A Privileged Relationship? Public Lawyers, Take Heed

By Ross H. Garber and Shana-Tara Regon

Every day, from the White House to city hall, government lawyers fulfill a critical public service. They provide advice and counsel on all manner of issues integral to the proper functioning of government. In many instances, they are public officials' most trusted advisors, relied on to provide guidance on the most sensitive and significant issues. Usually, government lawyers and their clients communicate candidly and openly, simply assuming their discussions are protected from disclosure by the attorney-client privilege.

But the law is less than clear on the nature and extent of the attorney-client privilege between government officials and their counsel. The courts that have addressed the issue have split on whether a government lawyer may be forced to disclose otherwise privileged conversations to federal prosecutors conducting a grand jury investigation. The Second Circuit Court of Appeals recently became the first and only federal appellate court to recognize an attorney-client privilege for public officials similar to the one enjoyed by companies and private individuals.

The Second Circuit Decision: Recognition of the Privilege

In *United States v. John Doe*,[1] the U.S. Court of Appeals for the Second Circuit held that a former counsel to the governor of Connecticut could not be compelled to give grand jury testimony about confidential discussions she had with the governor and other members of the governor's staff. The court noted, however, that its holding conflicts with a decision by the Seventh Circuit and is "in sharp tension[2]" with decisions by the Eighth Circuit and D.C. Circuit, all of which have rejected the government attorney-client privilege in grand jury investigations. Given the split in the circuits, government lawyers need to be aware of these privilege issues and act accordingly.

Doe arose in the context of a grand jury investigation into allegations of corruption in the administration of Connecticut Governor John G. Rowland.[3] As part of that investigation, a subpoena was issued to Anne George, a former chief legal counsel to the governor. George asserted the attorney-client privilege, but the government moved to compel her testimony, claiming that there is no government attorney-client privilege in criminal investigations. The district court granted the government's motion, reasoning that "in the grand jury context, any governmental attorney-client privilege must yield because the interests served by the grand jury's fact-finding process clearly outweigh the interest served by the privilege."[4]

On appeal, the Second Circuit reversed the district court and held that George could not be compelled to testify because she had an attorney-client privilege with the governor. Chief Judge John M. Walker Jr. wrote, "[i]t is crucial that government officials, who are expected to uphold and execute the law and who may face criminal prosecution for failing to do so, be encouraged to seek out and receive fully informed legal advice."[5] The court noted that "[u]pholding the privilege furthers a culture in which consultation with government lawyers is accepted as a normal, desirable, and even indispensable part of conducting public business."[6] In fact, the court found "the traditional rationale for the privilege applies with special force in the government context" because "[t]he government attorney requires candid, unvarnished information from those employed by the office he serves so that he may better discharge his duty to that office."[7] In addition to noting traditional rationales in support of the attorney-client privilege, the court took special notice of a Connecticut statute[8] specifically providing that in state civil or criminal cases, as well as in any state legislative or administrative proceedings, confidential communications with government lawyers are privileged.

Departure from Three Other Circuits

The Second Circuit's position is at odds with decisions by the three other appeals courts that have considered the

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issue. The D.C. Circuit and Eighth Circuit held that lawyers from President Clinton's White House Counsel's office were required to provide otherwise privileged information to Whitewater Independent Counsel Kenneth Starr.[9] More recently, the Seventh Circuit held that the privilege did not apply in criminal cases and decided that the counsel to Governor Ryan of Illinois could be compelled to testify about conversations he had with Ryan when Ryan was the secretary of state.[10]

In each of these three cases, the court found that because a government lawyer is a public official, the interests of the grand jury supersede the privilege. In *Doe*, the Second Circuit rejected this position: "We cannot accept the . . . unequivocal assumption as to where the public interest lies" because, while the public interest is furthered by enabling a grand jury to gather facts, "it is also in the public interest for high state officials to receive and act upon the best possible legal advice."[11]

An Uncertain Privilege: Public Lawyers, Be Wary

The Supreme Court has not weighed in on the issue, and the extent of the privilege in other circuits remains an open question. Clearly, this uncertainty creates difficulties, both for government lawyers and their clients. As the Supreme Court recognized in *Upjohn Co. v. United States*, "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege . . . is little better than no privilege at all."[12]

Until the issue is sorted out, lawyers for public officials and their clients walk a fine line. These days, when a public official or state employee seeks the legal advice of a government lawyer, that lawyer is likely to consider carefully whether the discussion might be considered privileged. The government lawyer will assess whether the individual public official will be considered a "client," whether the communication is intended to be confidential, and whether the communication is for the purpose of providing or obtaining legal advice. In addition, while it may be difficult to draw a precise line, the careful government lawyer will avoid providing legal advice related solely to personal or partisan matters. Dual titles for government counsel, such as "deputy chief of staff" or "senior advisor," could increase the chance that the counsel's communications will be deemed political as opposed to legal, thus preventing invocation of the privilege.

Since courts have disagreed as to whether there is a government attorney-client privilege in criminal cases, public sector lawyers should keep in mind that they might someday be subpoenaed to testify about the substance of conversations with their clients. Accordingly, they should ensure that any public official or state employee who seeks their guidance on a sensitive issue understands that, despite reasonable expectations to the contrary, a court could decide that the attorney-client privilege does not apply. If a person seeks a government lawyer's opinion on an issue that may implicate criminal exposure, the lawyer should advise that person to consult with private counsel who can evaluate, with the benefit of a solid privilege, whether disclosure to a government lawyer could impair the individual's rights and interests.

The current state of affairs is not tidy. Under the circumstances, an informed public official will probably be reluctant to disclose sensitive matters to a government lawyer, and a careful government lawyer will be disinclined to hear them. This is precisely the type of situation the Second Circuit sought to avoid when it "decline[d] to abandon the attorney-client privilege in a context in which its protections arguably are needed most."[13] ■

Endnotes

1. 399 F.3d 527 (2d Cir. 2005).
2. *Id.* at 536.
3. Governor Rowland resigned from office in July 2004, one day before the appeal in *Doe* was argued.
4. 399 F.3d at 530.
5. *Id*. at 534.
6. *Id*.
7. *Id*. at 534-535.
8. *See* CONN. GEN. STAT. § 52-146r (b) (2005).
9. *In re* Lindsey, 158 F.3d 1263 (D.C.), *cert. denied*, 525 U.S. 996 (1998); *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir.), *cert. denied*, 521 U.S. 1105 (1997).
10. *In re* Witness Before the Special Grand Jury, 288 F.3d 289 (7th Cir. 2002).
11. 399 F.3d at 534.
12. 449 U.S. 383, 393 (1981).
13. 399 F.3d at 536.