



OUTSIDE COUNSEL

BY EVAN T. BARR

Second Circuit Says Government Lawyers Covered by Privilege

In February, the U.S. Court of Appeals for the Second Circuit held that private conversations between the former governor of Connecticut, John Rowland, and his chief legal officer were protected under the attorney-client privilege from disclosure to a federal grand jury.

That may not sound surprising to the average practitioner, but in so ruling, the Second Circuit split with three other circuits, which had recently refused to apply the privilege to government lawyers under similar circumstances, thus setting the issue up for possible U.S. Supreme Court review.

The Rowland Case

The case arose in connection with the long-running investigation into whether Mr. Rowland and members of his staff had accepted gifts from private sources in return for favorable treatment and state contracts. As part of the investigation, in February 2004, the U.S. Attorney's Office in Connecticut issued a grand jury subpoena to Anne C. George, the former chief legal counsel to the Office of the Governor of Connecticut, seeking to gain access to conversations between Mr. Rowland, his staff, and legal counsel.

Ms. George testified to the grand jury that she had engaged in numerous conversations with Mr. Rowland and others on the subject of the receipt of gifts and the meaning of related state ethics laws. Invoking the attorney-client privilege on behalf of her client, the Office of the Governor, Ms. George refused to answer any questions about the content of the conversations. In April 2004, District of Connecticut Chief Judge Robert N. Chatigny entered an order compelling Ms. George's testimony, and the appeal followed.¹

On appeal, the U.S. Attorney's Office argued that any governmental attorney-client privilege had to give way where a federal grand jury was seeking access to otherwise privileged statements to further a criminal investigation.

Evan T. Barr, a partner at Steptoe & Johnson LLP, from 1995 through 2004, was an assistant U.S. attorney in the Southern District of New York, where he served as co-chief of the major crimes unit. **Eduardo Crosa**, an associate with the firm, assisted in the preparation of this article.



The Second Circuit split with other circuits, which had refused to apply the privilege to government lawyers under similar circumstances, thus setting up a possible U.S. Supreme Court review.

According to the court's summary of the prosecution's theory, Ms. George, as a government attorney, had a fundamentally different relationship with her client, the Office of the Governor, than did a private attorney representing a private individual. "Her loyalty to the Governor ... must yield to her loyalty to the public, to whom she owes ultimate allegiance when violations of the criminal law are at stake."

In *In re: Grand Jury Investigation*, 04-2287 (2d Cir., Feb. 22, 2005), the Second Circuit, citing the well-established principles behind the attorney-client privilege, disagreed with the prosecution, and reversed Chief Judge Chatigny's ruling compelling Ms. George to testify. The court noted that the law generally assumed the existence of a governmental attorney-client privilege in civil suits between government agencies and private litigants, and in the context of litigation over the scope of the Freedom of Information Act. Given the acceptance of the privilege in those settings, the Court

expressly rejected the notion that the privilege should be curtailed in another particular category of cases, such as those involving potential criminal charges. As for the prosecution's claim that disclosure would be in the public interest, the court noted that applying the privilege would further the equally important public interest in enabling high state officials to receive and act upon the best possible legal advice.

In assessing the public interest factor, the Second Circuit noted that the Connecticut Legislature had enacted a statute (Conn. Gen. Stat. §52-146r(b)) specifically providing that "[i]n any civil or criminal case or proceedings ... 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."

The Second Circuit acknowledged, however, that its decision was in sharp conflict with relatively recent rulings by the three other circuits that had addressed the issue.

In *In re: Bruce R. Lindsey (Grand Jury Testimony)*, 158 F3d 1263 (D.C. Cir. 1998), the U.S. Court of Appeals for the D.C. Circuit ordered Bruce Lindsey, then-deputy White House counsel and assistant to the president, to testify before a federal grand jury convened regarding private communications between Mr. Lindsey and then-President Bill Clinton concerning the Whitewater and Monica Lewinsky matters. Mr. Lindsey had asserted both the attorney-client, work-product, and executive privileges in declining to answer the prosecutors' questions. While the D.C. Circuit, like the Second Circuit, recognized the existence of a government attorney-client privilege in the civil context, it refused to, in its terms, extend the privilege to a grand jury setting involving the Office of the President.

According to the D.C. Circuit, when an executive branch attorney was called to give evidence about alleged crimes within the executive branch, "reason and experience, duty and tradition dictate that the attorney shall provide the evidence," because, the Court concluded, "with respect to investigations of federal criminal offenses, and especially offenses committed by those in government, 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 exposure." Rather, as the D.C. Circuit saw it, the proper allegiance of the government lawyer was to further "the public's interest in uncovering illegality among its elected and appointed officials."

In another Whitewater-related case, *In re: Grand Jury Subpoena Duces Tecum*, 112 F3d 910 (8th Cir. 1997), the Office of Independent Counsel (OIC) moved to compel production of notes taken by a White House lawyer at a meeting regarding the First Lady's activities following the death of Vincent Foster. The OIC also sought notes taken by another White House lawyer of a meeting concerning the discovery of certain billing records from the Rose Law Firm. The White House asserted attorney-client and work-product objections to producing the documents.

'United States v. Nixon'

Noting that the attorney-client privilege had not previously been applied in these circumstances, the U.S. Court of Appeals for the Eighth Circuit held that the White House could not use the privilege to withhold potentially relevant information from the grand jury. As a policy matter, the Eighth Circuit concluded that the "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." Although the Eighth Circuit found no precedent directly on point, it relied heavily on *United States v. Nixon*, 418 US 683 (1974), in which the Supreme Court, while acknowledging a qualified executive privilege covering certain presidential communications, held that such a privilege must give way to a subpoena seeking specific and relevant evidence needed in a particular criminal case.

In April 2002, the court in *In Re: A Witness Before the Special Grand Jury*, 288 F3d 289 (7th Cir. 2002), held that in the context of a federal criminal investigation, the attorney-client privilege did not permit a state government lawyer to refuse to disclose communications with a state officeholder when confronted with a grand jury subpoena. The Seventh Circuit case involved the so-called "licenses for bribes" scandal in the Illinois secretary of state's office. As part of its corruption investigation, the U.S. Attorney's Office in Chicago sought the testimony of Roger Bickel, who had served as chief legal counsel to then-Secretary of State (later Governor) George Ryan. Mr. Ryan, the ultimate target of the investigation, objected and advised the prosecutors that he would not waive the attorney-client privilege relating to any of his prior conversations with Mr. Bickel.

Citing arguments from both the D.C. Circuit and Eighth Circuit opinions, the Seventh Circuit granted the government's motion to compel. While the court stated that it recognized the need for "full and frank communication between government officials," the court found more persuasive "the serious arguments against extending the attorney-client privilege" to protect such communications "when criminal proceedings are at issue." The

court insisted there were crucial differences between a government lawyer's clients and the clients of other lawyers.

In particular, the Seventh Circuit focused on the policy factors behind the use of the privilege in private and public settings. The court noted that "individuals and corporations are both subject to criminal liability for their transgressions"; therefore, the court reasoned that "individuals will not talk and corporations will have no incentive to conduct or cooperate in internal investigations if they know that any information disclosed may be turned over to the authorities." But in the context of a government agency, the court found there was no need to offer the protection of the attorney-client privilege to ensure compliance with the laws

The Second Circuit had the assumption that the privilege as a general matter is applicable and that any exceptions should be narrowly construed.

because, the court noted, a state agency cannot be held criminally liable by either the state itself or the federal government. As for the individual government officer potentially exposed to prosecution, the court simply noted that "[a]n officeholder wary of becoming enmeshed in illegal acts may always consult with a private attorney, and there the privilege would unquestionably apply."

'Better of the Argument'

Ultimately, the Second Circuit has the better of the argument. The 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.

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. Furthermore, given 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. But in most other cases, as a matter of public policy, it makes sense to encourage a public official 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. Nor does it seem fair or reasonable to force a public official to retain private counsel, at his or her expense, every time a difficult legal issue arises.

Of course, as the other circuits point out,

there remains the potential for abuse. Government lawyers should not be put in the position of being forced to render free legal advice regarding, for instance, purely personal conduct (the Lewinsky matter being a good example). Rather than eliminating the privilege, however, that problem could be addressed by requiring the submission of questionable documents or testimony for in camera review, to determine whether the conduct at issue falls within the scope of the official's duties. Furthermore, a public official should not be allowed to rely in confidence on the advice of government counsel once he or she has been formally designated as a subject or target of a criminal investigation since by that point, the justification of facilitating prospective compliance with the law no longer applies.

Second Circuit Differs

Why did the Second Circuit decline to follow the majority view? There are a number of possible explanations. First, the Second Circuit started with the assumption that the privilege as a general matter is applicable and that any exceptions to the general rule should be narrowly construed, thus shifting the odds in favor of the putative privilege holder.

Second, the reasoning of the other circuits may have been perceived as a byproduct of prosecutorial overreaching by the Whitewater independent counsel, Kenneth W. Starr.

Third, the court may have been influenced by federalism concerns, given the fact that the Connecticut Legislature had specifically recognized the existence of a privilege for government lawyers in both civil and criminal proceedings, a factor not present in the other circuit rulings.

Finally, the Second Circuit's decision may simply reflect today's greater sensitivity to the perils of potential white-collar criminal exposure in the post-Enron, Sarbanes-Oxley world. In any event, it now seems apparent that this fundamental dispute over the role of government lawyers will have to await final resolution by the Supreme Court.²

1. Governor Rowland resigned before the appeal was decided. On Aug. 6, 2004, Mr. Rowland's successor, Governor M. Jodi Reil, declined the government's request to waive the privilege held by the Office of the Governor. On Aug. 25, 2004, the Second Circuit issued its order, without explanation, reversing the district court. On Dec. 23, 2004, Mr. Rowland pleaded guilty to one count of conspiracy to commit honest services fraud. In January 2005, the government moved to dismiss the appeal as moot, but the Second Circuit denied the motion, citing its discretion to leave an order intact where the circumstances leading to mootness occurred after the filing of an order but before the mandate had issued.

2. The government has until April 9, 2005, to decide whether to file a petition for rehearing or rehearing en banc. As of press time, no decision had been announced.