Federal Rules of Evidence concerning privileges, and stressed that these rules did in fact "recognize[] a place for a government attorney-client privilege."[108] Furthermore, the court asserted that "[t]he practice of attorneys in the executive branch reflects the common understanding that a government attorney-client privilege functions in at least some contexts."[109]

Based on the weight of these combined authorities, the D.C. Circuit emphatically concluded that a governmental attorney-client privilege does exist under federal law.[110] After reaching this conclusion, the court was only left to determine whether the Office of the President could invoke it in the context of a grand jury proceeding, an issue of first impression in the D.C. Circuit.[111] The court began by noting that any attorney representing a government official must contend with a number of "competing values," which typically do not arise for the private practitioner.[112] The Office of the President asserted that the court

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104. *Id.* Under exemption five of FOIA, "'intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency' are excused from mandatory disclosure." *Id.* (quoting Freedom of Information Act, 5 U.S.C. § 552(b)(5) (1994)).

105. *Id.* (quoting Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980)).

106. *Id.* (quoting Tax Analysts v. IRS, 117 F.3d 607, 618 (D.C. Cir. 1997)).

107. *Id.* at 1269. In support of this premise, the court reiterated that "when 'the Government is dealing with its attorneys as would any private party seeking advice to protect personal interests, and needs the same assurance of confidentiality so it will not be deterred from full and frank communications with its counselors' exemption five applies." *Id.* (quoting *Coastal States*, 617 F.2d at 863).

108. *Id.*

109. *Id.*

110. *Id.* at 1269-70.

111. *Id.* at 1270-72 (explaining that "[a]lthough the cases decided under FOIA recognize a government attorney-client privilege that is rather absolute in civil litigation, those cases do not necessarily control the application of the privilege here").

112. *Id.* at 1271-72 ("[A]lthough the traditional privilege between attorneys and clients shields private relationships from inquiry in either civil litigation or criminal prosecution, competing values

"should find an *exception* in the grand jury context only if practice and policy require."[113] Conversely, the Independent Counsel maintained that there was no clear justification for extending the government attorney-client privilege to grand jury proceedings.[114]

Ultimately, the D.C. Circuit sided with the Independent Counsel, and held that the governmental attorney-client privilege could not be invoked to prevent disclosure in a grand jury proceeding.[115] The court asserted that "government attorneys stand in a far different position from members of the private bar. Their duty is not to defend clients against criminal charges and it is not to protect wrongdoers from public disclosure."[116] The court maintained that government attorneys may have an independent obligation to disclose information to further a governmental purpose, and therefore, the loyalty of a governmental lawyer "cannot and must not lie solely with his or her client agency."[117] Finally, following the lead of the Eighth Circuit, the D.C. Circuit noted that nothing prevents governmental officials from consulting personal counsel in order to ensure that their communications will be kept confidential.[118]

3. Seventh Circuit Court of Appeals.—In 2002, the Seventh Circuit stepped into the fray and affirmed a lower court holding that granted the United States's motion to compel an attorney, employed by the State of Illinois, to testify before a grand jury.[119] In *In re Witness Before the Special Grand Jury*, a state government attorney refused, on the basis of the attorney-client privilege, to give testimony concerning communications between him and a state office holder in contravention of a grand jury subpoena.[120] The District Court for the Northern

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arise when the Office of the President resists demands for information from a federal grand jury and the nation's chief law enforcement officer.").

113. *Id.* at 1272.

114. *Id.* The court stressed that these two positions "are not simply semantical: they represent different versions of what is the status quo. To argue about an 'exception' presupposes that the privilege otherwise applies in the federal grand jury context; to argue about an 'extension' presupposes the opposite." *Id.*

115. *Id.* Before reaching this conclusion, the court examined whether the common interest doctrine would apply to shield communications between Lindsey and the President while he was acting as an intermediary between the President and his private attorney. *Id.* at 1282. The court ultimately rejected the argument after finding that Lindsey, as a government attorney with overreaching duties, could not invoke an absolute immunity in the face of a grand jury subpoena. *Id.* at 1283.

116. *Id.* at 1272.

117. *Id.* at 1273, 1279 (asserting that such an approach would be "contrary to tradition, common understanding, and our governmental system").

118. *Id.* at 1276.

119. *See In re* Witness Before the Special Grand Jury, 288 F.3d 289 (7th Cir. 2002). The Attorney was, at the time of the litigation, Counsel to the Governor. The Governor was being investigated for actions in office while he was Secretary of State. The Governor's current counsel was his counsel when he was Secretary of the State as well. *Id.*

120. *Id.* at 290.

District of Illinois, Eastern Division, rejected his argument and asserted that no such government attorney-client privilege existed in the context of a federal grand jury proceeding, and even if one did exist, it was waived in this case.[121]

The Seventh Circuit started its analysis by pointing out that there was "surprisingly little case law on whether a government agency may also be a client for purposes of this privilege."[122] Not surprisingly, to support the argument that any privilege that may exist between a government attorney and his client does not extend to criminal proceedings, the United States relied heavily on the recent decisions of the Eighth and D.C. Circuits discussed previously.[123] Naturally, the opposition maintained that those cases were wrongly decided, "insofar as they might apply here to support a distinction between governmental clients and private clients."[124]

Ultimately, the Seventh Circuit fell into line with the Eighth and D.C. Circuits in finding that public policy does not favor extending the government attorney-client privilege that exists in the context of civil litigation to other contexts, including grand jury proceedings.[125] The court relied on *In re Lindsey* to assert that "government lawyers have a higher, competing duty to act in the public interest."[126] In a new twist, the court stressed the fact that government lawyers receive their compensation from the public in concluding that "the public lawyer is obligated not to protect his governmental client but to ensure its compliance with the law."[127] Furthermore, the court rejected any assertions that federalism concerns should afford government attorneys representing state offices and officials a different level of protection than a government attorney representing federal interests.[128]

4. Second Circuit: A Light in the Tunnel.—The Second Circuit broke ranks with her sister circuits in 2005 when it decided *In re Grand Jury Investigation (Doe)*,[129] which came down firmly on the side of the "well-established and familiar principle[s]" supporting the attorney-client privilege.[130] This decision involved an appeal from an order of the United States District Court for the

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121. *Id.* at 291.

122. *Id.* Here, it should be noted, the parties did stipulate that a government attorney-client privilege exists in the context of civil and regulatory actions. *Id.*

123. *Id.* at 292; *see supra* notes 72-118 and accompanying text.

124. *Id.*

125. *Id.* at 294 (stressing that "reason and experience dictate that the lack of criminal liability for government agencies and the duty of public lawyers to uphold the law and foster an open and accountable government outweigh any need for a privilege in this context").

126. *Id.* at 293.

127. *Id.*

128. *Id.* at 295 (asserting that "we can see no reason why state government lawyers are so different from federal government lawyers that a different result is justified," and thus they both "enjoy no immunity from disclosing relevant information to a federal grand jury").

129. 399 F.3d 527 (2d Cir. 2005).

130. *Id.* at 530; *see* Evan T. Barr, *Second Circuit Says Government Lawyers Covered by Privilege*, 231 N.Y. L.J. 54 (2005).

District of Connecticut compelling the former chief legal counsel to the Office of the Governor of Connecticut to comply with a grand jury subpoena to testify about the contents of confidential conversations she had with former Governor John G. Rowland.[131] In deciding that the government attorney-client privilege is alive (although maybe not well) in the criminal context, the Second Circuit firmly rejected the previously-discussed decisions of three Circuit Courts of Appeal and illuminated a conflict that is now ripe for Supreme Court review.

The Second Circuit began its analysis by pointing out that "'[t]he attorney client privilege is one of the oldest recognized privileges for confidential communications' . . . that for centuries has been a part of our common law."[132] The court noted that, although the privilege was originally predicated on notions of honesty, loyalty, and fairness that were linked to the barrister's code of honor as it existed in Elizabethan England, the modern conception of the attorney-client privilege emphasizes its utilitarian value as a tool for promoting justice and fairness in adversarial proceedings.[133] Thus, in examining the privilege as it exists today, the Second Circuit reiterated the fundamental purpose of the privilege as a means of encouraging "'full and frank communication between attorneys and their clients . . . thereby promot[ing] broader public interests in the observance of law and the administration of justice.'"[134]

Using the common law roots of the attorney-client privilege as the foundation for their analysis, the Second Circuit embraced the notion, rejected in other circuits, that the long-established principles and assumptions underlying the application of the attorney-client privilege in more familiar circumstances should guide the application of the privilege in "new" contexts today.[135] After looking at caselaw that recognizes the existence of a government attorney-client privilege in civil suits[136] and the scope of the Freedom of Information Act litigation,[137] as well as other authorities that restated the common law treatment of the

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131. *In re Grand Jury Investigation (Doe)*, 399 F.3d at 528-30.

132. *Id.* at 530-31 (quoting Swidler & Berlin v. United States, 524 U.S. 399, 403 (1998)).

133. *Id.* at 531.

134. *Id.* (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)).

135. *Id.* at 531-32 (stating that a wholesale reassessment of the privilege's utility is not needed whenever the privilege is invoked under previously unexplored circumstances, and that the "application of the privilege in 'new' contexts remains informed by the long-standing principles and assumptions that underlie its application in more familiar territory"). *Contra In re* Witness Before the Special Grand Jury, 288 F.3d 289 (7th Cir. 2002); *In re* Lindsey, 158 F.3d 1263 (D.C. Cir. 1998); *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir. 1997).

136. *In re Grand Jury Investigation (Doe)*, 399 F.3d at 532; *see, e.g.*, Galarza v. United States, 179 F.R.D. 291, 295 (S.D. Cal. 1998); Dep't of Econ. Dev. v. Arthur Andersen & Co., 139 F.R.D. 295, 300 (S.D.N.Y. 1991); Detroit Screwmatic Co. v. United States, 49 F.R.D. 77, 78 (S.D.N.Y. 1970); United States v. Anderson, 34 F.R.D. 518, 522-23 (D. Colo. 1963).

137. *In re Grand Jury Investigation (Doe)*, 399 F.3d at 533; *see, e.g.*, Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980); Mead Data Cent., Inc. v. U.S. Dep't of Air Force, 566 F.2d 242, 252 (D.C. Cir. 1977).

government attorney-client relationship,[138] the Second Circuit concluded that there was "substantial authority for the view that the rationale supporting the attorney-client privilege applicable to private entities has general relevance to government entities as well."[139]

After finding that the common law generally assumes the existence of a government attorney-client privilege, the Second Circuit refused to adopt the rationale, advanced by the Seventh, Eighth, and D.C. Circuits, that the government attorney-client privilege is necessarily weaker or must give way when a federal grand jury demands "otherwise privileged statements in order to further a criminal investigation."[140] The Second Circuit rejected any presumption that the public's interest is exclusively served through the furtherance of the grand jury's "truth-seeking" function, and refused to accept the government's argument that upholding the attorney-client privilege in these circumstances would constitute a "gross misuse of public assets."[141] The court asserted that it was also in the public's interest for public officials "to receive and act upon the best possible legal advice," and made note of a Connecticut statute which explicitly protects the government-attorney-client privilege for this purpose to dispel any notions to the contrary.[142]

Thus, in finding that the public interest is promoted through full and frank communication between the public official and government attorney, and that it is best protected through a robust interpretation of the attorney-client privilege in the government context, the Second Circuit sought to enshrine the principles that underlie the attorney-client privilege and defy a growing trend which "assumes that the 'public interest' in disclosure is readily apparent, and that a public official's willingness to consult will be only 'marginally' affected by the

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138. *In re Grand Jury Investigation (Doe)*, 399 F.3d at 532. The Second Circuit looked to several sources for "general guidance regarding federal common law principles." *Id.* In examining Proposed Federal Rule of Evidence 503, treatises written by legal scholars, and applicable caselaw examining the nature of the government attorney-client privilege, the Second Circuit noted that "serious legal thinkers, applying 'reason and experience,' have considered the privilege's protections applicable in the government context." *Id.*

139. *Id.* at 533.

140. *Id.* (refusing to abandon the attorney-client privilege in a context in which its protections are arguably needed most); Barr, *supra* note 130 (stating that the court was reluctant to entertain any "notion that the privilege should be curtailed in another particular category of cases, such as those involving potential criminal charges").

141. *In re Grand Jury Investigation (Doe)*, 399 F.3d at 534 (quoting *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 921 (8th Cir. 1997)).

142. *Id.* In assessing this public interest component, the Second Circuit relied on a statute passed by the Connecticut Legislature which specifically provided that: "[i]n any civil or criminal case or 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." CONN. GEN. STAT. § 52-146r(b) (2005).

abrogation of the privilege in the face of a grand jury subpoena."[143]

E. Possible Explanations for the Disparate Treatment

The Second Circuit's holding in *Doe* was a drastic, but welcome, departure from the "majority view" that had developed in other circuits in recent years.[144] There are several possible explanations for this change. First, and most importantly, the Second Circuit began its analysis with an assumption that there was a government attorney-client privilege, "and that any exceptions to the general rule should be narrowly construed."[145] This approach is in stark contrast to that adopted by the Seventh, Eighth, and D.C. Circuits, which began their analyses with a proclamation that a government attorney-client privilege does not exist in the context of a grand jury investigation, thus making the issue whether a "new privilege" should be established, not whether there was an exception to the general rule.[146] By starting off with an assumption that the privilege should apply, and then looking to see if there should be an exception in the context of a grand jury investigation, the Second Circuit "shifted the odds in favor of the putative privilege holder,"[147] making it easier for the court to conclude that the government attorney-client privilege should prevent disclosure.

Although it could be said that the analytical approach taken by the Second Circuit set the stage for its ultimate holding in support of the government attorney-client privilege, there are several other possible explanations. Some have argued that the Second Circuit rejected the analysis of the Eighth and D.C. Circuits because those decisions were "perceived as a byproduct of prosecutorial overreaching" by the Office of the Independent Counsel.[148] Others have pointed to the federalism issues presented in the Second Circuit case, citing the fact that the Connecticut Legislature "had specifically recognized the existence of a privilege for government lawyers in both civil and criminal proceedings" in order to explain the disparate outcome.[149] Finally, some have even suggested that the Second Circuit's decision merely "reflect[s] today's greater sensitivity to the perils of potential white collar criminal exposure in the post-Enron, Sarbanes-

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143. *In re Grand Jury Investigation (Doe)*, 399 F.3d at 533, 536.

144. *See* Barr, *supra* note 130; *In re Grand Jury Investigation (Doe)*, 399 F.3d at 536 n.4 (acknowledging that "[the] decision is in conflict with the Seventh Circuit's decision in *Ryan*, and is in sharp tension with the decision of the Eighth (*Grand Jury*) and the D.C. Circuits (*Lindsey*)," but asserting that "[they] are in no position, however, to resolve this tension in the law" (citations omitted)).

145. Barr, *supra* note 130; *In re Grand Jury Investigation (Doe)*, 399 F.3d at 531.

146. *See In re* Witness Before the Special Grand Jury, 288 F.3d 289 (7th Cir. 2002); *In re* Lindsey, 158 F.3d 1263 (D.C. Cir. 1998); *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir. 1997).

147. Barr, *supra* note 130.

148. *Id.*

149. *Id.*

Oxley world."[150]

In addition, the government attorney in *Doe* asserted that she provided legal advice to the "Office of the Governor" as opposed to specifically identifying Governor Rowland, as an individual, as her client.[151] This tactical characterization may have answered the concerns in previous opinions discussing whether the client of the government lawyer for purposes of the privilege was an office or entity as opposed to an individual official.

F. Analysis of Conflicting Positions: Who is Correct?

1. Search for Controlling Caselaw.—Despite the fact that the attorney-client privilege is one of the oldest and most firmly-rooted privileges recognized by the common law, the Eighth Circuit concluded that the privilege is not necessarily applicable to disputes involving federal government entities.[152] In reaching this conclusion, the court relied upon the lack of caselaw applying the attorney-client privilege in the context of a federal grand jury proceeding.[153] Thus, the court accepted the argument advanced by the Office of the Independent Counsel ("OIC"), asserting that the recognition of the privilege in such a context would be equivalent to "establishing a new privilege, which courts ordinarily undertake with great reluctance."[154]

This reasoning is problematic for two reasons. First, as the White House pointed out in its brief to the Eighth Circuit, the lack of caselaw precedent on this issue is expected given the fact that disputes such as this are very rare and "ordinarily could not arise except in the context of an OIC investigation."[155] Normally, a federal prosecutor's request for confidential governmental communications could be resolved quietly through intra-branch discussion and not subpoenas, but because the OIC is not part of the executive branch this method is not available in these situations.[156] Despite the fact that a government entity must respond to an OIC subpoena in a different manner than it would normally respond to another federal prosecutor's request, "it does not follow that the attorney-client privilege cannot be asserted by the entity receiving the request."[157] As the White House argued in its brief to the court, the unique

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150. *Id.*

151. *See In re* Grand Jury Investigation (Doe), 399 F.3d 527, 533 (2d Cir. 2005).

152. *In re* Grand Jury Subpoena Dues Tecum, 112 F.3d 910, 915 (8th Cir. 1997).

153. *Id.* at 915; *see* Kendall, *supra* note 7, at 429.

154. *In re Grand Jury*, 112 F.3d at 915; *see also* Kendall, *supra* note 7, at 429 (citing Appellant's Opening Brief at 9-11, 21-24, *In re Grand Jury*, 112 F.3d 910 (No. 96-4108)).

155. Kendall, *supra* note 7, at 429 (quoting Appellee's Brief at 36, *In re Grand Jury*, 112 F.3d 910 (No. 96-4108)).

156. Kendall, *supra* note 7, at 429; *see* MSNBC, *supra* note 49 (discussing the disclosure controversy surrounding Supreme Court nominee Roberts and stating that, "There is often an accommodation that is reached with respect to requests for information, and I suspect that is going to happen in this case").

157. Kendall, *supra* note 7, at 429.

situations created by an OIC subpoena, "can hardly mean that the privilege claimed is not well-recognized by federal courts under Rule 501 or that the privileges that otherwise exist now evaporate."[158]

The Eighth Circuit's narrow search for controlling caselaw is also flawed by its misguided belief that a government entity's ability to assert the attorney-client privilege depends upon the nature of the case.[159] As the White House argued in its brief to the court, "no court has ever held that the same attorney-client communication is privileged in some litigation settings but not others, for some corporate transactions but not others, in some criminal investigations, but not others."[160] Furthermore, the Supreme Court has explicitly rejected the notion that the attorney-client privilege should be applied differently in different situations, and asserted that the attorney-client privilege would be eroded by uncertainty if this approach were adopted.[161] The purposes underlying the privilege would be undermined, leaving government officials skeptical and unwilling to "disclose information to government attorneys for fear that they would later become involved in a grand jury proceeding where the attorney-client privilege" would not be available to prevent their disclosure.[162] As the Supreme Court asserted in cases preceding this decision, such a privilege "is little better then no privilege at all."[163]

2. Federal Common Law.—After finding that no caselaw precedent supported the White House's assertion that the attorney-client privilege should apply in federal grand jury criminal investigations, the Eighth Circuit refused to recognize or extend the attorney-client privilege to disputes involving federal government entities accused of criminal wrongdoing. This holding, however, disregards the principles of common law that have guided the application of the attorney-client privilege in this country for decades, and, more importantly, recent Supreme Court holdings that have illustrated the Court's reluctance to dilute the attorney-client privilege.[164] Indeed, even the D.C. Circuit, a court that has sought

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158. *Id.* (quoting Appellee's Brief, *supra* note 155, at 37).

159. *Id.* at 430.

160. *Id.* (quoting Appellee's Brief, *supra* note 155, at 32).

161. *See* Upjohn Co. v. United States, 449 U.S. 383, 393 (1981).

162. Kendall, *supra* note 7, at 430; *see Upjohn Co.*, 449 U.S. at 393, 397.

163. *Upjohn Co.*, 449 U.S. at 393.

164. *See, e.g.*, Swidler & Berlin v. United States, 524 U.S. 399 (1998) (rejecting a balancing approach and embracing a broad concept of privilege that survives the client's death and holding that client confidences that can be described as tangentially related to the legal advice provided in the course of communications are worthy of protection); United States v. Zolin, 491 U.S. 554 (1985) (recognizing that the attorney-client privilege promotes important societal interests and that *in camera* review can be utilized to promote this purpose, but also recognizing an important limitation on privilege by asserting that it cannot be applied where policy reasons for recognizing privilege are not present, such as where the communication is made for the purposes of furthering wrongdoing); Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343 (1985) (asserting that the privilege promotes full and frank communications between attorneys and their clients, encourages observance of the law, and aids in the administration of justice, and holding that the

to limit the scope of the government attorney-client privilege, recognized that it could not dispute the existence of a general, common law attorney-client privilege in the public sphere.[165] Clearly, the federal common law, embodied in Proposed Rule of Evidence 503, supports the notion that the government is a client for purposes of the attorney-client privilege,[166] and the concept that the attorney-client privilege is available to all clients, regardless of whether they are involved in criminal or civil proceedings.[167] Thus, one cannot escape the conclusion that the Eighth Circuit's conception of the privilege is baseless. The court should refuse to extend the privilege to the government during federal criminal investigations because, according to Proposed Rule 503, the government is already well within its rights to assert the privilege without exception.[168]

3. Purpose of Privilege.—As discussed earlier, the attorney-client privilege is a means of encouraging full and frank communication between the attorney and the client, and facilitating the full development of facts necessary for competent legal representation.[169] The attorney-client privilege also serves to encourage clients to seek legal advice early on and thus promotes societal interests,

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trustee of a corporation in bankruptcy can waive the corporation's attorney-client privilege with respect to pre-bankruptcy communications); *Upjohn Co.*, 499 U.S. at 383 (asserting that confidentiality is essential if the societal interests of fostering compliance with the law is to be served and holding that the privilege extends to conversations between corporate attorney and employees beyond the corporation's "control group").

165. *In re* Lindsey, 158 F.3d 1263 (D.C. Cir. 1998) (holding that, despite the existence of a common law attorney-client privilege that is applicable to government entities, the privilege could not be asserted to prevent the disclosure of communications pursuant to a federal grand jury subpoena).

166. *See* PROPOSED FED. R. EVID. 503, advisory committee notes; *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 926 (8th Cir. 1997) (Kopf, J., dissenting) (taking issue with the majority's refusal to acknowledge that a governmental attorney-client privilege existed, calling it a "well-recognized principle" that the government is entitled to claim both the attorney-client and work product privileges); *see also* Green v. IRS, 556 F. Supp. 79, 85 (N.D. Ind. 1982) (holding that the "[attorney-client privilege] also unquestionably is applicable to the relationship between Government attorneys and administrative personnel"); Hearn v. Rhay, 68 F.R.D. 574, 579 (E.D. Wash. 1975) ("Federal courts have uniformly held that the attorney-client privilege can arise with respect to attorneys representing a state."); United States v. Alu, 246 F.2d 29, 33-34 (2d Cir. 1957) ("It has been widely recognized that lawyers representing litigants should not be called as witnesses in trials involving those litigants if such testimony can be avoided consonant with . . . justice. We believe that this prohibition is applicable to the United States Government and its attorneys as well as to private litigants and their attorneys.").

167. *See* PROPOSED FED. R. EVID. 503; *In re Grand Jury*, 112 F.3d at 926 (Kopf, J., dissenting) (arguing that there is no precedent for holding that the privilege did not apply because a criminal investigation was ongoing).

168. Kendall, *supra* note 7, at 431 (pointing out that the Eighth Circuit disregarded the District Court's findings that there was "no 'authority specifically holding that a federal governmental attorney-client privilege may not be asserted in such a situation'" (citation omitted)).

169. *See Upjohn*, 449 U.S. at 389; *see also* Kendall, *supra* note 7, at 431-32.

specifically the "broader public interests in the observance of law and administration of justice."[170] These principles, however, have been undermined by the Seventh, Eighth, and D.C. Circuit Court decisions that have sought to limit the scope of the attorney-client privilege as it applies to government entities.

Public officials will be deterred from seeking legal advice from government attorneys, let alone early legal advice, if they believe that their communications could be revealed in later judicial proceedings.[171] This lack of communication could have significant repercussions. Besides the obvious blow to attorneys employed in the public sector,[172] the overall functioning of government may be impaired because of the reluctance of government officials to seek legal advice. The lack of communication could result in policies that may not be on firm legal ground, conduct that could unknowingly lead to violations of the law, and an increased number of investigations.[173] Aside from the devastating impact that this could have on the public's perception of government as a whole, law makers may have a hard time pursuing new policies to regain the public's confidence if they are forced to expend large amounts of time and resources remedying the wrongdoing of past officials.[174]

4. Uncertainty.—Probably the most harmful and overlooked aspect of the recent circuit court decisions is the uncertainty that it has injected into the application of the attorney-client privilege across the country. As the Supreme Court has pointed out, "how can a client, or even an attorney for that matter, know what may become relevant to a criminal investigation in the future?"[175] This element of uncertainty is precisely the kind of pitfall that the Supreme Court has repeatedly cautioned against in its attorney-client privilege jurisprudence.[176] Even attorneys and clients in the Second Circuit should be leery about feeling too confident regarding the privilege since the conflict in the circuits presents an opportunity for the Supreme Court to grant certiorari in the future to address the discrepancy.

5. Existing Checks on Abuse.—In asserting that the Second Circuit provided a more sound analysis of the issue, and ultimately reached a better conclusion, at

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170. Kendall, *supra* note 7, at 532 (quoting *Upjohn*, 449 U.S. at 389). In *Upjohn*, 449 U.S. at 389, the Supreme Court asserted that this public interest is advanced by "sound legal advice or advocacy . . . and that such advice or advocacy depends upon the lawyer's being fully informed by the client."

171. *See* Kendall, *supra* note 7, at 433.

172. Some have suggested that this will lead to government attorneys becoming totally obsolete. *See id.* at 430.

173. *See id.*

174. *See id.* at 435.

175. Radson & Waratuke, *supra* note 6, at 819.

176. Jaffee v. Redmond, 518 U.S. 1, 18 (1996) (stating that "'[a]n uncertain privilege . . . is little better than no privilege at all'" (quoting *Upjohn*, 449 U.S. at 393)); *see also Upjohn*, 449 U.S. at 393 (holding that the effectiveness of the attorney-client privilege would be greatly diminished if its existence was contingent on a judge's determination of the importance of the protected information).

least one commentator has argued that there is no need to ignore the plain evidence which points toward the existence of a robust attorney-client privilege in the public sphere that is adaptable to new and unforeseen contexts because there are existing checks on abuse that will keep government lawyers from using the privilege as a shield to hide official misconduct or wrongdoing.[177] To ensure that the "'seal of secrecy . . . between lawyer and client does not extend to communications made for the purpose of getting advice for the commission of a fraud or a crime,'"[178] the Supreme Court has repeatedly recognized a crime-fraud exception that will prevent the use of the attorney-client privilege to protect communications that further an improper purpose or hinder the administration of justice.[179] "The crime-fraud exception protects against the most egregious" abuses of the attorney-client privilege, specifically when a client seeks legal advice in order to further a crime or perpetuate a fraud.[180] Because "it is the intent and actions of the client that determine whether or not the [crime-fraud] exception applies" to a given communication, the fact that "the attorney is completely innocent and unaware of the client's wrongdoing" is of little consequence.[181]

In recent years the Supreme Court has removed significant procedural obstacles to the crime-fraud exception, making it easier for parties to inquire as to whether or not the exception applies to specific communications.[182] At the same time, the Supreme Court has maintained the important safeguard of judicial review *in camera* to ensure confidentiality when challenges fail.[183] This

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177. Barr, *supra* note 130 (supporting his conclusion by asserting that "[t]he notion that government lawyers must answer to the public at large sounds idealistic but ignores the fact that many of the legal issues confronted by an officeholder are not necessarily black and white").

178. Lance Cole, *Revoking Our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (and Why It Is Misguided)*, 48 VILL. L. REV. 469, 500 (2003) (quoting United States v. Zolin, 491 U.S. 554, 563 (1989) (internal quotation marks omitted)); *see also* Clark v. United States, 289 U.S. 1, 15 (1933).

179. *See* Cole, *supra* note 178, at 500.

180. *Id.*; *Zolin*, 491 U.S. at 569; *Clark*, 289 U.S. at 15. The exception has received a similar treatment in lower courts. *See, e.g.*, United States v. Martin, 278 F.3d 988, 1001 (9th Cir. 2002) (holding that the attorney-client privilege could not prevent disclosure of communications made to a lawyer involving future criminal purpose); *In re* Impounded, 241 F.3d 308 (3d Cir. 2001) (asserting that the attorney-client privilege is waived when an attorney is consulted for the purpose of furthering a crime or fraud); Alexander v. FBI, 198 F.R.D. 306, 310 (D.C. Cir. 2000) (listing the requirements for the crime fraud exception); *In re* Grand Jury Proceedings (Company X), 857 F.2d 710, 712 (10th Cir. 1988) (holding that "[t]he attorney-client privilege does not apply where the client consults an attorney to further a crime or fraud").

181. Cole, *supra* note 178, at 501.

182. *Id.* at 505; *Zolin*, 491 U.S. at 573 (adopting a reasonable belief standard for obtaining *in camera* review of alleged privileged communications and rejecting the "independent evidence rule" after concluding that "evidence directly but incompletely reflecting the content of the contested communications" could be used by a court in determining whether or not *in camera* review would be appropriate).

183. Cole, *supra* note 178, at 505; *Zolin*, 491 U.S. at 573.

pragmatic approach permits "government officials to obtain judicial review of improper assertions of privilege" with ease and also allows law enforcement officials "to overcome wrongful assertions of the privilege on a case-by-case basis."[184]

The crime-fraud exception is an effective check on any potential abuse of the attorney-client privilege, and therefore, one may question the rationale adopted in circuit court opinions that sought to limit the government attorney-client privilege in the context of grand jury investigations. As one commentator put it, "In those (presumably rare) cases in which an officeholder uses the services of a government lawyer to commit crimes, the well-established crime-fraud exception to the privilege is already available to ferret out wrongdoing."[185]

In addition to the widely recognized crime-fraud exception, the law of waiver also provides an effective check on abuse where the privilege is invoked in the context of criminal proceedings. One commentator notes, "[G]iven that the privilege belongs to the office as opposed to a particular individual, the possibility of waiver by a successor (who may belong to a different political party) should deter a politician bent on breaking the law from relying on government lawyers to do so."[186]

Furthermore, the common interest doctrine, as a matter of policy, has been trumpeted as a means of encouraging public officials to "turn to government counsel who may be able to bring institutional knowledge and expertise to bear in rendering advice on an issue involving federal or state law, without the official having to worry about potential disclosure at some later point."[187]

6. Balancing Competing Interests/Open Meeting Laws.—The attorney work product doctrine and the attorney-client privilege may be limited by open meeting laws, or "sunshine laws," that prevent governing bodies from meeting in private.[188] In general, because the governing body must meet in the open, and confidential communications with a government attorney cannot be shared in a public meeting, one of the elements necessary to establish the privilege is lacking.[189] However, despite this general rule, states throughout the country have recognized an independent basis for the attorney-client privilege, typically by invoking the strong public policy considerations that generally apply to private clients. For example, in many states, public bodies are authorized by statute to move into executive session for, among other reasons, obtaining legal advice from their attorney.[190] This allows for a private and confidential conversation away from the public.

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184. Cole, *supra* note 178, at 507-08.

185. Barr, *supra* note 130; Cole, *supra* note 178, at 507 (arguing that absent some evidence that the crime-fraud exception is not adequate to protect against abuse of the system, law enforcement officials should rely upon it to prevent abuse of the privilege on a case-by-case basis).

186. Barr, *supra* note 130.

187. *Id.*

188. *See* Radson & Waratuke, *supra* note 6, at 813.

189. *Id.*

190. *See, e.g.*, N.Y. PUB. OFF. LAW § 105(1)(d) (McKinney 2005).

One of the most frequently cited cases that reconcile the demands of an open meeting law with the application of the privilege is *Sacramento Newspaper Guild v. Sacramento County Board of Supervisors*.[191] In this case, the court weighed different competing public policy objectives and concluded that the lack of any legislative intent to override the attorney-client privilege made it possible for the privilege to operate concurrently with the state's open meeting laws.[192] In reaching this conclusion, the court stressed that "[g]overnment should have no advantage in legal strife; neither should it be a second-class citizen. . . . 'Public agencies face the same hard realities as other civil litigants. . . . An attorney that cannot confer with his client outside his opponent's presence may be under insurmountable handicaps.'"[193]

Courts throughout the country have taken an approach similar to that adopted in the California courts. The Supreme Court of Alabama, for example, after noting the "inherent, continuing, and plenary powers the judiciary has over its attorneys as officers of the court,"[194] balanced the competing interests at stake and concluded that an attorney's ability to fulfill his duties and obligations to his client were not affected by the state's sunshine law.[195] Similarly, a Texas appellate court asserted that the attorney-client privilege remained unchanged and protected despite the state's adoption of an open meeting law.[196] In holding that the attorney-client privilege protects conversations that take place when a governing body meets privately with its attorney, as permitted by the statute, to discuss pending or contemplated litigation, the court stressed that "a governmental body has as much right as an individual to consult with its attorney without risking the disclosure of important confidential information."[197]

In addition to California, Alabama, and Texas, courts in West Virginia, Minnesota, Alaska, and Iowa recognize the continued existence of a robust attorney-client privilege despite the passage of open meeting laws in their respective jurisdictions.[198] However, it should be noted that some jurisdictions

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191. 69 Cal. Rptr. 480, 492 (Ct. App. 1968) (holding that California's Open Meeting law operated concurrently with California's Evidence Code), *superseded by statute as stated in* McComas v. Bd. of Educ., 475 S.E.2d 280 (W. Va. 1996); *see* Radson & Waratuke, *supra* note 6, at 813.

192. *Sacramento Newspaper Guild*, 69 Cal. Rptr. at 490; *see also* Oklahoma Assoc. of Mun. Att'ys v. State, 577 P.2d 1310 (Okla. 1970) (similarly finding that the legislature did not intend to abrogate the attorney-client privilege in enacting the Open Meetings Act).

193. *Sacramento Newspaper Guild*, 69 Cal. Rptr. at 490 (quoting Sacramento Newspaper Guild v. Sacramento Co. Bd. of Supervisors, 62 Cal. Rptr. 819, 821 (Ct. App. 1967)) (internal quotation marks omitted); *see* Radson & Waratuke, *supra* note 6, at 814.

194. Radson & Waratuke, *supra* note 6, at 815 (quoting Dunn v. Ala. State Univ. Bd. of Tr., 628 So. 2d 519, 529-30 (Ala. 1993)).

195. *Dunn*, 628 So. 2d at 530.

196. Markowski v. City of Marlin, 940 S.W.2d 720, 725 (Tex. Ct. App. 1997).

197. *Id.* at 726-27 (asserting that "logic dictates" that the conversations that took place at that meeting should be protected).

198. Radson & Waratuke, *supra* note 6, at 815.

such as Florida, Arkansas, and Nevada, have adhered to the opposite approach by rejecting any notion that there is an implied attorney-client privilege exception to their states' open meeting laws.[199] For example, in *Neu v. Miami Herald Publishing Co.*,[200] the Florida Supreme Court emphatically stated that the state's evidence code and the rules of professional conduct did not create an exception to the state's sunshine law that would protect conversations between a government attorney and his client.[201] Although the court acknowledged that its holding would create an unfair advantage to those who challenge the government in adversarial proceedings, they ultimately concluded that it was the legislature's duty to create such an exception.[202] Although this holding had a profound impact, leading many to believe that there was little to no attorney-client privilege left in the government context in the State of Florida, the court made a point to stress that its decision did not eliminate the privilege; it merely recognized that the state's open meeting law prevented governing bodies from meeting in private and, thus, having confidential conversations that would otherwise be protected by the privilege.[203]

With respect to the attorney work product doctrine, states that have adopted public record acts have run into many of the same issues that are raised by the inherent conflict between open meeting acts and the attorney-client privilege in the government sphere. In enacting the federal counterpart to state public record acts, the Freedom of Information Act, Congress sought to harmonize the conflicting interests of open government and accountability on the one hand and a client's right to confidentiality on the other.[204] Pursuant to its terms, FOIA mandates that all agency records are subject to disclosure upon demand except for records that fall under one of the enumerated statutory exemptions.[205] As noted by the Eighth Circuit in *In re Grand Jury*,[206] exemption five protects "inter-

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199. *Id.*; *see, e.g.*, McKay v. Bd. of County Comm'rs of Douglas County, 746 P.2d 124, 128 (Nev. 1987) (asserting that the open meeting law affects communications with a client to the extent that the client is meeting as a governing body); Laman v. McCord, 432 S.W.2d 753, 754 (Ark. 1968) (holding that a city council could not meet privately with their attorney after the passage of FOIA).

200. 462 So. 2d 821 (Fla.), *superseded by statute as stated by* City of Melbourne v. A.T.S. Melbourne, Inc., 475 So. 2d 270, 271 (Fla. Dist. Ct. App. 1985).

201. *Id.* at 823.

202. Radson & Waratuke, *supra* note 6, at 809-10. The Florida State legislature accepted this invitation and ultimately created an exemption to the sunshine law for what came to be known as "shade sessions." *Id.* Specifically Section 286.011(8) of the Florida Code permits a "board or commission of any state agency or authority or any agency or authority of any county, municipal corporation, or political subdivision, and the chief administrative or executive officer of the governmental entity" to meet privately with its attorney to discuss "pending litigation to which the entity is presently a party." FLA. STAT. § 286.011(8) (2005).

203. Radson & Waratuke, *supra* note 6, at 810.

204. *See id.* at 834.

205. *See id.*; NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 136 (1975).

206. *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir. 1997).

agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency" from public disclosure.[207] Federal courts, including the United States Supreme Court, in interpreting exemption five have maintained that it protects documents that are not discoverable by a private party enthralled in litigation with a government agency.[208] Thus, with respect to a government attorney operating in the private sphere, exemption five protects "'working papers of the agency attorney and documents which would come within the attorney-client privilege if [it] applied to public parties.'"[209] By reconciling the mandate of FOIA with the need for attorney-client confidentiality in the public sphere, the federal government recognized that "'frank discussion of legal or policy matters' in writing might be inhibited if the discussion were made public; and the 'decisions' and 'policies formulated' would be the poorer as a result."[210]

II. PROFESSIONAL RESPONSIBILITY RULES MANDATE CONFIDENTIALITY

The focus on the government attorney-client confidentiality issue by the courts has centered on the privilege of confidentiality rooted in the common law of evidence. However, a review of codes of conduct or rules of professionalism that govern lawyers further demands that conversations between attorneys and their clients remain confidential.

A. American Bar Association

While the United States has long recognized that government attorneys are entitled to protection under the same common law privileges that are afforded to private practitioners, the exact scope of these privileges for attorneys representing clients in the public sphere remains marred in controversy. The American Bar Association ("ABA"), in adopting model rules of professional conduct, has shed some light on this dilemma by setting a standard for professional responsibility that is intended to guide the practice of attorneys operating in both the public and private sectors.[211] As recently as 2005, the ABA spoke out in support of a robust attorney-client privilege, asserting that the privilege is a key foundational concept

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207. 5 U.S.C. § 552(b)(5) (2000); Radson & Waratuke, *supra* note 6, at 834.

208. *See* Radson & Waratuke, *supra* note 6, at 834; *see, e.g.*, *Sears, Roebuck & Co.*, 421 U.S. at 148-49; EPA v. Mink, 410 U.S. 73, 85-86 (1973), *superseded by statute as stated in* Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975).

209. Radson & Waratuke, *supra* note 6, at 834; *see Sears, Roebuck & Co.*, 421 U.S. at 154.

210. *Sears, Roebuck & Co.*, 421 U.S. at 150 (holding that the government would be hampered if a contrary approach was adopted because government agencies would be forced to operate in a fish bowl); *see* Radson & Waratuke, *supra* note 6, at 834; *see also Mink*, 410 U.S. at 87.

211. Radack, *supra* note 17, at 125 (explaining that the ABA originally adhered to an approach that "forbade lawyers from revealing confidential information acquired during the course of representing a client, which could include the attorney's supervisor in the department or agency, the agency itself, the statutory mission of the agency, the entire government of which that agency is part, and the public interest"); *see* MODEL RULES OF PROF'L CONDUCT (2002).

of every attorney-client relationship.[212] In accordance with this stance, the ABA has relied on common law precedent and the support of experts in the field of legal ethics, to protect and promote the attorney-client privilege of confidentiality through rules that will guide the practice of all attorneys in the years to come.[213]

The ABA first codified regulations for the conduct of lawyers in the United States at its annual meeting in 1908 when it adopted the *Canons of Professional Ethics* ("Canons").[214] In adopting the Canons, the ABA declared that a lawyer has "[t]he duty to preserve his client's confidences"[215] and that "the stability of the Courts and of all departments of government rests upon the approval of the people."[216] In recognizing the people's right to invoke a privilege of confidentiality, the ABA also recognized that there was potential for abuse. Thus, in adopting the Canons, the ABA excluded conversations and communications from the definition of "confidences," leaving them outside the scope of the recognized privilege.[217] Despite this exclusion, attorneys were given a great deal of discretion to determine whether their client's behavior warranted disclosure under the future crime exception, while Canon 41 also gave attorneys wide discretion when faced with client fraud or deception.[218]

In 1969, the ABA abandoned the Canons, and adopted the *Model Code of*

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212. In their report to the ABA House of Delegates, the ABA Task Force on Attorney-Client Privilege recommended that the ABA adopt a resolution expressing its strong support for the preservation for the attorney-client privilege and work product doctrine, and its opposition to policies, practices, and procedures of governmental agencies that have eroded the attorney-client privilege and work product doctrine. ABA TASK FORCE ON ATTORNEY CLIENT PRIVILEGE REPORT TO THE HOUSE OF DELEGATES, EXECUTIVE SUMMARY (2005), *available at* http://www.abanet.org/buslaw/attorneyclient/home.shtml. Specifically, Recommendation 111 states:

> [T]he American Bar Association strongly supports the preservation of the attorney-client privilege and work product doctrine as essential to maintaining the confidential relationship between client and attorney required to encourage clients to discuss their legal matters fully and candidly with their counsel so as to (1) promote compliance with the law through effective counseling, (2) ensure effective advocacy for the client, (3) ensure access to justice and (4) promote the proper and efficient functioning of the American adversary system of justice . . . .

ABA TASK FORCE ON ATTORNEY-CLIENT PRIVILEGE, RECOMMENDATION 111 (2005), *available at* http://www.abanet.org/buslaw/attorneyclient/materials/hod/recommendation_adopted.pdf.

213. Radack, *supra* note 17, at 127.

214. *Id.* at 128-29.

215. CANONS OF PROF'L ETHICS Canon 37 (1928); *see* Radack, *supra* note 17, at 128.

216. CANONS OF PROF'L ETHICS Preamble (1928); *see* Radack, *supra* note 17, at 128.

217. *See* CANONS OF PROF'L ETHICS Canon 37 (1928) (asserting that "the announced intention of a client to commit a crime is not included within the confidences which [an attorney] is bound to respect"); Radack, *supra* note 17, at 129 (explaining that disclosure may be necessary "'to prevent the [crime] or to protect those against whom it is threatened'" (quoting CANONS OF PROF'L ETHICS Canon 37 (1928))).

218. CANONS OF PROF'L ETHICS Canon 37 (1928); Radack, *supra* note 17, at 129.

Professional Responsibility ("Model Code").[219] The Model Code contained a confidentiality privilege that extended the protection formally adopted in the ABA's old Canons.[220] Pursuant to Disciplinary Rule ("DR") 4-101,[221] the new privilege encompassed client confidences and secrets and forbade attorneys from revealing information "except in the most serious of circumstances, elevating confidentiality to 'a good of the highest order.'"[222]

After several years of contentious debate and several lengthy studies on the matter, the ABA adopted the Model Rules of Professional Conduct in 1983, and these became the Association's "official statement of the ethical obligations of attorneys."[223] Model Rule 1.6, governing the confidentiality of information, prohibited an attorney from disclosing any information concerning a client unless the disclosure was requested by the client or needed to a reasonable extent for the client's defense.[224] The Rule did not provide for any distinctions with respect to

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219. Radack, *supra* note 17, at 129.

220. *Id.*

221. MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101 (1969), entitled "Preservation of Confidences and Secrets of a Client" states:

> (A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
>
> (B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
>
> (1) Reveal a confidence or secret of his client.
>
> (2) Use a confidence or secret of his client to the disadvantage of the client.
>
> (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.
>
> (C) A lawyer may reveal:
>
> (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
>
> (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
>
> (3) The intention of his client to commit a crime and the information necessary to prevent the crime.
>
> (4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.
>
> (D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.

See also Radack, *supra* note 17, at 129.

222. Radack, *supra* note 17, at 129 (quoting Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1108 (1985)).

223. *Id.* at 129-30; *see also* MODEL RULES OF PROF'L CONDUCT Chairperson's Introduction (1983).

224. Radack, *supra* note 17, at 130.

the application of the privilege or impose any limitations on a client's right to invoke it.[225] Thus, Rule 1.6 provoked a great deal of controversy during the drafting process with opponents arguing that it contained exceptions that were "less permissive than the Model Code's," which ultimately had the effect of limiting attorney discretion with respect to what information should be disclosed.[226] Although the Rule was finally adopted by the ABA following a lengthy public debate, its unpopularity was evidenced by the fact that less than one-fifth of the states that adopted some version of the Model Rules did so with Model Rule 1.6 in its unaltered form.[227]

Judging from these numbers, it is apparent that many jurisdictions were not keen to adopt the approach to attorney-client confidentiality that was being advanced by the ABA. According to one author, many practitioners and scholars

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225. *Id.*

226. *Id.* (asserting that Model Rule 1.6 is quite clear: "absent the client's consent, a lawyer must keep the client's secrets," but pointing out that it makes a limited exception for communications concerning future crimes); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (1983) (permitting attorneys to disclose information without the client's consent, in order "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm").

227. Radack, *supra* note 17, at 130. Here, the author notes, "In recent years, the standards for confidentiality have varied significantly, and sometimes contradictorily, from state to state." *Id.* at 130. According to the author, "[f]orty-two states and the District of Columbia adopted some variation of the Model Rules." *Id.*; *see* COMPENDIUM OF PROFESSIONAL RESPONSIBILITY RULES AND STANDARDS 555 (2001) (stating that California, Iowa, Maine, Nebraska, New York, Ohio, Oregon, and Tennessee are the only states that do not base their lawyer conduct codes on the Model Rules). Of the states that have adopted some form of the Model Rules, only a few have adopted Rule 1.6 verbatim. Radack, *supra* note 17, at 130; *see also* THOMAS D. MORGAN & RONALD D. ROTUNDA, 2002 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 134-44 (2002) (stating that Alabama, Delaware, District of Columbia, Kentucky, Louisiana, Missouri, Montana, Rhode Island, and South Dakota have adopted Model Rule 1.6, but noting that South Dakota does permit disclosure to rectify frauds or crimes in which the lawyer's services have been used). According to Radack, "'[t]he modifications adopted by [the other] states range from dramatic rejections to minor adjustments." Radack, *supra* note 17, at 130 (second alteration in original) (quoting Irma S. Russell, *Cries and Whispers: Environmental Hazards, Model Rule 1.6, and the Attorney's Conflicting Duties to Clients and Others*, 72 WASH. L. REV. 409, 445 (1997)). Radack reported that six states still followed the more expansive confidentiality exceptions of the predecessor Model Code DR 4-101. *Id.* Thirty-seven states allowed a lawyer to disclose confidential information to prevent a crime or fraud. *Id.* However, of those thirty-seven states, three allowed disclosure for criminal fraud only, twenty-five allowed disclosure for any crime (including criminal fraud), six allowed disclosure for both criminal and non-criminal fraud, three allowed disclosure to prevent any crime (including criminal and non-criminal fraud), and four states actually required attorneys to report criminal fraud. *Id.* at 130-31. Based on this quick analysis, it is apparent that Radack's assertion that "Rule 1.6 was all over the map, literally and metaphorically," is certainly true, with the "vast majority of states adopting confidentiality standards that were broader than what was permitted by the categorical prohibition of Rule 1.6." *Id.* at 131.

of legal ethics opposed the strict interpretation of confidentiality promoted in the Model Rules because it "at best was 'lagging behind changes in the profession and society generally,'[228] and at worst, was 'radically out of step with the realities of the modern world.'"[229] In response to a growing chorus of criticism, in 1997, the ABA appointed the "Ethics 2000 Commission" to review and propose revisions to the Model Rules.[230]

The Ethics 2000 Commission proposed substantial changes to the confidentiality privilege, which included an expansion of the grounds for permissive disclosure under Rule 1.6.[231] Although the commission reaffirmed the legal profession's commitment to the core value of confidentiality in the strongest terms, they made it a point to stress "the integrity of the lawyer's own role within the legal system."[232] In this respect, the Commission "regard[ed] the Rule as out of step with public policy and the values of the legal profession," and thus recommended revising the confidentiality privilege in order to broaden the right of disclosure beyond the scope promoted in the Model Rules.[233] On February 5, 2002, the ABA House of Delegates adopted the Commission's recommendations (with amendments agreed upon by the House), and thereafter the revised version of Rule 1.6 became official ABA policy.[234]

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228. Radack, *supra* note 17, at 131 (quoting David W. Raack, *The Ethics 2000 Commission's Proposed Revision of the Model Rules: Substantive Change or Just a Makeover?*, 27 OHIO N.U. L. REV. 233, 233 (2001)).

229. *Id.* (quoting Russell, *supra* note 227, at 466).

230. *Id.* (explaining that this was the first real look at the Model Rules by the ABA since their adoption in 1983).

231. *Id.* at 131.

232. *Id.* (internal quotation marks omitted) (quoting MARGARET COLGATE LOVE, ABA ETHICS 2000 COMMISSION, FINAL REPORT SUMMARY OF RECOMMENDATIONS (2001), *available at* http://www.abanet.org/cpr/e2k-mlove_article.html).

233. *Id.*

234. *Id.* The Ethics 2000 Rule 1.6 passed in 2002, governing "Confidentiality of Information," provided:

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

MODEL RULES OF PROF'L CONDUCT, Proposed Rule 1.6 (2001). According to Radack, "[t]he most radical recommendations proposed by the Ethics 2000 Commission with regard to Rule 1.6—the

The goals of the attorney-client privilege and the work-product doctrine are closely related to their professional responsibility counterpart, as adopted in revised Model Rule 1.6.[235] The revised rule explicitly states that, "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, [or] the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted[.]"[236] The comments to Rule 1.6 assert that confidentiality is the "fundamental" component, or "hallmark" of the attorney-client relationship because it creates an environment of trust that promotes the public interest.[237] Despite this proclaimed societal importance, Rule 1.6 does not provide any guidance for practitioners with respect to how they should exercise their reclaimed discretionary authority.[238] This deficiency becomes most apparent in government practice, where attorneys are often left, once again, questioning who their clients are.

Revised Model Rule 1.6 does not define "client" nor give any guidance with respect to the kinds of entities, such as individuals, corporations, or government agencies, that are able to claim "client" status.[239] Because of this lack of guidance, many commentators have presumed that Rule 1.6 applies "whenever a lawyer is serving someone, regardless of who that person or entity is."[240] On the other hand, some scholars and practitioners have looked to other Model Rules and their accompanying comments, including Model Rule 1.13 governing situations in which an "organization" is a client, for guidance on the issue.[241]

According to Model Rule 1.13, when a lawyer is "employed or retained by an organization . . . [the lawyer] represents the organization acting through its duly authorized constituents."[242] Rule 1.13 generally requires the lawyer to act in "the best interest of the organization,"[243] and it further provides guidance to practicing lawyers with respect to how they should balance and weigh their duties

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additions of an exception in order to prevent client crimes or frauds reasonably certain to cause substantial economic injury and an exception in order to rectify any injury that has already been caused by client behavior—ended up on the ABA House of Delegates' cutting room floor." Radack, *supra* note 17, at 132. On August 12, 2003, however, the ABA House of Delegates, at the urging of the ABA Task Force on Corporate Responsibility, adopted these provisions in order to complement the Sarbanes-Oxley Act of 2002 and new SEC rules that were enacted to promote disclosure of information to prevent economic injury. *Id.*

235. Panas, *supra* note 50, at 546.

236. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2003); Panas, *supra* note 50, at 546.

237. MODEL RULES OF PROF'L CONDUCT R. 1.6, cmts. 2, 6; Panas, *supra* note 50, at 546-47 (explaining that individuals will not "communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter" without this level of trust).

238. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6.

239. Panas, *supra* note 50, at 547.

240. *Id.*

241. *See id.*

242. *See* MODEL RULES OF PROF'L CONDUCT R. 1.13(a); Panas, *supra* note 50, at 547.

243. MODEL RULES OF PROF'L CONDUCT R. 1.13(b); Panas, *supra* note 50, at 547.

with respect to the organization as a whole, and its individual constituents.[244]

For attorneys working for government officials and government agencies, the requirements and guidance contained in Rule 1.13 does not provide much additional help. In the official comments to Rule 1.13, however, the ABA provides the first reference to, and discussion of, the duties of lawyers acting on behalf of a government organization.[245] Comment 9 to Model Rule 1.13 states that:

> [d]efining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules [Scope 18]. . . . Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. . . . Thus, when the client is a governmental organization, a different balance may be appropriate . . . for public business is involved.[246]

In asserting that the obligation of government lawyers is "a matter beyond the scope of these Rules" the Comment makes explicit reference to "Scope 18" which governs the duties and obligations of attorneys representing private individuals.[247] Because this statement does not provide any additional guidance on the matter, it is not apparent what this reference should mean to an attorney acting in the government sphere. At the very least, this reference "indicates that the duties of lawyers for governmental entities may differ from situations where the client is a private actor" despite the fact that little to no elaboration is provided.[248]

Indeed, in contrast to the current Comment 9 that stresses that an agency or branch can be the client, the former version "generally favored considering the government lawyer's client to be 'the government as a whole' despite the fact that there was no explicit reference to the government attorney at all."[249] Although some commentators have suggested that the ABA revised the Comment to "incorporate a functional test for determining the identity of the government lawyer's client,"[250] others have rejected this view, and concluded that, at best, the

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244. *See* MODEL RULES OF PROF'L CONDUCT R. 1.13(a) (2003); *Id.* R. 1.13(f); Panas, *supra* note 50, at 547 (asserting that Rule 1.13 provides that attorneys may have to instruct constituents of the organization, such as directors, officers, shareholders, and employees, that the organization itself is the client in situations where the constituent's interests may differ from those of the client).

245. Panas, *supra* note 50, at 548-49.

246. *See* MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. 9; Panas, *supra* note 50, at 548.

247. MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. 9; Panas, *supra* note 50, at 547-48.

248. Panas, *supra* note 50, at 548.

249. *Id.*; STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 156 (Aspen 2005) (discussing the differences between old and new rules and comments).

250. Panas, *supra* note 50, at 548 (internal quotation marks omitted) (quoting Margaret Love, *The Revised ABA Model Rules of Professional Conduct*: *Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441, 460 (2002)).

new approach merely advocates a case by case analysis and detracts from the "government-as-a-whole approach" in determining who the government's client is.[251]

In short, despite the reference to government lawyers contained in Comment 9 to Model Rule 1.13, and the general indication that an agency-approach may be more appropriate then the government-as-a-whole approach, the "Model Rules ultimately leave unclear the exact parameters of the government lawyer's duties."[252]

B. State Regulation of Attorney Ethics

The proclamations of individual state bar associations, and their views on the ABA's approach, as expressed in Model Rule 1.6, also provide insight into the future direction of the attorney-client privilege in the government context.

1. Hawaii.—Hawaii has gone further than any other state in defining the parameters of the government attorney-client privilege by including specific language applicable to government attorneys in the state's Rules for Professional Conduct.[253] In adopting their own version of Rule 1.6, the state of Hawaii has chartered a new course in the path toward a robust attorney-client privilege by adopting rules for professional conduct that extend to attorneys representing clients in the public sector.

Similar to the ABA's Model Rule 1.6, Hawaii's Rule 1.6 establishes a duty of confidentiality with respect to communications between an attorney and her client.[254] In addition to this general mandate, Hawaii included two exceptions to the duty of confidentiality that are specifically applicable to government attorneys. Pursuant to Hawaii's Rule 1.6, a government attorney

> may reveal information relating to representation of a client to the extent

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251. *See* Panas, *supra* note 50, at 548. In addition to Model Rule 1.13, and its accompanying Comments, Model Rule 1.11, which governs conflicts of interest with former and current government employees and officers, has also provided limited guidance for attorney's operating in the government sphere. *Id.* Although the Rule appears to establish an agency-approach, in actuality, "it retreats from that position in several key places." *Id.* For example, although the Rule states that attorneys who once worked for the government may not take on clients with matters relating to those that they were involved with "personally and substantially" while acting as a government attorney, "unless the appropriate government agency" consents, Comment 4 arguably adopts a narrower, "agency" standard (along with the personal and substantial involvement language) to insure that potential disqualifications due to conflict of interest remain at a minimum. *Id.* Despite this general statement, this Rule does not provide any real addition to the Model Rules approach to the government attorney problem. *See id.*

252. *Id.* at 549.

253. *See* HAW. RULES OF PROF'L CONDUCT R. 1.6 (2005).

254. HAW. RULES OF PROF'L CONDUCT R. 1.6(a) (stating that, "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c)").

> the lawyer reasonably believes necessary . . . to prevent a public official or public agency from committing a criminal or illegal act that a government lawyer reasonably believes is likely to result in harm to the public good . . . [or] to rectify the consequences of a public official's or a public agency's act which the government lawyer reasonably believes to have been criminal or illegal and harmful to the public good.[255]

By including permissive disclosure provisions that apply specifically to governmental attorneys in their Rules for Professional Conduct, Hawaii's legislature took a stand and reasserted the importance of recognizing an attorney-client privilege in the public sphere. Although these provisions permit disclosure by a government attorney in certain circumstances, and thus appear to weaken the rules of confidentiality as they apply to government lawyers, the commentary that accompanies the rule clearly envisions a robust privilege of confidentiality that would apply to all practicing attorneys within the state. With respect to government attorneys, Comment 6 explicitly states that "[t]he requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance."[256] Therefore, although Hawaii's rule of confidentiality permits disclosure by government attorneys when it will achieve a public good, or prevent some harm to the public interest, the rule still recognizes that confidentiality is an important value that must be preserved. By striking such a balance, Hawaii takes the position that, despite the inherent difficulties involved and conflicting interests at play, a robust government attorney-client privilege can survive in the face of strong public policy concerns.[257]

2. California.—California has adhered to the general approach, exemplified

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255. HAW. RULES OF PROF'L CONDUCT R. 1.6(b)(4) & (5). In addition to the two exceptions noted, the Rules also provide that all attorneys "shall reveal information which clearly establishes a criminal or fraudulent act of the client in the furtherance of which the lawyer's services had been used, to the extent reasonably necessary to rectify the consequences of such act, where the act has resulted in substantial injury to the financial interests or property of another. HAW. RULES OF PROF'L CONDUCT R. 1.6(c). As discussed *infra* Part II.B.3, a similar exception is contained in Indiana's ethics code.

256. HAW. RULES OF PROF'L CONDUCT R. 1.6 cmt. 6.

257. Although no other state has gone as far as Hawaii in recognizing the existence of a government attorney-client privilege, and defining its general scope, Florida has made moves in this general direction. *See* FLA. ETHICS OPINION 77-25. Although Florida has not amended their rules of professional conduct in the same manner as Hawaii, it has rendered ethics opinions that do contemplate the existence of a government attorney-client privilege. *See, e.g.*, FLA. ETHICS OPINION 77-25. More specifically, these opinions suggest that a government attorney must choose between his or her duty of confidentiality and his or her duty with respect to the public at large; indeed, it is suggested that, in some circumstances, a government attorney must step back and enter private practice in order to maintain confidentiality in the face of an overwhelming public interest in disclosure. *Id.*

by ABA Model Rule 1.6, which provides for a qualified attorney-client privilege of confidentiality.[258] Like ABA Rule 1.6, California's Rule 3-100 stresses the importance of confidentiality, by mandating that "[a] member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule."[259] By making reference to the Business and Professions Code, Rule 3-100 emphasizes the importance of confidentiality in the attorney-client privilege, and suggests that, in the most extreme cases, an attorney may be prohibited from disclosing information revealed by a client, even to the lawyer's own detriment.[260]

Judging from the language adopted in the California Rules, and the limited permissive disclosure provisions contained therein,[261] it is clear that Rule 3-100 adheres to an even stricter standard than the ABA's model rules.[262] Indeed, California's policy in keeping sacrosanct the attorney-client privilege and attorney-client confidentiality is clarified in the California Bar Association's discussion of Rule 3-100, which states that "[a] member's duty to preserve the confidentiality of client information involves public policies of paramount importance . . . [p]reserving the confidentiality of client information contributes to the trust that is the hallmark of the client-lawyer relationship."[263] Furthermore, the discussion states that confidentiality is to be broadly applied to any

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258. CAL. RULES OF PROF'L CONDUCT R. 3-100 (2004).

259. *Id.* R. 3-100(A). Section 6068 of California's Business and Professions Code states that it is the duty of a member, "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets of his or her client." CAL. BUS. & PROF. CODE § 6068 (West 2005).

260. *See* CAL. RULES OF PROF'L CONDUCT R. 3-100(A); CAL. BUS. & PROF'L Code § 6068.

261. Rule 3-100(B) offers only one exception to the duty of confidentiality, that is, when the attorney "reasonably believes that the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in the death of, or substantial harm to, an individual." CAL. RULES OF PROF'L CONDUCT R. 3-100(B). Clearly, although a lawyer is under no duty to reveal information from a client that a crime may be committed, if such information is to be revealed, the attorney must first attempt to persuade the client not to commit the act or pursue a course of conduct that will prevent the threatened death or bodily harm. *See id.* R. 3-100(C). Therefore, the attorney must warn the client of his or her decision to reveal the "confidential" information, and, in the event that the attorney does decide to reveal such information, the disclosure "must be no more than is necessary to prevent the criminal act[.]" *Id.* R. 3-100(D).

262. Although the ABA's standards for attorney-client confidentiality are high, California's standards seem to be even stricter. Unlike the ABA's DR 4-101, California's Rule 3-100 does not contain an exception permitting the attorney to release confidential information to collect or establish his or her fee, or to defend himself or herself against an accusation of wrongful conduct. California's Rule 3-100 also does not contain an exception to reveal information under court order or by law.

263. CAL. RULES OF PROF'L CONDUCT R. 3-100 discussion [1], *available at* http://www.calbar.ca.gov/state/calbar/calbar_extend.jsp?cid=10158 (follow hyperlink for 3-100) (last visited Apr. 21, 2006).

information shared between attorneys and clients during representation.[264]

In adhering to this strict approach, the California Bar Association maintains that a privilege of confidentiality is beneficial to the immediate attorney-client relationship, and it is an essential component of our justice system; thus, "informing a client about limits on confidentiality may have a chilling effect on client communication. . . . When a member has revealed confidential information under paragraph (B), in all but extraordinary cases the relationship between member and client will have deteriorated so as to make the member's representation of the client impossible."[265] Thus, California recognizes that by preserving the attorney-client privilege and the duty of confidentiality, the justice system is strengthened in the eyes of the general public.[266]

3. Indiana.—In the preamble to the Indiana Rules of Professional Conduct, the importance of confidentiality in the attorney-client relationship is emphasized by asserting that "[a] lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law."[267] The individual rules of professional conduct, specifically Rule 1.6 which governs confidentiality, exemplify this point, although its vague provisions leave its exact scope unascertainable.[268]

Like the rules discussed in prior sections, Indiana's Rule 1.6(a) first sets out the general principle that "[a] lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized to carry out the representation or the disclosure is

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264. CAL. RULES OF PROF'L CONDUCT R. 3-100 discussion [2], *available at* http://www.calbar.ca.gov/state/calbar/calbar_extend.jsp?cid=10158 (follow hyperlink for 3-100) (last visited Apr. 21, 2006) (stating that "[t]he principle of client-lawyer confidentiality applies to information relating to the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the attorney-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, as all established in law, rule and policy").

265. CAL. RULES OF PROF'L CONDUCT R. 3-100 discussion [10], [11], *available at* http://www.calbar.ca.gov/state/calbar/calbar_extend.jsp?cid=10158 (follow hyperlink for 3-100) (last visited Apr. 21, 2006).

266. This is not to say, however, that all information between attorney and client may be classified as "confidential." On July 1, 2004, by order of the Supreme Court of California, the California Bar Association accepted that "Rule 3-100 is not intended to augment, diminish, or preclude reliance upon, any other exceptions to the duty to preserve the confidentiality of client information recognized under California law." CAL. RULES OF PROF'L CONDUCT discussion [13], *available at* http://www.calbar.ca.gov/state/calbar/calbar_extend.jsp?cid=10158 (follow hyperlink for 3-100) (last visited Apr. 21, 2006) (leading to the possibility that this strict Rule of Professional Conduct may in fact be precluded by an existing or forthcoming California law).

267. IND. RULES OF PROF'L CONDUCT Preamble, ¶ 4 (2005).

268. Unlike the ABA's Model Rules, the Indiana Rules of Professional Conduct do not define exactly what a "client" is, nor do they distinguish a "secret" from a "confidence." *See* IND. RULES OF PROF'L CONDUCT R. 1.6.

permitted by paragraph (b)."[269] Similar to the approach adopted by the ABA, Indiana Rule 1.6 includes an exception that would permit an attorney to disclose confidential communications for the purposes of preventing a crime or reasonably certain death or substantial bodily harm.[270] Indiana permits disclosure of confidential information only "to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services."[271]

Although there are several exceptions to the rules of confidentiality contained in Indiana's Rules of Professional Conduct, it is clear that Indiana's Rules seek to promote and protect the preservation of client confidences and secrets. In Comment 2 accompanying Indiana's Rule 1.6, it is asserted that "[a] fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation."[272] In the event that a lawyer is ordered to disclose certain information that should be kept confidential, Comment 13 requires the attorney to "assert on behalf of the client all non-frivolous claims that the order is not authorized by other law or that the information sought is protected by the attorney-client privilege or other applicable law."[273] The commentary accompanying Indiana's confidentiality rule stresses that attorneys should be reluctant to disclose confidential information and should do so only in rare and extreme cases.[274]

4. New York.—New York State's ethics standards concerning the

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269. *Id.* R. 1.6(a).

270. *Id.* R. 1.6(b)(1), (2); MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101 (1980). Compliance with "other law or court order" is also an exception wherein the attorney "may reveal information relating to the representation of a client to the extent the attorney believes necessary." IND. RULES OF PROF'L CONDUCT R. 1.6(b)(6). The obligation of confidentiality can also be disregarded by a lawyer

> to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Id. R. 1.6(b)(5). Moreover, a client's information can be revealed "to secure legal advice about the lawyer's compliance with these rules." *Id.* R. 1.6(b)(4).

271. *Id.* R. 1.6(b)(3).

272. *Id.* R. 1.6 cmt. 2.

273. *Id.* R. 1.6 cmt. 13.

274. Indeed, even prospective clients receive some protection from disclosure of information under Indiana's Rules. *Id.* R. 1.18(b) (stating "[e]ven when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client"). Indiana, therefore, like the ABA, California, and New York, sees the duty of confidentiality and the attorney-client privilege as important obligations to protect even though a formal attorney-client relationship has not been established.

preservation of client confidences are generally compatible with the standards espoused in the American Bar Association's Disciplinary Rules. Like ABA Disciplinary Rule 4-101, New York's Disciplinary Rule 4-101 creates separate definitions for the terms "confidence" and "secret,"[275] and includes provisions mandating their protection and exceptions that would permit their disclosure.[276] Unlike the ABA's Disciplinary Rules, New York adds a fifth exception governing the withdrawal of written or oral opinions, or representations previously given by the lawyer which are expected to be relied upon by a third person, if they are found to contain "materially inaccurate information or [are] being used to further a crime or fraud."[277]

Though New York's Disciplinary Rules are similar to the broader standards of the ABA, New York's Ethical Considerations stress that confidentiality is an important part of the attorney-client relationship, and that it promotes efficiency of the justice system as a whole.[278] More specifically, these ethical considerations stress that if information is to be revealed it should be done so in as limited a fashion as possible.[279] The Ethical Considerations explain the importance of trust between an attorney and a client,[280] and note that, although the attorney-client privilege is more limited than the ethical obligation to guard the confidences of the client, "[a] lawyer should endeavor to act in a manner which preserves the

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275. *See* LAWYER'S CODE OF PROF'L RESPONSIBILITY DR. 4-101 (2002); MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101 (1980). In New York, "confidence" refers to information protected by the attorney-client privilege under law, while "secret" is information gained in the professional relationship that the client has asked be held "inviolate" or if revealed "would be embarrassing or would likely be detrimental to the client." N.Y. LAWYERS' CODE OF PROF'L RESPONSIBILITY DR 4-101(A).

276. N.Y. LAWYERS' CODE OF PROF'L RESPONSIBILITY 4-101(B), (C). These exceptions permit disclosure where the client affected gives consent after full disclosure, where the release of information is permitted under the Disciplinary Rules or is required by law or by court order, or where there is an intention of the client to commit a crime. *Id.* DR 4-101(C). New York's disciplinary rule also permits disclosure of confidences or secrets necessary to establish or collect the lawyer's fee or to defend the lawyer's employees or associates against an accusation of wrongful conduct. *Id.* DR 4-101(C).

277. *Id.* DR 4-101(C)(5).

278. *See, e.g.*, *id.* EC 4-7.

279. *Id.* EC 4-7 (stating that "[t]he lawyer's exercise of discretion to disclose confidences and secrets requires consideration of a wide range of factors and should not be subject to reexamination . . . a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose").

280. *Id.* EC 4-1 ("Both the fiduciary relationship existing between lawyer and client and the proper function of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ the lawyer. . . . The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of a client not only facilitates the full development of facts essential to proper representation of the client but also encourages non-lawyers to seek early legal assistance.").

evidentiary privilege."[281] Accordingly, just as California, Indiana, and the ABA standards require an attorney to represent their client zealously within the bounds of the law, except under a few enumerated exceptions, the New York Disciplinary Rules also seek to promote the attorney-client relationship by emphasizing due care with respect to disclosure. As stated in Ethical Consideration 4-2, "[a] lawyer must always be sensitive to the rights and wishes of the client and act scrupulously in the making of decisions which may involve the disclosure of information obtained in the professional relationship."[282]

5. Summary of State Ethics Requirements.—Despite a few differences in their codes, all of the jurisdictions discussed share a common goal of preserving and promoting the duty of confidentiality in the lawyer-client relationship. Although only Hawaii's code specifically makes mention of the attorney-client relationship as it applies to government attorneys, these rules do indicate that the rules concerning confidentiality are to be applied broadly among the legal population. None of the state codes or rules examined contains language in its preamble suggesting any distinction in application to government lawyers versus private practitioners. Rather, all lawyers, regardless of employer, are bound by these disciplinary rules, model rules, and professional codes. Accordingly, the duty of confidentiality should apply to all legal professionals, regardless of the context in which they operate. Moreover, if communications with prospective clients are entitled to protection, government lawyers and the entities they represent should be afforded the same protections. It is inconsistent to require a duty of confidentiality as a mandate of professionalism but not recognize it as a part of the common-law privilege for some lawyers and clients.

III. THE WORK PRODUCT DOCTRINE

The work product doctrine has, in many ways, run parallel to the principles of attorney-client privilege.[283] Information falling within the attorney-client privilege may, for example, be incorporated into the work product of an attorney, thus providing protection for the document within both privileges. It is for this reason that when the attorney-client privilege is under scrutiny, it is relevant to look to the work product doctrine as well.[284]

Unlike the attorney-client privilege, the work product doctrine "is relatively new to American jurisprudence."[285] The doctrine was judicially created by the U.S. Supreme Court in *Hickman v. Taylor*.[286] In *Hickman*, the plaintiff's attorney

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281. *Id.* EC 4-4.

282. *Id.* EC 4-2.

283. The work product doctrine protects the product of the attorney which included papers, notes, memos, thought process, and case strategy as outlined in *Hickman v. Taylor*, 329 U.S. 495 (1947).

284. There are several aspects of the work product doctrine that parallel the attorney-client privilege.

285. Radson & Waratuke, *supra* note 6, at 825.

286. 329 U.S. at 510-12.

demanded witness statements taken by the defendant's attorney, and asserted that the defendant's attorney was required to answer deposition questions and interrogatories outlining what the witness had told him, pursuant to the applicable rules of civil procedure.[287] Although the Court recognized the important policy interests promoted through the liberalization of the discovery process, it also recognized that attorneys need to "work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel," when preparing cases on behalf of their clients.[288] After balancing these competing policy interests, the Supreme Court unanimously rejected the plaintiff's position, and asserted that documents and other tangible items, as well as intangible materials reflecting the attorney's thought process, prepared "with an eye toward litigation" should remain privileged.[289]

Thus, the holding in *Hickman* set forth the principles of what came to be known as the "work product rule."[290] Although the case involved the application of the work product privilege in the context of private civil litigation, the Supreme Court later extended the privilege to criminal cases.[291] The Court further reaffirmed these "strong public policy" considerations when it recognized the work product privilege for corporations in *Upjohn*, over thirty years later.[292]

In 1998, the Second Circuit further broadened the scope of the work product privilege by asserting that the privilege applied to documents prepared by an attorney in anticipation of litigation, and not just to those documents prepared during actual litigation proceedings.[293] In addition, the court asserted that this

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287. *Id.* at 501; Radson & Waratuke, *supra* note 6, at 825 (stating that "the plaintiff's attorney demonstrated no need for the information other than to 'help prepare himself to examine witnesses, to make sure he overlooked nothing'").

288. *Hickman*, 329 U.S. at 510-11.

> Were those materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interest of the clients and the cause of justice would be poorly served.

Id.; *see also* Dawson v. New York Life Ins. Co., 901 F. Supp. 1362, 1368 (N.D. Ill. 1995) (explaining that the attorney work product doctrine is "distinct from and broader than the attorney-client privilege," and was "developed to protect the work of an attorney from encroachment by opposing counsel;" the doctrine "consists of a multi-level protection whereby that information most closely related to an attorney's litigation strategy is absolutely immune from discovery, while that information with a more tenuous relationship to litigation strategy might be available in circumstances evidencing substantial need or undue hardship on the part of the discovery proponent").

289. *Hickman*, 329 U.S. at 510-11; *see* Radson & Waratuke, *supra* note 6, at 829.

290. *See* Radson & Waratuke, *supra* note 6, at 826.

291. United States v. Nobels, 422 U.S. 225, 238 (1975).

292. Upjohn v. United States, 449 U.S. 383 (1981) (internal quotation marks omitted).

293. United States v. Adlman, 134 F.3d 1194, 1204 (2d Cir. 1998).

privilege would include all conversations between an attorney and client in anticipation of litigation, or documents prepared therefrom, even in cases where a client consulted an attorney for advice involving a business decision.[294] Two years after this decision by the Second Circuit, the attorney work product privilege was codified in the Federal Rules of Civil Procedure,[295] and today, the privilege is uniformly accepted by all courts.[296]

Although the work product doctrine and attorney-client privilege overlap to a certain degree, there are some important differences. First, the work product doctrine seeks to protect the interests of the attorney and the client, unlike the attorney-client privilege, which belongs to the client alone.[297] Therefore, the attorney work product privilege must be waived by the client as well as the attorney.[298] This has led many federal courts to hold that an attorney may claim the privilege to protect his own mental impressions, conclusions, opinions, and legal theories about the case, even when the documents show ongoing client fraud, which would prevent the client from invoking the privilege in his own defense.[299] Second, unlike the attorney-client privilege, the work product privilege is generally not waived when the work product is shared with third parties.[300] "Because the purpose of the privilege is to protect the work product from the knowledge of and use by opposing counsel, sharing the document with third parties does not waive its protection."[301] However, as a practical matter, some have suggested that when attorney work product is shared with many others, so as to increase the opportunity for opposing counsel to get the information, it could constitute a waiver of the privilege.[302]

Courts have applied the work product doctrine to shield documents from discovery and from FOIA requests. This suggests that there are communications and documents prepared by government lawyers that are confidential or protected from disclosure. In addition to claiming the attorney-client privilege, where appropriate, government attorneys should assert their ethical/professional responsibilities to maintain client confidentiality as well as the work product

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294. *Id.*

295. *See* FED. R. CIV. P. 26(b)(3) (stating that an attorney's work product, including documents prepared in anticipation of litigation, should be protected from discovery by the courts unless the proper showing has been made); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 136(1) (Proposed Final Draft No. 1, 1996) (material "prepared by a lawyer for litigation then in progress or in reasonable anticipation of future litigation).

296. Radson & Waratuke, *supra* note 6, at 826.

297. *In re* Grand Jury Proceedings, 43 F.3d 966, 972 (5th Cir. 1994) (stating that an attorney may assert the work-product privilege).

298. *In re* Grand Jury Proceedings (FMC Corp.), 604 F.2d 798, 801-02 (3d Cir. 1979).

299. Radson & Waratuke, *supra* note 6, at 829; *see, e.g.*, *In re Grand Jury Proceedings*, 43 F.3d at 972; *see also In re* Special Sept. 1978 Grand Jury, 640 F.2d 49 (7th Cir. 1980).

300. Bogosian v. Gulf Oil Corp., 738 F.2d 587, 593 (3d Cir. 1984); *In re Grand Jury Proceedings*, 43 F.3d at 972.

301. Radson & Waratuke, *supra* note 6, at 829.

302. *Id.*

doctrine to maintain confidential communications with their clients.

IV. RECOMMENDATIONS TO CLARIFY THE EXISTENCE OF THE GOVERNMENT ATTORNEY-CLIENT PRIVILEGE OF CONFIDENTIALITY

What follows are both strategies for most effectively invoking the attorney-client privilege in the government context, as well as options for reform to clarify the existence of the government attorney-client privilege of confidentiality. Support from lawyers in both the public and private sector will be essential to ensure that the privilege is recognized and enforced in the future.

A. Advice for Government Lawyers

1. Take an Active Role in Reform Efforts.—Government lawyers (and their clients) clearly have the most at stake, requiring them to become active participants in any ongoing debate and dialogue surrounding both the privilege of confidentiality and the ethical responsibility to maintain client confidences. Although this charge may seem obvious, it may present significant challenges for public sector attorneys who, as a group, may not be as active in organized bars. In addition, because of other government ethics laws and regulations, public sector attorneys may not always be able to participate in the drafting or filing of amicus curiae cases, nor may they consistently be afforded opportunities by their government employers to participate in bar association and law reform activities. For those government lawyers who are able to participate in organized bar activities, this subject should be at the top of the agenda for groups within the American Bar Association including the Administrative Law Section, the State and Local Government Law Section, and the Government and Public Sector Lawyers Division. Active representation by government lawyers in entities such as the Standing Committee on Professionalism and special task forces, including the current Task Force on the Attorney-Client Privilege, is essential to make certain that the private bar is fully informed about and sensitized to the unfortunate lack of uniformity in the application of standards within the profession.

2. Create a Paper Trail to Demonstrate That the Elements of the Common Law Privilege are Satisfied.—Part I.B of this Article sets forth the eight elements required for the common-law privilege to attach. It is particularly important for government lawyers both to maintain records demonstrating that conversations are covered under the privilege and to take care to articulate that these elements were satisfied when the conversations occurred. So, for example, government lawyers must be clear to distinguish for themselves and their clients whether a particular conversation involves the request for or communication of legal advice (as opposed to policy advice or political strategic advice). In addition, government lawyers must be clear to identify "which client" they provided the legal advice to. For example, following the dicta in the Eighth and D.C. Circuit Courts cases, government attorney Anna George asserted that her client in Connecticut was not the former Governor as an individual, but rather the "Office

of the Governor," which included the Governor and key members of his staff.[303] Although this may have proved persuasive to the Second Circuit, it leaves open the possibility of the scenario that the Seventh Circuit admittedly did not address—whether a successor political figure in a particular "government office" can waive the privilege.

3. Advise Clients About the Uncertainty of the Ability of Government Lawyers to Maintain Confidentiality.—As a result of the current uncertainty, government lawyers have an obligation to discuss the potential for disparate application of both the common law evidentiary privilege and the rules of professional conduct governing confidential conversations between lawyers and their clients in the public and private sectors. Proactive education and information sharing about this issue will promote a level playing field for political actors, who, absent further legislative or judicial pronouncements on this issue, may inadvertently rely on a mistaken belief that conversations seeking legal counsel will automatically be protected from disclosure. A conversation or written memo on point can provide some small level of comfort to attorneys who must also provide zealous representation for clients.

B. Legislative Reform

Although the Second Circuit decision did not hinge on the fact that the State of Connecticut has a unique statute that affords protection of confidential communications between government attorneys and their clients,[304] the persuasive nature of the existence of the statute suggests that legislative bodies should consider adopting similar statutes or laws at the federal, state, and local levels. This action would, at a minimum, signal strong public policy support for the notion that such conversations are entitled to remain confidential. The Connecticut statute, which offers a good model, provides:

> [i]n 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.[305]

The level of protection offered by this statute is most closely akin to the philosophy behind the California Rules of Professional Conduct, which holds the

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303. *In re* Grand Jury Investigation (Doe), 399 F.3d 527, 533 (2d Cir. 2005).

304. This is because it was a federal court addressing federal law. The Court stated

> We do not suggest, of course, that federal courts, charged with formulating federal common law, must necessarily defer to state statutes in determining whether the public welfare weighs in favor of recognizing or dissolving the attorney-client privilege. But we cite the Connecticut statute to point out that the public interest is not nearly as obvious as the Government suggests.

Id. at 534.

305. CONN. GEN. STAT. § 52-146r (b) (2005).

privilege sacrosanct, and other than client waiver, provides for no other exception when disclosure could be compelled. States may choose to provide broad coverage for government lawyers at the state level only or include those who perform at the municipal level. Congress should consider a statute to similarly cover federal government lawyers. This would ensure that conversations between members of Congress and their public counsel, as well as conversations between executive and judicial branch attorneys and their clients, are protected.

C. The ABA Must Demonstrate Leadership

As the ABA serves as the voice of the profession,[306] it is imperative for it to take a leadership role in stimulating the discussion and debate on this critical issue facing the profession. Although government lawyers only comprise roughly eight percent of the practicing bar,[307] lack of serious attention to this issue will continue to foster a decrease in public confidence in the legal profession. In fact, other bar associations have noted the importance of preserving client confidences as crucial to maintaining public confidence in lawyers.[308]

1. A Call to the ABA Task Force on the Attorney-Client Privilege.—On April 8, 2006, ABA President Michael Greco delivered a speech to the American Council of Trial Lawyers in defense of the attorney-client privilege.[309] In describing the privilege as a "bedrock principle of the American justice system and our democracy,"[310] he stated, in part,

> Threats to the privilege and work product protections . . . represent just one front in a growing governmental assault on the independence of the legal profession itself, and on the ability of lawyers effectively to counsel clients. A wide range of government policies and practices are now combining—either coincidentally or by design—to attempt to marginalize and diminish the lawyer's role in society as trusted advisor, counselor, and defender of rights.[311]

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306. "The Mission of the American Bar Association is to be the national representative of the legal profession, serving the public and the profession by promoting justice, professional excellence and respect for the law." *See* American Bar Association, ABA Mission, http://www.abanet.org/about/home.html (last visited Apr. 21, 2006).

307. AMERICAN BAR ASSOCIATION, LAWYER DEMOGRAPHICS (2005), *available at* http://www.abanet.org/marketresearch/lawyerdemographics-2005.pdf.

308. See, for example, an article published by The Missouri Bar, Christian Stiegemeyer, *While the Public Perception of Lawyers Is Nothing New, There Are Steps You Can Take to Change It*, http://www.mobar.org/a4eb6e40-1fe6-446f-aef7-9b0a66e1e677.aspx (last visited Apr. 21, 2006).

309. Michael S. Greco, President, American Bar Association, Address to American College of Trail Lawyers on Defense of Attorney Client Privilege (Apr. 8, 2006), *available at* http://www.abanet.org/op/greco/memos/triallawyersaddress.shtml. It should be noted that the speech does not specifically address the government attorney-client privilege, but rather the privilege in general.

310. *Id.*

311. *Id.*

President Greco further asserted that,

> In the end, erosion of the attorney-client privilege will marginalize the lawyer and the lawyer's ability to defend liberty and pursue justice. Erosion of the lawyer-client relationship will lead to the diminishment of the lawyer's role in society because clients will no longer entrust confidences with and seek counsel from their lawyers. And such diminishment will lead to a less effective, less respected, and greatly reduced lawyer's role in society not only in particular client matters, but more broadly.[312]

President Greco concluded by promising that, "The ABA Task Force on Attorney-Client Privilege will continue the ABA's vigorous efforts to preserve the vital attorney-client and work product protections . . . ."[313]

This ABA Task Force has, to date, publicly focused on other aspects of the attorney-client privilege that do not squarely address the issues raised in this Article. It would be a travesty if the Task Force concludes its work without taking an equally forceful position recognizing the critical importance of the privilege for government attorneys and their government clients.

2. Clarification of the Model Rules.—Between 1997 and 2002, the ABA Ethics 2000 Commission worked to modernize the Model Rules of Professional Conduct.[314] In light of the subsequent and ongoing confusion over whether conversations between government attorneys and their clients are required to remain confidential, it would be appropriate for the ABA to re-examine the language of Rule 1.6 as well as the accompanying commentary for purposes of clarifying that the duty to protect client confidences applies in the public sector. A re-examination of the Model Rules seems outside the jurisdiction of the task force created to examine the attorney-client privilege, yet the ethical mandate to maintain client confidences should apply equally in the public and private sectors. The ABA must include consideration of this reform as part of its agenda to address the privilege of confidentiality.

D. Judicial Recognition of the Privilege

When political issues are separated from the aforementioned underlying foundational principles that protect conversations between attorneys and their clients, courts should find persuasive the rationale advanced by the Second Circuit in quickly concluding that government attorneys and their clients are entitled to invoke the attorney-client privilege. The common law rule of precedent supports this outcome, and, in fact, none of the other circuits flatly denied that such a privilege exists. Rather, the Seventh, Eighth and D.C. Circuits, by their own

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312. *Id.*

313. *Id.*

314. *See* American Bar Association, Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000"), Chair's Introduction (Aug. 2002), http://www.abanet.org/cpr/mrpc/e2k_chair_intro.html.

admissions, simply failed to find the privilege in the specific facts presented to them in each case. The circuitous rationale perhaps represented an argument in search of a desired outcome, carefully crafted so as not to be entirely dismissive of the long established privilege.

The courts need guidance from the Bar as to appropriate and expected protections of client confidences from an ethics and professionalism perspective. Courts would also benefit, as did the Second Circuit, from legislative pronouncements indicating public policy positions in favor of confidentiality. Regardless, however, of whether these reforms can be accomplished before the next test case makes its way to a circuit court or to the U.S. Supreme Court, the underlying fundamental principles supporting a "bedrock rule" of confidentiality of conversations between lawyers and their clients have not, up until the Whitewater cases before the Eighth and D.C. Circuits, been viewed as applying differently depending upon who was compensating the attorney for the legal advice. The Judiciary has an obligation to apply the common law privilege without discriminating between the practice setting of the lawyer involved.[315]

CONCLUSION

The sanctity of the attorney-client relationship must not be undermined by the whim of partisan politics. Although it is true that government attorneys, like all other government officials, have a higher duty to protect public trust and integrity in government, abolishing the historic attorney-client privilege in the government context is neither necessary nor appropriate to accomplish this goal. The organized bar, the judiciary and the legislative branches of the federal, state, and perhaps local governments must each take the appropriate steps to ensure that standards of attorney professionalism and evidentiary privileges are applicable to those admitted to the bar regardless of whether they are employed in the public, private, or non-profit sectors. The political maneuvering and posturing evident in the background of the circuit court cases involving allegations about and investigations of a U.S. President, a First Lady, and two state governors, as well as the current split among the circuits, cries out for a clarification of the rules of professionalism and the common law privilege. Absent action by the organized bar and legislatures, the U.S. Supreme Court will undoubtedly be called upon to resolve the inconsistencies in the lower courts' application of the common law privilege, without the benefit of a record of meaningful dialogue and debate to provide guidance leading to a just and fair resolution.

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315. It is the practice setting that has seemingly agitated the earlier courts. This is evident from the admonition offered that if public officials desire to seek protection of their conversations with lawyers, they should hire private sector lawyers to represent them. So, it is not that the non-attorney government actor can never claim the privilege; the courts have suggested that lawyers who work for the government do not offer that "protection" because they are publicly paid rather than privately compensated.