Attorney Client Privilege

Memorandum

RAJEEV DUGGAL

(1) Priv is N/A

(2) if is applicable Did they keep it confid a ~~stranger~~ They have BoP to show ~~no~~ efforts to keep from gen disclosure.

(3) Assumes this is type of comm protected by A-C privilege

(4) Argue A-C don't ~~apply~~ ~~to this~~ satisfy elements of A-C priv.

MEMORANDUM

TO: John Bates
Alex Azar

FROM: Rajeev Duggal

DATE: February 6, 1995

RE: Executive Branch Attorney-Client Privilege

Issue

You have requested research regarding whether or not the attorney-client privilege can be asserted by the White House Counsel and the Office of the President against the Office of the Independent Counsel thereby prohibiting the disclosure of communications between the White House Counsel and officials of the Office of the President. The communications at issue took place during hearing, interview, and grand jury preparation sessions conducted by the White House Counsel for officials of the Office of the President.

The specific issues involved are 1) whether or not an attorney-client privilege exists for communications between a government attorney and a government official each acting in his official capacity; 2) whether or not disclosure of communications by one arm of the Executive Branch to another would waive the attorney-client privilege as to parties outside the Executive Branch; 3) whether or not the privilege can be asserted by one arm of the Executive Branch as to another arm of the Executive Branch.

Discussion

1. Existence of Privilege in Governmental Context

The attorney-client privilege is generally recognized as applicable to communications where officials of a government agency[1] are "clients" and agency attorneys are "attorneys." See, e.g., National Labor Relations Board v. Sears, Roebuck & Co., 421 U.S. 132, 154 (1975) (related work-product privilege is applicable to government attorneys in litigation; FOIA

[1] The Freedom of Information Act defines "agency" as "any executive department, military department, Government Corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." 5 U.S.C. § 552(f).

case); Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 863 (D.C. Cir. 1980) (government needs same assurances of confidentiality as private parties; FOIA case); Mead Data Central, Inc. v. United States Dep't of Air Force, 566 F.2d 242, 252 (D.C. Cir. 1977) (attorney-client privilege protected communications between Air Force and its attorneys; FOIA case); SEC v. World Wide Coin Invs., Ltd., 92 F.R.D. 65, 67 (N.D. Ga. 1981) (privilege applicable to communications between SEC staff and SEC counsel); United States v. American Tel. & Tel. Co., 86 F.R.D. 603, 621 (D.D.C. 1979) (privilege for government analogous to that for corporations); Confidentiality of the Attorney General's Communications in Counseling the President, 1982 WL 170711, at *11 (O.L.C. 1982) (communication between President and Attorney General protected by attorney-client privilege; FOIA case).

In order for a communication to be protected by the attorney-client privilege, it must be shown that (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion of law or (ii) legal services or (iii) assistance in some legal proceeding, and (d) not for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client. Colton v. United States, 306 F.2d 633, 637 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963); RTC v. Diamond, 137 F.R.D. 634, 642 (S.D.N.Y. 1991).

The privilege is limited to communications that are confidential. Mead Data Central, 566 F.2d at 253. As such, the communication must be expressly intended to be confidential and a showing of intention of secrecy must be made. Coastal States Gas Corp., 617 F.2d at 863 (agency failed to demonstrate that confidentiality was expected and efforts were made to keep the confidential material protected from general disclosure); Hearn v. Rhay, 68 F.R.D. 574, 579 (E.D. Wa. 1975). The presence of third persons, therefore, would vitiate the privilege. Hearn, 68 F.R.D. at 579.

Regarding existence of the privilege in the governmental context, most of the cases above arise in the context of FOIA requests. As such, it is arguable that governmental assertions of the attorney-client privilege are limited to the FOIA context and that no privilege exists for the government in other contexts, such as inter-governmental disputes. FOIA generally provides for disclosure of information to the public upon request. 5 U.S.C. § 552. However, information may be withheld in nine specific categories. Id. § 552(b)(1)-(9). Exemption 5 statutorily adopts the common law attorney-client privilege for individuals and corporate entities and allows for its use by government agencies responding to FOIA requests. Id. § 552(b)(5). On its face, Exemption 5 does not allow a government agency to use the attorney-client privilege in other than the FOIA context. And it is unclear whether or not an independent common law attorney-client privilege exists for the government. See Kerr v. United States District Court, 511 F.2d 192, 197-78 (9th Cir. 1975) (Exemption 5 not intended to create evidentiary privileges for civil discovery), aff'd, 426 U.S. 394 (1976); Denny v. Carey, 78 F.R.D. 370, 373 (E.D. Pa. 1978) (FOIA exemption does not create independent

evidentiary privilege)[2]. Thus, in-spite of the general trend, it can be argued that no attorney-client privilege exists for governmental entities outside the FOIA context.[3]

2. Waiver of Privilege

Although confidentiality is required for retention of the privilege, a government agency does not waive the privilege when a privileged communication is disclosed to other agencies provided that the agencies have a "commonality of interest." FDIC v. Ernst & Whinney, 137 F.R.D. 14, 16 (E.D. Tenn. 1991) (transfer of criminal referrals from FDIC to U.S. Attorney's Office and state and federal bank regulatory agencies did not waive privilege because identity of interest existed). Stated differently, where the client is a governmental entity, the privilege extends to communications between attorneys and all agents or employees of the agency who are authorized to act or speak for the agency in relation to the subject matter of the communication. Coastal States Gas Corp., 617 F.2d at 863 (privilege not defeated by limited circulation beyond agency attorney and client to those who need to know them); Mead Data Central, 566 F.2d at 253 (fact that communication was circulated among more than one employee of the Air Force does not necessarily destroy the privilege); Confidentiality of the Attorney General's Communications in Counseling the President, 1982 WL 170711, at *11 (O.L.C. 1982) (no waiver from disclosure of communications between President and Attorney General to those within the operative circle of officials at the Office of the President and Department of Justice). In such situations, an agency would likely disclose a communication with an understanding of confidentiality by the recipient. See United States v. Exxon, 87 F.R.D. 624, 637 (D.D.C. 1980). Thus, the privilege would not be waived by disclosure of communications within the Executive Branch provided that a commonality of interest exists with the recipient.

This result is consistent with the Supreme Court's expansive approach to the attorney-client privilege for corporate entities in Upjohn Co. v. United States, 449 U.S. 383 (1981). In Upjohn, the Court adopted the view that an attorney's communications with all employees, rather than just with upper-level officials, of the corporation fall within the privilege. Id. It follows then that communication of privileged information throughout the entity is protected and does not result in waiver of the privilege. Thus, if the corporate entity is analogized to the Executive Branch, communication of information throughout the Executive Branch should

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[2] In Mead Data Central, 566 F.2d at 252, one of the leading cases, the court was careful to state that it was "under exemption five" that the attorney-client privilege was being extended to communications between an agency and its attorneys.

[3] Some state legislatures have mandated this approach. See, e.g., Ark. Stat. Ann. § 28-1001, Rule 502(d)(2) (1979) (attorney-client privilege does not protect communication between public officer or agency and government lawyers); Me. Rev. Stat. Ann. tit. 16, Rule 502(d)(6) (same); 5B N.D. Cent. Code § 268 (same).

also be protected and not result in waiver.[4]

3. Intra-Executive Branch Assertion of Privilege

The cases above arise in the context of the Executive Branch asserting the attorney-client privilege as to private parties (i.e. in FOIA requests, civil discovery, etc.). It is unclear, though, whether or not the privilege can be asserted by one arm of the Executive Branch as to another. The context most frequently addressed is assertion of the privilege by the Executive Branch as to the Legislative Branch. In this context, the Office of Legal Counsel has expressed the opinion that the attorney-client privilege has not been recognized as providing a separate basis for resisting congressional demands for information. Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act, 1986 WL 213239, at *9 (O.L.C. 1986). Rather, in such context, the attorney-client privilege is subsumed by the constitutional considerations that shape the executive privilege. Id. Thus, an assertion of privilege by the Executive Branch as to the Legislative Branch must be analyzed as an assertion of the executive privilege. Id.

It follows, as a lesser inference, from the OLC opinion that an arm of the Executive Branch may also not assert the attorney-client privilege as to another arm of the Executive Branch. See id. The issue then becomes whether or not an arm of the Executive Branch may assert the executive privilege as to another arm of the Executive Branch.

Generally, the executive privilege protects confidential Executive Branch communications. United States v. Nixon, 418 U.S. 683 (1974). The privilege, in order to be meaningful, extends beyond the President personally to communications between officials surrounding the President made in furtherance of advising the President. General Accounting Office--Authority to Obtain Information in Possession of the Executive branch--Constitutional Law--President--Confidential Communications--Appointments, 1978 WL 15328, at *1-2 (O.L.C. 1978).[5] Thus, the communications at issue could fall within the executive privilege even though the President was not personally involved. See id.

There are no opinions discussing whether or not the executive privilege may be asserted by one arm of the Executive Branch as to another. However, the President does have the power, related to the executive privilege, to control the flow of information within the Executive Branch. All information within the possession of the Executive Branch agencies are within the control of the President as the head of the Executive Branch. Inter-

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[4] However, as discussed above, in the government entity context communications are only protected and not waived if there is a "commonality of interest" between agencies.

[5] See also Applicability of Executive Privilege to the Recommendations of Independent Agencies Regarding Presidential Approval or Veto of Legislation, 1986 WL 213252, at *2 (O.L.C. 1986) (executive privilege also extends to independent agencies).

Departmental Disclosure of Information Submitted Under the Shipping Act of 1984, 1985 WL 185388, at *4 (O.L.C. 1985). The President has the duty to ensure that information within the Executive Branch is protected from outside disclosure that would, in his judgment, adversely affect the public interest. Id. This power to control the flow of information to sources outside the Executive Branch carries with it the power to control the flow of information within the Executive Branch. Id. at *5 (antitrust division can refuse to transmit information to other agencies); see also, e.g., Exec. Order No. 9784, 11 Fed. Reg. 10909 (1946) (providing guidelines for the transfer of records between agencies). This power may be delegated by the President to individual officials within the Executive Branch. Id. Thus, the White House Counsel, if delegated this power in an executive order, could in the public interest refuse to transmit certain information to other arms of the Executive Branch. See id.

Conclusion

The attorney-client privilege is available for government attorneys and their agency clients. The privilege may not be waived by intra-Executive Branch communication provided that there is a commonality of interest or other similar need for such transmission of information. However, it is not clear that the attorney-client privilege can be asserted by one arm of the Executive Branch as to another. The authority seems to suggest that the attorney-client privilege is not applicable within the government and rather that the executive privilege applies.

With regard to intra-Executive Branch assertions of the executive privilege, it is unclear whether or not the privilege is available. However, it is clear that the President has the power to control the flow of information within the Executive Branch. Thus, it seems that the only established means of preventing the type of disclosure at issue here would be for the President to order that the communications between the White House Counsel and officials of the Office of the President not be disclosed to the Office of the Independent Counsel.

In order to obtain access to the communications at issue it should be argued that 1) the attorney-client privilege exists, even as to private parties, only within the FOIA context; 2) even if the privilege exists outside the FOIA context, the required elements were not satisfied; 3) even if the privilege exists for general use by the government as to private parties, the attorney-client privilege is not available in inter-branch disputes and thus is certainly not available in intra-Executive Branch disputes; 4) the executive privilege is only available in inter-branch disputes and not in intra-Executive Branch disputes; 5) any privilege that exists will not be waived by disclosure to the Office of the Independent Counsel; and 6) only the President may order that the communication not be disclosed to the Office of the Independent

Counsel as part of his power to control the flow of information within the Executive Branch.[6]

If you have any questions, please let me know.

[6] Further research regarding this issue in the context of a request by the grand jury for information regarding the communications between the White House Counsel and officials of the Office of the President will be undertaken. The specific issue addressed will be whether or not the attorney-client privilege or executive privilege can be asserted by the Executive Branch as to a request for information by the Judicial Branch via a grand jury.

MEMORANDUM

TO: John Bates
Alex Azar

FROM: Rajeev Duggal

DATE: February 9, 1995

RE: Summary of Cases re Executive Branch Attorney-Client Privilege

Below are summaries of major opinions cited in my previous memo thet were not also summarized in the Fiske memo.

1. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854 (D.C. Cir. 1980).

DOE field auditors auditing a firm requested interpretation of regulations from DOE regional counsel. The counsel prepared memoranda for the field auditors. Coastal States Gas Corporation made a FOIA request for the memoranda.

DOE argued that the memoranda fall within FOIA Exemption 5, which protects materials that would be protected under the attorney-client privilege, and thus are not required to be disclosed.

The court stated that the attorney-client privilege is the oldest of the evidentiary privileges and encourages clients to be open and honest with their attorneys. Further that inviolability of the privilege is essential to protection of the client's legal rights and to the proper functioning of the adversary process.

However, the court stated that the privilege is narrowly construed and protects only those disclosures necessary to obtain informed legal advice that might not have been given without the privilege. The court found no purpose that would be served by applying the attorney-client privilege in this case.

The court held that while an agency can be a "client" and an agency lawyer an "attorney" within the meaning of the attorney-client privilege, this was not such a case. Id. at 863. The court reasoned that there was no "counselling" that was intended to protect the agency. Id. Rather there were just facts regarding the audit of a third party communicated by the auditor to the counsel and a neutral, objective analysis of regulations in response. Id. The court found this to be analogous to question and answer guidelines that might be found in an agency manual. Id.

As an independent basis for denial of the privilege, the court also found that DOE did not demonstrate confidentiality at the time of the communication and its maintenance since that time. Id. "The burden is on the agency to demonstrate that confidentiality was expected in the handling of these documents, and that it was reasonably careful to keep this confidential information protected from general disclosure." Id. The court reasoned that the evidence showed "no attempt whatsoever" to protect the memoranda within the agency. Id. This because the agency didn't know who had access to the documents and because it circulated copies of the memoranda to area offices. Id.

As a related point, the court held that the test for whether such circulation constituted a waiver of the privilege was whether the agency could demonstrate that the documents were circulated no further than among those members who are authorized to speak or act for the organization in relation to the subject matter of the communication. Id.

On the facts, the court held that the DOE did not establish that anyone had an expectation of confidentiality as to the communications, and thus, there was no attorney-client privilege protection.

2. Mead Data Central, Inc. v. United States Dep't of Air Force, 566 F.2d 242, 252 (D.C. Cir. 1977).

The communications at issue were 1) a legal opinion from one section of the Air Force JAG to another; 2) a legal opinion prepared by the Air Force JAG; and 3) a memorandum from the assistant general counsel of the Department of Defense to the Air Force JAG. Mead Data Central filed a FOIA request for these documents, and the Air Force asserted the attorney-client privilege under Exemption 5.

As a threshold matter, the court stated that there "is no reason why [the attorney-client privilege] should not be extended to an agency's communications with its attorneys under exemption five." Id. at 252.

After holding the privilege applicable, the court found that the Air Force had demonstrated that the information in the documents was communicated "to or by an attorney as part of a professional relationship in order to provide the Air Force with advice on the legal ramifications of its actions." Id. at 253. Although this satisfied most of the requirements for the privilege, the court stated that the Air Force also had to show that the information was confidential and that it was not later shared with third parties. Id. But the court also stated that if the client is an organization, the privilege extends to all those authorized to speak for the organization in relation to the subject matter of the communication. Id. Thus, confidentiality would not be destroyed just because the information was circulated to more than one person within the Air Force. Id.

With regard to two of the documents (nos. 1 and 3 above), the court held that the Air

Force only provided the subject, source, and recipient of the information and had not demonstrated that the information was kept confidential. Id. at 254-55. As such, the case was remanded for such a showing.

With regard to the last document (no. 2 above), the court held that the information was not kept confidential. Id. at 255. This because the document set forth information regarding the background of and negotiations with a third party. And since this information was known by that party, there could be no confidentiality and no attorney-client privilege. Id.

3. SEC v. World Wide Coin Invs., Ltd., 92 F.R.D. 65 (N.D. Ga. 1981).

Plaintiff sought discovery of 1) an SEC staff memorandum recommending an enforcement action and 2) oral communications between an SEC staff member and SEC counsel.

The court held that the memorandum from Commission attorneys to staff members was of the type intended to be protected by the attorney-client privilege and was not discoverable. Id. at 66. The court also found that the substance of the oral communications was protected. Id.

4. United States v. American Tel. & Tel. Co., 86 F.R.D. 603 (D.D.C. 1979).

Judge Greene established procedural and substantive guidelines for discovery.

In the comments to guidelines 9, 10, and 11, which relate to the attorney-client privilege, the opinion stated that the attorney-client privilege should be applied to the government as it is applied to corporations because the situations are analogous. Id. at 621.

In guideline 8, the court held that in the case of the government, the "client" in the attorney-client privilege is "the department or agency that employed the attorney." Id. at 616. In addition, "[t]he privilege also applies when an attorney provides legal advice or assistance to another agency if the advice or assistance is on a basis that is confidential among the clients and relates to a matter in which the agencies have a substantial identity of interest." Id.

In the comments to guideline 8, the opinion stated that no cases were found dealing with the identity of the client in respect to the government but that Judge Greene viewed the government as divisible and as a cluster of clients. Id. at 617. Thus, in some situations the government would not be a single client. Id. "For example, if the Justice Department and the enforcement bureau of FCC took opposite positions before the FCC, it would be absurd to say that their exchange of briefs involved an attorney-client communication." Id. The court

held that the" client" is an attorney's own agency and other agencies with a substantial identity of legal interest. Id.

5. RTC v. Diamond, 137 F.R.D. 634 (S.D.N.Y. 1991).

The RTC claimed attorney-client privilege in withholding documents for which discovery was requested.

The court held that a government agency could invoke the attorney-client privilege for confidential communications to and from their in-house or outside counsel just as a private party could invoke the privilege. Id. at 643. As such, an agency must also satisfy all the elements of the privilege. Id.

The elements required are that (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion of law or (ii) legal services or (iii) assistance in some legal proceeding, and (d) not for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client. Id. In addition, the court stated that information does not become privileged merely because it is forwarded to or routed through the counsel's office. Id.

On the facts, the court found that the RTC had not provided enough information from which to determine whether or not 1) the communications related to the subject matter upon which legal advice was sought; 2) the communications merely contained information that happened to be addressed to or by counsel; and 3) the communications were made without the presence of strangers. Id. Thus, the court remanded the case for further presentation.

6. Kerr v. United States District Court, 511 F.2d 192 (9th Cir. 1975), aff'd, 426 U.S. 394 (1976).

Prisoners requested production of documents from California Adult Authority Department in civil rights action. California asserted the attorney-client privilege under FOIA to prevent disclosure.

The court held that FOIA was inapplicable because this was a state agency and alternatively because FOIA was not intended to create evidentiary privileges in civil discovery. Id. at 197. Rather, FOIA only permits withholding of information from the public generally. Id. Thus, the information had to be disclosed.

7. Denny v. Carey, 78 F.R.D. 370, 373 (E.D. Pa. 1978).

Bank brought action to compel discovery of report from the Board of Governors of the Federal Reserve System. The court stated that just because the report would have been exempt from disclosure under FOIA did not mean that it was exempt from disclosure in this instance. Id. at 373. This because FOIA does not create any independent evidentiary privileges. Id.

8. FDIC v. Ernst & Whinney, 137 F.R.D. 14 (E.D. Tenn. 1991).

Criminal reports and referrals were prepared by the FDIC in consultation with its attorneys. The reports and referrals were transmitted to the U.S. Attorney's office and certain state and federal bank regulatory agencies. Ernst & Whinney made a motion to compel production and the FDIC asserted the attorney-client privilege.

The court held that the documents were clearly covered by the attorney-client privilege. Id. at 16. The primary issue was whether or not the privilege was waived by transmission to other agencies.

The court held that the privilege was not waived because the documents were transferred to other agencies that had an "absolute commonality of interest" with the FDIC. Id. The court reasoned that deciding otherwise would have a chilling effect on communication between agencies. Id. Thus, there was no waiver from transmission to the U.S. Attorney's office and state and federal bank regulatory agencies.

9. United States v. Exxon, 87 F.R.D. 624 (D.D.C. 1980).

DOE asserted the attorney-client privilege in response to a discovery request from Exxon Corp. The court stated that in order to properly invoke the privilege, DOE must prepare a "Vaughn-like" index of the communications setting forth 1) the source of the information; 2) whether the communication occurred in confidence; and 3) whether the source was a lawyer working as an attorney for DOE. Id. at 637.

Further, the court stated that wide dissemination within an agency does not indicate a likelihood that a communication was not confidential because there could have been dissemination upon an understanding of confidentiality. Id.

Thus, DOE was required to prepare an index in order to properly invoke the privilege.

10. Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act, 1986 WL 213239 (O.L.C. 1986)

Congress requested that the Attorney General disclose information regarding the appointment of an independent counsel. With regard to whether or not the attorney-client privilege protected this information, the OLC stated that

> [a]lthough the attorney-client privilege may be invoked by the government in litigation and under the Freedom of Information Act separate from any "deliberative process" privilege, it is not necessarily considered to be distinct from the executive privilege in any dispute between the executive and legislative branches. The interests implicated under common law by the attorney-client privilege generally are subsumed by the constitutional considerations that shape executive privilege, and therefore it is not usually considered to constitute a separate basis for resisting congressional demands for information. As this office has previously noted, for the purpose of responding to congressional requests, communications between the Attorney General, his staff, and other Executive Branch "clients" that might otherwise fall within the common law attorney-client privilege should be analyzed in the same fashion as any other intra-Executive Branch communications.

Id. at *9 (footnotes omitted).

As such, the President would assert the executive rather than the attorney-client privilege in response to a congressional request. The OLC stated that this involves an evaluation of the Executive Branch's interest in keeping the information private versus the Congress' need for obtaining the information. Id. at *18. The OLC determined that the Executive Branch's need to preserve its position as the sole entity that enforces criminal laws would weigh strongly in favor of non-disclosure. Id. at *20. The OLC also stated that under the Reagan Memorandum, the decision to invoke the privilege as to a congressional request is the President's to make, based on recommendations from the concerned department head, the Attorney General, and the Counsel to the President. Id.

11. General Accounting Office--Authority to Obtain Information in Possession of the Executive branch--Constitutional Law--President--Confidential Communications--Appointments, 1978 WL 15328 (O.L.C. 1978).

GAO requested information from the Chairman of the Counsel of Economic Advisors. The OLC determined that GAO did not have the authority to obtain the information sought.

The OLC found that the information sought was used to advise the President, that GAO is part of the Legislative Branch, and thus that the executive privilege could be invoked. Id. at *1. In addition, the OLC stated that the privilege extends beyond the President to communications between those around him. Id. As such, it found that even though some of the communications were between the CEA and the DOE, they could be protected by the executive privilege. Id. at *2. The OLC then balanced the competing interests and determined that the information did not need to be disclosed. Id. at *4.

12. Inter-Departmental Disclosure of Information Submitted Under the Shipping Act of 1984, 1985 WL 185388 (O.L.C. 1985).

The Shipping Act of 1984 required certain information to be filed with the Federal Maritime Commission. The Act prohibited disclosure of such information to the public. The issue addressed was whether or not the Commission could disclose this information to other agencies within the Executive Branch.

The OLC held that in the absence of specific legislative intent by Congress to prevent such inter-departmental disclosure, it would be allowed because of "the general presumption that information obtained by one federal government agency may be freely shared among federal government agencies." Id. at *1.

The OLC explored the Shipping Act and the analogous Clayton Act to determine congressional intent and determined that there was no specific intent to prohibit such inter-departmental disclosure. Id. at *4. The OLC, therefore, found that the information could be shared stating that

> the President's authority to control the flow of information within and without the Executive Branch carries with it the power to limit distribution of such information within the Executive Branch. Thus, unless and until revised by higher authority, we have no doubt about the validity and enforceability of the present policy of the Antitrust Division of this department to refuse to transmit certain information gathered by it beyond this Department. We believe the Commission is free, as a matter of law, to adopt a policy of providing the information at issue here to other federal departments and agencies that have a need for it in connection with carrying out their official responsibilities.

Id. at *5.

13. Exec. Order No. 9784, 11 Fed. Reg. 10909 (1946).

Executive order issued in 1946 stating that nonconfidential records could not be transferred between agencies without approval of the Director of the Bureau of the Budget. The Director may allow the transfer if it is in the public interest to do so.

MEMORANDUM

When can a federal governmental agency assert an attorney-client privilege when materials are sought by the Special Counsel appointed by the U.S. Attorney General?

There are no cases which specifically address this issue, but it is unlikely that an attorney-client privilege can be invoked successfully by a federal department or agency when documents or information is sought by a special counsel appointed by the Attorney General.

As a general proposition, a duly appointed special attorney or special counsel stands in the shoes of the Attorney General of the United States and has the same power to conduct any kind of legal proceeding, civil or criminal, that the Attorney General is authorized to conduct. 28 **U.S.C.** § 515 (West 1993). The Attorney General has exclusive authority to conduct all litigation in which the United States is a party or has an interest except when Congress has expressly directed otherwise. 28 **U.S.C.** § 516 (West 1993); see **FDIC v. Cherry, Bekaert & Holland**, 131 F.R.D. 596, 599 (M.D. Fla. 1990) (FDIC's attorney is the Justice Department for purposes of bank misconduct investigations; FDIC & Justice "working toward a common goal, prosecution of violation of the banking laws, with an identity of interests"); compare **FDIC v. Irwin**, 727 F. Supp. 1073, 1074 (N.D. Tex 1989)(in context of settlement of civil lawsuit, Attorney General has wide plenary authority, but FDIC could sue and be sued under 12 U.S.C. § 1819 without control by Attorney General), *aff'd*, 916 F.2d 1051 (5th Cir. 1990).

In general, then, the Attorney General is the chief lawyer for his client, the United States and any departments or agencies of the United States. See **Stiftung v. Zeiss**, 40 F.R.D. 318, 325 (D.D.C. 1966) (Attorney General, acting through Justice Department, carries the burden of litigation for U.S. and its agencies). It is the Attorney General, or his special counsel, who ultimately decides whether to invoke or waive any evidentiary privilege that might apply to federal departments or agencies. Several federal cases have held that the Department of Justice may assert either an executive/governmental or attorney-client privilege to protect the disclosure of intra-departmental or inter-agency communications to non-governmental, private litigants. See **Stiftung**, 40 F.R.D. at 324 (executive privilege could be invoked by Attorney General concerning intra-governmental documents reflecting advisory opinions, recommendations and deliberations in suit against corporate litigants); **FDIC v. Ernst & Whinney**, 137 F.R.D. 14, 16 (E.D. Tenn. 1991) (attorney-client privilege applied to documents prepared by FDIC "for use in consultation with the FDIC's attorneys, who are, in these kind of matters, the United States Attorneys" when requested by accounting co. defendant who was sued by FDIC for audit irregularities of failed bank); **Cherry, Bekaert**, 131 F.R.D. at 599 (since FDIC is statutorily required to report violations of criminal laws to Justice Department, U.S. Attorney acts as FDIC's attorney and may claim attorney-client privilege against private defendants concerning bank closure).

These cases simply assume that the common law attorney-client privilege, coupled with

the wording of Rejected Rule 503 of the Federal Rules of Evidence, applies to governmental agencies and public officers. The wording of Rejected Rule 503(a)(1) certainly supports assertion of an attorney-client privilege by governmental agencies. It reads:

> (a) Definitions. As used in this rule:
> (1) A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.

Various federal cases have recognized some of the "entities" to which the privilege may belong, including the State Department, Air Force, IRS, Department of Energy, Home Loan Bank Board, and FDIC. See **C. Wright & K. Graham, Federal Practice & Procedure** § 5475, at 131-32 (1986) (collecting cases).

Frequently the facts in these cases show a pattern in which the information was collected by one agency for possible or actual future transmission to the Justice Department for either criminal investigation or civil litigation. In these instances, courts have found a commonality of interests between the various governmental agencies on one side with private litigants on the other side. No case has held that the interests of the Justice Department are opposed to those of another government agency in the context of evidentiary privileges. It would seem incongruous to claim that an attorney-client privilege protected communications within a governmental agency from its own chief legal advisor, the Attorney General, or his special delegate.

Further, it would be poor public policy to hold that governmental agencies have any legal right to withhold relevant information from their chief legal advisor and the chief law enforcement officer of the United States. Such an attitude would turn government agencies into private, powerful legal fiefdoms, largely immune from outside investigation or accountability since so much intra-agency communication might be categorized as legal advice. It would transform the attorney-client privilege into a shield concealing unlawful activity by federal officials behind a veil of confidentiality, secure from investigation by the chief law enforcement officer of this nation.

On the other hand, not all communications between a federal agency's counsel and its employees are confidential communications that seek legal services. There is no privilege when the communications are directed primarily toward:

1) "business goals" of the agency;
see **McCaugherty v. Sifferman**, 132 F.R.D. 234, 238 (N.D. Cal. 1990) ("the court should sustain an assertion of privilege only when there is a clear evidentiary predicate for concluding that each communication in question was made primarily for the purpose of generating legal advice. No privilege can attach to any communication as to which a business purpose would have served

as a sufficient cause");

2) "political advice";
see **Republican Party of North Carolina v. Martin**, 136 F.R.D. 421, 426 (E.D. N.C. 1991);

3) matters which are required by statute or regulation to be made and whose confidentiality are not clearly preserved by the statutory or regulatory scheme;
see **McCaugherty**, 132 F.R.D. at 238.

There are no reported cases in which a "public officer" has successfully asserted an attorney-client privilege when the public entity itself was willing to waive the privilege. There are three possible scenarios in which the issue might arise:

1) the public officer has consulted an attorney for personal legal advice relating to his official duties;
see e.g. **Hearn v. Rhay**, 68 F.R.D. 574, 578-79 (E.D. Wash. 1975)(prison officials sued for civil rights violations were stripped of official immunity, thus any legal communications with governmental attorneys in the presence of other persons, even other prison officials, or contained in files to which others had access waived asserted privilege);

2) a predecessor public officer wishes to assert a privilege that his successor is willing to waive;
see e.g. **Commodity Futures Trading Comm'n v. Weintraub**, 471 U.S. 343 (1985) (in the context of corporations, attorney-client privilege may be waived by present management at time privilege asserted rather than former management at time communications were made; trustee of a corporation in bankruptcy has the power to waive the corporation's privilege with respect to prebankruptcy communications); or

3) the present public officer wishes to assert the attorney-client privilege concerning his communications when the public entity itself wishes to waive that privilege;
see **Weintraub**, 471 U.S. at 348 (corporate managers "must exercise the privilege in a manner consistent with their fiduciary duty to act in the best interests of the corporation and not of themselves as individuals").

In all three scenarios, the interests of the individual public official fall when balanced against the rights of society and the best interests of the entity, public or private.

Because privileges are in derogation of the truth, the policy of the attorney-client privilege is to protect confidential attorney-client relationships only to the extent that the injury the relationship would suffer from disclosure is greater than the benefit to be gained thereby.

8 **Wigmore, Wigmore's Evidence** § 2285, at 527 (McNaughton rev. ed. 1961). While it is frequently noted that governmental agencies, employees, and their lawyers must communicate freely with each other to best serve the public interest and public entity without fear of disclosure to third-party, private interests, this rationale does not apply to disclosure to the Justice Department, a sister agency. It is unlikely that communications between a departmental or agency attorney and the employees within that agency will be chilled to any significant degree by the possibility that the Attorney General or his designate might some day require disclosure of some communications in the context of a federal criminal investigation. See **Nixon**, 418 U.S. at 711.

In sum, if a government officer or agency wishes to invoke an attorney-client privilege concerning communications between the agency's counsel and employees of the federal agency when a Special Counsel, appointed by the Attorney General, asserts and demonstrates a need for those materials in a criminal proceeding or investigation, the privilege is most likely to fall. See, **United States v. Nixon**, 418 U.S. 683, 711-13 (1974) (noting that a generalized claim of Presidential privilege falls to the demands for fair administration of criminal justice; "[w]ithout access to specific facts a criminal prosecution may be totally frustrated. The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases").

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NOTES
ATTORNEY-CLIENT PRIVILEGE IN CONTEXT OF GOVERNMENTAL AGENCIES

Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343 (1985)

trustee of a corporation in bankruptcy has the power to waive the corporation's attorney-client privilege with respect to prebankruptcy communications

--corporations speak only through agents; privilege can only be waived by persons;
--in context of corporations, privilege is waived by management--officers and directors--at time privilege is asserted rather than at time of communications
--managers "must exercise the privilege in a manner consistent with their fiduciary duty to act in the best interests of the corporation and not of themselves as individuals." p. 348
--analyzes the federal interests that could be impaired by either waiver or assertion of privilege
--would a particular holding (here that bankruptcy trustee holds privilege and can waive it) have a chilling effect upon attorney-client communications? (not here, no greater than it would in solvent corporation in which management could waive privilege)

Upjohn Co. v. United States, 449 U.S. 383 (1980)

subject matter test applied to attorney-client privilege in context of corporation; communications made by employees to corporate counsel investigating illegal payments to foreign officials were privileged when I.R.S. sought interview notes/questionnaires, etc.

--"privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." p. 390

--"the privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney." p. 395

--"the recognition of a privilege based on a confidential relationship ... should be determined on a case-by-case basis." p. 396 (quoting **Trammell**, 445 U.S. at 47)

--Burger's concurrence (attempting to set a general, global standard): "a communication is privileged at least when, as here, an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment. The attorney must be one authorized by the management to inquire into the subject and must be seeking information to assist counsel in performing any of the following functions: (a) evaluating whether the employee's conduct has bound or will bind the corporation; (b) assessing the legal consequences, if

any, of that conduct; or (c) formulating appropriate legal responses to actions that have been or may be taken by others with regard to that conduct." p. 403

United States v. Nixon, 418 U.S. 683 (1974)

The Nixon tapes case. A generalized claim of Presidential privilege may fall to the specific, specialized need for evidence in a pending criminal trial and the fundamental demands of due process.

--Ct. first rejects Nixon's argument that the dispute was an "intra-branch" one between a subordinate and superior officer of the Executive Branch & hence not subject to judicial resolution. p. 692. Attorney General, not President, has "the power to conduct the criminal litigation of the United States Government. ... Acting pursuant to those statutes, the Attorney General has delegated the authority to represent the United States in these particular matters to a Special Prosecutor with unique authority and tenure. The regulation gives the Special Prosecutor explicit power to contest the invocation of executive privilege in the process of seeking evidence deemed relevant to the performance of these specially delegated duties." p. 695.

--balances presumptive Presidential privilege against demands for fair administration of criminal justice. "we cannot conclude that advisors will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution." p. 711. "Without access to specific facts a criminal prosecution may be totally frustrated. The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases." p. 713.

F.D.I.C. v. Ernst & Whinney, 137 F.R.D. 14 (E.D. Tenn. 1991)

Criminal reports and referrals from FDIC were privileged from discovery by defendant being sued by FDIC for audit irregularities of failed bank.

--these documents were of type covered by attorney-client privilege. "These documents were prepared by the FDIC for use in consultation with the FDIC's attorneys, who are, in these kinds of matters, the United States Attorneys. ... It is undisputed that all of the reports at issue were furnished by the FDIC not only to the United State's Attorney's Office, but also to other state and federal bank regulatory agencies." p. 16.

--next issue: was privilege waived by: 1) furnishing some of them to other regulatory agencies; or 2) inadvertently furnishing some to defendant during discovery process?
--re 1) FDIC furnished documents "only to other agencies which had an absolute commonality of interest with the FDIC in dealing with potential criminal acts which occurred at these banks." p. 16 therefore, no waiver here: "If the FDIC was discouraged

from having open communications with these other agencies relative to these alleged criminal actions because of a fear of waiver of its attorney-client privilege, the effect of such discouragement would be widespread." p. 16

--no waiver by informing bank officers of FDIC findings re criminal referrals--these are "facts" not privileged communications--the facts themselves are discoverable. p. 17

--re inadvertent disclosure: factors to consider: p. 17

1) reasonableness of precautions taken to prevent inadvertent disclosure;
2) number of inadvertent disclosures;
3) extent of disclosure;
4) any delay and measures taken to rectify disclosures;
5) whether the overriding interest of justice would or would not be served by relieving a party of its error.

--after analyzing specific facts, no waiver here.

FDIC v. Irwin, 727 F.Supp. 1073 (N.D. Tex. 1989)

FDIC sued directors of failed bank for breach of fiduciary duty. They settled but 3rd party plaintiffs sued U.S. alleging wrongdoing by Comptroller in closing the bank. U.S. claims that FDIC couldn't settle suit with bank directors without its permission. Court holds FDIC could.

--U.S. claimed it had sole authority to settle litigation under 28 U.S.C. §§ 516 & 519. These statutes specifically say that an agency may conduct its own litigation if expressly "authorized by law" and 12 U.S.C. § 1819 specifically states that FDIC has power "to sue and be sued"

Republican Party of North Carolina v. Martin, 136 F.R.D. 421 (E.D.N.C. 1991)

Constitutional challenge by Repub. Party to North Carolina's method of electing superior court judges. Plaintiffs wanted to depose Gov. Martin & requested production of documents. Gov. claimed work product privilege, executive privilege, and attorney-client privilege.

--sets out general rule of applicability: "The privilege applies only if
(1) the asserted holder of the privilege is or sought to become a client;
(2) the person to whom the communication was made
  (a) is a member of the bar of a court, or his subordinate; and
  (b) in connection with this communication is acting as a lawyer;
(3) the communication relates to a fact of which the attorney was informed
  (a) by his client
  (b) without the presence of strangers

(c) for the purpose of securing primarily either
(i) an opinion on law or
(ii) legal services or
(iii) assistance in some legal proceeding, and not
(d) for the purpose of committing a crime or tort; and
(4) the privilege has been
(a) claimed and
(b) not waived by the client." p. 425-26

--courts strictly construe the privilege and proponent has burden to prove elements. 426.

--here, most of the communications were <u>from</u> attorney to client & did not have effect of revealing any confidential communications from Gov. to atty.

--court looks "to the services which the attorney has been employed to provide and determine if those services would reasonably be expected to entail the publication of the client's communication." p. 427

If the final product, e.g. memorandum, opinion letter, etc., was intended to be published (or shared with others), then the underlying data and all preliminary drafts and copies of other documents whose content was necessary to preparation of the published document, will also lose the privilege. p. 427.

Ct. holds that all but one document not privileged "because they involve attorney-client communications which: (a) occurred incident to a request for, or the rendition of, political, not legal advice; and/or (b) do not arguably reveal Governor Martin's confidential communications; and/or (c) could not reasonably have been expected to remain confidential." p. 427.

--e.g. many are cover letters which do not include facts which could reveal confidential client communications; many are drafts of letters and speeches intended to be made public; many are memoranda prepared by counsel which do not reveal confidential communications and others are factual recitation of case law without specific application to factual setting

--lengthy discussion of application of work product doctrine as well--which is largely upheld

Buford v. Holladay, 133 F.R.D. 487 (S.D. Miss. 1990)

Terminated state employees sued under civil rights statute & sought discovery of legal advice & opinions from Mississippi Attorney General's Office re right to terminate permanent employees of Dept. of Economic Development ("DED") under legislatively mandated reorganization of department. Privilege upheld; ditto work product privilege.

--"to the extent that the attorney has obtained information from non-client third parties, the attorney-client privilege does not apply, and information which an attorney secures from a third party while acting on behalf of his client is not shielded from disclosure by the privilege." p. 491.

--the existence of a statute which requires Attorney General to furnish advice to governmental agencies does not preclude application of attorney-client privilege when the agency does indeed seek legal advice. p. 491. cites **Thill Securities Corp. v. New York Stock Exchange**, 57 F.R.D. 133, 138-39 (E.D. Wis. 1972) (noting that, where communications are confidential and related to obtaining legal advice, attorney-client relationship may exist between two governmental agencies).

--re argument that issuance of a public opinion waived attorney-client privilege: "The mere fact that the end product of an attorney-client relationship is a document that becomes part of the public record does not per se waive the privilege as to all communications that occurred prior to the publication of the document." p. 492.

--re "deliberative process privilege" (or governmental privilege): "this Court is persuaded that the particularity with which statutory privileges have been provided for certain types of governmental information militates against the finding of a broad, generalized privilege for all governmental deliberation." p. 494

--"the deliberative process privilege has traditionally been applied only to communications relating to policy formulations at the highest levels of the federal executive branch." p. 494.

McCaugherty v. Sifferman, 132 F.R.D. 234 (N.D. Cal. 1990)

FDIC, as manager of FSLIC Resolution Fund, invoked both attorney-client privileged and work product doctrine to oppose production of documents to plaintiff buyers of bank. Communications were between lawyers hired by FDIC and FADA (subsidiary of FSLIC to manage & advise re failed S & L's).

--much of the communication was directed toward "business goals" not generating legal advice; "the court should sustain an assertion of privilege only when there is a clear evidentiary predicate for concluding that each communication in question was made primarily for the purpose of generating legal advice. No privileged can attach to any communication as to which a business purpose would have served as a sufficient cause." p. 238.

--"Similarly, privilege cannot attach to any communication that was compelled by statute or regulation and whose confidentiality was not clearly preserved by the statutory or regulatory scheme." p. 238.

--FSB argues that b/c FSLIC exercised such statutory control & power over FSB in the transaction, the legal egos of Farmers, FSB, and FSLIC were merged for purposes of attorney-client privilege communications. p. 240. Court rejects b/c while valid in theory, not "based on real world conduct." 1) FSLIC didn't take clear steps to tell FSB that FSLIC was the holder of the privilege & therefore should consider FSLIC attorneys as its own & to keep all communications confidential; 2) FSB had its own attorney who gave legal advice re transaction; 3) FSLIC attorneys explicitly disclaimed representation of anyone other than FSLIC & FADA.

Court orders production of all communications b/t Farmers & FSB that were shared with FSLIC, FADA & their counsel.

"Since the attorney-client privilege over a corporation belongs to the inanimate entity and not to individual directors or officers, control over privilege should pass with control of the corporation, regardless of whether or not the new corporate officials were privy to the communications in issue." p. 245.

"A party who invokes the attorney-client privilege also must provide to the opposing party the following information for each document or communication not disclosed, to the extent that providing this information will not destroy the privilege:

(1) the name and job title or capacity of the author(s) or originator(s); and

(2) the name and job title or capacity of every person who received the document or a copy of it, or who was present when the communication was made or who overheard it; and

(3) the relationship between the author(s)/originator(s) and each person who received the document or a copy of it or who was present when the communication was made or who overheard it; and

(4) whether the primary purpose of the document or communication was to seek or provide legal advice or services; and

(5) the date of the document or communication; and

(6) the subject matter(s) address in the document or communication; and

(7) whether the document or communication was transmitted in confidence; and

(8) a brief statement as to why, under the law, the document or communication is protected by the attorney-client privilege. p. 248.

FDIC v. Cherry, Bekaert & Holland, 131 F.R.D. 596 (M.D. Fla. 1990)

In suite by FDIC against defendants concerning bank closure, FDIC asserts attorney-client privilege re criminal referrals sent to Justice Department, loan "write-ups," post-closing reports, and witness statements taken by FDIC.

FDIC is statutorily required to report violations of criminal laws to Justice Department. "In reporting such suspected violations, the court [in **Wausau v. Federal Dep. Ins. Corp.**, ___ F.R.D. __ (E.D. Tenn. April 22, 1986)] held, the U.S. Attorney acted as the FDIC's lawyer. .. The court viewed the FDIC and the Justice Department as working toward a common goal, prosecution of violation of the banking laws, with an identity of interests." p. 599.

--"The undersigned concludes that the FDIC's attorney is the Justice Department and its U.S. Attorneys with regard to investigations of bank misconduct and for the referral of suspected criminal violations for prosecution . . ." p. 599

--loan write-ups also protected by attorney-client privilege; "The writeups appear to be communications made in confidence by FDIC investigators to their counsel for the purpose of seeking legal advice concerning possible lawsuits." p. 601

--witness statements taken by an FDIC agent protected by work product privilege b/c they were taken in for a case closely related to present one

Clavir v. United States, 84 F.R.D. 612 (S.D.N.Y.)

Attorney plaintiffs sue U.S. for illegal surveillance by F.B.I. Dept. of Justice had memos re interviews with FBI agents as part of Justice's investigation of FBI unauthorized investigation techniques. Plaintiffs want these memos produced and Justice agreed but FBI agents asserted their own work-product, statutory and attorney-client privileges. Court rejects privilege argument.

re atty-client privilege: "there was no attorney-client relationship between the investigators and the agents being interviewed. If anything, the relationship was much closer to that between a prosecuting attorney and a prospective grand jury witness. Indeed, these interviews were carried out in close connection with a grand jury investigation . . ." p. 614.

Hearn v. Rhay, 68 F.r.D. 574 (E.D. Wash. 1975)

Inmate civil rights suit. Plaintiff wants production of documents containing legal advice to prison officers by state attorney general. He gets them because any attorney-client privilege waived by defendants' good faith defense.

--court notes that federal courts have uniformly held that attorney-client privilege can arise with respect to attorneys representing a state. Here prison officials are clients of Washington State Attorney General & privilege can be asserted if applicable. p. 579

--in determining who was the client--the prison officials in their individual capacity or the Washington State Dept. of Social and Health Services? Here it was the individual defendants since the civil rights suit was premised on theory that they were stripped of their official immunity. p. 579

--therefore, any communications from attorney General to them which were shared by these specific officials with others are no longer privileged. p. 580 (collecting cases)

public policy discussion re would assertion of privilege in this context be harmful? Yep. "In an ordinary case the obstruction [caused by assertion of atty-client privilege] is not likely to be great for attorney-client privileges are usually incidental to the lawsuit, notwithstanding their possible relevance, and other means of proof are normally available. In this case, however, the content of defendant's [sic] communications with their attorney is inextricably merged with the elements of plaintiff's case and defendants' affirmative defense. These communications are not incidental to the case; they inhere in the controversy itself, and to deny access to them would preclude the court from a fair and just determination of the issues. To allow assertion of the privilege in this manner would pervert its essential purpose and transform it into a potential too for concealment of unconstitutional conduct behind a veil of confidentiality." p. 582.

Stiftung v. Zeiss, 40 F.R.D. 318 (D.D.C. 1966)

executive privilege may be asserted by Government (Dept. of Justice) concerning intra-departmental memoranda and inter-departmental communications containing opinions, recommendations and deliberations pertaining to decisions Justice Department was required to make about litigation. Here, Justice had been involved in prior lawsuit concerning trademarks of contestants. Government had produced 4,500 documents, claimed privilege on 49.

--executive privilege "obtains with respect to intra-governmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." p. 324.

--"The Attorney General is charged with the duty of rendering all legal services essential to the operations of the Executive Branch. [noting 5 U.S.C. §§ 291, 306] He also carries the burden of litigation to which the United States or any of its agencies is a party. [noting 28 U.S.C. § 507(b); Exec. Order No. 6166, § 5 (1933), reprinted at 5 U.S.C. §§ 157, 159 (1964)] These responsibilities are discharged through the Department of Justice, and the Department's legal business embraces the requirements and activities of various governmental agencies. It is evidence that the Department, to

function adequately, must depend heavily upon candid exchanges of ideas, not only among its own staff, but also, particularly because of the institutional nature of its decisions, with other agencies whose interests are involved." p. 325.

--"And while no clear separation can be made between the United States as a client-litigant and the Department as its legal representative, government, no less than the citizen, needs open but protected channels for the kind of plain talk that is essential to the quality of its functioning." p. 325.

--concerning executive privilege: "The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual consideration by that officer." p. 326 [here it was invoked by the Attorney General in a lengthy affidavit]

STATUTES

28 U.S.C. § 510 Delegation of authority

Attorney General may delegate any function of Attorney General to any other officer, employee or agency of Dept. of Justice.

--statute relating to appointment of special U.S. Attorneys is a grant of authority to A.G., not a limitation; does not limit delegation authority of A.G. **U.S. v. Giacolone**, 408 F. Supp. 251 (D.C. Mich. 1975)

Atty Gen. may delegate his authority to special prosecutors; **U.S. v. Morrison**, 531 F.2d 1089 (1st Cir. 1976), *cert. denied*, 429 U.S. 837 (19__).; **In re Sealed Case**, 829 F.2d 50 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1027 (19__).

28 U.S.C. § 512 Attorney General to advise heads of executive departments

Head of an executive department may require opinion of A.G. on questions of law arising in department.

28 U.S.C. § 514 Legal services on pending claims in departments and agencies

When head of an executive department/agency is of the opinion that the interests of the U.S. require the services of counsel on the examination of any witness concerning any claim, or on the legal investigation of any claim, pending in the department of agency, he shall notify A.G. & give all relevant info & A.G. shall provide the service.

28 U.S.C. § 515 Authority for legal proceedings; commission, oath and salary for special attorneys.

(a) A.G. or any officer of Justice Dept. or any special attorney appointed under law, may, when specifically directed by A.G., conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings, which U.S. attorneys are authorized by law to conduct.

--this provision should be liberally construed because it was adopted for the protection of the United States. **In re Patriarca**, 396 F.Supp. 859 (D.C.R.I. 1975)

--A. G. has authority to make broad grants of authority to special attorneys; not limited to appointing them for a limited or specific purpose, but must have some description of type of case; can't be a "roving" commissioner. **U.S. v. Di Girlomo**, 393 F.Supp. 997 (D.C. Mo. 1975), *aff'd* 520 F.2d 372 (19__), *cert. denied*, 423 U.S. 1033 (19__).

28 **U.S.C.** § 516 Conduct of litigation reserved to Dept. of Justice

Except as otherwise authorized by law, the conduct of litigation in which the U.S., an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Dept. of Justice, under A.G.'s direction.

re Representation of U.S. by private counsel in litigation against persons committing bank fraud crimes, see 12 **U.S.C.** § 4243.

A.G. is chief legal officer of U.S. and absent express congressional directive to contrary, is vested with plenary power over all litigation in which U.S. or U.S. agency is a party, but b/c authority is so broad, it must be narrowly construed. F.D.I.C. has authority to sue & be sued without approval by A.G. **FDIC v. Irwin**, 727 F.Supp. 1073 (N.D. Tex. 1989), *aff'd*, 916 F.2d 1051 (5th Cir. 1990).

Any congressional limitations upon authority must be express, can't be inferred. **U.S. v. Tonry**, 433 F.Supp. 620 (D.C. La. 1977).

28 **U.S.C.** § 517 Interest of United States in pending suits

Solicitor General, or any officer of Dept. of Justice, may be sent into any district in U.S. to attend to the interests of the U.S. in a suit pending in a U.S. or state court or to attend to any other interest of the U.S.

TREATISES

C. Wright & K. Graham, Federal Practice & Procedure (1986)

§ 5475 Lawyer-Client Privilege -- "Public Officer"; Public Entity

--little case development but most courts have assumed that governments can claim the benefits of attorney-client privilege p. 125

factors that militate against a privilege for governmental entities:

1. since government has such extensive coercive power, gov. lawyers have little need for a privilege to encourage their "clients" to talk;
2. many gov. workers are, or could be, placed under a statutory duty to disclose info. they have learned in their official capacity (e.g. Freedom of Information Act, Open Records Act);
3. power to suppress evidence of communications between government employees is inconsistent with open government of a democracy;
4. costs of governmental privilege very high b/c of the large number of lawyers and government employees who have knowledge of relevant facts in so many lawsuits;
5. the governmental or state's secrets privilege protects the important items.

factors that support a privilege for governmental entities:

1. the governmental or state's secret privilege is not designed to deal with attorney confidentiality;
2. existing framework of attorney-client privilege better developed to deal with area than is an expansion of governmental privilege;
3. temporary (?) suppression of info because of contingencies of litigation not in same class as total denial of info to citizens re operations of their government;
4. large corporations probably don't need an evidentiary privilege to make their employees talk to them, either, yet they have a privilege;
5. since government is frequently only counterweight to large corporations, it's not fair to make them litigate with one hand tied behind their backs.

Does the inclusion of term "public officer" in definition of client mean that the individual employee can claim a privilege even when the agency/entity itself is prepared to waive it? Or permit the former incumbent to assert it when the present incumbent wants to waive it? p. 130

Cases have recognized some of the "entities" to which a privilege may belong--State Department, Air Force, IRS, Dept. of Energy, Home Loan Bank Board. pp. 131-32.

"Matters become considerably more complicated when the 'lawyer' for the agency is another 'public entity' or 'public officer' with obligations which may conflict with that of the supposed 'client.' For example, lawyers employed by the Department of Justice investigating the conduct of agents of the Federal Bureau of Investigation, an agency that is at least nominally a part of the Justice Department, were held to have no attorney-client relationship with the agents." pp. 132-33. **Clavir v. United States**, 84 F.R.D. 612, 614 (S.D.N.Y. 1979)

Difficulties of sorting out when government lawyer is rendering "professional legal services" as opposed to "business" advice concerning the business of the agency or "political" advice.

Courts have held that a corporate attorney who is investigating facts acts as a lawyer, not a detective, but at least one case has held this is not true when a government lawyer engages in investigative activity for a municipal employer. **Diamond v. City of Mobile**, 86 F.R.D. 324 (D.C. Ala. 1978)

Note, *The Applicability and Scope of the Attorney-Client Privilege in the Executive Branch of the Federal Government*, 62 **B.U.L.Rev.** 1003 (1982)

Court Sealed
FOIA(b)(3) - Fed. R. Crim. Pro. 6(e) - Grand Jury