Ethical Issues For Government Attorneys

1/23/14

By Keith Fruehling, kfruehling@heylroyster.com

Who is My Client?

City and county attorneys across the state and nation both enter and hold their positions in unique ways. For example, some are elected, some appointed, some are full-time, while others are part-time and work with private clients in addition to their public entity client. Regardless of how they got there or how many hours they work, these attorneys face a number of interesting ethical questions almost on a daily basis.

While the scope of these issues covers a wide spectrum, the most basic question is: who does the City or County Attorney represent? This determination is important because as a fundamental ethical responsibility, the lawyer has a duty to safeguard his or her client's confidences. In addition, the attorney has the professional responsibility to avoid conflicts of interest. However, this duty is owed only to "clients."

At first glance, the question of "who" is the client seems easy to determine. However, upon closer examination, it can test the ethical and moral resolve of even the most learned ethics professor. Often, determining who the client really is can be a complex process when a governmental entity is involved. The definition of "client" may differ depending on whether the lawyer is representing an individual or an agency, and whose interests are being served by the legal advice. For example, is the client of a county attorney the county, the county legislative body, individual county commissioners, department heads, or the taxpayers of the county?

Regardless of the employment category into which a City or County Attorney falls, questions of client identity affect each in a wide variety of ways, including:

- Does the attorney represent the County Commission or the City Council?
- What issues of conflict arise in representing various agencies of the City or County?
- What issues of conflict arise in representing officers and employees of the City or County?

Some City and County Attorneys may believe that public service means that their client is "the public." Most public servants assume that their ultimate responsibility rests with the public they serve. Thus, it is reasonable for them to conclude that their representational responsibility rests not with their County Board or City Council, but rather with the public, in general. Characterizing the "public" as the client allows broad discretion in determining which causes to pursue, and can produce chaotic policy conflicts in governance.

The ABA's Model Rules of Professional Conduct for Lawyers recognize that, in the government context, client identification and the resulting obligations can be quite difficult to gauge. However, most cases that have dealt with the issue have the governmental attorney representing a specific governmental entity and/or individual as opposed to the amorphous "public."

Client Identification and Privilege

Once the client is identified, other questions arise. One of the more challenging involves privilege. For example, where a government lawyer must represent an entity through its County Board and/or City Council, which conversations in the course of that representation are privileged? One such case arose here in the State of Illinois.

That case involved a federal investigation into alleged corrupt practices by the Governor of Illinois while he was the Illinois Secretary of State. The U.S. Court of Appeals for the Seventh Circuit addressed the question of whether communications between a government lawyer and employees of a government agency were protected by the attorney-client privilege. In that context the court posed the question this way: "The central question . . . is whether a state government lawyer may refuse, on the basis of the attorney-client privilege, to disclose communications with a state officeholder when faced with a grand jury subpoena." *In Re: A Witness Before the Special Grand Jury 2000.2*, 288 F.3d 290 (7th Cir. 2002)

The Seventh Circuit provided an excellent discussion on the issue of privilege. They noted that despite the fact that the concept of privilege is an old one; there were surprisingly few cases analyzing the question of a government's right to assert attorney-client privilege, and whether a government client can assert the attorney-client privilege in a civil matter.

The court held:

One of the oldest and most widely recognized privileges is the attorney-client privilege, which protects confidential communications made between clients and their attorneys for the purpose of securing legal advice. . . . It is well established that a client may be either an individual or a corporation. . . . . But here, we have a special case: the client is neither a private individual nor a private corporation. It is instead the State of Illinois itself, represented through one of its agencies. There is surprisingly little case law on whether a government agency may also be a client for purposes of this privilege, but both 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.

In Re: A Witness Before the Special Grand Jury 2000.2, 288 F.3d at 291.

The basis upon which the attorney-client privilege rests has historically been linked to the need for an attorney, while representing a client, to be accorded a full and frank factual description of the client's case. The privilege is intended to induce the full and frank discussion. Whether that same foundation exists for cases involving the government may not be so clear. Even more important, government lawyers are charged differently than their private counterparts - with duties not only to the client, but an even more robust duty to the public interest they serve. The Seventh Circuit highlighted the following:

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 . . . 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 governmental client but to ensure its compliance with the law.

Id. at 293.

Thus, at least in the context of a criminal proceeding, the Seventh Circuit concluded that the government lawyer represented the agency, not the individual, and that communications between the

two were not privileged. In addition to the Seventh Circuit's guidance, the government attorney can look to the law governing their corporate counsel colleagues for guidance.

Upjohn warnings are governed by Rule 1.13 of the Illinois Rules of Professional Conduct. Rule 1.13 states, in relevant part:

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

(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 [regarding conflicts of interest]. 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.

Attorney-Client Privilege & *Upjohn* Warnings

The scope of the federal attorney-client privilege in a corporate context was defined by the United States Supreme Court in *Upjohn Co. v. United States*, 101 S. Ct. 677, 449 U.S. 383 (1981). The attorney-client privilege protects confidential communications between attorney and client made in the course of obtaining professional assistance. In *Upjohn*, the Supreme Court held communications between all corporate employees and its counsel for purposes of securing legal advice from counsel were protected from compelled disclosure under the attorney-client privilege. The Supreme Court's decision was largely premised on the very difficult choice that corporate counsel would face if his or her communications with employees were not protected. For example, an attorney forced to interview only top management would have a difficult time determining what happened in a particular situation. If, on the other hand, he or she interviewed mid-level or lower-level management with knowledge of the situation, the communications would not be privileged. In either case, the attorney's investigation would be hampered under a "control group" scenario.

Since *Upjohn*, courts and commentators have discussed an Upjohn or corporate *Miranda* warning. The need for such warning stems from the fact that corporate counsel's client is the corporation, and not an employee, officer, or director of the corporation. The privilege therefore belongs to, and is controlled by, the corporation, meaning the corporation can elect to waive any privilege that has attached to a communication between the corporate counsel and a corporate employee. If an *Upjohn* warning has not been provided, an employee may believe that he or she is represented by corporate counsel. Counsel who discloses employee-provided information may be subject to employee claims that he or she breached his or her duty of loyalty and confidentiality owed to the client.

Thus, the attorney representing the municipality is best served to provide an *Upjohn* warning to the person consulting her to make the representation clear.

WHO?

Who does a governmental attorney provide an *Upjohn* warning to? An *Upjohn* warning is generally given to an employee, officer, or director before an interview begins.

WHAT?

What does an *Upjohn* warning contain in the context of a government attorney? An *Upjohn* warning generally consists of the following requirements:

(1) that the attorney represents the County, City or other unit of government and does not represent the individual personally;

(2) that the communications between the attorney and the individual are privileged;

(3) that the privilege belongs solely to the County, City or other unit of government, which may in its discretion choose to waive the privilege and disclose the communications to third parties; and

(4) that so long as the privilege attaches, the employee may not disclose the communication to third parties.

What does an *Upjohn* warning sound like in the governmental context? The Municipality or County's counsel may phrase an *Upjohn* warning to an employee in the following manner:

"As counsel for ABC County (or City), I represent the county. I do not represent you individually. The County can decide whether it wishes to waive the attorney-client privilege with regard to what you tell me and disclose it to someone else, including other units of government and regulatory agencies."

"Because I represent ABC City (or County), I represent the city and not you personally."

WHEN?

When should the government counsel provide an *Upjohn* warning? Neither Rule 1.13, nor *Upjohn*, requires County, City or other unit of government counsel to provide an *Upjohn* warning in all cases. Counsel must, however, consider whether such warning should be provided whenever he or she is involved in matters in which the lawyer knows or reasonably should know that the entities interests are adverse to those of the constituents with whom the lawyer is dealing. When the attorney becomes aware that the individual's interest is adverse to that of the corporation, the attorney should advise the individual of the conflict of interest, that the lawyer cannot represent the individual, and that the individual may wish to retain independent counsel.

WHERE?

Where or in what context is an *Upjohn* warning given? An *Upjohn* warning is a verbal warning that the government counsel provides. There is currently no rule requiring that the *Upjohn* warning be given in writing. Depending upon the circumstances, the warning should be documented by a signed acknowledgement, handwritten notes, or a contemporaneous memorandum of the interview.

WHY?

Why is providing an *Upjohn* warning important? In the government context, the attorney's client is the governmental entity he/she represents. The attorney-client privilege belongs to the entity, and the government's counsel should always act in the best interest of the entity. While employee-attorney communications are privileged, the governmental entity can waive the privilege.

Illinois "Control Group Test"

Illinois law is narrower than the broader attorney-client privilege rule from *Upjohn*. Illinois follows the "control group test" from Consolidated Coal Co. v. Bucyrus-Erie Co., 89 Ill. 2d 103, 432 N.E.2d 250, 59 Ill. Dec. 666 (1982).The "control group test" is used to determine whether the attorney-client privilege applies to communications between corporate counsel and the organization's constituents.

Under the control group test, the attorney-client privilege only applies to communications between an attorney and members of the control group.

In Consolidated Coal Co., an engineer supplied information to those whose opinions were sought and relied upon by others who occupied an advisory role and substantially contributed to decision making. The court held the engineer was not a member of the control group for purposes of being protected by the attorney-client privilege. Thus, the engineer's report was not privileged and was made available to the coal company in its action against the corporate manufacturer to recover damages sustained when a wheel excavator collapsed in a coal mine.

Who is in the control group?

- **Top Management**

The only communications that are ordinarily held privileged under the control group test are those made by top management with the ability to make a final decision, rather than communications made by employees whose positions are merely advisory.

- **Employees**

Who have actual authority to make a judgment or decision; or

Who are in an advisory role

  - An employee whose advisory role to top management in a particular area is such that a decision would not normally be made without his or her advice or opinion, and whose opinion in fact forms the basis of any final decision by those with actual authority
  - For example, if an employee of the status described is consulted for the purpose of determining what legal action the corporation will pursue, his or her communication is protected from disclosure.
  - However, individuals upon who top management may rely for supplying information are NOT members of the control group.