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THE GOVERNMENT-CLIENT PRIVILEGE AFTER *OFFICE OF THE PRESIDENT V. OFFICE OF THE INDEPENDENT COUNSEL*

Lance Cole*

I. INTRODUCTION

Last June the Supreme Court denied certiorari in *Office of the President v. Office of the Independent Counsel*.¹ The denial of certiorari left standing a decision of the Eighth Circuit Court of Appeals requiring the White House to produce to Independent Counsel Kenneth W. Starr two sets of notes prepared by White House lawyers during discussions with Hillary Rodham Clinton and her personal counsel.² In that decision the Eighth Circuit rejected arguments that the notes, taken by government lawyers in the course of their official duties, were protected from disclosure by a governmental attorney-client privilege or the attorney work-product doctrine.³

The Supreme Court had been widely expected to issue an opinion in the case,⁴ and the unexpected denial of certiorari has left many government attorneys questioning whether and to what extent the Eighth Circuit opinion may affect them and their governmental clients. This Article analyzes how the Eighth Circuit decision may affect attorneys in the legal departments of state and local governments. The first section of the Article discusses the extent to which the governmental attorney-client privilege remains viable in light of the Eighth Circuit decision and the Supreme Court's denial of certiorari. The conclusion is that while the Eight

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1. 117 S. Ct. 2482 (1997).

2. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997), cert. denied, 117 S. Ct. 2482 (1997).

3. *Id.* at 915, 924.

4. See, e.g., Marcia Coyle, *Privilege Ruling Could Touch All Government Attorneys*, NAT'L L.J. vol. 19, No. 38, May 19, 1997.

Circuit decision suggests that, in certain limited circumstances, government attorneys no longer can take for granted that a governmental attorney-client privilege is available, in most circumstances the privilege probably remains viable. To assist government attorneys who must function in this uncertain environment, the article identifies a spectrum of legal matters that are likely to confront government lawyers and discusses the likelihood that a governmental attorney-client privilege remains available in such matters. The article also suggests that in some areas new procedures may be needed to ensure that the interests of the governmental entity client are protected.

The second major area of concern raised by the Eighth Circuit decision is the extent to which government attorneys can rely upon a common interest or joint defense privilege when handling legal matters for their governmental client. This issue is particularly important for state and municipal governments that may be involved in multi-party litigation and other legal matters that require cooperation and consultation with third parties and their counsel, such as large-scale construction projects and public offerings of securities to finance such projects. While the Eighth Circuit decision does not raise the same kind of fundamental question with respect to the viability of the common interest privilege as it does with respect to the governmental attorney-client privilege, it provides important cautionary guidance for government attorneys who wish to rely upon a common interest privilege. The article identifies situations in which government attorneys should exercise caution and suggests areas in which new procedures may be needed to protect the interests of governmental clients.

II. THE GOVERNMENTAL ATTORNEY-CLIENT PRIVILEGE

From the perspective of the government lawyer, the most important aspect of the Eighth Circuit decision in *In re Grand Jury Subpoena* is what the court did not decide: The Eighth Circuit clearly did not hold that there is no governmental attorney-client privilege.⁵

5. 112 F.3d at 915 (stating "We need not decide whether a governmental attorney-client privilege exists in other contexts, for it is enough to conclude that even if it does, the White House may not use the privilege to withhold potentially relevant information from a federal grand jury."). The court further provided:

Even if we were to conclude that the governmental attorney-client privi-

The limited nature of the holding in *In re Grand Jury Subpoena* does not diminish its importance. At a minimum, the case creates uncertainty regarding the application of the attorney-client privilege to government lawyers, holding that lawyers for the federal government cannot use the governmental attorney-client privilege to shield information from a federal grand jury. If construed more broadly, the decision calls into question whether government lawyers can ever assert the privilege in response to a governmental investigation or inquiry. This uncertainty regarding the viability of the governmental attorney-client privilege is important because, as the Supreme Court observed in the leading case on attorney-client privilege, “[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.”⁶ The analysis that follows is aimed at reducing this uncertainty.

A. *General Availability of the Governmental Attorney-Client Privilege*

As a federal court addressing a claim of privilege in a federal grand jury proceeding, the Eighth Circuit was applying Rule 501 of the Federal Rules of Evidence. Rule 501 provides that privileges are “governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.”⁷ This rule required the court to “apply the federal common law of attorney-client privilege” to the case before it.⁸

The Eighth Circuit began its analysis with Proposed Federal Rule of Evidence 503, promulgated by the Supreme Court in 1972, which defined “client” to include “a person, public officer, or corporation, association, or other organization or entity, either public or private.”⁹ The court ac-

lege ordinarily applies in civil litigation pitting the federal government against private parties, a question we need not and do not decide, we believe the criminal context of the instant case, in which an entity of the federal government seeks to withhold information from a federal criminal investigation, presents a rather different issue.

Id. at 917-18 (citations omitted).

6. *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

7. FED. R. EVID. 501; 112 F.3d at 915 (quoting Rule 501).

8. 112 F.3d at 915 (citing *In re Bieter Co.*, 16 F.3d 929, 935 (8th Cir. 1994)).

9. *Id.* at 915 (citing PROPOSED FED. R. EVID. 503(a)(1), *reprinted in* 56 F.R.D. 183, 235 (1972)).

knowledge that the commentary to the proposed rule made clear that "[t]he definition of 'client' includes governmental bodies."¹⁰ Even though the proposed federal rule and its commentary were sufficient to establish the "broad proposition that a governmental body may be a client for purposes of the attorney-client privilege,"¹¹ the Eighth Circuit found that proposition insufficient to decide whether the White House attorneys' notes were protected by the privilege.¹²

While the court recognized that the general rule appears to be that the attorney-client privilege extends to a communication of a governmental organization, it concluded that this general rule may not apply when one agency of government claims the privilege in resisting a demand for information by another.¹³ This conclusion led the court to focus on whether the privilege can be asserted by a government agency to thwart a properly issued grand jury subpoena in a criminal case.

Before examining the court's analysis of the issues presented by a grand jury subpoena, it is important to recognize that the Eighth Circuit indicated that its holding does not call into question the viability of the governmental attorney-client privilege in other situations.¹⁴ The court also noted that cases "in which the party seeking information was a private litigant adversarial to the government" were not relevant to its analysis of the grand jury subpoena issue.¹⁵ In short, there is nothing in the Eighth Circuit opinion to suggest that the governmental attorney-client privilege should not be available to a governmental entity in civil litigation with private parties adversarial to the government.

10. *Id.* at 915-916. For an argument that the attorney-client privilege should not be available to governmental agencies, see Lory A. Barsdate, *Attorney-Client Privilege for the Government Entity*, 97 YALE L.J. 1725 (1988).

11. *Id.* at 916.

12. *See id.*

13. 112 F.3d at 916 (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 124 (Proposed Final Draft No. 1, 1996) (hereinafter RESTATEMENT)).

14. *See id.* at 921. "Assuming arguendo that there is a governmental attorney-client privilege in other circumstances, confidentiality will suffer only in those situations that a grand jury might later see fit to investigate." *Id.*

15. *Id.* at 917 (citations omitted).

*B. The Governmental Attorney-Client Privilege and
Grand Jury Subpoenas*

After considering the arguments of the parties and relevant case law, the Eighth Circuit concluded that the governmental attorney-client privilege should not be available to thwart a federal grand jury subpoena because of the "important differences between the government and non-governmental organizations such as business corporations."¹⁶ The two important differences identified by the court were that: (1) a business corporation may be subject to civil and criminal liability for the actions of its agents, while the White House faced no such exposure in connection with the Independent Counsel's grand jury investigation;¹⁷ and (2) a "general duty of public service" requires government employees and agencies to favor disclosure over concealment.¹⁸ While these two points may support a conclusion that the White House should not be able to assert a governmental attorney-client privilege to withhold information from a federal grand jury, their application to other governmental entities is less clear.

First, city and state governments can be the subject of federal regulatory and enforcement actions by agencies such as the Securities and Exchange Commission and the Environmental Protection Agency, and may be opposed to the federal government in litigation.¹⁹ In such situations the position of a state or municipal government is not analogous to the position of the White House in the Independent Counsel's investigation which, as the Eighth Circuit stressed, is an investigation of "the actions of individuals, some of whom hold positions in the White House."²⁰ A strong argument can be made that any time legitimate interests of a state

16. *Id.* at 920 (distinguishing *Upjohn Co. v. United States*, 449 U.S. 383 (1981)).

17. 112 F.3d at 920.

18. *Id.*

19. *See, e.g., United States v. City & County of Denver*, 100 F.3d 1509 (10th Cir. 1996) (granting the United States declaratory judgment that city and county's cease-and-desist order was void because it was based on a zoning ordinance that conflicted with a remedial order of the EPA); *United States v. State of Colorado*, 990 F.2d 1565 (10th Cir. 1993) (denying the United States declaratory and injunctive relief to prevent the State of Colorado and the Colorado Department of Health from asserting state administrative authority to regulate hazardous waste management at a federal facility).

20. 112 F.3d at 923.

or local government entity are at stake in litigation with the federal government or in a federal investigation or regulatory proceeding, the governmental attorney-client privilege should be available to the local government entity in the same way it is available to a corporation or other private entity. While this argument may not reach a federal grand jury investigation in which the state or local governmental entity has no criminal exposure, that unusual situation should be recognized as the exception, and not the general rule.²¹

The second factor that motivated the Eighth Circuit to deny the White House the benefits of the governmental attorney-client privilege, a duty of disclosure incumbent on the White House attorneys, does not apply with equal force to attorneys for state and municipal governmental entities. The Eighth Circuit emphasized that White House attorneys, as federal employees, are under a statutory duty to report criminal wrongdoing by other employees.²² Attorneys for state and local governments, however, are not subject to that federal statute.²³ While attorneys for state and local governments may be subject to reporting requirements in specific circumstances,²⁴ they are under no similar obligation to report

21. *Cf. id.* at 921 (stating that "confidentiality will suffer only in those situations that a grand jury might later see fit to investigate.").

22. *Id.* at 920. The statute provides:

Any information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reported to the Attorney General by the head of the department or agency, unless—

(1) the responsibility to perform an investigation with respect thereto is specifically assigned otherwise by another provision of law; or

(2) as to any department or agency of the Government, the Attorney General directs otherwise with respect to a specified class of information, allegation, or complaint.

28 U.S.C. § 535(b) (1997).

23. The statutory disclosure requirement is limited by its terms to the heads of "a department or agency of the executive branch of the Government." 28 U.S.C. § 535(b) (1997).

24. For example, state and local government attorneys are obligated to report suspected child abuse in some jurisdictions. *See, e.g.*; 20 ILL. COMP. STAT. ANN. 505/34.8 (West 1997); N.Y. Soc. Serv. § 421 (McKinney 1997). Also, state bar association rules require attorneys to report suspected misconduct of other attorneys. *See, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103(A) (1969); MODEL RULES OF PROFESSIONAL CONDUCT 8.3(A)(1983). These reporting requirements are of a different order than the federal statute applicable to the White

suspected wrongdoing by other governmental employees. More important, a legitimate interest of the state or local governmental entity in the outcome of litigation or an investigation should override any "general duty of public service" favoring disclosure and should make application of the governmental attorney-client privilege appropriate. Again, this points to the conclusion that the governmental attorney-client privilege should be unavailable to a government entity only when a grand jury seeks information in connection with a criminal investigation and the entity itself has no exposure to criminal liability.²⁵

C. The Work-Product Doctrine and Government Attorneys

The Eight Circuit also concluded that the attorney work-product doctrine was not available to the White House.²⁶ The rationale underlying this holding was essentially the same as the attorney-client privilege holding: The White House attorneys were not working in anticipation of an adversarial proceeding involving the White House, because the Independent Counsel was not investigating the White House.²⁷ The court rejected arguments that preparing for congressional hearings could suffice to meet the anticipation of litigation requirement because "the only harm that could come to the White House as a result of such an investigation is political harm."²⁸

Again, those facts are readily distinguishable from a situation in which a state or municipal government is a party, or reasonably anticipates being a party, to litigation. In those instances, the attorney work-product doctrine should be no less available to attorneys representing a state or municipal government than to attorneys representing private parties in litigation. Nothing in the Eighth Circuit's work product analysis suggests otherwise.

House attorneys, however, because they do not seek to impose a general duty to report wrongdoing.

25. *Cf.* 112 F.3d at 921 (stating that "[b]ecause agencies and entities of the government are not themselves subject to criminal liability, a government attorney is free to discuss anything with a government official—except for potential criminal wrongdoing by that official—without fearing later revelation of the conversation.").

26. *Id.* at 924.

27. *Id.*

28. *Id.*

III. THE COMMON INTEREST PRIVILEGE AND GOVERNMENT ATTORNEYS

In addition to the issue of the availability of a governmental attorney-client privilege for communications with attorneys representing state and municipal governments, the Eighth Circuit opinion calls into question the availability of the "common interest" or "joint defense" doctrine to governmental entities and their legal counsel. As the court noted, the common interest doctrine expands the traditional attorney-client privilege to protect the confidentiality of communications among attorneys representing clients with a "common interest."²⁹

The federal courts have applied the common interest doctrine broadly.³⁰ Most important for state or municipal governments seeking to protect the confidentiality or work product and consultations with co-counsel, it is well-settled that a governmental agency can share a common interest or joint defense privilege with a private party.³¹ The question raised by

29. *Id.* at 922 (citing RESTATEMENT § 126(1) and PROPOSED FED. R. EVID. 503(b)(3)). The common interest doctrine is an exception to waiver that protects "communications made in the course of an ongoing common enterprise and intended to further the enterprise." *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989). The doctrine protects both communications among parties who share a common interest and are represented by a single attorney, *see In re Regents of the University of California*, 101 F.3d 1386 (9th Cir. 1996), and communications among attorneys who represent different parties sharing a common interest, *see HBE Leasing Corp. v. Frank*, 48 F.3d 623 (2d Cir. 1995). While there is no bright-line rule for determining when a shared interest is strong enough to claim the protection of the privilege, some courts have been willing to recognize a common interest among parties who could become adversaries in later litigation, *see e.g., In re Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974*, 406 F. Supp. 381 (S.D.N.Y. 1975), or who may assert cross-claims against one another, *see e.g., In re LTV Sec. Litig.*, 89 F.R.D. 595 (N.D. Tex. 1981).

30. *See, e.g., In re Grand Jury Subpoenas*, 89-3 and 89-4, 902 F.2d 244, 249 (4th Cir. 1990) (providing: "Whether an action is ongoing or contemplated, whether the jointly interested persons are defendants or plaintiffs, and whether the litigation or potential litigation is civil or criminal, the rationale for the joint defense rule remains unchanged: persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims.").

31. *See, e.g., United States ex. rel. Burroughs v. DeNardi Corp.*, 167 F.R.D. 680, 686 (S.D. Cal. 1996) (finding a common interest between United States and plaintiff bringing a claim under The False Claims Act, even though the United States declined to intervene, because of a "substantial interest" in the success of the litigation).

the Eighth Circuit's rejection of the common interest doctrine in *In re Grand Jury Subpoena Duces Tecum* is whether that decision limits the general availability of the doctrine for governmental bodies.

Like the Eighth Circuit's holding on the governmental attorney-client privilege issue, discussed above, the common interest doctrine holding turns on the court's analysis of the interests represented by the White House attorneys. Consistent with its view that the institutional interests of the White House were not implicated in the Independent Counsel's investigation, the court concluded that "there is lacking in this situation the requisite common interest between the clients, who are Mrs. Clinton in her personal capacity and the White House."³² In the court's view, the Independent Counsel's investigation of the actions of individuals, some of whom hold positions in the White House, "can have no legal, factual, or even strategic effect on White House as an institution."³³ Because the White House's institutional interests did not coincide with the personal interests of Mrs. Clinton or other individuals being investigated by the Independent Counsel, the court held that the common interest doctrine was not available to the White House.³⁴

Once again, it is important to recognize that the Eighth Circuit's holding was based on the particular facts before the court. Nothing in the court's analysis of the common interest doctrine suggests that the doctrine should not be available in situations where legitimate institutional interests of a government entity are aligned with a private party. In situations where a state or local government entity is involved in civil litigation or other legal proceedings and wishes to share confidential information or work product with third parties who share a common interest, it should be able to rely on the common interest doctrine to protect the confidentiality of the shared information, so long as a legitimate governmental interest is at stake in the matter.³⁵

The teaching of the Eighth Circuit opinion is that a personal or

tion); *Chamberlain Mfg. Corp. v. Maremot Corp.*, No. 90 C 7127, 1993 WL 625511 (N.D. Ill. July 21, 1993) (finding a common interest between United States and plaintiff who bought stock in a corporation that supplied the Department of Defense with non-conforming gun barrels); *United States v. American Tel. & Tel. Co.*, 642 F.2d 1285, 1300 (D.C. Cir. 1980) (finding a common interest between MCI and the United States).

32. 112 F.3d at 922.

33. *Id.* at 923.

34. *See id.*

35. *See supra* note 29.

political interest of incumbent officeholders or officials is not a legitimate governmental interest that will support an assertion of the common interest doctrine.³⁶ To avoid the trap that ensnared the White House lawyers, attorneys for state and municipal governments should engage in a two-step analysis before sharing confidential information pursuant to a joint defense agreement or the common interest doctrine. First, the attorney responsible for the matter should identify the specific interest of the government entity client that supports entering into a joint defense arrangement. Classic examples of interests that will support a joint defense privilege are common interests in defending a lawsuit that could expose a government entity to monetary liability or common interests in pursuing a claim against third parties that could result in a monetary recovery or other legal relief for the government entity.³⁷ While these kinds of specific legal interests are sufficient to support a joint defense privilege, the Eighth Circuit concluded that more nebulous interests, such as "ensuring that there [is] no distortion of . . . events by political and legal adversaries,"³⁸ are not sufficient.

Once a legitimate interest of the government entity client has been identified, a second analysis is necessary to ensure that assertion of a joint defense privilege will survive judicial scrutiny. The government attorney must also consider whether there is any public disclosure obligation incumbent upon the governmental entity that might override the assertion of a joint defense privilege. For example, in one case a state open records act was applied to require the disclosure of legal advice provided to a city by the city's corporate counsel.³⁹ Procedures to implement this two-step analysis are discussed below.

36. See 112 F.3d at 923. "But even if we assume that it is proper for the White House to press political concerns upon us, we do not believe that any of these incidental effects of the White House are sufficient to place the governmental institution in the same canoe as Mrs. Clinton, whose personal liberty is potentially at stake." *Id.*

37. See generally EDNA SELAN EPSTEIN & MICHAEL M. MARTIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* (2d ed. 1989) (collecting cases).

38. 112 F.3d at 922 (quoting Brief of The White House).

39. Cf. *In re Grand Jury (Doe)*, 886 F.2d 135, 138-139 (6th Cir. 1989) (declining to hold that the City of Detroit could assert the attorney-client privilege for legal advice provided to the city council by the corporation counsel in closed meetings because under the Michigan Open Meetings Act the meetings may have been unlawfully closed).

III. CONCLUSIONS AND RECOMMENDATIONS

For the reasons discussed above, the decision in *In re Grand Jury Subpoena Duces Tecum* should not apply to attorneys representing the state and local government entities in most situations. Most important, the decision should not deprive government entities of the protections of the governmental attorney-client privilege in civil litigation or other legal disputes with third parties. Where the institutional interests of a government entity are adverse to third parties, the governmental attorney-client privilege remains available even under the strictest reading of the Eighth Circuit opinion.

A. *Grand Jury Subpoenas and Recommended Procedures*

The one situation in which the Eighth Circuit opinion might apply to a state or local government is where a federal grand jury is conducting a criminal investigation and the governmental entity is the recipient of a grand jury subpoena. Under the Eighth Circuit's rationale, because the government entity has no exposure to criminal liability, it has no need to invoke a governmental attorney-client privilege. Although governmental entities might argue that the Eighth Circuit decision should be limited to situations where one entity of the federal government is resisting a subpoena from another entity of the federal government,⁴⁰ federal courts may be inclined to read the Eighth Circuit decision more broadly in this context and give precedence to the federal interest in law enforcement. This reading would present the risk that, at least where a federal grand jury subpoena is involved, a government entity may not be able to assert a governmental attorney-client privilege.

For example, a federal grand jury might investigate a contractor or vendor that did business with a municipal government and the matters under investigation might include the vendor's business dealings with government agencies. When such an investigation is underway, attorneys representing the municipal government probably would conduct their own

40. *Cf.* 112 F.3d at 921. "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." *Id.* (emphasis supplied and citation omitted).

fact-finding and provide legal advice to government officials on matters pertaining to the grand jury investigation, such as whether or not municipal agencies could assert civil claims against the vendor. The municipal government might subsequently receive a grand jury subpoena calling for production of any and all documents that refer or relate to the vendor. In that situation, government attorneys should not assume that their work-product, such as interview notes and legal memoranda to government officials, are protected by the governmental attorney-client privilege or the work product doctrine.

Because the Eighth Circuit opinion is based on the federal common law of attorney-client privilege, its precedential value in state court proceedings is not clear.⁴¹ It is difficult to predict whether state courts are likely to adopt the Eighth Circuit's reasoning in state cases involving grand jury investigations or similar proceedings. It does appear, however, that the same reasoning employed by the Eighth Circuit could be adopted by a state court considering whether to enforce a state grand jury subpoena directed to a state agency or municipal government in connection with a criminal investigation. In that instance, the state court might conclude that the governmental entity cannot invoke the governmental attorney-client privilege to thwart a state grand jury subpoena.

Even if there is a risk that the governmental attorney-client privilege will not be available when either a federal or state grand jury subpoenas information from a state or local government, such cases are not likely to arise often. To ensure that these cases are identified and appropriate steps taken to avoid compromising the government entity's interests, government lawyers should establish a procedure for identifying and reporting to senior attorneys any legal matters that involve a grand jury investigation or other criminal inquiry. Those matters, and the work of government attorneys in connection with them, can then be monitored with the understanding that the governmental attorney-client privilege and work product doctrine may not be available if government documents and records, including the work product of government lawyers, are subpoenaed.

The risk that the governmental attorney-client privilege may not be available to government attorneys when a criminal investigation is pend-

41. *Compare* *Maleski v. Corporate Life Ins. Co.*, 163 Pa. Cmwlth. 36 (Pa. 1994) (adopting federal test for distinguishing between the privilege of a corporation and that of individual officers and directors), *with* *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103 (1982) (declining to follow federal courts in rejecting the control-group test for the scope of a corporation's attorney-client privilege).

ing may make it more difficult for government attorneys to advise government officials and employees in connection with such matters. Prior to the Eighth Circuit decision, attorneys representing governmental entities may have assumed that they could discuss matters relating to a criminal investigation with government employees and have those discussions protected by the attorney-client privilege, at least so long as the discussions involved actions taken by the employees in their official capacity as government officials.

In light of the Eighth Circuit decision, government attorneys can no longer assume that the attorney-client privilege will protect discussions with government officials if a prosecutor or grand jury later seeks to obtain information about those discussions. The Eighth Circuit opinion minimizes the risk that this will affect the ability of government attorneys to do their jobs:

Nor do we foresee any likely effect of our decision on the ability of a government lawyer to advise an official who is contemplating a future course of conduct. If the attorney explains the law accurately and the official follows that advice, no harm can later come from later disclosure of the advice, which would be unlikely anyway.⁴²

Leaving aside the difficulty of “explain[ing] the law accurately” in the context of the complex legal issues that often confront government entities, as a practical matter, the distinction between “a future course of conduct” and an official’s past actions is not always clear. Government officials may need confidential advice about the legality of past actions before deciding on a future course of conduct. The Eighth Circuit’s solution to this problem is simple: “An official who fears he or she may have violated the *criminal* law and wishes to speak with an attorney in confidence should speak with a private attorney, not a government attorney.”⁴³ In the real world, of course, a government official may not know that he or she has violated the criminal law and, therefore, needs private counsel until he or she has spoken with an attorney. Moreover, the first attorney government officials are likely to seek out for legal advice is likely to be a government attorney with whom they work and to whom they routinely look for advice.

What does this mean for attorneys who work for state and local governments? First, as to the interests of the governmental client, the

42. 112 F.3d at 921.

43. *Id.* (emphasis added).

attorney must bear in mind that any discussion with an official that relates to a criminal investigation may not be privileged. The second question, and perhaps the more difficult practical problem, is what the government attorney should tell the individual government official who seeks advice in that situation. Here the government attorney should follow the practice that is usually employed by corporate counsel representing a large corporation in a criminal investigation. Careful corporate lawyers in that situation tell individual corporate officials at the outset that they represent the corporation, not the individual official, and that any information provided by the official may be shared with the corporate client (just as a government official's discussion with a government attorney might later be revealed to prosecutors or a grand jury conducting a criminal investigation).⁴⁴ If the official is reluctant to discuss the matter with the government attorney under those circumstances it may be appropriate to recommend that the official obtain personal counsel.

Government attorneys confronted with a criminal investigation that deals with government officials can follow a similar approach. By warning government officials at the outset that they represent the government entity, not the individual official, they can avoid conflicts of interest and steer individuals toward personal counsel if needed. As a practical matter, in any situation where a government official is the subject or target of a criminal investigation,⁴⁵ the government attorney probably should recommend that the individual obtain personal counsel.⁴⁶ If government attor-

44. See Paul H. Dawes, *Corporate Investigations*, 509 PLI/Lit. 491, 520 (explaining that it "should be made clear to the employees (particularly those being interviewed)" that "[t]he corporation is usually the sole client in internal investigations"). At a minimum, attorneys representing a corporate entity have a clear ethical duty to inform corporate officials that they represent the corporation when there is a conflict of interest between the official and the corporation. See MODEL RULES OF PROFESSIONAL CONDUCT 1.13(d) (1983) (providing: "In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.").

45. The Department of Justice defines a "subject" as "a person whose conduct is within the scope of the grand jury's indictment." United States Department of Justice Manual § 9-11.150 (1992-1 Supplement). A "target" is defined as "a person as to whom the prosecution or the grand jury has substantial evidence linking him/her to the commission of a crime and who, in the judgment of the prosecution, is a putative defendant." *Id.*

46. Cf. Lawrence J. Zweifach, *Internal Corporate Investigations*, 905 PLI/Corp. 531 (1995) (explaining the risks and benefits of joint representation of a corporation

neys follow this approach it may sometimes make it more difficult to obtain information from government officials. It should then minimize the risk that a government attorney could be criticized for not putting an official on notice that his or her discussion with the government attorney was not privileged.

In instances where government officials who are subjects or targets of a criminal investigation wish to retain personal counsel, an issue may arise as to whether the governmental entity will pay the employee's legal fees. This can be a difficult issue because, in the early stages of an investigation, the government attorney may not know whether an employee has broken the law or otherwise acted in a manner that is inconsistent with the best interests of the governmental entity. Here again, the government lawyer may wish to follow procedures like those employed by large corporations in such situations. Corporations often agree to provide indemnification for personal legal expenses arising out of official conduct if the corporate official affirms in writing that he or she has acted in good faith, that his or her conduct was in the best interests of the corporation, and, in the case of a criminal proceeding, he or she had no reasonable cause to believe the conduct was unlawful.⁴⁷ The corporation may advance funds for such expenses as they are incurred, prior to the final outcome of the legal proceeding, if the official provides a written assurance that he or she meets the standards described above and that he or she will repay any funds advanced if it is ultimately determined that he or she was not entitled to indemnification under these standards.⁴⁸ A governmental entity may be able to utilize a similar approach to ensure that employees are treated fairly and the institutional interests of the governmental entity are protected. Procedures to implement this approach can be developed using the corporate law model as a guideline.

and employee, and that corporate counsel usually should recommend that the employee obtain separate counsel).

47. See generally Model Business Corporations Act, sections 8.50-8.53; Del. Gen. Corp. Law, § 145.

48. *Id.*

*B. The Common Interest Doctrine and
Recommended Procedures*

The other area in which government lawyers should exercise caution to protect the confidentiality of attorney-client communications and attorney work product is where the governmental client may seek to rely upon the common interest doctrine or joint defense privilege. As noted above, instances often arise in which a government entity's institutional interests are aligned with the interests of private third parties in litigation or other legal matters. In those situations it may be beneficial for the government entity to enter into a formal joint defense agreement or share confidential information in reliance upon the common interest doctrine.

The Eighth Circuit decision makes it imperative that government attorneys analyze whether the protections of the common interest privilege are available before sharing confidential information or work product with third parties. Government attorneys should adopt procedures to assure that the two-step common interest analysis described above is completed before confidential information is shared with third parties. Attorneys recommending information sharing with third parties should be required to obtain the approval of the chief legal officer for the government entity prior to disclosing confidential information. A memorandum requesting this approval should be submitted to the chief legal officer by the government attorney responsible for the matter. That memorandum should identify the specific institutional interest of the government entity that is at issue in the legal matter, describe how that interest coincides or is aligned with the interests of the third parties with whom information will be shared, and confirm that there is no open records act requirement or other disclosure obligation incumbent upon the government entity that would override the common interest doctrine.

In most situations, a written joint defense or information sharing agreement should be prepared and executed by the government lawyers and the third parties with whom the information is to be shared.⁴⁹ It may

49. See DAN K. WEBB, ROBERT W. TARUN & STEVEN F. MOLO, CORPORATE INTERNAL INVESTIGATIONS 5.05[5] at 5-45 (1993) (explaining that: "a written joint defense agreement is preferable to a mere oral understanding . . . courts may conduct a hearing and explore what evidence exists of the joint defense agreement. A clear, formal, dated and signed written agreement is more likely to persuade a court that an agreement exists. . . ."); see also Gerald F. Uelman, *The Joint Defense*

be advisable to prepare a standard form of agreement for this purpose that contains recitals identifying the government's interest in entering into an information sharing agreement.⁵⁰ If such a form of agreement is developed, the approval of the chief legal officer should be required if the terms of the standard agreement are to be altered or a written agreement is not to be used.

C. Public Offerings of Securities

While the above analysis applies to most assertions of the governmental attorney-client privilege and to most routine information sharing agreements, special considerations may be present when government attorneys work with outside counsel and counsel to third parties, such as underwriters, to prepare disclosure documents for public offerings of securities. There is some authority indicating that the attorney-client privilege may not be asserted with respect to information provided to an attorney for the purpose of preparing a public disclosure document.⁵¹

Privilege: Know the Risks, 14 No. 4 LITIG. 35 (1988) (recommending the execution of written joint defense agreements).

50. For an example of such an agreement, see Joshua F. Greenberg, *The Antitrust Aspects of Mergers*, 982 PLI/Corp. 97, 137 (1997).

51. The scope of the privilege with respect to such information is unsettled. Some courts hold that the privilege may not be asserted with respect to any information provided to an attorney in the course of preparing a public disclosure document. *See, e.g., In re Grand Jury Proceedings*, 727 F.2d 1352, 1358 (4th Cir. 1984) (requiring an attorney who had been retained to help prepare a prospectus for a private placement of limited partnership interests to testify before the grand jury because "the information given [the attorney] . . . was to be published to others and was not intended to be kept in confidence"); *United States v. (Under Seal)*, 748 F.2d 871, 875 n.7 (4th Cir. 1984) (rejecting privilege for documents given to tax attorney to prepare proposed tax ruling, and for "[t]he details underlying the published data," which included "the communications relating to the data, the document, if any, to be published containing the data, all preliminary drafts of the document, and any attorney's notes necessary to the preparation of the document"). Other courts hold that the privilege may not be asserted only with respect to information contained in documents that eventually are disclosed. *See, e.g., Apex Municipal Fund v. N-Group Securities*, 841 F. Supp. 1423 (S.D. Tex. 1993) (holding that communications between an underwriter for a bond fund and counsel for the purpose of preparing public offering statements are privileged except to the extent that the information actually appears in a public document); *Schenet v. Anderson*, 678 F. Supp. 1280 (E.D. Mich. 1988) (holding that the privilege protects preliminary drafts of stock purchase offers and tender offers); *Natta v. Hogan*, 392 F.2d 686 (10th Cir. 1968)

The Eighth Circuit's emphasis on the disclosure duties of government lawyers⁵² may signal a reluctance by the courts to accept assertions of privilege where the purpose of communications with lawyers is to prepare public disclosure documents. In this regard the Eighth Circuit opinion might be cited by parties seeking communications among counsel for a government entity and underwriters in connection with the preparation of disclosure documents for securities offerings. Government attorneys involved in this process must balance the requirements for complete and accurate disclosure to investors of all material information against the risk that confidential communications among counsel in the disclosure process may not be protected by the attorney-client privilege or the common interest doctrine.

This Article provides a general analysis of the potential application of the Eighth Circuit opinion to the legal affairs of the typical state or local government entity. Certain of the issues discussed above, such as the likelihood that the courts of a particular state will follow the Eighth Circuit decision and the issues presented when a government entity works with third parties and their counsel to prepare disclosure documents for public offerings of securities, will merit in-depth analysis when those issues arise. In general, however, lawyers representing state and local governments can implement the procedures described above to protect their governmental client's institutional interest in maintaining the confidentiality of legal advice and attorney work product.

(holding that underlying documents used in patent proceedings are protected by the privilege). For further discussion of this issue, see Richard H. Porter, *Voluntary Disclosures to Federal Agencies—Their Impact on the Ability of Corporations to Protect from Discovery Materials Developed in the Course of Internal Investigations*, 39 CATH. L. REV. 1007 (1990) and Note, *Disclosure Under the Securities Laws: Implications for the Attorney-Client Privilege*, 90 COL. L. REV. 456 (1990).

52. 112 F.3d at 920-921.