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Attorney-Client Privilege in the Public Sector: A Survey of Government Attorneys

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NOTE

Attorney-Client Privilege in the Public Sector: A Survey of Government Attorneys

NANCY LEONG*

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I. INTRODUCTION

Although the attorney-client privilege has a long history in American and common law, the issue of whether the privilege extends to government entities and the attorneys who represent them remains controversial. In 2005, the Second Circuit concluded that the privilege applies to attorney-client relationships in the public sector,¹ a holding that directly conflicts with recent decisions in the Seventh,² Eighth,³ and D.C. Circuits.⁴ These decisions have created uncertainty for practitioners who represent government clients and have prompted considerable concern from professional organizations. In a recent ABA teleconference, moderator Ross H. Garber called attorney-client privilege “one of, if not the most important issue for government lawyers.”⁵

The traditional justification for the attorney-client privilege is instrumental: the confidentiality guaranteed by the privilege is necessary to promote candor in discussions between attorneys and their clients. Many commentators have accepted this rationale unquestioningly. However, available empirical evidence is equivocal at best. While I draw no firm conclusions about the validity of the instrumental rationale generally, I do suggest that the rationale is less persuasive for entity clients such as corporations. Moreover, for government entity clients, any attempt to justify the privilege instrumentally must account for the diminished expectation of confidentiality in the public sector as well as democratic values disfavoring secrecy in government.

In this Note, I aim to demonstrate that the traditional instrumental rationale cannot validate an absolute privilege with respect to government entity clients. Although my analysis of the privilege in the government context will draw from historical precedent and existing scholarly literature, I also hope to provide further insight into the way the privilege functions in practice by grounding the discussion in a series of twenty-five interviews with government attorneys that I

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

2. *In re A Witness Before the Special Grand Jury*, 288 F.3d 289 (7th Cir. 2002).

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

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

5. See, e.g., Am. B. Ass’n, Ctr. For Continuing Legal Educ. Teleconf., *Everyday Ethics for Government Attorneys* (Dec. 16, 2005) (recording on file with author).

conducted between November 2005 and January 2006.⁶

The Note will proceed in three parts. Part I provides the history of the government attorney-client privilege, exploring its treatment in the model evidentiary codes as well as the increasing attention it has received in the courts.

Part II explores the theoretical justification for the privilege in more depth and examines the few attempts at empirical verification. Although conventional wisdom holds that an absolute privilege is necessary to induce client candor, this instrumental rationale is particularly dubious when the client is an entity rather than an individual.

Part III turns to the privilege in the government entity context. Because individual government officers exercise less control over the privilege than do private individual clients, such officers have very different incentives for disclosure in communications with attorneys. Moreover, the background regime of open government provisions and the high degree of public scrutiny that most governments receive foster a climate of openness that contrasts to the baseline expectation of confidentiality prevalent in the private sector. Therefore, in many cases, the privilege currently provides less assurance of secrecy in the public sector. Nonetheless, when interviewed, most government attorneys stated that their clients were not preoccupied with the possibility that attorney-client communication might become public. Moreover, attorneys expressed that any undetected marginal decrease in candor caused by the uncertainty of the privilege did not prevent them from representing their clients effectively.

This evidence strongly suggests that an absolute privilege is not a necessity for effective communication between government officials and attorneys, thereby undermining the traditional instrumental rationale as a justification for the privilege in the government context. While some degree of protection for sensitive communications is still appropriate, it is also important to take into account the government attorney's unique responsibility to serve the public interest. I do not attempt to formulate the proper scope of the government attorney-client privilege in this Note. However, courts should weigh the important considerations of transparency and openness in government in adapting the contours of the attorney-client privilege to the unique context of the public sector.

II. EVOLUTION OF THE GOVERNMENT ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES

The attorney-client privilege protects confidential communications between lawyers and those whom they represent. Many attorneys and commentators have accepted, as a matter of course, that the attorney-client privilege extends to

6. See *infra* note 111 for a detailed discussion of my interview methodology.

government entity clients.⁷ Yet a closer examination of the history of the privilege calls this assumption into question. This section traces the development of the attorney-client privilege for government clients in the United States, ultimately revealing only equivocal support for a conclusion that the privilege functions similarly for government entities.

A. EARLY HISTORY

Only two courts confronted the government attorney-client privilege prior to the 1960s, and both assumed with little analysis that it protected government entities.⁸ This lack of jurisprudence on the privilege resulted, at least in part, from the provisions of the Federal Housekeeping Act, which enabled government officials to prohibit government employees from testifying in court.⁹ Following the Act's amendment in 1958, however, government officers increasingly relied on the attorney-client privilege to block the release of sensitive information.

In 1963, *United States v. Anderson* upheld the existence of the privilege with little analysis,¹⁰ casting its decision in broad terms that encouraged courts in several subsequent cases to assume that the privilege applied to communications between government attorneys and employees.¹¹ The lone objection arose in *United States v. Board of Trade of Chicago*, in which the United States attempted to shield from discovery documents prepared for the Commodities Exchange Authority by the Department of Agriculture's Office of General Counsel.¹² The court dismissed previous decisions as "conclusory, unsupported, and unexplained," and asserted that "novel privileges should be grounded upon more pertinent and persuasive precedent than this."¹³ The court then found that the attorney-client relationship in this particular government context was "more akin to the functioning of a high-level corporate officer seeking the views of other corporate division chiefs than to the traditional lawyer and client relationship."¹⁴ Nonetheless, the *Board of Trade* decision failed to instigate more widespread skepticism about the government attorney-client privilege.

7. PAUL R. RICE, 1 ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 4:28 n.82 (2d ed. 1999) ("Most courts have assumed, without analysis, that governmental entities can assert the attorney-client privilege.").

8. See *Conn. Mut. Life Ins. Co. v. Shields*, 18 F.R.D. 448, 450 (S.D.N.Y. 1955) (noting that "the policy of the privilege seems to me to provide no ground for the distinction" between public and private clients); *Rowley v. Ferguson*, 48 N.E.2d 243, 248 (Ohio Ct. App. 1942) (assuming that "[t]he fact that both attorney and client were public officials should make no difference").

9. R.S. § 161 (1875) (current version at 5 U.S.C. § 822).

10. *United States v. Anderson*, 34 F.R.D. 518 (D. Colo. 1963).

11. See, e.g., *Thill Sec. Corp. v. N.Y. Stock Exch.*, 57 F.R.D. 133 (E.D. Wisc. 1972); *Detroit Screwmatic Co. v. United States*, 49 F.R.D. 77 (S.D.N.Y. 1970); *General Electric Co. v. United States*, 1972 U.S. Ct. Cl. LEXIS 442 (Ct. Cl. Sept. 19, 1972).

12. *United States v. Bd. of Trade of Chicago*, No. 71 C 2875, 1973 U.S. Dist. LEXIS 11307 (N.D. Ill. Oct. 30, 1973).

13. *Id.* at *8.

14. *Id.* at *9-10.

The Freedom of Information Act (FOIA),¹⁵ enacted in 1967, also critically influenced the development of case law on the government attorney-client privilege. When a party tries to assert the privilege during ordinary litigation, courts tend to be skeptical because such action “deprives the court of relevant evidence and may obstruct a just determination.”¹⁶ In the context of FOIA requests, however, the case is often at an earlier stage and it is less clear whether the documents will be of critical importance.¹⁷ Consequently, courts decided in a large number of cases that the attorney-client privilege was grounds for refusing a FOIA request without the close scrutiny that they might have applied if the issue of government attorney-client privilege arose in a different setting.¹⁸

Thus, until the past decade or so, courts tended to accept the privilege without substantial analysis, although some underlying skepticism lingered. As the court in *Jupiter Painting Contracting Co. v. United States* noted, “[c]ourts have generally accepted that the attorney-client privilege applies in the governmental context, while expressing apprehension at its pernicious potential in a government top-heavy with lawyers.”¹⁹ But for the most part, courts alleviated any residual anxiety by reference to the two evidentiary model codes.

B. THE MODEL EVIDENCE CODES

The Proposed Federal Rules of Evidence were developed in the late 1960s and early 1970s. Proposed Rule 503, which would have codified the attorney-client privilege, was drafted in 1969.²⁰ At the time there were only five state and federal opinions that, with little analysis, recognized the government attorney-client privilege.²¹ Despite the overall paucity of evidence, the drafters of Proposed Rule 503 defined the “client” who can assert a privilege as “a person, public officer, or corporation, association, or other organization or entity, either public or

15. Freedom of Information Act, 5 U.S.C. § 552 (2006).

16. Melanie B. Leslie, *Government Officials as Attorneys and Clients: Why Privilege the Privileged?*, 77 IND. L.J. 469, 480 (2002).

17. *See id.* at 480-81.

18. *See, e.g.*, Bryan S. Gowdy, Note, *Should the Federal Government Have an Attorney-Client Privilege?*, 51 FLA. L. REV. 695, 710 (1999) (noting that many lower courts have cited *NLRB v. Sears* for the proposition that the government is entitled to an attorney-client privilege, despite the fact that the *Sears* court did not explicitly hold that Exemption 5 to FOIA incorporated the attorney-client privilege). Others have argued that FOIA is frequently employed by litigants or potential litigants seeking to gain information without following the rules of discovery. *See, e.g.*, Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 666-67 & n.76 (1984) (describing the manipulation of FOIA to gain strategic advantage). This perception may have fostered courts' increased willingness to defer to government claims of privilege in the FOIA context, and suggests that perhaps decisions made in a FOIA context are distinguishable from the non-FOIA context.

19. 87 F.R.D. 593 (E.D. Pa. 1980).

20. *See* Leslie, *supra* note 16, at 479.

21. *See id.* at 479 and n.57.

private.”²² Similarly, the Advisory Committee’s Note to Proposed Rule 503 states flatly that “[t]he definition of ‘client’ includes governmental bodies,” citing existing cases that themselves failed to examine whether the privilege should apply to government attorneys.²³

Thus, like the courts that had previously considered the issue, the drafters of Proposed Rule 503 did not explain their decision to extend the privilege to government entities; as Professor Melanie Leslie observes, there is no record of debate over the significance of this choice.²⁴ Nonetheless, courts soon began to look to Proposed Rule 503 as authority on the scope of the attorney-client privilege, and the rule continues to provide justification for the privilege in the government context today.²⁵

Proposed Rule 503’s conclusory justification for applying the attorney-client privilege to government entities is particularly surprising given that the drafters in the near-contemporaneous revision of the Uniform Rules of Evidence reached a contradictory result. Uniform Rule 502, which addresses the attorney-client privilege, 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.”²⁶ Although this formulation substantially limits the privilege for government entities, the drafters of the Uniform Rules also spent only minimal time discussing the rationale underlying their construction of the privilege. Couched in general terms, this justification relied primarily on the importance of open government.²⁷

After the two sets of evidentiary rules were finalized, most states adopted the Proposed Federal Rules, including Proposed Rule 503, with its application of the attorney-client privilege to government entities. However, four states—Arkansas, Maine, North Dakota, and Oklahoma—did adopt the Uniform Rules of Evidence version, with its substantially restricted version of the government attorney-client privilege.²⁸ A few states also adopted the Uniform Rules but excised the provision restricting the scope of the privilege, essentially making the

22. FED. R. EVID. 503(a)(1) (Proposed official draft 1969).

23. Advisory Committee Note to Proposed Rule 503.

24. See Leslie, *supra* note 16, at 479.

25. See, e.g., *Winton v. Bd. of Comm’rs*, 188 F.R.D. 398, 400 (N.D. Okla. 1999) (“Proposed Rule 503 recognizes an attorney-client privilege for public entities and officers like the Defendants in this case. The Court finds Rule 503’s statement to be a sound reflection of the common law. Defendants may, therefore, exercise an attorney-client privilege.”).

26. UNIF. R. EVID. 502(d)(6).

27. *Proceedings of the Annual Conference Meeting in Its Eighty-third Year*, Nat’l Conf. of Comm’rs on Unif. St. Laws 57-58 (1974); *Proceedings of the Annual Conference Meeting in Its Eighty-second Year*, Nat’l Conf. of Comm’rs on Unif. St. Laws 74-75 (1973).

28. See ARK. CODE ANN. § 16-41-101 (1987); ME. R. EVID. 502(d)(7); N.D. R. EVID. 502(d)(6); OKLA. STAT. ANN. tit. 12, § 2502(D)(6) (West 1993).

privilege coextensive with Proposed Federal Rule 503.²⁹ At least on the faces of the relevant statutes, different states vary considerably in the way they treat the government attorney-client privilege.

At the federal level, the Proposed Federal Rules relating to privileges, including Proposed Rule 503, engendered considerable controversy.³⁰ Ultimately, Congress instead adopted a single rule, Rule 501, which allows the courts to apply privileges using "principles of the common law."³¹ Despite this instruction, the federal courts have accepted the Proposed Federal Rules as evidence of common law practices surrounding the privilege, even though the Proposed Federal Rules were never enacted.³² Rule 501 also states that federal privilege law applies except where state law supplies the rules of decision.³³ Nonetheless, "the Court has sometimes taken note of state privilege laws in determining whether to retain them in the federal system."³⁴

C. RECENT DEVELOPMENTS

The history outlined in the previous sections suggests that conflicting ideas about the proper scope of the government attorney-client privilege have existed, albeit in obscurity, for several decades. The Watergate scandal could have exposed this tension if communications between President Nixon and his legal advisors had been put at issue. Instead, Nixon waived both the executive and attorney-client privileges, leaving White House Counsel Fred Buzhardt free to testify before the grand jury.³⁵ Similarly, Peter Wallison, White House Counsel under President Reagan, produced his diary and assisted in other ways with the Iran-Contra investigation.³⁶ Once again, the conflict remained a potentiality.

All this changed when the Office of the Independent Counsel launched a broad investigation into the Clinton administration. The Whitewater investigation resulted in a multitude of grand jury subpoenas, against which President Clinton's legal defense unsuccessfully tried to claim the attorney-client privilege in *In re Grand Jury Subpoena Duces Tecum*³⁷ and *In re Bruce R. Lindsey*.³⁸

In *Subpoena Duces Tecum*, the Eighth Circuit decided the issue of "whether an

29. See IDAHO R. EVID. 502; KY. R. EVID. 503; MISS. R. EVID. 502; S.D. CODIFIED LAWS § 19-13-2 to -5 (1994); TEX. R. EVID. 503; UTAH R. EVID. 504; VT. R. EVID. 502.

30. See GEORGE FISHER, EVIDENCE 728 (2002).

31. FED. R. EVID. 501.

32. See *United States v. Gillock*, 445 U.S. 360 (1980).

33. See *id.* at 368. For example, federal privilege law would apply in a federal grand jury investigation of a state government official.

34. *Id.* at n.8.

35. SPECIAL PROSECUTION FORCE, WATERGATE REPORT 88 (1975), cited in *In re Bruce Lindsey*, 158 F.3d 1263, 1275 (D.C. Cir. 1998).

36. See *Lindsey*, 158 F.3d at 1275.

37. 112 F.3d 910 (8th Cir. 1997).

38. 158 F.3d 1263 (D.C. Cir. 1998).

entity of the federal government may use the attorney-client privilege to avoid complying with a subpoena by a federal grand jury.”³⁹ As part of the Whitewater investigation, Independent Counsel Kenneth Starr issued a grand jury subpoena requiring disclosure of “documents created during meetings attended by any attorney from the Office of Counsel to then-President Clinton and Hillary Rodham Clinton (regardless of whether any other person was present).”⁴⁰ The White House (as the Eighth Circuit defined the party in interest in the case) cited the attorney-client privilege as justification for its refusal to produce the documents.⁴¹

The Eighth Circuit distinguished the case’s criminal context from the civil context in which much of the case law on the government privilege had developed,⁴² also noting “the general principle that the government’s need for confidentiality may be subordinated to the needs of the government’s own criminal justice processes.”⁴³ The court then emphasized the significant public interest concerns at stake:

We believe 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. We also believe 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.⁴⁴

Although the court acknowledged that voiding the privilege in the criminal context might create uncertainty that would make the privilege virtually useless, it dismissed this objection by explaining, “confidentiality will suffer only in those situations that a grand jury might later see fit to investigate.”⁴⁵ Thus, the court held that the privilege did not apply to the instant situation.

The following year, in 1998, the D.C. Circuit confronted an identical legal issue in *In re Bruce Lindsey*, this time because Deputy White House Counsel Bruce Lindsey declined to answer questions before a federal grand jury investigating then-President Clinton’s relationship with Monica Lewinsky.⁴⁶ The

39. *In re Subpoena Duces Tecum*, 112 F.3d at 915.

40. *Id.* at 913.

41. *Id.* at 914.

42. *Id.* at 917-18.

43. *Id.* at 919.

44. *Id.* at 921.

45. *Id.* at 921. Various commentators have criticized this response as inadequate, noting that it is impossible to tell in advance what situations a federal grand jury might later investigate. See, e.g., Todd A. Ellinwood, “*In the Light of Reason and Experience*”: *The Case for a Strong Government Attorney-Client Privilege*, 2001 WIS. L. REV. 1291, 1321 (2001) (“[T]he mere possibility of a criminal investigation will often be impossible to know *ex ante*.”).

46. *In re Bruce Lindsey*, 158 F.3d 1263, 1267 (D.C. Cir. 1998).

D.C. Circuit also held that the privilege did not provide a shield in the federal grand jury context. Similar to the Eighth Circuit, the court based much of its reasoning on “the public’s interest in uncovering illegality among its elected and appointed officials . . . another protection of the public interest is through having transparent and accountable government.”⁴⁷

The D.C. Circuit also focused on 28 U.S.C. § 535(b), a federal statute requiring that “[a]ny information . . . received in a department or executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reported to the Attorney General”⁴⁸ Although it is unclear whether the Office of the President, and thus the White House Counsel, technically falls within the ambit of section 535(b), the court found that the statute “evinces a strong congressional policy that executive branch employees must report information” relating to criminal wrongdoing.⁴⁹ Thus, the D.C. Circuit found that this affirmative responsibility, coupled with the public interest in disclosure of information, made the privilege inapplicable in the federal grand jury context.

The Eighth Circuit and the D.C. Circuit departed substantially from previous case law and other authority in finding that the government’s attorney-client privilege receded in the context of a federal grand jury investigation. Not surprisingly, these two cases attracted considerable attention in scholarly literature, and both have drawn a fair amount of criticism, both for their departure from precedent and for their purported partisanship.⁵⁰

47. *Id.* at 1273.

48. 28 U.S.C. § 535(b) (2002).

49. Lindsey, 158 F.3d at 1274, quoting *In re Sealed Case* (Secret Service), 148 F.3d 1073, 1078 (D.C. Cir. 1998).

50. Prior to *Subpoena Duces Tecum* and *Lindsay*, the leading scholarly analysis of the government attorney-client privilege was a Note arguing that the privilege should not be extended to government entities because it “does not serve the privilege’s underlying goals and conflicts with the principle of open government.” See Lory A. Barsdate, Note, *Attorney-Client Privilege for the Government Entity*, 97 YALE L.J. 1725, 1727 (1988). In the aftermath of the Whitewater cases, some commentators have argued that the rationale for the attorney-client privilege is equally compelling when the client is a government entity. See Ellinwood, *supra* note 45 (also contending that if a government official has committed a clear violation of the law, the government attorney should advise the official to seek private counsel); Adam M. Chud, Note, *In Defense of the Government Attorney-Client Privilege*, 84 CORNELL L. REV. 1682 (1999) (arguing that the privilege should apply except for conversations related to personal issues, ongoing criminal investigations, or clearly criminal activity); Note, *Maintaining Confidence in Confidentiality: The Application of the Attorney-Client Privilege to Government Counsel*, 112 HARV. L. REV. 1995 (1999) (arguing that the government attorney-client privilege should apply even in the federal grand jury context). Another Article has focused on the issue of who can waive the privilege rather than the underlying policy reasons. See Michael Stokes Paulsen, *Who “Owns” the Government’s Attorney-Client Privilege?*, 83 MINN. L. REV. 473 (1998) (analogizing the United States government to a corporation and concluding that the Independent Counsel should control the decision whether to assert the attorney-client privilege). Other commentators have acknowledged that the government context differs from the private sector in some respects, and that the privilege should be modified accordingly. See Amanda J. Dickmann, *In re Lindsey: A Needless Void in the Government Attorney-Client Privilege*, 33 IND. L. REV. 291 (1999) (acknowledging that a qualified privilege is appropriate in the face of a criminal investigation while advocating in camera inspection to protect “military, diplomatic and sensitive national security secrets”); Leslie,

Nonetheless, the idea of an abrogated government attorney-client privilege in the context of a federal grand jury subpoena began to gain traction. In *In re A Witness before the Special Grand Jury*, the Seventh Circuit adopted the reasoning of the Eighth and D.C. Circuits in finding that the Chief Legal Counsel to the Secretary of State's Office of Illinois could not invoke the privilege against a federal grand jury subpoena.⁵¹ The Seventh Circuit also cited the importance of considering the public interest, explaining, "interpersonal relationships between an attorney for the state and a government official acting in an official capacity must be subordinated to the public interest in good and open government"⁵² At least in criminal cases, courts appeared to have reached a consensus that the government privilege should yield.

This illusion of agreement ended with the Second Circuit's decision in *In re Grand Jury Investigation*.⁵³ Similar to the Seventh Circuit decision, *In re Grand Jury Investigation* involved a grand jury subpoena issued to the former Chief Legal Counsel to the Office of the Governor of Connecticut.⁵⁴ Unlike the Seventh Circuit, the Second Circuit found that the privilege was absolute. The decision relied partly on a Connecticut statute providing 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."⁵⁵ However, the crux of the Second Circuit decision was a belief that government officials must be able to rely on the privilege in seeking legal advice. The court found that "if anything, the traditional rationale for the privilege applies with special force in the government context,"⁵⁶ also noting 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."⁵⁷ Similar to the Seventh, Eighth, and D.C. Circuits, the Second Circuit found that public interest considerations compelled its decision on the government attorney-client privilege. But in stark

supra note 16, at 469 (arguing that a qualified privilege is sufficient because the privilege will have little impact on government employees' decisions to confide in counsel); Walter Pincus, *No Clear Legal Answer: The Uncertain State of the Government Attorney-Client Privilege*, 4 GREEN BAG 2d 269 (2001) (suggesting a balancing test coupled with in camera inspection to determine whether the privilege should hold). Although most of the debate has focused on the privilege in the federal government context, a recent Comment also specifically addressed the situation of a federal grand jury investigation of state government corruption. See Joel D. Whitley, Comment, *Protecting State Interests: Recognition of the State Government Attorney-Client Privilege*, 72 U. CHI. L. REV. 1533 (2005) (arguing that the public policy reasons for rejecting the attorney-client privilege for federal government entities do not apply in the state government context).

51. *In re A Witness Before the Special Grand Jury*, 288 F.3d 289 (7th Cir. 2002).

52. *Id.* at 294.

53. 399 F.3d 527 (2d Cir. 2005).

54. *Id.* at 528.

55. *Id.* at 534, quoting CONN. GEN. STAT. § 52-146r(b) (2005).

56. *Id.*

57. *Id.*

contrast to the other circuits, the Second Circuit found that the public interest justification actually compelled it to *uphold* the privilege, rather than to abrogate it.

Thus, recent Second, Seventh, Eighth, and D.C. Circuit decisions on the privilege demonstrate that the extent of the government attorney-client privilege is unsettled, and will likely remain so until the issue is argued before the Supreme Court. The importance of this privilege is underscored by Executive Order 13,233, issued by President George W. Bush in 2001.⁵⁸ Under previous law, presidents could only assert the privilege for as long as they held office.⁵⁹ Executive Order 13,233 now decrees that presidents can continue to assert the privilege even after they leave office.⁶⁰ Thus, the scope of the privilege has gained even greater significance given that it can be wielded unilaterally not only by current presidents, but also by former presidents, years or even decades after they leave office, to control what information the public may access.

In less than fifty years, the government attorney-client privilege has evolved from an ignored and virtually unused provision to a hotly-debated issue of paramount importance to government officers' efforts to shield sensitive information from disclosure to the public. Courts and commentators continue to disagree on the subject. Thus, because ready answers are unavailable, the remainder of this Note will look to the underlying justification for the privilege and determine whether it applies to the government context.

III. THE PRIVILEGE IN THE PRIVATE SECTOR

Evidentiary authorities generally agree that the most compelling rationale for the attorney-client privilege is instrumental: the privilege facilitates "full and frank communication between attorneys and their clients," thereby promoting "broader public interests in the observance of law and administration of justice."⁶¹ However, some evidence has called this justification into question by casting doubt on whether the attorney-client privilege in fact facilitates candor.

In this section, I first outline the traditional instrumental rationale for the privilege, then summarize the inconclusive empirical research on the subject. The

58. See Exec. Order 13,233, Further Implementation of the Presidential Records Act, 66 Fed. Reg. 56,025 (Nov. 1, 2001) [hereinafter Presidential Records Act].

59. See Ira Berlin, *Executive Order Undermines Democracy*, 30 OAH NEWSLETTER (Org. of Am. Historians, Bloomington, IN), May 13, 2002, <http://www.oah.org/pubs/nl/2002may/berlin.html> (last visited Nov. 27, 2006).

60. See Presidential Records Act, *supra* note 58, § 2(a) ("[T]he former President or the incumbent President may assert any constitutionally based privileges"; "The President's constitutionally based privileges subsume privileges for records that reflect: military, diplomatic, or national security secrets (the state secrets privilege); communications of the President or his advisors (the presidential communications privilege); legal advice or legal work (the attorney-client or attorney work product privileges); and the deliberative processes of the President or his advisors (the deliberative process privilege).").

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

indeterminacy of this research prevents firm conclusions on the viability of the instrumental rationale. Nonetheless, to the extent that the instrumental rationale does justify an absolute privilege for individual clients, I suggest that the justification is weaker for entity clients such as corporations.

A. THEORETICAL JUSTIFICATION FOR THE ATTORNEY-CLIENT PRIVILEGE

Most evidentiary rules focus on the courtroom behavior of witnesses, attorneys, judges, and juries, and are designed to ensure that evidence introduced in court is reliable and relevant to the matter at hand.⁶² In contrast, the rules of privilege are concerned with conduct that occurs in society at large. As Representative Elizabeth Holtzman observed during the Congressional hearings on the then-proposed Federal Rules of Evidence, “unlike most evidentiary rules, privileges protect interpersonal relationships outside of the courtroom.”⁶³

These broader social implications of the privilege may explain why privileges in general, and the attorney-client privilege in particular, have prompted so much debate. Nineteenth century English utilitarian philosopher Jeremy Bentham sharply criticized the attorney-client privilege, noting sarcastically that if the privilege were revoked, “a guilty person will not in general be able to derive quite so much assistance from his law advisor, in the way of concerting a false defense, as he may do at present.”⁶⁴

Bentham’s cynical view was disputed by evidentiary theorist Dean Wigmore, who argued in favor of privileges on the grounds that they facilitate the search for truth and hence ensure accurate judicial decision.⁶⁵ Wigmore’s theory was that certain communications “originate[] in a confidence that they will not be disclosed”—in other words, but for the speaker’s belief that a given statement will remain secret, the statement would not be spoken in the first place.⁶⁶ Thus, Wigmore believed the privilege would not result in a net loss to the information available to a trier of fact, because it would shield only statements that would not have been made in its absence.⁶⁷ Relatedly, Wigmore argued that, if a privilege applied, it must be “absolute” in character.⁶⁸ Because secrecy was a necessary precondition to disclosure, if the speaker felt that secrecy was assured only in

62. See Edward J. Imwinkelried, *A Psychological Critique of the Assumptions Underlying the Law of Evidentiary Privileges: Insights from the Literature on Self-Disclosure*, 38 LOY. L.A. L. REV. 707, 707 (2004).

63. H.R. REP. NO. 93-650, at 28 (1973), reprinted in 1974 U.S.C.C.A.N. 7075, 7097.

64. Jeremy Bentham, *The Rationale of Judicial Evidence*, in 7 THE WORKS OF JEREMY BENTHAM 473-75, 477, 479 (1827).

65. See 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285 (John T. McNaughton rev., 1961).

66. *Id.* (emphasis omitted); see also Edward J. Imwinkelried, *Questioning the Behavioral Assumption Underlying Wigmorean Absolutism in the Law of Evidentiary Privileges*, 65 U. PITT. L. REV. 145, 151 (2004) (emphasis omitted).

67. See WIGMORE, *supra* note 65, § 2291.

68. *Id.*

some circumstances, the disclosure still would be chilled.

Wigmore's treatise became the foremost authority on evidentiary rules, and his view remains extremely influential today.⁶⁹ His conclusion that the privilege is necessary to promote candid disclosure from a client to her attorney is deeply ingrained in contemporary legal culture, and the view is so dominant that most lawyers, let alone laypeople, never pause to question it.

A few scholars have advanced non-instrumental justifications for the attorney-client privilege.⁷⁰ Professor Charles Fried argues that the privilege is necessary to the fundamental value of client autonomy, claiming that it is "immoral for society to constrain anyone from discovering what the limits of [the law's] power over him are."⁷¹ Professor David Louisell grounds his justification for the privilege in a concern for privacy, asserting that the inviolability of certain relationships is "more important to human liberty than accurate adjudication."⁷² Expressing a similar concern for human relationships, former Supreme Court Justice Arthur Goldberg once asserted that privileges such as the attorney-client privilege "relate to the fundamental rights of citizens."⁷³ Finally, Professor Charles McCormick argues that

[o]ur adversary system of litigation casts the lawyer in the role of fighter for the party whom he represents. A strong sentiment of loyalty attaches to the relationship, and this sentiment would be outraged by an attempt to change our customs so as to make the lawyer amenable to routine examination upon the client's confidential disclosures regarding personal business.⁷⁴

The primary response to these arguments is that attorney-client relationships do not deserve greater protection than the many other relationships in which disclosures frequently occur.⁷⁵ Thus, although these more conceptual theories have received some attention, Wigmore's emphasis on promoting candor has retained primacy.

Despite the dominance of the instrumental rationale, our legal culture still

69. See Imwinkelried, *supra* note 62, at 708-09.

70. See Leslie, *supra* note 16, at 484-85. I am indebted to Melanie Leslie's work for gathering the sources in this paragraph.

71. Charles Fried, *Correspondence*, 86 YALE L.J. 573, 586 (1977).

72. David W. Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 110 (1956).

73. *Hearings on Proposed Rules of Evidence Before Special Subcomm. on Reform of Fed. Criminal Laws, H. Comm. on the Judiciary*, 93 Cong., 1st Sess. 142, 143-44 (1973) (testimony of Justice Arthur J. Goldberg).

74. CHARLES T. MCCORMICK ET AL., MCCORMICK ON EVIDENCE § 87, at 205-206 (Edward W. Cleary ed., 3rd ed. 1984).

75. See, e.g., Leslie, *supra* note 16, at 484 & n. 84. Moreover, to the extent that these non-instrumental justifications have some relevance for an individual client, they are less persuasive for organizational clients such as corporations or governments. For example, Fried's autonomy argument and Louisell's concern for privacy and liberty carry far more weight when the rights of an individual human are at stake; it is more difficult to argue that a corporation's interest in "liberty" justifies an absolute protection of its officers' communications with counsel.

reflects a latent discomfort with the privilege. As the Court acknowledged in *United States v. Nixon*, “[privileges] are designed to protect weighty and legitimate competing interests . . . [and] are not lightly created nor expansively construed, for they are in derogation of the search for truth.”⁷⁶ This account of the privilege lies in tension with the instrumental rationale: if Wigmore is right that the privilege only protects communications that would not have been made in its absence, then application of the privilege would not really represent any such derogation.

In light of this underlying discomfort, it is important to remember that some of the assumptions underlying Wigmore’s theory about privilege have never been empirically verified. Most importantly, it has never been established that the privilege is actually necessary to facilitate client candor. The following section will explore this assumption in more detail in relation to particular types of attorney-client relationships.

B. IMPLEMENTATION IN PRACTICE

The strength of the instrumental rationale for the attorney-client privilege varies depending on the identity of the client. This section will suggest that the theoretical argument that the privilege facilitates candor is strongest when the client is an individual, and is less compelling when the client is an entity such as a corporation. Available empirical evidence relating to the instrumental rationale does not support any firm conclusions: only a few studies have been conducted, and even the most well-designed research construct can only imperfectly simulate the calculus that takes place when an actual client weighs whether to disclose information to her attorney. Still, for both individual and entity clients, available research suggests that the relationship between confidentiality and candor is less definitive than popularly assumed. Although only further research can resolve this question, both theoretical arguments and available empirical evidence suggest that some skepticism with regard to the instrumental rationale is warranted, particularly in the context of entity clients.

1. REPRESENTATION OF INDIVIDUALS

In 1962, Yale Law School published the results of a study in which 108 laypersons and 125 lawyers filled out questionnaires regarding the importance of confidentiality in the attorney-client relationship.⁷⁷ The study found that many subjects believed that an attorney would have to divulge confidential information in some situations, suggesting that for these people absolute confidentiality was

76. *United States v. Nixon*, 418 U.S. 683, 709-10 (1974).

77. Comment, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226 (1962).

not a prerequisite for candid communication. Thirty percent of layperson participants (32 of 108) erroneously believed that attorneys have a legal obligation to reveal client confidences if asked to do so by a lawyer in court, and nearly 20% (21 of 108) stated that they did not know for sure.⁷⁸ In general, laypersons were somewhat more divided on the effect of the privilege than were attorneys. While 72% of attorneys (90 of 125) believed that the privilege helped induce disclosure, about half of laypersons said they would be “less likely to make free and complete disclosure” without the privilege.⁷⁹ Finally, only 45% of laypersons (49 of 108) affirmatively believed that attorneys should not reveal confidential information if asked to do so in court.⁸⁰

The Yale study permits only tentative conclusions. It was conducted by a legal periodical over forty years ago, and it is difficult to evaluate some of the data because lawyers and laypersons were asked different sets of questions. Nevertheless, certain results do suggest that an absolute privilege is not necessary to induce candor. As Fred Zacharias has explained, its findings imply that, “while a preference for nondisclosure rules exists, a substantial majority of laypersons would continue to use lawyers even if secrecy were limited.”⁸¹

Zacharias attempted to replicate the Yale study in the late 1980s, finding that the relationship between the guarantee of confidentiality and the client’s willingness to disclose was less symmetrical and more complex than Wigmore assumed.⁸² Although nearly 30% of subjects who had previously consulted lawyers on various matters stated that they had shared information that they would have been unwilling to disclose without a guarantee of confidentiality,⁸³ as Zacharias observes, there are a number of possible explanations for this result.⁸⁴ Rather than relying on the promise of confidentiality per se, the clients may have viewed confidentiality as important “because they view lawyers as honorable professionals who customarily promise discretion”⁸⁵ In other words, participants may have viewed the guarantee of confidentiality as an indicator of a

78. *Id.* at 1261 (Form A – Laymen – Question 5).

79. *Id.* at 1232 n.38, 1262, 1270 (Form A – Laymen – Question 6; Form C – Lawyers – Question 5). The conclusions that can be drawn here are limited because the question did not measure the extent of the privilege’s effect on disclosure. For example, we have no way of knowing whether the attorneys believed that the privilege had a significant impact on disclosure or only a small impact, or whether laypersons would be significantly less likely to make free and complete disclosure, or only slightly less likely.

80. *Id.* at 1262 (Form A – Laymen – Question 7).

81. Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 378 (1989).

82. *See id.*

83. *Id.* at 381. Half of all subjects (including those who had consulted lawyers previously as well as those who had not) predicted that they would withhold information from attorneys if no firm obligation of confidentiality existed. *Id.* at 380.

84. *Id.* at 380.

85. *Id.* at 381. This hypothesis is bolstered by a question that asked clients whether they would withhold information if the lawyer “promised confidentiality except for specific types of information which he/she described in advance”: only 15.1% of clients stated that they would withhold information in such a situation. *Id.* at 386.

lawyer's competence rather than as a promise of absolute secrecy.

Other parts of the survey lend weight to Zacharias' inference. One suggestive portion asked subjects whether lawyers should disclose privileged information in morally compelling situations where the current privilege rules nonetheless clearly forbid disclosure.⁸⁶ In nearly all cases, a substantial majority of subjects concluded that a lawyer should disclose the privileged information.⁸⁷ Moreover, the fact that lawyers could disclose information in certain situations did not appear to impact subjects' willingness to consult with attorneys: in each of twelve hypotheticals, less than 25% of subjects indicated that they would be less willing to consult a lawyer if such disclosure was allowed.⁸⁸ Thus, the Zacharias study also suggests that absolute confidentiality may not be necessary for individual clients to be willing to communicate candidly with their lawyers.

Commentators have raised other questions about the need for confidentiality. One theorizes that laypersons generally "engage in a balancing process" in deciding whether to share information, weighing the "rewards, benefits, or utility of disclosure."⁸⁹ Yet this does not necessarily support the need for the privilege, because we cannot "assume[] that the layperson is acting rationally at the time of the decision whether to disclose."⁹⁰ For example, the client may be overly influenced by his own emotional reactions, or may have a "diverse variety of conflicting, contradictory goals" that militate in opposite directions with respect to disclosure.⁹¹ Another commentator has argued that the privilege provides a critical incentive for many criminal defendants, who are likely to be unfamiliar with the applicable law and who may withhold facts important to their defense unless confidentiality is assured, but that in other circumstances the privilege is far less compelling.⁹² Finally, several researchers have reported significant variations in self-disclosure patterns among individuals⁹³—thus, even if some people do require the privilege to reveal information, it may not be a necessary precondition for the majority.⁹⁴

The available data simply do not provide a clear answer to the question of

86. Typical scenarios involved privileged information regarding the whereabouts of a kidnapping victim or the innocence of a person falsely accused of a crime. *Id.* at 409.

87. *Id.* at 395.

88. *Id.*

89. Imwinkelried, *supra* note 62, at 718.

90. *Id.* at 719.

91. *Id.* at 719-20.

92. Leslie, *supra* note 16, at 483. Moreover, the Fifth Amendment right against self-incrimination absolves the client-defendant of the obligation to "reveal compromising facts to his adversary." *Id.* In contrast, the discovery rules in civil litigation require disclosure of every relevant fact, so even information that the client would rather keep secret is often bound to come out during discovery.

93. Imwinkelried, *supra* note 62, at 720-21.

94. Of course, even if a small but significant minority of people requires an absolute privilege for disclosure, this might provide sufficient justification for such a privilege. Certainly this argument holds some sway in the individual context, but in the government context, we must balance these considerations against the competing values of transparency and openness that will be discussed more thoroughly in Part III.

whether the attorney-client privilege is a requirement for candid communication between individual clients and their lawyers. Yet existing research does suggest that the necessity of confidentiality is an open question even for these clients, for whom the instrumental rationale is at its most robust. The next section will discuss the even stronger cause for skepticism about the instrumental justification in the corporate context.

2. REPRESENTATION OF CORPORATIONS

Courts have consistently held that the attorney-client privilege applies in situations where the client is a corporate entity.⁹⁵ The seminal case is *Upjohn Co. v. United States*, in which the Supreme Court not only held that the privilege extends to corporations, but also affirmed that the privilege covers communications between an attorney and *any* employee representing the corporation, rather than merely those involving a “control group” consisting of upper management.⁹⁶

Following *Upjohn*, the corporate attorney-client privilege is firmly entrenched in legal doctrine. Nonetheless, applying the attorney-client privilege to the corporate context adds a new layer of conceptual difficulty.⁹⁷ People generally advance the same instrumental rationale as for individual clients—“to encourage more open and candid communication from those who personify the corporation in order that attorneys can render more informed advice to the corporation.”⁹⁸ Importantly, however, the privilege extends only to the corporate entity, not to its individual employees.⁹⁹

This limitation results in a misalignment of interests. Because individual corporate employees are not protected by the privilege, they may lack incentive to disclose information regardless of whether the privilege applies to the corporation as a whole. Corporate counsel is likely to share information reported by an individual employee with at least the upper management of the corporation. Thus, as Leslie suggests, an employee may hesitate to reveal information that looks bad for herself or for the corporation, either because she fears reprisal from her employer or because she fears more general damage to her reputation.¹⁰⁰

95. See, e.g., *United States v. Louisville & Nashville R.R. Co.*, 236 U.S. 318 (1915).

96. *Upjohn Co. v. United States*, 449 U.S. 383, 396-97 (1981).

97. As Paul Rice, author of the leading treatise on the attorney-client privilege, explains, “the very existence of the [corporate] privilege is based on intuition, instinct, assumption, and hunches about the conduct of individuals.” RICE, *supra* note 7, § 4:10; see also DAVID LUBAN, *LAWYERS AND JUSTICE* 217-34 (1988) (suggesting that attorney-client privilege should be abolished when the client is an organization rather than a natural person).

98. RICE, *supra* note 7, § 4:21.

99. *Id.* at 96. It is also important to keep in mind that the corporation’s attorney-client privilege “does not personally protect the agents, even though they may have incurred personal liability from the actions on behalf of the corporation.” *Id.* at 97, citing *United States v. Aramony*, 88 F.3d 1369, 1388-92 (4th Cir. 1996).

100. Leslie, *supra* note 16, at 493.

This concern is particularly salient because the employee has no personal control over the privilege: when the client is a corporate entity, only the board of directors has the power to waive or assert the privilege.¹⁰¹ Should the board decide to waive the privilege on behalf of the corporation, the individual employee has no means of resisting, even if the information revealed is personally damaging.¹⁰² Even for relatively high-ranking employees who do exercise some control over the privilege, the possibility that information will be shared with other high-ranking employees may create a disincentive to reveal information.¹⁰³

The only existing empirical study of the corporate attorney-client privilege, conducted in the 1980s, also suggested that the existence of a privilege does not determine high-ranking employees' decisions to disclose.¹⁰⁴ In interviews, corporate executives did cite the privilege as one factor in their decision to confide information, but the most important factor was their trust in the particular attorney.¹⁰⁵ If the privilege were tailored to allow disclosure in some situations, the survey suggested that there would be little chill on most communications, although at the margin it might decrease candor among upper-level executives, particularly with respect to written communications.¹⁰⁶

Professor Paul Rice speculates that economic incentives may nonetheless provide justification for the attorney-client privilege. He explains, "Because of the privilege's guaranteed protection to the corporation, the corporation's hierarchy will be more willing to exercise the economic power over its employees and order them to communicate with counsel. The threat of sanction will often influence employees to relate facts that are adverse to themselves."¹⁰⁷ Although this seems reasonable in theory, it is more challenging to envision how it would play out in practice. To wield the threat of sanction effectively, upper management would have to be aware that the recalcitrant employee knew something important. Moreover, the sanction the corporation threatened would have to be more severe than the consequences the employee feared from disclosure. Surely these conditions would occur in only a subset of cases.

Rice also makes the argument that employees may decide to be candid simply because "the interests of both the individual employees and the corporate client

101. See RICE, *supra* note 7, § 4:21.

102. Leslie, *supra* note 16, at 493.

103. See Elizabeth Thornburg, *Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client Privilege*, 69 NOTRE DAME L. REV. 157, 166-73. For example, Thornburg points out that an employee may be concerned that other employees will waive the privilege with respect to his communication by disclosing the communication to non-privileged individuals. See *id.* at 166-73. Even if the disclosure remains within the company, a high-ranking officer may wish to avoid remonstrations from his colleagues.

104. Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191 (1989). The study did not examine the impact of the privilege on rank-and-file employees.

105. *Id.* at 277. It is worth noting that trust in an attorney might be fostered by the existence of the privilege.

106. *Id.* at 264, 371, 374.

107. RICE, *supra* note 7, § 4:21.

often coincide” and thus the assertion of the privilege “usually enures to the benefit of its employees.”¹⁰⁸ Certainly this unity of interests can occur, although it is less certain whether it affects employees’ disclosure calculations, particularly at the early stages of an investigation when it is unclear whether their interests will be aligned with those of the corporation.

Notwithstanding Rice’s arguments, it is generally uncertain to what extent the privilege actually encourages rank-and-file employees to communicate more candidly with corporate counsel. For upper-level management, Leslie theorizes that the attorney-client privilege may provide some incentive to be more forthcoming.¹⁰⁹ Such executives’ personal interests are more likely to be aligned with those of the corporation, and they may also have more influence over whether the corporation as a whole waives the privilege.¹¹⁰ Yet Leslie also expresses skepticism as to whether the eventual outcome is desirable: even if the privilege “affects the candor of upper management at the margins . . . it often does so in service of dubious ends,”¹¹¹ perhaps by allowing executives to conceal their own wrongdoing from shareholders and the public.

In sum, the instrumental rationale is less compelling in the corporate context than in the individual context. For rank-and-file employees, lack of control over the privilege and fear that inculpatory information will be disclosed to their supervisors means that the privilege will likely provide little additional incentive for frank communication. For upper-level management, on the other hand, the attorney-client privilege may facilitate candor in some situations.

Ultimately, I do not seek to undermine the instrumental rationale in the context of the private sector. However, I do wish to question the extent to which we accept this rationale for the privilege in all circumstances. The corporate entity privilege, in particular, raises problems with the instrumental rationale that resonate even more powerfully in the government context.

IV. THE PRIVILEGE IN THE PUBLIC SECTOR

This Part will discuss the attorney-client privilege as it applies to government entity clients. To contextualize the theoretical conclusions that courts and commentators have advanced, I will also present the findings of a series of interviews that I conducted with attorneys who represent state and municipal governments.¹¹²

108. *Id.*

109. Leslie, *supra* note 16, at 494.

110. *Id.*

111. *Id.*

112. The interviews were conducted during the two-and-a-half months between November 15, 2005, and January 31, 2006. The bulk of my interviews were with attorneys who worked for state attorney generals’ offices. I conducted twenty such interviews with attorneys in twenty different states. I also conducted five interviews with attorneys who represented municipalities. To locate government attorneys willing to be

Realities of government practice render the instrumental rationale unpersuasive in the public sector. Like corporate employees, most government employees do not exercise individual control over the privilege. Moreover, government employees are subject to open government provisions and extraneous media and political pressures that considerably diminish their expectation of confidentiality. Despite this background, government attorneys report that their clients communicate with sufficient candor to allow adequate representation. Thus, although confidentiality may provide a meaningful incentive for communication in some cases, it does not have to take the form of an absolute privilege that guarantees total secrecy.

Because instrumental necessity does not justify an absolute privilege, the unique responsibilities of public sector practice can help to determine a more appropriate tailoring. The government attorney has a duty to promote the public interest, and, as many commentators have recognized, the important democratic values of transparency and openness in government bear substantially on this interest. I do not attempt the complex task of delineating the privilege in this Note. However, in light of the government attorney's unique responsibility to the public, courts should weigh the importance of open government heavily as they determine the scope of the privilege for government entities.

A. A CLIMATE OF OPENNESS

The attorney-client privilege operates against a backdrop of other provisions designed to promote openness in government. Every state has FOIA provisions

interviewed, I either called a general telephone number or sent an email to a general email address for a government entity. The attorneys I contacted were exceedingly generous with their time; several discussions exceeded an hour in length.

I acknowledge the limitations of my research. First, the interviews were not standardized: although I attempted to cover the same set of issues in each interview, the order and phrasing of my questions varied somewhat depending on my interviewee's responses. Thus, the information I gleaned may be used for only the broadest of quantitative comparisons; any more specific analysis is likely to be deceptive. My sample of attorneys was also non-representative. Although I attempted a degree of randomization by contacting the general number or email address for government counsel, the attorneys with whom I eventually spoke cannot be described as a random sample. They may have agreed to speak with me due to their specific experience with the privilege, their seniority in the office, their familiarity with ethics issues, or simply their lighter workload. Finally, there might of course be a discrepancy between what attorneys *say* about the privilege to an interviewer and what they actually *do* on a daily basis.

Despite these obvious shortcomings, I felt that the interview methodology I employed was appropriate to a nuanced and complex issue such as the attorney-client privilege. Objective questionnaires would have allowed greater standardization and more potential for quantitative analysis, but also might have encouraged attorneys to craft cautious, lawyerly responses. The interviews also frequently yielded interesting information that a questionnaire would not have uncovered because I would not have asked about it.

To facilitate discussion I assured all attorneys that information they shared with me would be kept confidential, and that they would not be identified by state, agency, or name. The source for each quotation in the Note has been anonymized, and all identifying information has been redacted. Several attorneys requested copies of my written product for their records, which I provided upon completion.

and other public records acts, which are designed to allow public access to virtually all government documents that do not fall within a recognized exception. Many jurisdictions also have some version of an open meetings act, which allows public attendance at any meeting between government officers unless a recognized exception applies. Paul Rice has observed that the extent of open government laws in seven states abolishes the government attorney-client privilege altogether;¹¹³ other states provide only a limited exception for attorney-client communications concerning pending claims or litigation.¹¹⁴ Moreover, Rice notes, “there have so far been no reported adverse consequences from this action.”¹¹⁵ These open government provisions have shaped the expectations of the government employees they regulate. As one state attorney I interviewed explained, “people in state government are used to operating under public scrutiny and being very candid.”¹¹⁶

As discussed in Part I.B, a few states also have adopted the Uniform Rules of Evidence, with its provision that the attorney-client privilege does not apply unless the communication is in preparation for litigation or some other proceeding.¹¹⁷ Attorneys I spoke to from these states differed in their assessment of how this evidentiary provision played out in practice: one stated that “for all practical purposes, we treat it as though there is no privilege,”¹¹⁸ while another hesitated before commenting, “I think most people don’t actually know about the exception. It hasn’t come up.”¹¹⁹ Still, at least in those states where attorneys are aware of the limitations on the privilege, it seems there is little expectation of confidentiality.

Uncertainty as to who controls the privilege also reduces the expectation of confidentiality. Ordinarily only the client can waive the privilege,¹²⁰ but in the government context, the client might be viewed as the individual officer, the agency, the executive branch, the government as a whole, or even the citizens of the state or municipality.¹²¹ In some cases, the identity of the client may vary depending on the structure of the government entity and the nature of the matter

113. See Paul R. Rice, *The Government’s Attorney-Client Privilege: Should It Have One?*, PUB. COUNS. NEWSLETTER, (Md. St. B. Ass’n, Baltimore, MD), <http://www.acprivilege.com/articles/acgov.md.htm>.

114. Leslie, *supra* note 16, at 504-5.

115. Rice, *supra* note 113.

116. Telephone Interview with State Attorney (“SA”) #4 (Nov. 30, 2005).

117. See *supra* Part I.B.

118. Telephone Interview with SA #1 (Nov. 22, 2005).

119. Telephone Interview with SA #2 (Nov. 29, 2005).

120. FED. R. EVID. 503(b) (Proposed official draft 1969).

121. See Paulsen, *supra* note 50, at 487-92 (analyzing this question in the federal context and concluding that the “client” of an attorney working in the White House Counsel’s office is the government as a whole); see also MODEL RULES OF PROF’L CONDUCT Rule 1.13 cmt.9 (2004) [hereinafter MODEL RULES] (“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.”).

at hand.¹²² Many attorneys I interviewed agreed that the client's identity is fluid; one state attorney recalled "a time when I spent an hour and a half speaking with our antitrust attorneys to figure out who the client was."¹²³

Although such difficult questions of client identity do arise, the default presumption is that the agency is the client. As the Restatement (Third) of the Law Governing Lawyers states, "For many purposes, the preferable approach . . . is to regard the respective agencies as the clients and to regard the lawyers working for the agencies as subject to the direction of those officers authorized to act in the matter involved in the representation."¹²⁴ In practice, most state attorneys adopted this presumption, agreeing that the agency was the client for the majority of the matters they handled, while municipal attorneys viewed the city council as their client.

The fact that the client is usually an entity creates some of the same difficulties as it does in the corporate context: because the agency itself cannot control the privilege, it is unclear which employees can act on its behalf to waive or assert the privilege. In practice, the agency head seems to control the privilege in most states, although again this has not been tested extensively in the courts. A few state attorneys also thought that the governor might have input into whether to waive or maintain the privilege.¹²⁵ Others guessed that the governor could waive the privilege over the agency head's objections, but added that this had never occurred.¹²⁶ At least one state has a "control group" test, in which only one of a select few high-ranking agency officers can assert the privilege.¹²⁷ In the municipal setting, the two attorneys I spoke with agreed that the privilege could be waived by a vote of the majority of the city council.

The important point is that in most cases an individual government employee exercises little or no control over the waiver of the privilege. If an agency employee discloses sensitive information to a government attorney, the head of

122. See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 97 cmt. c (2000) ("No universal definition of the client of a governmental lawyer is possible Those who speak for the governmental client may differ from one representation to another. The identity of the client may also vary depending on the purpose for which the question of identity is posed.").

123. Telephone Interview with SA #17 (Jan. 20, 2005).

124. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 97 cmt. c; see also *United States v. AT&T*, 86 F.R.D. 603, 617 (D.D.C. 1979) (stating that, while the identity of the government attorney's client is unclear, it "clearly includes the attorney's own agency"); Jeffrey Rosenthal, *Who is the Client of the Government Lawyer?*, in *ETHICAL STANDARDS IN THE PUBLIC SECTOR: A GUIDE FOR GOVERNMENT LAWYERS, CLIENTS, AND PUBLIC OFFICIALS* 13, 24 (Patricia Salkin ed., 1999) ("[T]he government lawyer is ethically bound to represent the agency by whom he or she is employed . . .").

125. See, e.g., Telephone Interview with SA #3 (Nov. 29, 2005).

126. Telephone Interview with SA #7 (Dec. 5, 2005). But see, e.g., Telephone Interview with SA #10 (Dec. 9, 2005) ("My first reaction is that, although the agency head is appointed by the governor, the advice is to the agency, not to the governor.").

127. Telephone Interview with SA #6 (Dec. 5, 2005). Interestingly, this test seems very similar to the one rejected by the Court in the corporate context in *Upjohn*. See *United States v. Upjohn*, 449 U.S. 383, 390-92 (1981).

the agency can later waive the privilege over the employee's objection. Relatedly, the attorney has an ethical responsibility to tell the head of the agency when an employee reveals information of potential legal concern.¹²⁸ Thus, for most employees, there is little certainty of confidentiality even to the extent that the privilege exists in their particular jurisdiction.

The possibility of waiver might provide little disincentive for communication if employees felt reasonably sure that their superiors would not waive the privilege. Yet this certainty does not seem to exist in practice: many attorneys attested to substantial media and political pressures that often prompted waiver of the privilege even if a government entity was legally entitled to assert it. As one state attorney explained:

There's nothing in the Open Records Act that was intended to obviate the attorney-client privilege. But there are pressures from the media if they are running their stories and they want to know something right away. The presumption is that something will be released unless it falls within a recognized exception. And sometimes, even if something would be privileged, a client will release it because there is political pressure. A lot of times the client doesn't want to incur the wrath of the public . . . quite frankly, after you get hammered in the headlines for several days, the attorney-client privilege becomes secondary.¹²⁹

Other attorneys agreed that asserting the privilege required a certain expenditure of political capital that sometimes was not worth the benefit it yielded. One explained, "We usually approach it as practically as possible . . . we may advise people just to waive it. The state doesn't want to be in the position of hiding the ball."¹³⁰

The realities of government operation provide important context for an examination of the government attorney-client privilege. In many localities,

128. See MODEL RULES R. 1.13(b) (explaining that when a lawyer knows that there has been a legal violation by a member of an organization, "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"); Leslie, *supra* note 16, at 506; Barsdate, *supra* note 50, at 1379. Federal law also requires executive branch employees to report criminal wrongdoing by other employees to the Attorney General. See 28 U.S.C. § 535(b) (2002).

129. Telephone Interview with SA #6 (Dec. 5, 2005). The same attorney also mentioned that with the short deadline set by the state's Open Records Act, media pressure sometimes even made it difficult to review all requested documents prior to release. See Telephone Interview with SA #17 (Jan. 20, 2006) ("I dealt with [media pressure] in a situation involving the regulation of charities, where the attorney general is the client because there is no separate agency that regulates it. So we went ahead and opened up all the files on a matter, and decided not to assert the privilege, although we could have."); Telephone Interview with SA #11 (Dec. 13, 2005) ("In representing one of our state agencies, you have to be cognizant of the fact that whatever we do, the agreement will eventually be public. Whereas in the private sector you're not going to have Joe Public knocking on the door.").

130. Telephone Interview with SA #7 (Dec. 5, 2005); see also Telephone Interview with SA #3 (Nov. 29, 2001) ("We might be encouraging our clients to waive the privilege as a matter of public policy. As a practical matter, political pressure might make waiving the privilege the best thing to do.").

officials are already accustomed to substantial public scrutiny of their actions as a result of various open government provisions. Sometimes such provisions effectively moot the privilege altogether. Moreover, even in governments where the privilege continues to have teeth, government officers are not guaranteed confidentiality. Because a high-ranking official—in most cases, either the agency head or the governor—controls the privilege, the individual employee has no direct control over its waiver. At the local government level, because the city council as a whole decides to waive the privilege by majority vote, an individual council member also lacks absolute control over the waiver of the privilege. Particularly given that external pressure from the media or other groups may make disclosure of privileged information politically prudent even where not legally compelled, most officers are not in a position to rely on the privilege to shield their communications.

The highest-ranking officials, such as agency heads, exert more direct control over the waiver of privilege. However, open government provisions still apply to at least some of their communications. Moreover, media scrutiny is likely to be much greater for high-ranking officials, leading to situations where the most prudent course of action is to release the communications. Even when an agency head wishes to assert the privilege, she may face significant pressure from other high-ranking officers to waive the privilege. Moreover, because the privilege extends to the office or agency rather than the individual, even if a high-ranking official decides to assert the privilege, her successor may later decide to waive the privilege and make the communication public.¹³¹ Other provisions, such as the deliberative process privilege, may provide greater protection for the communications of high-ranking officials than for low-to-mid-level government employees.¹³² Still, at least with respect to the attorney-client privilege, even these high-ranking officers are not wholly immune to the climate of openness that permeates government, and cannot presume that their communications with their attorneys will never become public.

B. INSTRUMENTAL CONCERNS

The climate of openness present in government provides a backdrop for

131. See Rosenthal, *supra* note 124, at 26 ("Should the agency head resign or otherwise terminate service and be replaced with a different individual, it is the new agency head that speaks on behalf of the agency and thus will be able to assert or waive the privilege."); Leslie, *supra* note 16, at 518 & n.230. Although this issue has never been litigated explicitly in the government context, the Supreme Court has recognized the right of a successor in interest to waive the privilege in the context of other entities. See, e.g., *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 356 (1985) (holding that a corporation's bankruptcy trustees can waive the privilege over the objection of the corporation's directors).

132. For example, some commentary has suggested some doubt as to whether the deliberative process privilege extends to lower-level officials. See Russell L. Weaver & James T.R. Jones, *The Deliberative Process Privilege*, 54 Mo. L. Rev. 279, 299 (1989). The deliberative process privilege is discussed in more detail *infra* note 142.

questioning the viability of the instrumental rationale in the government context. Many commentators have simply assumed that a weak attorney-client privilege in the government context would lead to an unacceptable chilling of communication between government officers and their attorneys.¹³³ Evidence given to support this generalization generally takes the form of stylized hypotheticals or citations to other commentators.¹³⁴

However, interviews with attorneys who represent government officers suggest that these prevailing assumptions do not necessarily hold true. Although attorneys reported that government officers sometimes expressed a general concern for confidentiality, the existence of an absolute privilege was not determinative in the decision to disclose information. Many attorneys regarded the privilege as qualified, nonexistent under applicable laws, or uncertain due to other considerations, yet the officers they represented continued to communicate with apparent candor. More importantly, attorneys uniformly reported that regardless of any undetected chilling effect, they were still able to provide adequate representation for their clients. Ultimately, the lack of a serious impediment to communication and the continued ability of government attorneys to represent their clients indicate that the instrumental concerns provide insufficient justification for an absolute government attorney-client privilege.

1. CANDOR

As explained above, the attorney-client privilege provides a less-than-absolute guarantee of secrecy for government employees. However, it is uncertain whether this diminished confidentiality actually reduces government employees' willingness to confide in counsel. Conversations with government counsel suggest that government employees are aware of the privilege, but it is not their central focus. The degree of concern for the privilege varies considerably from one government entity to another and from one government employee to the next.

In some cases, government officers were attentive to the privilege. One attorney, who also noted that the media was particularly active in his state, said that "not a week goes by that one of my clients doesn't say, hey [name redacted], do we have that attorney-client privilege confidentiality thing. So they are acutely

133. See, e.g., Dickmann, *supra* note 50, at 307-08 ("Chilling' effects on full and frank communications will inevitably occur."); Ellinwood, *supra* note 45, at 1321, 1325 ("If the sanctity of the privilege is not assured ex ante, a chilling effect on client communication will result."; "The fact that there will be a chilling effect is evident . . ."); Chud, *supra* note 50, at 1690 ("[T]he client would not necessarily have divulged the information to the court absent the protection offered by the attorney-client privilege."); Note, *supra* note 50, at 2012 ("[O]nly through the preservation of the certainty and scope of the attorney-client privilege, whether in the private or governmental context, can society promote the full and frank communication essential to the provision of complete and effective legal advice."); Whitley, *supra* note 50, at 1535-37 ("[T]he attorney-client privilege furthers public policy by encouraging client disclosure . . .").

134. See, e.g., Dickmann, *supra* note 50, at 307-08; Ellinwood, *supra* note 45, at 1320-21; Whitley, *supra* note 50, at 1537.

aware of it, and they ask about it continually.”¹³⁵ Another attorney acknowledged, “Sometimes when I’m talking to a client people will ask if this is privileged. Not because they did something illegal or something, but just because they want to understand the ground rules.”¹³⁶

Other attorneys felt that concern about the privilege varied from one client to the next. An attorney who represented an agency of several hundred people explained, “Some people, they have a red file folder marked privilege, and anything from me automatically goes in there. Others, it just gets buried, and they are not really aware of it.”¹³⁷ Attorneys also commented that an employee’s amount of public sector experience sometimes factored into their concern for the privilege. One stated, “We don’t talk about it a lot . . . It’s because we have a lot of repetitive clients. So they already know how the privilege works. Sometimes we get someone who we haven’t worked with before, and they will say to me, if I tell you something, is it privileged?”¹³⁸ Another agreed, “Newer people to government tend to ask about it more.”¹³⁹

Finally, a significant group of attorneys stated that their clients were not concerned with the privilege. One explained, “My experience has been, at least with the agencies I’ve dealt with, they don’t give a lot of thought to the attorney-client privilege. Sometimes I do have an agency head say, ‘I’m telling you this as an attorney,’ even if they may not know exactly what that means.”¹⁴⁰ A twenty-year veteran of a state attorney general’s office agreed: “In my experience, there hasn’t been much said about it in normal day-to-day representation.”¹⁴¹ To some extent, the lack of concern for the attorney-client privilege may have been due to other confidentiality provisions that exist in some jurisdictions, such as the deliberative process privilege.¹⁴² Still, it seems likely that many

135. Telephone Interview with SA #6 (Dec. 5, 2005).

136. Telephone Interview with SA #3 (Nov. 29, 2005).

137. Telephone Interview with SA #10 (Dec. 9, 2005).

138. Telephone Interview with SA #2 (Nov. 29, 2005).

139. Telephone Interview with SA #5 (Dec. 2, 2005).

140. Telephone Interview with SA #12 (Dec. 14, 2005).

141. Telephone Interview with SA #13 (Dec. 15, 2005).

142. For a thorough discussion of the deliberative process privilege, see Weaver & Jones, *supra* note 132. As the authors explain, the privilege protects predecisional communications among government officials that make recommendations or express opinions on legal or policy matters. *Id.* at 290, 296. The privilege is qualified, and can be overridden on a showing of sufficient need. *Id.* at 315-20. The privilege is available to federal government officials and to state and municipal officials in federal court, and has been recognized by many, though not all, state courts. See Kirk D. Jensen, Note, *The Reasonable Government Official Test: A Proposal for the Treatment of Factual Information Under the Federal Deliberative Process Privilege*, 49 DUKE L.J. 561, 561-65 & n.14 (1999) (collecting cases and other authority).

Similar to the attorney-client privilege, the deliberative process privilege has been justified on grounds of instrumental necessity. See, e.g., Michael N. Kennedy, *Escaping the Fishbowl: A Proposal to Fortify the Deliberative Process Privilege*, 99 NW. U. L. REV. 1769, 1800-01 (2005) (“[T]he basic assumption that people speak more freely in private than in public is so deeply rooted in our law that it would be odd if such an insight were not recognized in the context of government deliberations as it is in so many other contexts.”); Weaver & Jones, *supra* note 132, at 316 (“One would also expect some administrators to be more cautious in their future

government clients simply are not overly preoccupied about whether the privilege is available to protect their disclosures.

Regardless of whether their clients expressed concerns about confidentiality, most attorneys felt that these concerns did not significantly constrain communications with their clients. An attorney from a state with broad open government laws commented, "There's really not much of a chilling effect. People just kind of do their job and don't think about things becoming public record."¹⁴³ The observation suggests that in many cases the fact that government employees need legal advice to "do their job" is sufficient incentive to communicate with lawyers, regardless of the contours of the privilege.¹⁴⁴ Another attorney, whose state supreme court had held that the attorney-client privilege did not apply in litigation between agencies, nonetheless felt that the decision had not made clients significantly less forthcoming: "In general I think it doesn't make a difference. It's kind of like putting TV cameras around. For a while people modify their behavior, but then they forget and go back to what they were doing before."¹⁴⁵ An attorney who worked in a state where the governor had recently released an agency memo without seeking permission from the agency nonetheless believed that the incident would not chill communications: "This won't really affect things. Maybe on the margin people will be a little less willing to talk, but for the most part, no."¹⁴⁶ On the whole, attorneys stated that their clients were sufficiently candid with them, and felt that concerns about the privilege did not conflict with the desire to obtain accurate legal advice through frank disclosure.

If anything, attorneys felt that their clients become concerned about the privilege *after* disclosing something, rather than tempering their candor pre-disclosure. One state government attorney commented,

I have not ever had someone say to me, I didn't come to you because I thought someone might get this information later. So I haven't found that our open government has created obstacles to agencies getting legal advice . . . I think most don't think about it until after the fact, and they say, wow, I wish I hadn't said that.¹⁴⁷

Another attorney explained that "in many cases, people want the attorney-client privilege because they just don't want to deal with the consequences. That's just

deliberations [if there were no privilege]."). However, commentators have also aired misgivings about the viability of the instrumental rationale for the deliberative process privilege. *See, e.g.,* Gerald Wetlauffer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 IND. L.J. 845, 886-88 (1990) (questioning whether the absence of the privilege would in fact chill communication).

143. Telephone Interview with SA #8 (Dec. 6, 2005).

144. *See* Leslie, *supra* note 16, at 498-99.

145. Telephone Interview with SA #4 (Nov. 30, 2005).

146. Telephone Interview with SA #3 (Nov. 29, 2005).

147. Telephone Interview with SA #10 (Dec. 9, 2005).

practical.”¹⁴⁸ The concern that a previous statement will become public, however, does not provide as compelling a justification for the privilege as the concern that the statement will not be made in the first place, because no chilling of communication has taken place.

Some attorneys even remarked that they wished their clients were *less* forthcoming with information, particularly in the context of electronic communications. One state attorney explained regretfully,

Things are forwarded so easily. I’ve sent something on email responding to an email from an agency employee, and they forward it to all the managers, and then those people forward it to someone. So I don’t know how many people it went out to – it could be in the hands of a hundred people! People think, ‘it’s just email.’¹⁴⁹

Another added, “Every once in a while I have to send out a reminder saying, ‘please remember to mark this privileged if it’s from me.’ Another thing is with email, sometimes people will send me a message and cc, like, seven or eight people.”¹⁵⁰ In such cases, attorneys felt that their clients were not thoughtful about confidentiality and wished that they would be more circumspect about their disclosures.

It would be an exaggeration to say that attorneys unanimously agreed that their clients were willing to be candid regardless of the privilege. One state attorney felt that,

there are some situations in which clients wouldn’t be as frank if the privilege wasn’t there One of the problems we have is getting our clients to come to us before they take action, because so many times folks think all lawyers do is say no. I think that they will be even more reluctant if it’s not confidential. And I think we would be less effective at serving them.¹⁵¹

Nonetheless, the same attorney readily acknowledged that his clients “don’t have *absolute* assurance, because you can’t tell what a court is going to do,”¹⁵² suggesting that to the extent clients do need the privilege to feel comfortable disclosing information, the privilege still may not need to be absolute. Another attorney explained that “for a number of matters that are sensitive or deal with issues of great importance, people want to know that the communications are covered” by the privilege.¹⁵³ Aside from these two remarks, attorneys did not

148. Telephone Interview with SA #16 (Dec. 20, 2005).

149. Telephone Interview with SA #12 (Dec. 14, 2005).

150. Telephone Interview with SA #10 (Dec. 9, 2005).

151. Telephone Interview with SA #3 (Nov. 29, 2005).

152. *Id.* (emphasis added).

153. Telephone Interview with SA #9 (Dec. 7, 2005). In contrast to most other interviewees, this attorney had been in public practice for less than a year and had previously practiced in the private sector for fourteen years. She was generally more cautious in her responses than were most other interviewees.

emphasize the necessity of the privilege.

Some attorneys also admitted difficulty in persuading their clients to disclose information to them, but attributed this to factors unrelated to uncertainty regarding the privilege. One attorney, who had worked in a state attorney general's office for more than twenty years, remarked that "you find that employees aren't forthcoming if they're not doing the right thing, regardless of whether there's a privilege."¹⁵⁴ Another attorney, who also had worked in the public sector for about twenty years, explained that resistance to disclosure "sometimes comes up with disgruntled employees. Like maybe they're unhappy with the direction something is going, or with the agency head. So they're less willing to talk to the attorney, because they think why would I talk to you, you're the enemy too."¹⁵⁵ Neither of these impediments to candor would be remedied by an absolute privilege.

At a recent ABA teleconference on Ethics for Government Attorneys, panelist Patricia Salkin argued strongly in favor of a government attorney-client privilege. However, she also remarked,

It's common for all different kinds of staff to come in and spill their guts about vouchers not filled out correctly, about all kinds of potential ethics issues going on with other people in the office and they think that they can go and tell the lawyer to clear their conscience and walk out and feel good about it¹⁵⁶

Salkin's comment exemplifies an underlying contradiction in the reasoning of many commentators: if the point of the privilege is to facilitate candor, yet government employees tend to reveal information even without the privilege, then what purpose does the privilege serve? The point of the privilege is not simply to conceal information for the convenience of the government attorney and her client—if the privilege is to exist, there must be some other policy rationale for its existence.

In sum, the interviews with government attorneys provide at most limited support for the instrumental justification for the attorney-client privilege.¹⁵⁷ Some clients do express concern about the privilege, but for the most part, attorneys indicated that their clients seem to think about the privilege infrequently, if at all. Moreover, the interviews also suggested that for many clients,

154. Telephone Interview with SA #4 (Nov. 30, 2005).

155. Telephone Interview with SA # 15 (Dec. 19, 2005). An absolute privilege would not make a difference in this situation because the individual employee would not have control over the assertion of the privilege.

156. Audio CD: Everyday Ethics for Government Attorneys, held by the Am. B. Ass'n Center for Continuing Legal Educ. (Dec. 16, 2005) (on file with author).

157. It is worth pointing out that the interviews cited in this section have captured *lawyers'* perceptions of their clients' disclosure incentives, while the clients themselves might tell a somewhat different story. Nonetheless, lawyers' opinions on whether their clients are forthcoming still provide valuable information. If an attorney believes that her client is generally candid, it suggests that, although the client may not always disclose every last detail, the level of disclosure is sufficient to satisfy the attorney's expectations and does not cause discernable interference with the representation.

the existence of the privilege is not determinative of their decision to disclose. Although the knowledge that a communication is privileged may put clients' minds at ease, they also seem not to know exactly what the privilege means, or even to *need* to know exactly what it means, in order to disclose information.

Not surprisingly, attorneys tend to think about the privilege much more than their clients do. As one attorney said, "I do think that agency folks don't think in advance about the privilege. I think attorneys think about it more."¹⁵⁸ However, attorneys' concerns surrounding the privilege seemed to consist mainly of fear that an employee would accidentally waive the privilege, thereby revealing something that would be disadvantageous in litigation. They were less concerned that the uncertain legal status of the privilege would prevent their clients from communicating candidly. Indeed, most attorneys' efforts with respect to the privilege focused on making sure their clients did not inadvertently reveal privileged information.¹⁵⁹

Perhaps the most accurate conclusion to draw is simply that the importance of the privilege in facilitating disclosure varies from one employee, agency, or state to the next. Even this conclusion demonstrates that the instrumental rationale is less powerful than many commentators have argued. If many clients disclose all relevant information without regard to whether their conversations are privileged, then for these clients the privilege is superfluous. It prompts no increase in candor, yet shields communications from exposure, thus resulting in a net decrease in the amount of information available to the public relative to a world without the privilege.¹⁶⁰ The exact degree to which the attorney-client privilege does operate to increase candor among government employees is difficult to ascertain empirically, but in many cases the increase appears minimal.

2. QUALITY OF LEGAL REPRESENTATION

The apparent candor of government employees despite the uncertainty of the

158. Telephone Interview with SA #12 (Dec. 14, 2005).

159. For example, one attorney described her efforts as a "continuing education program between us and the agency." She explained,

Every once in a while I have to send out a reminder saying, 'please remember to mark this privileged if it's from me.' Another thing is with email, sometimes people will send me a message and cc, like, seven or eight people. Now, I don't like that—I will reply just to the sender, and remind them that it's confidential.

Telephone Interview with SA #10 (Dec. 9, 2005). Another attorney explained, "What we try to train our clients to do is be careful with cc lists, and if they send emails on or forward them, that they have done thoughtful consideration of who they're sending it to." Telephone Interview with SA #15 (Dec. 19, 2005). A municipal attorney remarked, "I have to remind people on staff what it [the privilege] is and who it belongs to . . . [S]omeone will want to tell me something, and I have to tell them that I may need to share that with the city manager and the city council." Telephone Interview with Municipal Attorney ("MA") #2 (Dec. 15, 2005).

160. This contravenes Wigmore's theory of the policy underlying the privilege. *See, e.g.,* WIGMORE, *supra* note 65, § 2291.

privilege calls the instrumental necessity of the privilege into question. Still, we must also consider the ability of government attorneys to provide effective representation in the face of such uncertainty. It would be undesirable if an insufficient privilege interferes with government attorneys' ability to advise their clients or unduly disadvantages the government relative to private parties.

In interviews, government attorneys generally affirmed that they were able to advise their clients effectively despite the uncertainty of the privilege. Some reported that they occasionally modified their behavior to avoid creating a situation where sensitive information would be subject to disclosure, but they did not report negative consequences from such modification. A thirty-year veteran of the attorney general's office in a state with expansive public disclosure laws explained that because everything would become public following the conclusion of litigation, "if we have something that's particularly sensitive, we don't put it in writing. Like with witness preparation—we don't say, 'we don't want you to say this' in writing."¹⁶¹ Another attorney explained that if she goes to a meeting where she has not met everyone present, the first thing she does is find out who everyone is before she begins to talk, and "if there are people there who are not within the privilege, then I don't have a privileged conversation. I may say, 'I may need to have a talk with the director later, but here's what I can tell you today.'"¹⁶²

Commentators have questioned whether this sort of behavior modification, designed to work around a weak area in the government attorney-client privilege, might prevent attorneys from advising their clients as effectively.¹⁶³ One can certainly envision scenarios in which giving oral rather than written advice, or delaying advice to a client, might interfere with effective representation. However, government attorneys described such behavior modification matter-of-factly rather than negatively, implying that these adaptations to their working environment did not actually have a negative impact on their performance. It seemed that the uncertainty of the privilege sometimes made the *attorney's* job more difficult, but attorneys felt that in general this difficulty did not result in less effective representation for the government client.

Moreover, awareness that information could be revealed sometimes even produced desirable behavior modification. An attorney from a state that essentially treated the privilege as nonexistent except in litigation explained, "Sometimes when private attorneys come in they're startled that we don't have the privilege. But if it gives us an incentive to provide unfailingly good advice, then I think that's okay It's like a check that keeps you doing good work, the

161. Telephone Interview with SA #8 (Dec. 6, 2005); *see also* Telephone Interview with SA #4 (Nov. 30, 2005) ("We try not to put things in memos—we know it will come back to bite us.").

162. Telephone Interview with SA #15 (Dec. 19, 2005).

163. *See, e.g.,* Ellinwood, *supra* note 45, at 1320-21.

knowledge that something could be discoverable.¹⁶⁴ Another attorney could not recall a time when the privilege had been asserted in his division outside of litigation. Nevertheless, he said,

In thirty-five years, I never felt constricted in terms of what we wrote. Now when I came here, they said to me, if you're prepared to put it on paper, you better be prepared to announce it from the street corner. But we give the best advice we can here.¹⁶⁵

These attorneys' comments suggest that, in some cases, the knowledge that communications might become public helps to ensure that government attorneys provide high-quality legal advice.

The other major concern relating to the quality of legal representation is that without a robust government attorney-client privilege, the government will face a disadvantage in proceedings against private parties. Government attorneys readily acknowledged that limitations on the privilege presented additional difficulties, particularly in situations where there were competing interests at stake. One municipal attorney characterized government representation as "much more difficult than having private clients" and explained that sometimes city council members would leak information to acquaintances.¹⁶⁶ Several attorneys also remarked that certain information was more freely available to the other side due to state FOIA laws that narrowed the attorney-client privilege. A state attorney explained, "If you think the other side hasn't produced everything, the tools to compel them are more limited for us."¹⁶⁷

Although attorneys were forthright about these exigencies, they also felt that some additional difficulty was inherent in government practice. No attorney could recall a situation when constraints on the privilege had resulted in significant disadvantage to the government. Interestingly, some attorneys indicated that, although their litigation opponents in the private sector had far more access to potentially relevant information, this apparent liability often failed to materialize in practice because their opponents failed to avail themselves of the

164. Telephone Interview with SA #1 (Nov. 22, 2005). He also commented that "I haven't heard *any* experienced attorney here complain. I've heard nothing, zippo. I think everybody is comfortable with it."

165. Telephone Interview with SA #11 (Dec. 13, 2005).

166. This municipal attorney recalled,

When I was working as an attorney for another community . . . we got authorization for a range of settlements in a personal injury case. But then someone leaked it to the plaintiffs. So when we went to negotiate, they knew the high end, and that was where they were starting from. It ended up costing us, like, \$150,000. So . . . it's a little like litigating with one hand tied behind your back.

Telephone Interview with MA #1 (Dec. 1, 2005). Such clearly problematic scenarios might be somewhat more likely in the municipality context, where a single attorney often represents a city council entity comprising several elected individuals with divergent interests.

167. Telephone Interview with SA #10 (Dec. 9, 2005).

broad disclosure provisions affecting government parties.¹⁶⁸

Moreover, even if the government might be slightly disadvantaged relative to private parties in some circumstances, many attorneys stressed that this was simply a cost of the openness critical to quality public sector legal representation. Public scrutiny, they felt, was an integral component of their role. A thirty-five year veteran of a state attorney general's office stated firmly, "When dealing with public agencies you want as much disclosure as possible."¹⁶⁹ Another expressed agreement with a state decision abrogating the privilege in a criminal matter, explaining, "This is a public agency, and there were public funds involved. It's really a question of the public interest, and you don't want the attorney-client privilege to get in the way of that."¹⁷⁰ Even an attorney who analogized representation of a municipality to "litigating with one hand tied behind your back" readily agreed that "one has to balance the fact that this is an annoyance in doing our jobs with the needs of the public for information and this principle of open government."¹⁷¹ Thus, according to some government attorneys, a claim that abrogating the privilege impairs the quality of legal representation overlooks the contravening benefit of transparency in government.

On the whole, attorneys seemed more concerned about the privilege once litigation was ongoing or imminent. Even attorneys who were generally content with a very minimal attorney-client privilege often attached greater importance to confidentiality once they were actually in litigation, noting the importance of other protections such as the work product privilege.¹⁷² Provided that there was adequate protection for conversations undertaken in anticipation of litigation, attorneys were much less concerned about the abrogation of the privilege. The priority that attorneys place on shielding litigation preparation from scrutiny is unsurprising, and given our adversarial legal system, it seems desirable for such preparation to remain privileged. Thus, the eventual tailoring of the privilege should provide greater protection for such communication.

C. THE UNIQUE ROLE OF THE GOVERNMENT ATTORNEY

Discussions with government attorneys suggest that the traditional instrumental rationale cannot justify an absolute attorney-client privilege in all circumstances. In lieu of this traditional understanding, we should look to the wide variety of authorities that have conveyed a public-spirited vision of the government attorney's role to guide us in tailoring the privilege appropriately.

168. For example, one attorney remarked, "It's all open, so opposing counsel could ask to see the entire file, they could ask to see attorney work product from a different case that is similar. But it doesn't happen." Telephone Interview with SA #8 (Dec. 6, 2005).

169. Telephone Interview with SA #11 (Dec. 13, 2005).

170. Telephone Interview with SA #12 (Dec. 14, 2005).

171. Telephone Interview with MA #1 (Dec. 1, 2005).

172. Telephone Interview with SA #1 (Nov. 22, 2005).

This brief subsection cannot fully explore the nuances of the government attorney's role, nor will it attempt to delineate the proper scope of the privilege. Instead, I hope to highlight these issues as important areas for further research.

Various legal authorities have hinted that the government attorney has a special set of responsibilities. In *Berger v. United States*, the Supreme Court explained:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.¹⁷³

While *Berger* specifically addressed the duties of prosecutors, many lower court decisions have echoed its sentiments when discussing government attorneys more generally¹⁷⁴—as have a number of respected legal commentators.¹⁷⁵ The *Model Rules of Professional Conduct* also support the idea that government attorneys have a unique responsibility to act for the public good. The comment to Model Rule 1.13 explains, “a government lawyer may have authority under applicable law to question [government officials’] conduct more extensively” than would a lawyer for a private organization.¹⁷⁶ As a result, “a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved.”¹⁷⁷ In some situations, government attorneys even represent the general public in a more literal sense: for example, in the system of referendums and initiatives employed by twenty-four states, government attorneys have primary responsibility for defending enacted measures against legal challenge.¹⁷⁸

This public-spirited conception of the government attorney's role is mirrored

173. *Berger v. United States*, 295 U.S. 78, 88 (1935).

174. See, e.g., *Douglas v. Donovan*, 704 F.2d 1276, 1279-80 (D.C. Cir. 1983) (“As officers of this court, counsel have an obligation to ensure that the tribunal is aware of significant events that may bear directly on the outcome of litigation This is especially true for government attorneys, who have special responsibilities to both this court and the public at large.”).

175. See, e.g., Steven K. Berenson, *Public Lawyers, Private Values: Can, Should and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789 (2000) (“It is an uncontroversial proposition in mainstream American legal thought that government lawyers have greater responsibilities to pursue the common good or the public interest than their counterparts in private practice”); Douglas Letter, *Lawyer and Judging on Behalf of the United States: All I Ask is for a Little Respect*, 61 GEO. WASH. L. REV. 1295, 1297 (1993) (“In theory, federal public servants have a single master: the people of the United States.”); Ralph Nader & Alan Hirsch, *A Proposed Right of Conscience for Government Attorneys*, 55 HASTINGS L.J. 311, 313-14 (2003) (explaining the government attorney's special responsibilities); Elisa Ugarte, *The Government Lawyer and the Common Good*, 40 S. TEX. L. REV. 269, 274 (1999) (citing the government lawyer's “obligation as a public servant”); Note, *Rethinking the Professional Responsibilities of Federal Agency Lawyers*, 115 HARV. L. REV. 1170, 1192 (2002) (citing a “strong moral intuition that government attorneys should bear some responsibility for considering public values”).

176. MODEL RULES R. 1.13 cmt. 9.

177. MODEL RULES R. 1.13 cmt. 9.

178. See, e.g., Telephone Interview with SA #7.

by the attitudes of government attorneys themselves. In the interviews I conducted, attorneys almost universally agreed that their role was different from that of private attorneys because a concern for the public interest informed all of their decisions.¹⁷⁹ Their awareness of this public responsibility sometimes caused them to alter their behavior in a variety of ways to further what they viewed as the public good. One attorney explained,

We will be far less aggressive in objecting at a hearing when a public employee is being questioned. The idea is that this is a public employee and he should have to explain himself. Even if opposing counsel is asking fifty questions, and some of it is moving a little bit into something that is probably privileged, we will let it continue.¹⁸⁰

Similarly, some attorneys explained that in certain situations they voluntarily disclose information that might be privileged. A state attorney recalled a situation involving the regulation of charities, for which the attorney general's office is solely responsible: "We went ahead and opened up all the files on the matter, and decided not to assert the privilege, although we could have But if it's more appropriate and more fair to the people of the state, then in our office, we can make that determination."¹⁸¹ An attorney who had worked in government for twenty-two years spoke for many of his colleagues when he commented, "Our mantra is that what we do is for the benefit of the people . . . Unlike private attorneys, we don't zealously represent clients."¹⁸²

All this evidence suggests that government attorneys do not have the unilateral responsibility to their clients that private attorneys do. Although government attorneys do advocate forcefully for the positions of the government officers and

179. See, e.g., Telephone Interview with SA #1 (Nov. 22, 2005) ("Our mantra is that what we do is for the benefit of the people."); Telephone Interview with SA #2 (Nov. 29, 2005) ("I think that while my responsibility is to the agency, I also have a responsibility to the [attorney general's] office which defends the entire state. So I have a broader client."); Telephone Interview with SA #3 (Nov. 29, 2005) ("We've got to play fair all the time. Even when our clients want us to have four rows of teeth, we have to remember that we represent the state. We can't play hardball even when we want to."); Telephone Interview with SA #4 (Nov. 30, 2005) ("You are providing a vigorous defense, but you also have to look at the public good. And part of that is looking at the whole public picture."); Telephone Interview with SA #7 (Dec. 5, 2005) ("[Representing the government] is really quite different, because in representing the agencies, you also represent the state of [redacted]. You have to think about what is good for the state, and good for the way government works There is this sense of public service."). Telephone Interview with SA #8 (Dec. 6, 2005) ("Other times it's more where you act as an advisor to the agency, like you say, have you considered the impact on the taxpayers, or on the public fisc. The agency may say, we just want this issue to go away, and I'll say, this is going to make a bad precedent, or to be a bad thing for the other agencies, or something."). Nearly every government attorney discussed the idea of serving the public interest without prompting.

180. Telephone Interview with SA #7 (Dec. 5, 2005).

181. Telephone Interview with SA #17 (Jan. 20, 2006).

182. Telephone Interview with SA #1 (Nov. 22, 2005); see also Telephone Interview with SA #15 (Dec. 15, 2005) ("I think it's very suspicious when an agency does something to hide something that would otherwise be public. There's this question of the public interest, and basic principles of democracy. If there's no public policy reason to invoke the privilege, why would you?").

agencies that they represent, their responsibility to the general public is always in the background and at times affects the manner in which they represent their clients.

Courts have suggested that these broad concerns of public interest and justice come to bear in delineating the extent of a privilege. For example, in *United States v. Arthur Young & Company*, the court declined to create a privilege for an accountant's work product on the grounds that an independent auditor such as a public accountant "assumes a *public* responsibility transcending any employment relationship with the client."¹⁸³ The Court explained that the public accountant "owes ultimate allegiance to the corporation's creditors and stockholders as well as to the investing public. This 'public watchdog' function demands that the accountant maintain total independence from the client at all times and requires complete fidelity to the public trust."¹⁸⁴ There are important differences between an accountant and an attorney for the government. Still, the Court's emphasis on the accountant's public responsibilities demonstrates that the public interest is an important concern in determining the extent of a privilege.

Ultimately, this Note does not attempt to formulate the exact circumstances under which the attorney-client privilege protects communications between government officers and their attorneys. However, conversations with practicing government attorneys indicate that the instrumental justification carries far less weight than it has traditionally been assigned. Consequently, we must look elsewhere for guidance in sculpting the contours of the government attorney-client privilege. An array of authority suggests that the paramount responsibility of the government attorney is to work for the public interest, and it is with the public-spirited values of governmental transparency and openness in mind that courts should attempt to craft a suitable tailoring of the privilege.

V. CONCLUSION

The most commonly cited rationale for the attorney-client privilege is instrumental: the privilege is necessary to facilitate candid communication between clients and attorneys. However, in the government entity context, this justification falls short. The protection afforded by the privilege is already uncertain, due to various open government provisions and political and media pressures, yet government employees continue to communicate with sufficient candor to allow government attorneys to provide effective representation.

Thus, a more limited version of the attorney-client privilege is appropriate for the public sector, and my hope is that future research will elaborate on the shape the privilege should take. Courts, commentators, ethical canons, and attorneys themselves have noted the unique responsibility of the government attorney to

183. *United States v. Arthur Young & Co.*, 465 U.S. 805, 817 (1984) (emphasis in original).

184. *Id.* at 818.

serve not only the government entity she represents, but also the public interest. Ultimately, defining the privilege with this obligation in mind will best facilitate the important democratic values of transparency and openness in government.