THE ATTORNEY-CLIENT PRIVILEGE AND THE MUNICIPAL LAWYER

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I. INTRODUCTION

The attorney-client privilege is the oldest of common law privileges protecting confidential communications.[1] In recent years, the extent of protection

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afforded to communications between a governmental lawyer and officers and employees of a governmental entity have been examined. Scholarly writings and case law on the subject have done little to resolve the issue of whether and under what circumstances the attorney-client privilege can successfully be claimed by governmental entities and its representatives. This Article will examine the attorney-client privilege, the purposes underlying the privilege, the privilege in the corporate setting, and the problems associated with the privilege in the governmental setting, as well as the attorney-client privilege in criminal proceedings.

A. *Elements*

"The most concise and best-known statement of the attorney-client privilege" was made by Wigmore.[2] In his treatise on evidence, he phrases the general principle of the privilege as follows:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his *instance* permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.[3]

Some courts have expanded on this definition to convey the concepts with greater specificity.[4]

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1. GEOFFREY C. HAZARD, JR. ET AL., THE LAW AND ETHICS OF LAWYERING 222 (2d ed. 1994).
2. *Id.*
3. 8 JOHN HENRY WIGMORE, EVIDENCE § 2292, at 554 (rev. vol. 1961).
4. *See* United States v. Tedder, 801 F.2d 1437, 1442 (4th Cir. 1986). Some courts have used the following definition that seems to convey the same concepts with greater specificity:

> "(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."

Id. (quoting NLRB v. Harvey, 349 F.2d 900, 904 (4th Cir. 1965)).

B. *Purposes Underlying the Attorney-Client Privilege*

The purpose of the attorney-client privilege is based on two related principles. First, the privilege encourages loyalty in the attorney-client relationship, and second, the privilege encourages clients to make full and frank disclosures to their lawyers. With regard to the first principle underlying the privilege:

> Loyalty forms an intrinsic part of the relationship between a lawyer and client in our adversary system. This loyalty is offended if the lawyer is subject to routine examination regarding the client's confidential disclosures. The second principle [underlying the privilege] is that the privilege encourages clients to make full disclosure to their lawyers. A fully informed lawyer can more effectively serve his client and promote the administration of justice.[5]

Case law generally refers to this as encouraging "full and frank communication between attorneys and their clients."[6] Courts have also noted that the privilege "promote[s] broader public interests in the observance of law and administration of justice."[7] "The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client."[8]

The privilege may also be required to satisfy ethical requirements. For example, the American Bar Association's Model Code of Professional Responsibility, Ethical Consideration 4-1, states:

> [A] lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full

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5. Reed v. Baxter, 134 F.3d 351, 356 (6th Cir. 1998) (citing KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 87, at 205-06, § 89, at 212 (3d ed. 1984)).

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

7. *Id.*; *see also* Hickman v. Taylor, 329 U.S. 495, 511 (1947) (discussing the need for a lawyer to be able to "plan his strategy without undue and needless interference").

8. Upjohn Co. v. United States, 449 U.S. at 389.

> development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.[9]

The full and frank discussions protected by the attorney-client privilege also serve to allow a lawyer to decide the relevant and important facts upon consultation with a client. Further, "the loss of evidence admittedly caused by the [attorney-client] privilege is justified in part by the fact that without the privilege, the client may not have made such communications in the first place."[10]

C. *Problems Associated with the Attorney-Client Privilege*

"[T]he attorney-client privilege interferes with 'the truth-seeking mission of the legal process'" and is therefore not "favored."[11] A pervasive concern regarding the privilege is that it "excludes relevant evidence and stands 'in derogation of the search for the truth.'"[12] These problems can become particularly evident when the client is an organization.[13] Given the number of individuals possessing information relevant to litigation in large organizations, "administration of the privilege by the courts proves difficult" because the so-called "'zone of silence grows large[r].'"[14]

II. COURTS HAVE "ASSUMED" THAT A GOVERNMENTAL ATTORNEY-CLIENT PRIVILEGE EXISTS TO SOME DEGREE

Regardless of the lack of statutory evidence law, "most courts have assumed . . . that governments can claim the benefits of the [attorney-client] privilege."[15] In some instances, courts have avoided deciding whether a governmental attorney-client privilege exists and instead dismiss such a claim by

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9. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-1 (1980); *see also* Hickman v. Taylor, 329 U.S. at 511 (recognizing that inefficiency and unfairness would result if attorney work product were open to opposing counsel).

10. Swidler & Berlin v. United States, 524 U.S. 399, 408 (1998).

11. United States v. Aramony, 88 F.3d 1369, 1389 (4th Cir. 1996) (quoting United States v. Tedder, 801 F.2d 1437, 1441 (4th Cir. 1986)).

12. Reed v. Baxter, 134 F.3d 351, 356 (6th Cir. 1998) (quoting United States v. Nixon, 418 U.S. 683, 710 (1974)).

13. *Id.*

14. *Id.* (quoting David Simon, *The Attorney-Client Privilege As Applied to Corporations*, 65 YALE L.J. 953, 955 (1956)); *see also* 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5476, at 189 (1986) (noting that disclosure of information may be prevented by the use of the privilege when corporations are manipulating the information through their attorneys).

15. 24 WRIGHT & GRAHAM, *supra* note 14, § 5475, at 125.

reasoning that, even if the privilege did apply, the facts do not satisfy the standard for invoking the protections of the privilege.[16] For example, in *Reed v. Baxter*[17] the Sixth Circuit analyzed a claim of governmental attorney-client privilege in a municipal setting by assuming that the privilege was applicable.[18] However, because the court noted that by determining the facts did not satisfy the elements of the privilege, it did not have to specifically rule a governmental attorney-client privilege protected the communications.[19]

When courts apply the attorney-client privilege to the municipal setting, they seem generally unwilling to provide broad protection because of fear the privilege is incompatible with open government.[20] "Assuming that the [attorney-client] privilege applies, '[i]t is appropriate to recognize a privilege only to the very limited extent that . . . excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'"[21]

A. *A Specific Justification for the Attorney-Client Privilege in the Governmental Setting*

In their treatise on evidence, Wright and Graham discuss the governmental attorney-client privilege.[22] Their discussion of the advantages of the governmental attorney-client privilege "suffers from the fact that [the authors] have been unable to find any judicial or scholarly exposition of the reasons for recognition of the privilege."[23] Nonetheless, they propose some rationales for the attorney-client privilege in the governmental setting, which include:

> (1) "The other governmental privileges are not designed to deal with the special requirements of attorney confidentiality;"[24]
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> (2) "[T]he experience of courts in applying the attorney-client privilege to private parties is a better source of regulation than would be an attempted expansion" of other government privileges.[25]

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16. *See* United States v. Nixon, 418 U.S. at 713; Reed v. Baxter, 134 F.3d at 356.
17. Reed v. Baxter, 134 F.3d 351 (6th Cir. 1998).
18. *Id.* at 356.
19. *Id.* at 357. For a more complete discussion of *Reed v. Baxter*, see *infra* Parts II.B & VI.
20. *Id.* at 356.
21. *Id.* (quoting *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 918 (8th Cir. 1997)) (alteration in original).
22. *See* 24 WRIGHT & GRAHAM, *supra* note 14, § 5475, at 124-34.
23. 24 *id.* § 5475, at 127 n.21.
24. 24 *id.* § 5475, at 127.

(3) "[I]f elected officials were discouraged from having open discussions about pending litigation with counsel and key employees based on a fear of waiver of the attorney-client privilege, the effects of such lack of communication would be widespread and detrimental to society as a whole."[26]

(4) The rationale of providing full and frank disclosure to counsel is as important in the government context as in the corporate context.[27]

(5) Disallowing a governmental attorney-client privilege "may be seen as requiring the government to fight with one hand tied behind its back."[28]

(6) When a municipality has its own staff of lawyers, courts may analogize the privilege as applied to corporate in-house counsel.[29]

B. *Problems with the Attorney-Client Privilege in the Governmental Setting*

Although there are proposed benefits to the governmental attorney-client privilege, there are also "a number of considerations that militate against the expansion of the privilege to all governmental entities."[30] "[C]ourts and commentators have cautioned against broadly applying the privilege to governmental entities."[31] In *Baxter*, the Sixth Circuit considered the issue of an attorney-client privilege in the municipal setting and stated in 1998 that "there is little authority about which agents of an organizational client are the client for purposes of the attorney-client privilege."[32] The *Baxter* court noted: "The recognition of a governmental attorney-client privilege imposes the same costs as are imposed in the application of the corporate privilege, but with an added disadvantage. The governmental privilege stands squarely in conflict with the

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25. 24 *id.*

26. Roshani de Soyza Hardin, *Who Is the Governmental Client After* Reed v. Baxter?, (visited Aug. 4, 1999) <http://www.imla.org/members/mlpaperindex/papers/c98hardin.html>.

27. *Id.*

28. 24 WRIGHT & GRAHAM, *supra* note 14, § 5475, at 128.

29. 24 *id.* § 5476, at 170.

30. 24 *id.* § 5475, at 125.

31. Reed v. Baxter, 134 F.3d 351, 356 (6th Cir. 1998) (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 124 cmt. b (Proposed Final Draft No. 1, 1996); 24 WRIGHT & GRAHAM, *supra* note 14, § 5475, at 126).

32. Reed v. Baxter, 134 F.3d at 357.

strong public interest in open and honest government."[33] This consideration may be especially important when the privilege is used to shield potential information regarding criminal wrongdoing by a government official. Some courts acknowledge the distinction regarding criminal wrongdoing and have ruled the attorney-client privilege will not be allowed in such a situation.[34]

Some scholars argue a governmental attorney-client privilege that suppresses "evidence of communications between government employees and government lawyers is inconsistent with the openness to scrutiny that is thought by some to be the hallmark of a truly democratic republic."[35] Others argue a "governmental attorney-client privilege is inconsistent with 'open government' or 'sunshine' laws [that] are in effect in many states."[36] Similarly, others are concerned that the large number of government lawyers and the number of government employees who may have information relevant to litigation by or against the government would create a problem of lack of information.[37] Further, some say claims for governmental secrecy should only be protected by the existing privileges for secrets of state and official information.[38]

III. DEFINING THE MUNICIPAL LAWYER'S CLIENT

The first step in determining whether the attorney-client privilege applies is defining who is the client. If one accepts the proposition that the attorney-client privilege protects communications between municipal lawyers and their clients, the analysis of what is actually privileged is incomplete. One must decide, "Who is the municipal attorney's client?" This can be a complicated task. Because a municipal lawyer "does not *necessarily* represent a single client[,] . . . the client

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33. *Id.* (citing *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 920-21 (8th Cir. 1997)).

34. *See, e.g.*, United States v. Zolin, 491 U.S. 554, 574-75 (1989) (refusing to apply the privilege due to operation of the crime-fraud exception); *In re* Grand Jury Subpoena, 204 F.3d 516, 522-23 (4th Cir. 2000) (same); *In re* Lindsey, 148 F.3d 1100, 1102 (D.C. Cir. 1998) (per curiam) ("The public interest in honest government and in exposing wrongdoing . . . lead[s] to the conclusion that a government attorney may not invoke the attorney-client privilege in response to grand jury questions seeking information relating to the possible commission of a federal crime.").

35. 24 WRIGHT & GRAHAM, *supra* note 14, § 5475, at 126 (citing James A. Gardner, *A Personal Privilege for Communications of Corporate Clients: Paradox or Public Policy?*, 40 U. DET. L.J. 299, 376 (1963)).

36. 24 *id.*

37. *See* 24 *id.*

38. 24 *id.* § 5475, at 126-27 (citing James A. Gardner, *A Re-Evaluation of the Attorney-Client Privilege*, 8 VILL. L. REV. 447, 499-500 (1963)).

of the government lawyer is not so easily identified."[39] In a given day, a municipal lawyer may confer with the mayor, members of the city council, the city manager, various department heads, and agency administrators. The ultimate question is, "Which of the conferences are protected by the attorney-client privilege?" The answer lies with the response to a single question, "Who is the client?"

Nonetheless, an understanding of who actually is the municipal lawyer's client is vital to understanding what may be protected by the attorney-client privilege. For example, the attorney-client privilege does not protect from disclosure statements made by a client to his lawyer in the presence of a third party.[40] Therefore, if a municipal lawyer is meeting with a group that includes various city employees and officers, the communications from that meeting will not be privileged if even one person in that group is considered a third party rather than a client.[41]

Municipal lawyers are sought for advice by various city employees and officers, including the mayor, council members, administrative officials, and department heads. The importance of defining who the client is can be seen when situations arise between different agencies or departments, each of which the government lawyer is charged with advising. For example, a California court had to decide who the client was in a dispute between the county assessor and county board of supervisors when a statute required the government lawyer to advise all county officers.[42] In this 1977 case, the California state appellate court ruled that no attorney-client relationship existed between the county attorney and the county assessor within the meaning of an ethical rule forbidding a lawyer from accepting employment adverse to a former client.[43] Also, a Louisiana court in 1988 rather nonchalantly noted the city mayor was the client of the assistant city attorney.[44]

The American Bar Association's most current publication regarding addressing the government client provides some broad direction on this issue.[45] An essay by Jeffrey Rosenthal concludes:

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39. Jeffrey Rosenthal, *Who Is the Client of the Government Lawyer?*, *in* ETHICAL STANDARDS IN THE PUBLIC SECTOR 13 (Patricia E. Salkin ed., 1999).

40. Reed v. Baxter, 134 F.3d 351, 357 (6th Cir. 1998) (citing 8 WIGMORE, *supra* note 3, § 2311).

41. This description is similar to the fact pattern in *Reed v. Baxter* in which council members participated in a meeting with the city attorney as non-clients. Reed v. Baxter, 134 F.3d at 351.

42. Ward v. Superior Court, 138 Cal. Rptr. 532, 534 (Ct. App. 1977).

43. *Id.* at 539.

44. Finkelstein v. Barthelemy, 678 F. Supp. 1255, 1264 (E.D. La. 1988).

45. ETHICAL STANDARDS IN THE PUBLIC SECTOR, *supra* note 39.

> [T]he government lawyer is ethically bound to represent the agency by whom he or she is employed, recognizing that the agency speaks through—and its specific interests are formulated by—the individuals within the agency who are authorized to do so . . . . It is the government lawyer's responsibility to preserve and advocate the interests of the agency, as so expressed by [the individuals who are authorized to speak for and formulate the interests of the agency]. As long as the expressions, acts, or desires are not clearly unlawful, the government lawyer has the obligation, both ethically and practically, to advance those interests.[46]

IV. ETHICS CODES

State ethics codes generally define who is the lawyer's client. However, these codes are often unclear in this area. The various versions of state ethics codes are found in state statutes and court rules.

There are two primary ethics codes.[47] Although the Disciplinary Rules of the American Bar Association's Model Code do not address issues regarding the representation of organizations, the Model Rules do.[48] Model Rule 1.13 deals with an "organization as client."[49] Although thirty-eight states have adopted the Model Rules, one author notes that at least eight of those states have modified Rule 1.13 or the analogous provision.[50] Some of these modifications clarify the lawyer's obligation to the organization versus the lawyer's obligation to the individuals in the organization.[51] Because of these modifications, municipal lawyers must consider the particularized version in effect in their jurisdiction.

Rule 1.13 states: "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."[52] The commentary to this rule defines the organization's constituents as the "officers, directors, employees and shareholders."[53] However, the comments also clarify that the constituents of the organization are not necessarily the clients of

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46. Rosenthal, *supra* note 39, at 24.

47. Thirty-eight states, including the District of Columbia, have adopted the Model Rules, 10 states have adopted the Model Code, and three states have adopted an original or combination version. J. Ivan Legler, *Accounting for Differences in Ethics Rules from State to State*, MUN. LAW., Mar.-Apr. 1997, at 24, 26-27.

48. 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT at xxiv (2d ed. 1998).

49. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 (1984).

50. Legler, *supra* note 47, at 26-27.

51. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 cmt. 1 (defining "the constituents of the corporate organizational client").

52. *Id.* Rule 1.13(a).

53. *Id.* Rule 1.13 cmt. 1.

the lawyer.[54] The comments further note this rule applies to governmental organizations.[55] It says in the governmental context, different considerations may be appropriate when balancing issues of maintaining confidentiality versus assuring that wrongful official conduct is prevented or rectified.[56]

Missouri, for example, follows the Model Rules of Professional Conduct.[57] The state has adopted Rule 1.13, "Organization as Client," in what appears to be an identical form to the Model Rule.[58] Unlike Missouri, Colorado has opted to modify Rule 1.13 which specifies "the organization and lawyer's duty is to the organization itself and not to the various individuals connected with it."[59] This further defines to whom the Colorado lawyer may owe a duty.[60] However, Iowa is in the minority of states that have not adopted the Model Rules.[61] Iowa adheres to the Model Code of Professional Responsibility which does not address the issue of representing an organization as a client.

V. THE PRIVILEGE IN THE CORPORATE SETTING

Private corporations provide a setting somewhat analogous to the municipal setting because both involve the privilege as it relates to an organizational client. However, courts have more completely explored the privilege as it relates to private corporations.[62] In *Upjohn Co. v. United States*,[63] the Supreme Court applied the attorney-client privilege in the corporate context.[64]

In *Upjohn*, the Supreme Court invalidated the old "control group test" for corporations and adopted the "subject matter test."[65] In doing so, the Supreme Court rejected the Sixth Circuit's prior use of, and reasoning behind, the control

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54. *Id.* Rule 1.13 cmt. 2.
55. *Id.* Rule 1.13 cmt. 6.
56. *Id.*
57. Legler, *supra* note 47, at 26.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *See, e.g.*, Upjohn Co. v. United States, 449 U.S. 383, 389-91 (1981) (weighing the value of the control group test).
63. Upjohn Co. v. United States, 449 U.S. 383 (1981).
64. *See id.* at 397; *see also* United States v. Louisville & Nashville R.R., 236 U.S. 318, 336 (1915) (holding that Hepburn Act did not permit inspection of "confidential communications between attorney and client").
65. *See generally* Upjohn Co. v. United States, 449 U.S. at 392-97 (holding that communications made by corporate employees to counsel for a corporation, by the request of superiors for the purpose of obtaining legal advice when the employees knew they were being interviewed by the corporation to obtain legal advice, were protected).

group test.[66] The Sixth Circuit reasoned that the corporation is an inanimate entity and, therefore, "only the senior management, guiding and integrating the several operations, . . . can be said to possess an identity analogous to the corporation as a whole."[67] Therefore, the Sixth Circuit adopted the control group test, whereby only those within the corporation who had a "substantial role" in controlling and directing the corporation's response to legal advice—the control group—could utilize the protections of the attorney-client privilege.[68] Thus, the control group test did not protect communications between a corporate lawyer and lower-level employees.[69]

The control group test focused on who can effect change when receiving legal information from a lawyer.[70] In *Upjohn*, the Sixth Circuit defined the control group as "officers and agents . . . responsible for directing [the company's] actions in response to legal advice."[71] However, the Supreme Court in *Upjohn* ruled this view "overlooks the fact that the 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."[72]

The Supreme Court in *Upjohn* reasoned:

> Middle-level—and indeed lower-level—employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by the corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties.[73]

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66. *See id.* at 390-93.

67. *Id.* at 390 (citing United States v. Upjohn Co., 600 F.2d 1223, 1226 (6th Cir. 1979), *rev'd*, 449 U.S. 383 (1981)).

68. United States v. Upjohn Co., 600 F.2d at 1226. The first case to articulate the so-called control group test was *City of Philadelphia v. Westinghouse Electric Corp.* *Id.* (citing City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483, 485-86 (E.D. Pa. 1962)).

69. Upjohn Co. v. United States, 449 U.S. at 395.

70. *See id.* at 390-92.

71. United States v. Upjohn Co., 600 F.2d at 1225.

72. Upjohn Co. v. United States, 449 U.S. at 390; *see also* Trammel v. United States, 445 U.S. 40, 51 (1980) (holding that although the accused's spouse testified under a grant of immunity and assurances of lenient treatment, her testimony was still voluntary and the accused's claim of privilege was properly rejected); Fisher v. United States, 425 U.S. 391, 403 (1976) (holding that the enforcement of documentary subpoenas directed to taxpayers' attorneys was not precluded by the theory that attorneys were required to keep confidences of clients who had a reasonable expectation of privacy).

73. Upjohn Co. v. United States, 449 U.S. at 391.

The lawyer must be able to freely ascertain relevant facts regarding legal issues.[74] The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant.[75]

The Supreme Court said the control group test "frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation."[76] The control group test makes it difficult for corporate lawyers to render sound legal advice because of a lack of information from the non-control group.[77] The test "threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law."[78]

The Supreme Court in *Upjohn* downplayed the Sixth Circuit's concern regarding a burden on discovery.[79] The Sixth Circuit expressed concern that extending the attorney-client privilege beyond the limits of the control group test would severely burden "discovery and create a broad 'zone of silence' over corporate affairs."[80] However, the Supreme Court noted, pertaining to the facts of *Upjohn*, the attorney-client privilege "puts the adversary in no worse position than if the communications had never taken place. The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney."[81] Further,

> "the protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the [lawyer]?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney."[82]

Therefore, the United States Supreme Court adopted the subject matter test, which expanded the amount of communication which may be protected by the attorney-client privilege in the corporate context.[83] The subject matter test

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74. *Id.*
75. *Id.*
76. *Id.* at 392.
77. *Id.*
78. *Id.*
79. *Id.* at 395.
80. *Id.*
81. *Id.*
82. *Id.* at 395-96 (quoting City of Philadelphia v. Westinghouse Elec. Corp., 205 F. Supp. 830, 831 (E.D. Pa. 1962)).
83. *Id.* at 397-98.

protects communications between lawyers and agents or employees of the corporation who are authorized to speak or act on behalf of the corporation in relation to the subject matter of the communication.[84]

VI. THE ATTORNEY-CLIENT PRIVILEGE IN THE GOVERNMENTAL SETTING

It is far from clear whether the attorney-client privilege applies to municipal governments and under what circumstances the privilege applies.[85] Neither the Model Code of Evidence nor the Uniform Rules of Evidence provide for the attorney-client privilege in a municipal setting.[86] Rule 501 is the only rule in the Federal Rules of Evidence which addresses the attorney-client privilege.[87] Rule 501 neither specifically allows for the privilege in the municipal setting nor disallows it.[88] When that rule refers to the "privilege of a . . . government, State, or political subdivision thereof," it speaks in terms of the "governmental privilege" rather than comparing a privilege upon communications between a municipal lawyer and city employees or officers.[89]

The governmental privilege is separate and distinct from the government attorney-client privilege. The governmental privilege "protects the government from revealing military or diplomatic secrets or other information the disclosure of which would be contrary to the public interest."[90] In contrast, the government attorney-client privilege protects communications made between a lawyer and the government entity which is the lawyer's client.[91] The government attorney-client privilege is not premised on protecting diplomatic or other information that would be against the public interest if disclosed.[92]

Interestingly, courts have relied on the language of proposed Federal Rule of Evidence 503 as supporting the existence of a government attorney-client privilege.[93] Proposed Rule 503 defines "client" to include public officers, as well as organizations, either public or private.[94] The courts have generally not resolved the issue of the government attorney-client privilege. However, the

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84. *Id.*
85. 24 WRIGHT & GRAHAM, *supra* note 14, § 5475, at 124.
86. 24 *id.*
87. FED. R. EVID. 501.
88. *Id.*
89. *Id.*
90. BLACK'S LAW DICTIONARY 627 (5th ed. 1979) (citing United States v. Reynolds, 345 U.S. 1, 10-12 (1953)).
91. *See* 24 WRIGHT & GRAHAM, *supra* note 14, § 5475, at 128.
92. *See* 24 *id.*
93. 24 *id.*
94. 24 *id.* This proposed rule has subsequently been rejected. 24 *id.*

Court of Appeals for the Sixth Circuit discussed the issue in the cases of *United States v. Doe*[95] and *Reed v. Baxter*.[96]

In 1989, the Sixth Circuit in *United States v. Doe*, considered the question of who the municipal lawyer represents.[97] The *Doe* court ruled the Detroit City Council was a client of the city's lawyer with respect to closed condemnation hearings held pursuant to the city code.[98] The opposing party wanted the Detroit City Council to turn over minutes of four closed meetings between the City Council and the lawyers.[99] In two meetings, the "City Council met with, among others, corporation counsel and special corporation counsel to discuss condemnation of property."[100] In the other two meetings, the "City Council met with special corporation counsel, the attorney representing Council itself and the attorney representing the City Administration."[101] The City Council claimed the minutes were protected by the attorney-client privilege.[102] The Sixth Circuit reversed the lower court and held that under these facts an attorney-client privilege may exist.[103]

The lower court reasoned the City Council and City Administration advocated different positions, retained separate outside counsel, and operated in a bifurcated structure of government and, as such, were distinct entities.[104] However, the Sixth Circuit ruled that even if these assertions were correct, they still would "not support the district court's ultimate factual conclusion" that the minutes are not privileged.[105] Instead, the Sixth Circuit extended the attorney-client privilege to a city attorney who was found to represent both the City of Detroit as well as its City Council in a condemnation proceeding.[106] The court ruled in this manner even though the City Council had retained separate outside counsel to advise it regarding issues arising from the condemnation action.[107]

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95. United States v. Doe, 886 F.2d 135 (6th Cir. 1989).
96. Reed v. Baxter, 134 F.3d 351 (6th Cir. 1998).
97. United States v. Doe, 886 F.2d at 137.
98. *Id.* at 138.
99. *Id.* at 136.
100. *Id.* at 138.
101. *Id.*
102. *Id.* at 136.
103. *Id.* at 139. The court withheld judgment on whether the attorney-client privilege actually protected the minutes pending the outcome of another case determining whether the meetings were unlawfully closed under the Michigan Open Meetings Act. *Id.* (citing MICH. COMP. LAWS § 15.268 (1986)).
104. *Id.* at 137.
105. *Id.*
106. *Id.* at 137-38.
107. *Id.* at 138.

The court remanded *Doe* to the district court to determine whether the privilege would apply.[108] The outcome would turn on the "confidentiality" of the communications.[109] The *Doe* decision, which was rendered in 1989,[110] was readdressed by the Sixth Circuit in 1998 in the case of *Reed v. Baxter*—wherein the court appeared to narrow the scope of the attorney-client privilege in a municipal setting.[111] The court held that the attorney-client privilege did not protect communications from a meeting between a city attorney, city manager, city fire chief, and two city council members.[112] Because the court deemed the council members "third parties," their presence waived any potential privilege.[113] The court dodged the issue of whether the attorney-client privilege is applicable in the municipal setting.[114] Instead, it ruled that even if the privilege did apply to a municipality, the facts presented did not satisfy the requirements of the privilege.[115]

The facts in *Reed* were as follows: "In 1992, the city of Murfreesboro[, Tennessee] Fire Department took steps to fill a captain's position left vacant" upon the termination of an African-American captain.[116] "The Department notified prospective candidates that it would select three finalists for the promotion based on a combination of test scores, length of service, and number of state certifications."[117] Based on test scores, the Department selected three finalists.[118] These finalists included plaintiffs Henry Sharber and John Reed, both white candidates, and an African-American candidate.[119] However, due to procedural errors in grading the exam, the fire chief set aside the test scores and selected new finalists.[120]

The new set of top three candidates were chosen based on the other two criteria—length of service and number of state certifications.[121] The finalists on this new list included Thomas Adams, a Caucasian, and Thomas McClain and Emmet Young, both of whom were African-Americans.[122] Young had not

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108. *Id.* at 139.
109. *Id.* at 138.
110. *Id.* at 135.
111. Reed v. Baxter, 134 F.3d 351, 358 (6th Cir. 1998).
112. *Id.*
113. *Id.*
114. *Id.* at 356.
115. *Id.*
116. *Id.* at 353.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*

appeared on any of the previous lists.[123] The fire chief recommended Young for the job and the city manager officially promoted him.[124] The two Caucasian candidates under the first method—Reed and Sharber—filed a reverse discrimination claim.[125]

The day after the promotion, City Councilman Jack Ross called a "meeting to inquire into the circumstances surrounding Young's promotion."[126] This meeting in the city manager's office included City Attorney Thomas Reed, Councilmen Christopher Bratcher and Jack Ross, City Manager Haley, and Fire Chief Baxter.[127] Plaintiffs claim that statements made by the city attorney during this meeting reveal Young received the promotion solely because of his race.[128]

The *Baxter* court appears to have followed the restrictive control group test which the United States Supreme Court refused to apply to the corporate setting in *Upjohn Co. v. United States*.[129] The court reasoned that because the councilmen were third parties, the discussion was not held in confidence and, therefore, the requirements of attorney-client privilege were not satisfied.[130] Thus, no shield of the attorney-client privilege existed.[131]

The *Baxter* decision has been controversial. Some argue that all those in attendance at the meeting had a common interest.[132] If everyone had a common interest, then the communication might be considered confidential and, therefore, protected by the attorney-client privilege. In *Who Is the Government Client After* Reed v. Baxter, one author questions the *Baxter* court's reasoning.[133] The author observed: "All parties were present in their official capacities as elected officials or administration officials whose common interest was to best serve the needs of the residents of Murfreesboro in light of the pending litigation."[134] Therefore, the author argues the privilege should apply.[135]

The *Baxter* decision meant the communications between the city attorney, city council members, city manager, and city fire chief were discoverable by the

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123. *Id.*
124. *Id.*
125. *Id.* at 353-54.
126. *Id.* at 353.
127. *Id.*
128. *Id.*
129. Upjohn Co. v. United States, 449 U.S. 383, 392 (1981).
130. Reed v. Baxter, 134 F.3d at 358.
131. *Id.*
132. Hardin, *supra* note 26.
133. *Id.*
134. *Id.*
135. *Id.*

plaintiff and were admissible in court.[136] One can imagine the chilling effect this decision might have on city officials. For example, the communications at issue in *Baxter* involved a situation in which the city officials and employees allegedly spoke fully and frankly with the city attorney.[137] Their openness was probably founded on a misplaced belief that their discussion was made in confidence and protected by the attorney-client privilege. If these city employees encounter another similar situation in which they desire the assistance of legal counsel, it is very likely they may withhold particularly important information because of a concern that the conversation with the city attorney may not be held confidential.

The Sixth Circuit has "assumed that a governmental entity such as a municipal corporation may invoke the attorney-client privilege."[138] However, it is important to note the Sixth Circuit has "never explicitly" recognized the attorney-client privilege in the municipal setting.[139] This is true even after *Baxter* because the court ruled that even if the attorney-client privilege applied to municipalities, the *Baxter* facts did not satisfy the requirements of the privilege.[140]

One *Baxter* justice dissented, citing a concern that the majority construed the privilege too narrowly.[141] The dissent relied on agency theory, the application of the attorney-client privilege to corporations, and the *Doe* case.[142] The dissent argued under agency theory, "it is well settled that agents of a client are covered by the attorney-client privilege to the same extent as the client."[143] Therefore, because the municipal entity was the lawyer's client and the city councilmembers were agents of the municipal entity, the councilmembers were clients of the municipal lawyer.[144]

The dissent also argued that the rationale for the rule in a corporate and organizational setting is analogous to the municipal setting.[145] "[T]he majority has recognized that private corporations and other organizations who are analogous to governmental entities may constitute clients for purposes of the attorney-client privilege."[146] For example, the Supreme Court in *Upjohn* rejected

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136. Reed v. Baxter, 134 F.3d at 358.
137. *Id.* at 353-54.
138. *Id.* at 356 (citing United States v. Doe, 886 F.2d 135 (6th Cir. 1989)).
139. *Id.*
140. *Id.*
141. *Id.* at 358 (Jones, J., dissenting).
142. *See id.* at 358-60 (Jones, J., dissenting).
143. *Id.* at 358-59 (Jones, J., dissenting).
144. *Id.* (Jones, J., dissenting).
145. *Id.* at 359 (Jones, J., dissenting).
146. *Id.* at 358-59 (Jones, J., dissenting).

the control group test for corporations and adopted the subject matter test.[147] Under the Sixth Circuit's *Upjohn* control group test, only communications by the control group were protected.[148] The control group includes "those officers, usually top management, who play a substantial role in deciding and directing the corporation's response to the legal advice given."[149] Further, the dissent believed *Doe* was dispositive.[150] He argued *Doe* stands for the proposition that "for the purposes of the attorney-client privilege and thus, as clients of the city attorney, a city council could invoke the attorney-client privilege."[151] Finally, the dissent attacked the alleged unworkability of the *Baxter* majority's model.[152] He claimed:

> under the majority's reasoning it would be nearly impossible for a city council ever to invoke the attorney-client privilege. In most instances, a full city council meeting must be open to the public, which is not conducive to confidential discussions. A city council member; then, would only be able to seek confidential legal advice in a private meeting with the city attorney, such as the meeting between the councilmen and the city attorney in this case.[153]

VII. CRIMINAL PROCEEDINGS

The federal courts have recently narrowed the protection of the attorney-client privilege in grand jury proceedings. A recent article by the American Bar Association Section on State and Local Government predicts these decisions will affect local officials.[154] The article states that although these opinions only address "the scope of the privilege in the federal context, there is every reason to anticipate that courts will apply their reasoning to privilege claims by state and local officials (whether in state or federal criminal proceedings)."[155]

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147. *Id.* at 359 (Jones, J., dissenting).
148. *Id.* (Jones, J., dissenting).
149. United States v. Upjohn Co., 600 F.2d 1223, 1226 (6th Cir. 1979), *rev'd*, 449 U.S. 383 (1981).
150. Reed v. Baxter, 134 F.3d at 359 (Jones, J., dissenting).
151. *Id.* (Jones, J., dissenting).
152. *Id.* at 360 (Jones, J., dissenting).
153. *Id.* (Jones, J., dissenting).
154. Normal Redlich & David R. Lurie, *Federal Governmental Attorney-Client Privilege Decisions May Prove Significant to All Government Lawyers*, *in* ETHICAL STANDARDS IN THE PUBLIC SECTOR, *supra* note 39, at 294-95.
155. *Id.*

These federal court decisions have allowed an exception to the government attorney-client privilege in the case of grand jury proceedings.[156] In *In re Lindsey*,[157] the court ruled the attorney-client privilege provides no protection against a grand jury subpoena issued to a government lawyer.[158] The court stated: "When government attorneys learn, through communications with their clients, of information related to criminal misconduct, they may not rely on the government attorney-client privilege to shield such information from disclosure to a grand jury."[159] Even more forcefully, the D.C. Circuit Court of Appeals ruled "the attorney-client privilege dissolves in the face of a grand jury subpoena."[160]

The D.C. Circuit reasoned the allegiance of the government lawyer is "owed first and foremost to the 'public' and to the criminal justice system, not to the government agency or official the lawyer advises and serves."[161] The court also reasoned the "'public's interest in uncovering illegality among its elected and appointed officials' trumps the interest of government officials and agencies in obtaining fully informed advice from the lawyers that serve them."[162] The Eighth Circuit followed similar reasoning when it rejected the assertion of the attorney-client privilege in a grand jury proceeding in *In re Grand Jury Subpoena Duces Tecum*.[163]

The *Baxter* court considered this case helpful, relied heavily on it, and applied its reasoning to the municipal setting.[164] In the legal investigation titled *Office of President v. Office of Independent Counsel*, the Independent Counsel moved to compel the production of notes taken during meetings regarding Whitewater.[165] These meetings were attended by the White House lawyers, the President's wife, and the President's wife's lawyers.[166] Both the White House and President's wife resisted the motion to compel based on the attorney-client privilege.[167]

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156. *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 924 (8th Cir. 1997).
157. *In re* Lindsey, 148 F.3d 1100 (D.C. Cir. 1998) (per curiam).
158. *Id.* at 1114.
159. *Id.*
160. *Id.* at 1119.
161. Redlich & Lurie, *supra* note 154, at 294 (discussing *In re Lindsey* decision).
162. *Id.* at 294-95 (quoting *In re* Lindsey, 148 F.3d at 1109).
163. *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir. 1997).
164. Reed v. Baxter, 134 F.3d 351, 356 (6th Cir. 1998).
165. *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d at 913.
166. *Id.* at 914.
167. *Id.*

> They relied in part on the common-interest doctrine, which expands the coverage of the attorney-client privilege where two or more clients with a common interest in a matter are represented by separate lawyers and agree to exchange information concerning the matter. In such instances, a communication of any such client that otherwise would qualify as privileged is privileged as against third parties.[168]

The court said the common interest requirement is a "loose standard" that may be established as being "either legal, factual, or strategic in character."[169] Nonetheless, the court held the standard had not been satisfied.[170] The court refused to apply the attorney-client privilege, in part, because of disparity of interest between the President's wife and the White House.[171] The court described the varying interests present.[172] The President's wife's primary interest was avoiding criminal conviction.[173] On the other hand, the White House, as an institution, did not face such a threat.[174] The Supreme Court denied review of the Eighth Circuit's decision.[175]

VIII. PRACTICAL POINTERS

From a practical standpoint, the municipal lawyer should take certain steps to ensure communications with the client are not compromised. They include the following:

> *Take charge of the situation*—if the municipal attorney is asked to attend a meeting involving municipal employees or some of the elected officials, the attorney should evaluate the purpose and subject matter of the meeting, determine who should attend, and in some cases, who should be excluded from the meeting before it begins;
>
> *Include only those individuals that are essential*—invite only those individuals that are essential to decision-making or problem

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168. Reed v. Baxter, 134 F.3d at 357 (citing *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d at 922).
169. *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d at 922.
170. *Id.* at 922-23.
171. *Id.*
172. *Id.*
173. *Id.* at 923.
174. *Id.*
175. *In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir.), *cert. denied sub nom.* Office of the President v. Office on Indep. Counsel, 521 U.S. 1105 (1997).

resolution. Determine whether there is a commonality of interest among those attending the meeting;

Gather as many facts as early as possible—the municipal attorney needs to evaluate any legal or factual issues that will be discussed at the meeting;

Define your role—is the attorney serving as a problem solver, informal mediator, legal advisor, or merely as a member of the executive department for the municipality—the role of the attorney may impact the privileged nature of any conversations the municipal lawyer has with individuals present at the meeting and may also impact the privileged nature (or lack thereof) of any notes taken by the municipal lawyer;

Identify your client—in many jurisdictions, the client in a municipal setting is the composite members of the city council. However, in other jurisdictions, the mayor may be the client. In either circumstance, the privilege may, in all likelihood, not extend to conversations with individual council members under certain circumstances and in most cases, does not include executive members of the municipality or other department heads or staff members. In this regard, the municipal lawyer must remain cognizant of the difference between a witness and a client;

Identify the affected parties and their motivation—one or more of the individuals present at the meeting may end up as the subject of the action to be taken by the municipal lawyer or may be part of the problem that needs to be legally addressed;

Consider who you are talking to—in some cases, the municipal lawyer will be asked to offer preliminary assessments as to whether any law was violated or anything improper or unethical occurred. In other cases, statements of this kind, even though based on preliminary information, can be used against the municipality by those attending the meeting or by individuals who are able to gain access to the information through the discovery process;

Do not say anything you do not want repeated—except under circumstances in which the municipal lawyer is confident the statements and communications made are protected by the attorney-client privilege (that is, when the municipal attorney is meeting in

closed session with the client) the attorney should be cautious about the comments made and to whom they are made.

IX. CONCLUSION

The circumstances under which the attorney-client privilege applies in a municipal setting is far from clear. Hopefully, future cases will provide further guidance in this regard. In the meantime, the municipal lawyer should take precautionary steps to protect communications with municipal employees and elected officials.