THE ATTORNEY-CLIENT PRIVILEGE AND THE SCHOOL BOARD ATTORNEY: PITFALLS AND POINTERS

David B. Rubin
David B. Rubin, P.C.
Metuchen, New Jersey

INTRODUCTION

Confidentiality is the cornerstone of the lawyer-client relationship. The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law.[1] Its availability to public sector clients has been widely assumed, but only recently have courts and scholars begun to focus squarely on whether the privilege exists, and the special obligations placed on government lawyers. This article will explore the nature and extent of the attorney-client privilege as applied to government officials and agencies, with particular attention to the challenges facing school board attorneys.

OVERVIEW OF GOVERNMENT ATTORNEY-CLIENT PRIVILEGE

As mentioned above, most courts over the years have taken for granted that the attorney-client privilege applies to public sector clients;[2] however, until recently, little case law directly confronted the issue.[3] In fact, until the early 1960's, only two courts had ruled that communications between government lawyers and their clients were protected by the privilege.[4] Today, the existence of the privilege in some form is widely assumed, as reflected in the Restatement, "Unless applicable law otherwise provides, the attorney-client privilege extends to a communication of a governmental organization as stated in § 73 and of an individual employee or other agency of a governmental organization as a client with respect to his or her personal interest as stated in §§ 68-72."[5]

---

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

2 *See, e.g., District Attorney for the Plymouth Dist. v. Selectmen of Middleborough*, 481 N.E. 2d 1128 (Mass. 1985)(assuming without deciding that "public clients have an attorney-client privilege"); *Reed v. Baxter*, 134 F.3d 351, 356 (6th Cir. 1998)(assuming without deciding that local government entities may invoke the attorney-client privilege).

3 For a general discussion of the issue, *see* Patricia E. Salkin, *Eliminating Political Maneuvering: A Light in the Tunnel for the Government Attorney-Client Privilege*, 39 IND. L. REV. 561 (2006); Kathleen Clark, *Government Lawyers and Confidentiality Norms*, (2007), *available at* http://bepress.com/kathleen_clark/1.

4 Melanie B. Leslie, *Government Officials as Attorneys and Clients: Why Privilege the Privileged?*, 77 IND. L. J. 469, 476 (2002).

5 AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 74 (2000).

It has also been recognized in Proposed Federal Rule of Evidence 503, which includes public officers and entities in the definition of "client,"[6] although the drafters of the Uniform Rules of Evidence reached the opposite conclusion.[7] Most states have adopted some version of the Federal Rules, including Proposed Rule 503. Arkansas, Maine, North Dakota, and Oklahoma adopted the Uniform Rules version, with its narrow definition of the government attorney-client privilege. Idaho, Kentucky, Mississippi, Texas, Utah, and Vermont also adopted the Uniform Rules, but with a formulation of the government attorney-client privilege more similar to Proposed Federal Rule 503.[8]

The attorney-client privilege for government clients took on a political dimension beginning in the Clinton Administration, with the contentious battles between the White House and the Office of Independent Counsel and, more recently, between the Senate and the White House over disclosure of memos written by court of appeals nominee Miguel Estrada, and Supreme Court nominee John Roberts, while they served in the Solicitor General's Office.[9] These disputes drew public attention to the longstanding tension between the competing values of secrecy in effective lawyer-client relationships on the one hand, and unlimited public access to government information on the other.

Much of this debate has centered on identifying who the government lawyer's client is. There is support in the case law and the literature for the following as clients: the "public interest," the public at large, the entire government, the branch of government employing the lawyer, the particular agency employing the lawyer, and a particular government official in his or her official or individual capacity.[10] Most of the uncertainty in this area involves attorneys for state or federal agencies or officials, where pinning down who the client is can sometimes be like threading a moving needle. Fortunately, it seems well-settled that, for counsel serving local government agencies such as school boards, the "entity" analysis of ABA Model Rule 1.13(a), Organization as Client, provides the appropriate framework: "(A

---

6 *See* PROPOSED FED. R. EVID. 503(a)(1), reprinted in 56 F.R.D. 183, 235 (1972). Proposed Rule 503 was rejected by Congress, but many federal courts regard it as reflective of federal common law. *In re Grand Jury Investigation*, 399 F.3d 527, 532 (2nd Cir. 2005)("While Proposed Rule 503 was not adopted by Congress, courts and commentators have treated it as a source of general guidance regarding federal common law principles."); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 915 (8th Cir. 1997)("[W]e have described [Proposed Rule 503] as 'a useful starting place' for an examination of the federal common law of attorney-client privilege."); JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE, § 503.02, at 503-10 (2d ed. 1997)("[Proposed Rule 503] restates, rather than modifies, the common-law lawyer-client privilege.").

7 Uniform Rule 502 states that public entities may not claim the attorney-client privilege unless the "communication concerns a pending investigation, claim, or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to process the claim or conduct a pending investigation, litigation, or proceeding in the public interest." (Nancy Leong, *Attorney-Client Privilege in the Public Sector: A Survey of Government Attorneys*, GEO J. LEGAL ETHICS (Winter 2007).

8 *Id.* at 5.

9 *See* Salkin, *supra* note 3, at 569-71.

10 *See* Clark, *supra* note 3, at 13, and authorities cited at footnotes 56-61, including Keith W. Donahue, *The Model Rules and the Government Lawyer, A Sword or Shield? A Response to the D.C. Bar Special Committee on Government Lawyers and The Model Rules of Professional Conduct*, 2 GEO J. LEGAL ETHICS 987 (1989)("The client of the government lawyer should be the public interest.").

lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.)"

A New Jersey ethics opinion offers a cautionary tale for school board attorneys who forget that their client is the board as an entity.[11] A board member who had a beef with a fellow board member asked the board attorney to draft a resolution censuring the other member. He gave the attorney background information to help draft the resolution, but asked the attorney to keep it confidential, as he was not sure he was going to introduce it. The attorney did as requested but, when later directed by the board to reveal the draft resolution, felt compelled to seek an advisory opinion from state ethics authorities on his responsibilities. The ethics panel left no doubt about whom he owed his ethical duty to:

> The inquirer makes clear that the board member did not consult him as his individual attorney, but rather as the attorney for the board, to have the attorney draft a resolution for the board. The member was not, therefore, in a position to demand secrecy or confidential treatment as to matters germane to the board's business. If the attorney had understood that the member was demanding secrecy or confidential treatment as against the board, he should have made it clear that he could not accept such confidences.

Although the courts have only recently begun to focus squarely on the existence of the privilege in the public sector, most are in general agreement that it does exist, and serves an important policy goal. As the Supreme Judicial Court of Massachusetts recently held:

> We now state explicitly that confidential communications between public officers and employees and government entities and their legal counsel undertaken for the purpose of obtaining legal advice or assistance are protected under the normal rules of the attorney-client privilege. . . .The necessity of the privilege for government entities and officials flows directly from the realities of modern government. Public employees must routinely seek advice from counsel on how to meet their obligations to the public. It is in the public's interest that they be able to do so in circumstances that encourage complete candor, without inhibitions arising from the fear that what they communicate will be disclosed to the world. If counsel, despite all diligence, are unable to gather all of the relevant facts, they will less likely serve the public interest in good government by preventing needless litigation or ensuring government officials' compliance with the law. In short, counsel will be less likely to perform adequately the functions of a lawyer.[12]

Extension of Privilege to "Non-Legal" Advice

School board attorneys and other government lawyers frequently consider more than legal technicalities when advising their clients, which has raised questions about the applicability of the

---

[11] Advisory Committee on Professional Ethics Opinion 327 (Apr. 8, 1976).

[12] *Suffolk Construction Co., Inc. v. Division of Capital Asset Management*, 870 N.E. 2d 33, 38-39 (Mass. 2007).

attorney-client privilege to communications addressing such "non-legal" considerations. These concerns call into question the essential nature of legal advice.

ABA Model Rule 2.1 takes a broad view of the attorney's advisory role: "In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." The comments to the rule explain:

> Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

In a recent decision involving a government client, the Second Circuit expounded at some length on the point, in overturning a discovery order requiring disclosure of e-mails and other communications between an assistant county attorney and county officials:

> Fundamentally, legal advice involves the interpretation and application of legal principles to guide future conduct or to assess past conduct. . . .It requires a lawyer to rely on legal education and experience to inform judgment. . . .But it is broader, and is not demarcated by a bright line. What Judge Wyzanski observed long ago applies with equal force today:
>
> > The modern lawyer almost invariably advises his client upon not only what is permissible but also what is desirable. And it is in the. . . . public interest that the lawyer should regard himself as more than [a] predictor of legal consequences. His duty to society as well as to this client involves many relevant social, economic, political and philosophical considerations. And the privilege of nondisclosure is not lost merely because relevant nonlegal considerations are expressly stated in a communication which also includes legal advice.
>
> . . . .
>
> The complete lawyer may well promote and reinforce the legal advice given, weigh it, and lay out its ramifications by explaining: how the advice is feasible and can be implemented; the legal downsides, risks and costs of taking the advice or doing otherwise; what alternatives exist to present measures or the measures advised; what other persons are doing or thinking about the matter; or the collateral benefits, risks or costs in terms of expense, politics, insurance, commerce, morals, and appearances. So long as the predominant purpose of the communication is legal advice, these considerations and caveats are not other than legal advice or separable from it. The predominant purpose of a communication cannot be ascertained by quantification or classification of one passage or another; it should be assessed dynamically and in light of the advice being sought or rendered, as well as the relationship between advice that can be rendered only by consulting the legal authorities and advice that can be given by a

> non-lawyer. The more careful the lawyer, the more likely it is that the legal advice will entail follow-through by facilitation, encouragement and monitoring.
>
> . . . .
>
> It is hoped that legal considerations will play a role in governmental policymaking. When a lawyer has been asked to assess compliance with a legal obligation, the lawyer's recommendation of a policy that complies (or better complies) with the legal obligation – or that advocates and promotes compliance, or oversees implementation of compliance measures – is legal advice. Public officials who craft policies that may directly implicate the legal rights or responsibilities of the public should be encouraged to seek out and receive fully informed legal advice in the course of formulating such policies. . . .[13]

Despite these encouraging words, the issue remains a thorny one for government officials who serve not only as legal counsel, but, also, as political or policy advisors. Such was the case in one New York federal court decision, where the court held that the attorney-client privilege does not extend to incidental legal advice given by an attorney acting outside the scope of his role as an attorney, where the predominant purpose of the advice is non-legal.[14] In such cases, it is appropriate for the court to conduct *in camera* review and order redaction as necessary.[15]

Special Considerations in Criminal Investigations

While there appears to be general agreement that government clients enjoy an attorney-client privilege in civil litigation against private parties,[16] there is sharp disagreement on whether and how it applies in the setting of a criminal investigation. As of this writing, four major cases have addressed this question. In the first of these decisions, the Eighth Circuit addressed a claim of attorney-client and work-product privilege by White House counsel who had been directed by the Office of Independent Counsel to produce notes of meetings concerning President and Mrs. Clinton's Whitewater real estate dealings.[17]

---

13 *In re County of Erie*, 473 F.3d 413, 419-22 (2nd Cir. 2007)(footnotes, citations, and internal quotation marks omitted).

14 *Raba v. Suozzi*, No. CV-06-119, 2007 WL 128817 (E.D.N.Y. Jan. 11, 2007).

15 *See also*, *Cohen v. Middletown Enlarged City Sch. Dist.*, No. 05-Civ. 3633, 2007 WL 631298 (S.D.N.Y. Feb. 28, 2007); *Doctor John's Inc. v. City of Sioux City, Iowa*, No. C03-4121-MWB, 2007 WL 438931 (N.D. Iowa Jan.25, 2007).

16 "At least in civil litigation between a government agency and private litigants, the government's claim to the protections of the attorney-client privilege is on a par with the claim of an individual or a corporate entity." *In re County of Erie*, 473 F.3d 413, 419 (2nd Cir. 2007). *See also Ross v. City of Memphis*, 423 F.3d 596, 601 (6th Cir. 2005)("Review of both our sister circuits' precedents and outside authority confirm that a government entity can assert attorney-client privilege in the civil context."); *In re A Witness Before the Special Grand Jury 2000-2*, 288 F.3d 289 (7th Cir. 2002)("[B]oth parties here concede that, at least in the civil and regulatory context, the government is entitled to the same attorney-client privilege as any other client.").

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

Finding against the existence of a privilege, 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."[18]

One year later, the District of Columbia Circuit considered whether White House attorney Bruce Lindsey could invoke the attorney-client privilege to avoid responding to a grand jury subpoena seeking information about criminal conduct by governmental officials.[19] The court concluded that a governmental attorney-client privilege did exist under federal law, but did not extend to grand jury proceedings, finding 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."[20] The court agreed with the approach taken by the Eighth Circuit, noting that nothing prevented government officials from consulting personal counsel to assure that their communications were kept confidential.

The next two cases involved federal criminal investigations of state-level corruption. The first decision involved former Illinois Secretary of State George Ryan, where the Seventh Circuit fell in line with the Eighth and District of Columbia Circuits, holding that the state's interest in lawyer confidentiality must give way to the federal government's interest in rooting our government wrongdoing:

> While we recognize the need for full and frank communication between government officials, we are more persuaded by the serious arguments against extending the attorney-client privilege to protect communications between government lawyers and the public officials they serve when criminal proceedings are at issue. First, government lawyers have responsibilities and obligations different from those facing members of the private bar. While the latter are appropriately concerned first and foremost with protecting their clients – even those engaged in wrongdoing – from criminal charges and public exposure, government lawyers have a higher, competing duty to act in the public interest. . . .They take an oath, separate from their bar oath, to uphold the United States Constitution and the laws of this nation (and usually the laws of the state they serve when, as was the case with Bickel, they are state employees). Their compensation comes not from a client whose interests they are sworn to protect from the power of the state, but from the state itself and the public fisc. It would be both unseemly and a misuse of public assets to permit a public official to use a taxpayer-provided attorney to conceal from the taxpayers themselves otherwise admissible evidence of financial wrongdoing, official misconduct, or abuse of power. .... Therefore, when another government lawyer requires information as part of a criminal investigation, the public lawyer is obligated not to protect his government client but to ensure its compliance with the law.[21]

---

18 *Id*. at 921.

19 *In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998).

20 *Id*. at 1272.

21 *In re: A Witness Before the Special Grand Jury 2000-2*, 288 F.3d 289, 293 (7th Cir. 2002)(footnotes and citations omitted).

But the Second Circuit reached the opposite conclusion in a case involving the federal corruption probe of Connecticut Governor John Rowland and his administration:

> We cannot accept the Government's unequivocal assumption as to where the public interest lies. To be sure, it is in the public interest for the grand jury to collect all the relevant evidence it can. However, it is also in the public interest for high state officials to receive and act upon the best possible legal advice. . . .We believe that, if anything, the traditional rationale for the privilege applies with special force in the government context. It 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. Upholding 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. Abrogating the privilege undermines that culture and thereby impairs the public interest.[22]

This leaves the courts split on the issue, with more percolation likely in the circuits before the Supreme Court steps in and resolves the issue.

Waiver of the Privilege

A number of cases have addressed the troubling issue of who has authority to waive a government client's attorney-client privilege, and what conduct (intentional or inadvertent) constitutes a waiver. In one case, the Sixth Circuit addressed the issue in the context of a § 1983 failure-to-promote case against a city and its former police director.[23] The police director raised the defense of qualified immunity, relying on legal advice he had received from the city's attorneys. When plaintiff's counsel sought to depose the attorneys, the city objected on the ground that there was an attorney-client privilege that only it could waive. The district court held that any privilege held by the city "must give way" so that the police director could mount his defense.

On appeal, the court held that the police director had no standing to waive the city's attorney-client privilege, even if revealing those communications was essential to his defense:

> The district court's reasoning renders any municipality's privilege dependent on ex post litigation choices made by its employees. The uncertainty such balancing creates is worsened by the fact that reliance on the advice of counsel is not usually a component of the qualified immunity defense, which rests on objective considerations. . . .Making the City's ability to invoke attorney-client privilege contingent on litigation choices made by one of its former employees renders the privilege intolerably uncertain.[24]

---

22 *In re Grand Jury Investigation*, 399 F.3d 527, 534 (2nd Cir. 2005).

23 *Ross v. City of Memphis*, 423 F.3d 596 (6th Cir. 2005).

24 423 F.3d at 603-04 (citations omitted).

A Washington federal court considered the case of a Federal Aviation Administration (FAA) contracting officer, who challenged a corruption indictment based on the testimony of two FAA lawyers who revealed communications he had with them concerning the behavior giving rise to the charges against him.[25] The court was satisfied that the attorney-client privilege applied to government officials and agencies, and that the communications with the two government lawyers were covered by the privilege. The court rejected the official's claim of privilege, however, because he was not the "true client," even though he was communicating with the attorneys with the expectation of confidentiality. The agency was the client and, as such, the only party with standing to invoke or waive the privilege.

Connecticut is one state that has clarified the issue through legislation:

> In any civil or criminal case or proceeding or in any legislative or administrative proceeding, all confidential communications shall be privileged and a government attorney shall not disclose any such communications unless an authorized representative of the public agency consents to waive the privilege and allow such disclosure.[26]

Other states would do well to follow suit, to provide guidance to the bench, the bar and, more importantly, to public officials uncertain of their rights and obligations.

Schools boards and their counsel should also be mindful of the prospect that future boards may choose to waive attorney-client protection for communications that current board members would much prefer to remain confidential. Given the potential for politically-inspired recriminations, or simply the possibility that an isolated attorney-client communication may be taken out of context years later, counsel and the boards they represent should choose their words carefully when giving or seeking advice behind the veil of the attorney-client privilege.

Work-Product Doctrine

The so-called "work product" doctrine offers additional protection for information developed in, or in anticipation of, litigation. While it is not a privilege in the strict sense of the term,[27] it does serve as a helpful backstop to the attorney-client privilege. The Supreme Court, in the seminal case of *Hickman v. Taylor*,[28] explained that the doctrine protects from disclosure materials that are collected by an attorney in preparation for litigation, unless an adversary can demonstrate a sufficient need for the material. It also protects an attorney's mental processes, theories, analyses, and beliefs. In contrast to the attorney-client privilege which only may be waived by the client, work product generally belongs to the attorney, who has the sole authority to waive any protection.[29]

---

[25] *United States v. Ferrell*, No. CR07-0066MJP, 2007 WL 2220213 (W.D. Wash. Aug. 1, 2007).

[26] CONN. GEN. STAT. § 52-146r(b) (2007).

[27] *In re Qwest Communications International, Inc*., 450 F.3d 1179, 1184 n.3 (10th Cir. 2006).

[28] 329 U.S. 495 (1947).

[29] *In re Hechinger Investment Company of Delaware*, 303 Bankr. 18, 24-25 (D. Del. 2003).

In a recent case involving the New York City Board of Education, a New York federal district court considered whether information initially developed for purposes of litigation loses the protection of the attorney-client privilege if it is later used for non-litigation, policy-making purposes; and whether the work-product doctrine may offer protection when the attorney-client privilege is unavailable.[30] The case involved a claim by a class of disabled students challenging the school district's suspension policies. To assist in the preparation of its defense, the district's attorneys prepared questionnaires to be completed by district personnel, to gather data on the district's suspension practice. Recipients of the questionnaires were advised that they were part of the district's defense of the litigation, and were to be treated as confidential. After the questionnaires were completed, the district's Office of Youth Development and School-Community Services requested a copy to assist with policy, budget, and planning decisions regarding suspensions.

Plaintiffs demanded copies of the questionnaires in discovery, but the district refused on grounds of attorney-client privilege. The court was satisfied that the questionnaires, responses, and related correspondence fell within the attorney-client privilege because they were initially created for the predominant purpose of evaluating the district's legal position and formulating strategy in the pending litigation. That left open the question of whether sharing the information with another district official uninvolved in the litigation, for planning purposes unrelated to the litigation per se, constituted a waiver.

On that score, the court found that the official's request for the documents was not for the purpose of securing legal advice, and that the documents did not contain any legal advice. Accordingly, they were no longer protected by the attorney-client privilege. They were, however, protected by the attorney work-product doctrine:

> [T]he work-product doctrine is distinct from and broader than the attorney-client privilege. . . .Unlike the attorney-client privilege, the work-product privilege is not necessarily waived by disclosure to any third party; rather, the courts generally find a waiver of the work product privilege only if the disclosure substantially increases the opportunity for potential adversaries to obtain the information. . . .The purpose of the work-product doctrine is to protect material from an opposing party in litigation, not necessarily from the rest of the world generally. . . .Even where the attorney-client privilege has been waived, documents shown to others may still be protected as attorney work-product so long as there was some good reason to show it. . . .Sharing documents with a person who has a common interest with the disclosing party, rather than an adversarial relationship, does not waive attorney work-product. . . .[31]

In another school board case, an Alabama federal court extended the work-product privilege even further.[32] Counsel for district employees alleging sexual harassment sought discovery of documents generated by an assistant superintendent during an internal investigation of the school official accused of

---

30 *E.B. v. New York City Bd. of Educ*., No. CV 2002-5118, 2007 WL 2874862 (E.D.N.Y. Sept. 27, 2007).

31 *Id*. at *6 (internal citations and quotation marks omitted).

32 *Jeffery v. Russell County Bd. of Educ*., No. 3:06 cv685-CSC, 2007 WL 2903012 (M.D. Ala. Oct. 4, 2007).

wrongdoing. The investigation was ordered by the superintendent because the allegations were serious in nature, and he felt the possibility of litigation was "very high," but no litigation had yet been commenced or threatened, and no legal counsel were involved. Still, the court found these materials protected by the work-product doctrine, which it held was not limited to information gathered in anticipation of litigation, but extended to information gathered "in the course of preparation for *possible* litigation."[33] Even though the investigation was not at the specific direction of legal counsel, the court held, the work product protection has been extended to material collected by investigators and other agents whose efforts are typically relied upon by counsel.

Effect of Public Records and Open Meetings Statutes

Several decisions point out the interplay between state public records or open meetings statutes and the attorney-client privilege. In a case from Oregon, a school board engaged outside counsel to advise it concerning allegations of mismanagement and misconduct by district employees.[34] With the board's authority, the attorney engaged an independent auditing firm and a private investigator to assist in gathering the facts. They both conducted investigations and submitted reports of their findings and opinions to the attorney, who shared them with the board as part of the legal advice he was rendering. The issue before the court was whether those reports fell within an exemption to Oregon's public records law for "confidential communications made for the purpose of facilitating the rendering of professional legal services to the client[.]" Although the reports themselves were investigatory in nature and did not contain legal advice, the court held that they fell within the exemption because they were commissioned by the attorney specifically to assist him in rendering legal advice to his client.

In another case from Michigan, a school board met in closed session to discuss a letter drafted by its attorney concerning a union grievance that the board was scheduled to act upon later in the meeting.[35] When the grievance was denied, the union challenged the board's action on the ground that the board violated Michigan's open meetings law by discussing the attorney's letter in closed session, when the statute allowed them only to "consider material exempt from discussion or disclosure by state or federal statute."[36] The union did not dispute that the letter itself was "material" covered by the exemption. However, the union contended that the board's private discussion went beyond merely "considering" it. The court disagreed, holding that "the term 'consider'. . . . is not so limited that it required each board member to silently read the attorney's opinion letter and withhold all comment until the open meeting resumed."

As originally enacted, Florida's so-called "Sunshine Law" did not recognize an attorney-client privilege at all but, in 1993, the statute was amended to allow public bodies to "meet in private with the entity's attorney to discuss pending litigation to which the entity is presently a party before a court or administrative agency," provided that "[t]he subject matter of the meeting shall be confined to settlement

---

33 Citing *Hickman v. Taylor*, 329 U.S. at 505 (emphasis added).

34 *Klammath County Sch. Dist. v. Teamed*, 140 P.3d 1152 (Or. App. 2006).

35 *Ferryman v. Madison School District*, No. 265996, 2007 WL 549230 (Mich. App. Feb. 22, 2007).

36 MICH. COMP. LAWS. § 15.268(h) (2008).

negotiations or strategy sessions related to litigation expenditures."[37] In a Florida school board case,[38] the court upheld an attorney general's opinion that the exemption was limited to closed-door meetings attended solely by the board members, the district's chief executive, and legal counsel, and that the presence of administrative staff and consultants was not permitted, even where their specialized knowledge was essential to the discussion.

Not all courts have construed their open meetings laws as conservatively as Florida.[39] Others have taken just as hard a line.[40] The lesson from the cases is that the breadth of the public sector attorney-client privilege may be narrower under a state's open meetings and public records laws than it is under that state's ethical and evidence rules. Counsel would do well to determine the ground rules in advance, to avoid inadvertent disclosure of sensitive information.

Attorney as Whistle Blower

The ability (or, in some cases, the obligation) of government lawyers to blow the whistle on their clients' misconduct has received much scholarly attention in recent years,[41] and was clearly on the minds of the ABA Ethics 2000 Commission, as well as its Task Force on Corporate Responsibility, in their study of Model Rule 1.6 dealing with client confidentiality, and Model Rule 1.13 involving representation of organizational clients.

The Ethics 2000 Commission originally recommended changes in Rule 1.6 to give attorneys more discretion to disclose client confidences to prevent or remedy fraud. These recommended changes included two new provisions to subsection (b) of the Rule, permitting an attorney to reveal information to the extent the lawyer reasonably believes necessary to prevent or rededicate substantial injury to the

---

37 Fla. Stat. § 286.011(8) (1993).

38 *School Bd. of Duval County v. Florida Publishing Co*., 670 So.2d 99 (Fla. App. 1996); *see also* Florida Advisory Legal Opinion AGO 97-61, interpreting the Sunshine Law to provide that a school board attorney's discussions regarding school business with individual school board members are not privileged because they are not attorney-client communications, and that the attorney's written memorialization of such conversations are public records under Florida's public records law.

39 *See Sacramento Newspaper Guild v. Sacramento County Board of Supervisors*, 69 Cal. Rptr. 480, 492 (Cal. Dist. App. 3d 1968); *Oklahoma Association of Municipal Attorneys v. State*, 577 P.2d 1310 (Okla. 1978); *Dunn v. Ala. St. U. Bd. of Trustees*, 628 So.2d 519, 529-30 (Ala. 1993); *Markowski v. City of Marlin*, 940 S.W.2d 720 (Tex. App. Waco Div. 1997); *Tausz v. Clarion-Goldfield Cmt'y Sch. Dist*., 569 N.W.2d 125 (Iowa 1997).

40 *See Lagan v. Accord*, 432 S.W.2d 753 (Ark. 1968); *Mackay v. Board of County Commissioners of Douglas County*, 746 P.2d 124 (Nev. 1987).

41 *See* Clark *supra* note 3, at 4 n.9, and the following articles cited therein: Roger C. Cramton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer*, 5 GEO. J. LEGAL ETHICS 291 (1991); Charles S. Doskow, *The Government Attorney and the Right to Blow the Whistle: The Cindy Ossias Case And Its Aftermath (A Two-Year Journey To Nowhere)*, 25 WHITTIER L. REV. 21 (2003); James E. Moliterno, *The Federal Government Lawyer's Duty to Breach Confidentiality*, 14 TEMP. POL. & CIV. RTS. L. REV. 633 (2005); Jesselyn Radack, *The Government Attorney-Whistleblower and the Rule of Confidentiality: Compatible At Last*, 17 GEO. J. LEGAL ETHICS 125 (2003).

financial interests or property of another, in furtherance of which the client has used or is using the lawyer's services. The ABA House of Delegates rejected these proposals, but they were revived by the Task Force following the WorldCom, Tyco, and HealthSouth scandals, and adoption of the Sarbanes-Oxley Act. The Task Force also recommended changes to subsections (b) and (c) of Model Rule 1.13, to require "reporting up," and to allow "reporting out," in appropriate cases.

The final version of Model Rules 1.6 and 1.13 are as follows:

Model Rule 1.6:

(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 prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) 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;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) 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

(6) to comply with other law or a court order.

Model Rule 1.13:

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

> (f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.
>
> (g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Many states have adopted versions of the Model Rules since Ethics 2000 featuring their own home-grown variations on Rules 1.6 and 1.13. A complete listing is shown in the tables at the conclusion of this article.

Hawaii's version of Rule 1.6 goes further than any other state in allowing government attorneys to blow the whistle on their clients. Under that state's rule, a government attorney:

> may reveal information relating to the representation of a client to the extent 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.[42]

Comment 6 to the rule makes clear, however, 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."[43]

The District of Columbia's version of Rule 1.6 permits lawyers to disclose "when. . . .required by law or court order," but specifically permits government lawyers to disclose when "permitted or authorized by law."[44] One commentator has suggested that this language may permit government lawyers to disclose information whenever permitted under open government laws, such as the Freedom of Information Act,[45] but that interpretation is somewhat belied by the comments to the rule itself.[46]

---

42 HAW. RULES OF PROF'L CONDUCT R. 1.6(b)(4) (5) (1994).

43 HAW. RULES OF PROF'L CONDUCT R. 1.6 cmt. 6 (1994).

44 D.C. RULE 1.6(e)(2)(A), (B) (2007).

45 Clark, *supra* note 3, 46.

CONCLUSION

In summary, the attorney-client privilege exists in the public sector, but is limited by state "sunshine" legislation, the demands of the criminal justice system, and the emerging trend toward recognition of the government lawyer as a whistle blower on official wrongdoing. Counsel for public school districts can no longer afford to proceed on instinct alone, but must acquaint themselves and their clients with the sometimes-counterintuitive ground rules in place in their jurisdictions, and fashion safe and effective channels of communication for providing candid and well-informed advice.

[46] *See* D.C. Rule 1.6 Cmt. [37].

ABA MODEL RULES

http://www.abanet.org/cpr/jclr/1_6.pdf

http://www.abanet.org/cpr/jclr/1_13.pdf