



# Legal Profession and Government Lawyers: What is the Highest Competing Duty to Act in the Public Interest?

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# HARVARD LAW SCHOOL

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Legal profession and government lawyers: What is the  
highest competing duty to act in the public interest?

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## 1. Introduction

It is assumed by many scholars that “the government attorney may have authority regarding legal matters that do not exist in a private lawyer-client relationship, including the settlement of a matter or declining to appeal an adverse decision.”<sup>1</sup> Private lawyers or lawyers who do not work for the government are primarily concerned with protecting the interests of their clients, even if those clients may have been engaged in wrongdoing. However, we must analyze if government’s attorneys have a higher or a competing duty to act in the public interest. Therefore, in the first place this paper is about the difficulty of deciphering who is a government attorney client. Then it will analyze if a government attorney fails to determine his attorney-client duties because of the difficulty to differentiate the individuality of the client, if there is a risk of a breach of ethical duty.<sup>2</sup> But in the bottom of all these, the ultimate question is if there is a real difference between private and government lawyers regarding the public interest argument.

We also must say that considerable effort and interest have been put into examining the professional responsibilities of private lawyers, while the for-government lawyers not so much. As a result, we assume that government lawyers must accommodate themselves to the same standards and regulations as their private counterparts. The lack of a clear distinction between the rules and the rights of government and private lawyers could be a

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<sup>1</sup> National Association of Attorneys General, *Who is Your Client? Ethical Considerations for Government Attorneys*, NAAGazette Archive, available at <http://www.naag.org/publications/naagazette/volume-8-number-1/who-is-your-client-ethical-considerations-for-government-attorneys.php> last visited on April 11, 2017.

<sup>2</sup> *Id.*

manifestation of a larger democratic understanding of law and justice.<sup>3</sup> And this is a result of every country's values and principles applied to professional responsibility.

## **2. Special conflicts of interest for former and current government officers, and employees' client-lawyer relationship**

The ABA Model Rules of Professional Conduct (hereinafter MRPC or Model Rules) establish in the Rule 1.11: Special Conflicts of Interest for Former & Current Government Officers & Employees Client-Lawyer Relationship

Rule 1.11 Special Conflicts of Interest for Former And Current Government Officers And Employees

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.<sup>4</sup>

As we can see, MRPC 1.9 (c) says that when a lawyer has formerly represented a client, shall not use information relating to the representation to the

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<sup>3</sup> Allan C. Hutchinson, *In the Public Interest': The Responsibilities and Rights of Government Lawyers*, Osgood Hall Law Journal, at 105 (2008).

<sup>4</sup> MODEL RULES OF PROF'L CONDUCT R. 1.11 available at [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_11\\_special\\_conflicts\\_of\\_interest\\_for\\_former\\_current\\_government\\_officers\\_employees.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_11_special_conflicts_of_interest_for_former_current_government_officers_employees.html) last seen April 4, 2017.

disadvantage of the former client, except if the information has become generally known; and shall not use information relating to the representation unless otherwise permitted by the MRPC.

Rule 1.11 (c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was **a public officer or employee**, may not represent a private client **whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person.**

As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public.

(d) Except as law may otherwise expressly permit, **a lawyer currently** serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, **unless the appropriate government agency gives its informed consent**, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.<sup>5</sup>

As we can see, the MRPC establish that government lawyers are held to different ethical standards in some respects, mainly with regards to conflicts of interest. Lawyers' legal duties have the same distinction. Government lawyers can be currently serving as a public officer or employees of the government. We must assume that it refers to lawyers who are enrolled full-time and work for a governmental entity. However, these distinctions are not comprehensive because they are letting out of the box at those lawyers who work in a part-time capacity for the government. This is particularly relevant in rural areas of the United States where these lawyers represent the government as part of their private practices.<sup>6</sup>

### **3. Who is the client?**

All lawyers are subject to the MRPC and by the particular rules governing their activities. However, full-time government lawyers have a different role than lawyers in private practice. "Under various legal provisions, including constitutional, statutory and

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<sup>5</sup> *Id.*

<sup>6</sup> See, Jhon M. Burman, *Ethics for Lawyers Who Represent Governmental Entities as Part of Their Private Practice*, Wyoming Law Review, at 358 (2010).

common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships.”<sup>7</sup>

If we want to go even deeper, we must acknowledge that “the relationship between a government attorney and a government official or employee is not the same as that between a private attorney and his client.”<sup>8</sup> When representing a government entity, the question of who is the client might not be as easy as it appears to be. If we want to define the identity of the client the matter is beyond the scope of the MRPC. For instance, a lawyer who represents a big city will represent the entire office of the mayor and the mayor himself and therefore will have a different relationship with the client than does a private attorney representing a private individual.<sup>9</sup>

We must also assume that much of the daily work performed by government lawyers can be similar to that of private lawyers. What a lawyer generally does is to advise people and institutions on existing regulations, statutes, laws, and at large provide legal strategies that if approved by the client would have to be implemented. But if we go to the specifics of a government attorney’s job, then we see that when lawyers act on behalf of the government they have to place the public interest ahead of the interest of any particular individual.<sup>10</sup> While in theory it may sound reasonable, the reality differs. Because the identity of the individual as a public officer or representative and the identity of an individual acting as a civilian sometimes could be more intricate than it seems. “Although government lawyers are in a different position than private lawyers, a useful analogy can

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<sup>7</sup> *Id.* at 359.

<sup>8</sup> ANDREW L. KAUFMAN & DAVID B. WILKINS, PROBLEMS IN PROFESSIONAL RESPONSIBILITY FOR A CHANGING PROFESSION, at 317 (5<sup>TH</sup> ed. 2009).

<sup>9</sup> *Id.* at 316.

<sup>10</sup> , John M. Burman, *supra* note 6, at 113.

be drawn to the context and challenges faced by those lawyers who represent corporations or other similar organizations.”<sup>11</sup>

Based on the previous argument, the government attorney’s client could be considered the public at large, for instance: the government, a particular government agency, or the officials responsible for decision-making within that agency.<sup>12</sup> If we have a case where the Department of Justice represents another government agency, then the question is whether the client is the agency or the Department of Justice.

Let’s look at Comment 9 to MRPC 1.13, which recognizes the difficulty for attorneys serving a governmental client. “Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond scope of these Rules... Thus, when the client is a governmental organization, a different balance may be appropriate... for public business is involved.”<sup>13</sup>

#### **4. Attorney-client privilege**

It comes from general knowledge that conversations between lawyers and clients are under the attorney-client privilege of confidentiality. However, this notion that was

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<sup>11</sup> *Id.* at 121.

<sup>12</sup> Jessica Wang, *Protecting Government Attorney Whistleblowers: Why We Need an Exception to government Attorney-Client Privilege*, *The Georgetown Journal of Legal Ethics*, 1073 (2013).

<sup>13</sup> MODEL RULES OF PROF’L CONDUCT R.1.13 cmt.9, *supra* note 4. See also, Jessica Wang, *supra* note 12, at 1073.



considered at one-point absolute now it has suffered from public distrust. “The privilege extended to attorney-client relationship in the government setting is confusing and not as clear-cut as the privilege in other attorney-client settings.”<sup>14</sup> The logic behind the attorney-client privilege of confidentiality is that it encourages full communication enabling the attorney to properly represent the client. It is assumed that the client will disclose all relevant facts. From a wider perspective, freedom of consultation promotes broader public interests in the administration of justice.<sup>15</sup>

From a distinct perspective, in today’s context, where we have new forms of public interaction and where information can be made publicly available very easily, some of the unique duties of government attorneys become more evident in the whistleblower scenario. “There is a bigger potential for government attorney whistleblowers could leak confidential information to expose wrongdoing or mismanagement to the public.”<sup>16</sup> There is a bigger social conscience promoting whistleblowing as good for the public interests.

Confidentiality issues are a little bit trickier in the government sphere where lawyers provide legal advice but at other times may provide policy advice and political or strategical advice. In other words, if we apply the Model Rules, then the privilege of confidentiality would only apply to the legal advice and not to the other kind of advice that we have described. And the other difficult part about confidentiality is to determine who

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<sup>14</sup> Patricia E. Salkin, *Beware: What You Say to your [Government] Lawyer May Be Held Against You – The Erosion of Government Attorney-Client Confidentiality*, American Bar Association, *The Urban Lawyer*, at 283, (2003).

<sup>15</sup> *Id.* at 285.

<sup>16</sup> Jessica Wang, *supra* note 12 at 1063.

you are giving legal advice to: if it is to an individual party or the office. This problem becomes more evident when a new person is elected or appointed to some specific office.<sup>17</sup>

On an additional point, when Congress passed the Freedom of Information Act (FOIA) in 1967 the intention was to permit access to official information that have been unnecessarily protected from the public. But above all the idea was to avoid the misuse of that private information in the hands of the government. There are 9 exceptions that allow the government to keep some documents from the public. Attorney-client privilege is one of the exceptions with the idea to promote free and open conversation. It is assumed that without confidentiality government officials would avoid discussing sensitive matters with counsel.<sup>18</sup>

If we assume that the argument is that in the public practice of law, the ultimate client might be the general public and not the public official, and then there should not be an attorney-client confidentiality privilege for government lawyers. However, it is unthinkable that something like this could be accepted in a civilized society. Nonetheless, courts have not clearly defined who the client of the government lawyer is, but have imposed a higher duty of government lawyers to act in the public interest.<sup>19</sup>

Vis-à-vis private practice, where everyone assumes that conversations are private and therefore confidential, the government setting is the opposite. In the government

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<sup>17</sup> Patricia E. Salkin, *supra* note 13 at 285.

<sup>18</sup> *Id.* at 288.

<sup>19</sup> *Id.* at 289.

setting there is the idea that all information is public and transparency is of paramount importance in democratic institutions. Therefore, in order to guarantee democracy and avoid corruption there should not be absolute privacy except in specific circumstances and for public interest reasons.

Is there a distinction of attorney-client privilege as applied to criminal and civil cases in the government context? In *Swidler & Berlin v. United States*<sup>20</sup> the Supreme Court held that there is not distinction between civil versus a criminal context when it comes to attorney-client privilege. However, this case did not involve a government lawyer situation because the attorney was one working in the private setting. For this reason, some people still think that the attorney-client privilege for government lawyers whether in the civil or the criminal areas are still uncertain. In fact, courts still treat the government attorney-client privilege differently in the criminal investigative context.

Despite the fact that it seems that there is no distinction between the civil and criminal law cases in terms of confidentiality, the widely shared perception among lawyers is that government attorneys have greater responsibilities to serve the public interests, especially in the criminal law context. In *Berger v. United States*<sup>21</sup> the Court recognized that the United States prosecutor's client is not an individual or a private entity, but a sovereignty: the local, state, or federal government.<sup>22</sup> Additionally there was embedded the idea that the government attorney had to seek justice as its ultimate purpose. Today, there

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<sup>20</sup> 524 U.S. 399 (1989).

<sup>21</sup> 295 U.S. 78 (1935).

<sup>22</sup> *Id.* at 88.

is still this belief that the government lawyer owes special duties not just to their clients but to the public in all contexts.<sup>23</sup>

There is a historical justification for the confidentiality privilege, however “the Eight, D.C., and Seventh Circuits held that the public interest is better served by not recognizing the government attorney-client privilege in the grand jury setting.”<sup>24</sup> The idea behind these decisions is the value of an open and honest government, this value being even greater than the value of having a full and frank communication between clients and counsel.

In recent years, the Clinton White House gave rise to various decisions that transformed the attorney-client privilege for government attorneys. In the year 1996 Kenneth Starr, as an Independent Counsel, served a grand jury subpoena on the White House requiring the production of the Whitewater documents. The White House claimed that the documents were privileged; however, the court concluded that “whether or not a government attorney-client privilege exists at all, the White House may not use the privilege to withhold potentially relevant information from a federal grand jury.”<sup>25</sup>

From the Whitewater investigations emerged two federal court appeals decisions that are relevant to this paper. “The Eight Circuit’s 1997 decision in *In re Grand Jury Subpoena Duces Tecum* and the D.C. Circuit’s 1998 decision in *In re Lindsey*. Both

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<sup>23</sup> Kerri R. Blumenauer, *Privileged or Not? How the Current Application of the Government Attorney-Client Privilege Leaves the Government Feeling Unprivileged*, Fordham Law Review, at 88 (2006).

<sup>24</sup> *Id.* at 100.

<sup>25</sup> Patricia E. Salkin, *supra* note 13, at 294.

decisions held that federal government attorneys may not invoke the attorney-client privilege against disclosure to a federal grand jury.”<sup>26</sup> These decisions generated fear about the weakening of the privilege. There should be a more reasonable rule in order to solve the practical problems facing government attorney-client privilege, because this privilege remains limited and uncertain.

## **5. The Public Interest**

As we have seen, sometimes, the relationship between lawyers and clients in government are different from the lawyer-client relationship in the private sector. In some cases, some government lawyers should consider the public interest in making decisions. For instance, prosecutors decide by themselves whether to go for a plea agreement or not. But this is dangerous because different lawyers have different conceptions of public interest. However, those government lawyers that can make client-like decisions should consider the public interest as a base for their decisions. These lawyers serve as trustees for the client. In that scenario, “when making those client-like decisions in their role as trustees, it is appropriate for government lawyers to consider the public interest.”<sup>27</sup>

There is a discussion between those commentators that consider that the “public interest” is their client and those who say that these lawyers are trustees for the client. The client could be the state government itself. If the State is the client then the state attorney,

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<sup>26</sup> Adam M. Chud, “*In Defense of the Government Attorney-Client Privilege*,” *Cornell Law Review*, at 1684 (1999).

<sup>27</sup> Kathleen Clark, *Government Lawyers and Confidentiality Norms*, *Washington University Law Review*, at 1068 (2008).

for instance, is entrusted the decisions based on what he considers the best interest of the State. Therefore, in all cases where the government attorney is entitled to make client-like decisions, then he is the sovereign. We can see these situations more commonly in criminal cases. In *Berger v. United States*, the Court ruled that “the United States Attorney is the representative not of an ordinary party to controversy, but of a sovereign whose obligation to govern impartially is as compelling as its obligation to govern at all.”<sup>28</sup>

However, if we apply the Model Rules of Professional Conduct R.3.8(d) Special Responsibilities of a Prosecutor, and all the procedures that are set for a prosecutor, some scholars argue that these government attorneys can be to seek justice by following those rules, rather than by trying to reach their own notion of justice in a case by case analysis. The question: are federal prosecutors different from other lawyers, has been debated over the years with no clear solution. For example, “courts and bar association ethics committees have always exempted prosecutors from ethics restrictions imposed on private lawyers in (1) conducting criminal investigations, (2) rewarding witnesses for their willingness to testify, and (3) dealing with conflict of interest.”<sup>29</sup>

## **6. State Attorney Generals**

A State Attorney General represents the state agencies and the people of the state, at least in general terms. Among the term “people” there are diverse groups that may or may not have conflicting interests. In some situations, zealous advocacy could even be

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<sup>28</sup> *Berger v. United States*, 295 U.S. 78, 88 (1935).

<sup>29</sup> Bruce A. Green & Fred C. Zacharias, *The Uniqueness of Federal Prosecutors*, The Georgetown Law Journal, at 229 (2000).

inappropriate or at least must be balanced with other considerations. On the other hand, they should also seek for the truth and justice. With a dual role as advocate and public servant the uncertainty increases. There are rules that are not definite and vague standards.<sup>30</sup>

The Model Rules have their focus on private lawyering and tried to adapt themselves to government lawyering. In addition, courts have held, almost consistently, that different rules apply to prosecutors and agency lawyers. In fact, the traditional agency approach applied to private lawyers is not the best suit for government lawyering. In the latter, public interest considerations seem to have been gaining more adepts. In any case, the Model Rules of Professional Conduct are not the best descriptors of the different circumstances that a government attorney must face.

## **7. Wrongdoing and confidentiality**

As we have seen, the government lawyer has a duty that is based on the public interest. That includes the right to know about the government's conduct, especially if it misconducts. These situations gave rise to the federal government lawyer's duty to breach confidentiality. The government lawyer assumes that "the moral force toward revelation has an element not present for the private lawyer: the government lawyer works for a

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<sup>30</sup>See, Jane Dattilo, *Representing the Public's Interest: Ethical Issues Confronting State Attorneys General Generally, and Multistate Litigators Specifically*, Columbia Law School, at 6-11 (2008).

public-abiding client, one that would expect disclosure of internal government wrongdoing.”<sup>31</sup>

When attorneys discover fraud or criminal wrongdoing within the government they face a difficult dilemma. They must decide whether to breach attorney-client privilege or to conceal violations of the law or to expose them. The Whistleblower Protection Act is an attempt to protect any federal employee from retaliatory employment actions for disclosing information. If the employee reasonably believes evidences a violation of any law, rule or regulations or gross mismanagement.<sup>32</sup> “Whistleblower protection law and the misconduct exception both suggest that government attorneys operate under an obligation to disclose criminal activity and violation of the law.”<sup>33</sup>

Comment 9 of the Model Rules give us certain indication that government’s attorneys client is the agency itself and not the government or the public as a whole. However, in this specific point, maybe, the identification of the client is not as important as the government attorney must face the particular legal problem with the idea of serving the public interest in general. The hard question resides on where to draw the line. Because we should not assume that all communications between the client and the government attorneys is exempted from the privilege. “An express whistleblower exception to the

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<sup>31</sup> James E. Moliterno, *The Federal Government Lawyer’s Duty to Breach Confidentiality*, Temple Political & Civil Rights Law Review, at 634 (2005).

<sup>32</sup> 5 U.S.C. § 2302(b)(8) (2006).

<sup>33</sup> Jessica Wang, *supra* note 12 at 1073.



government attorney-client privilege would resolve this inconsistency and rectify government misconduct more efficiently.”<sup>34</sup>

## **8. A critique of the public interest approach**

Much has been said about the ethical duties of government lawyers in their professional practice. Government lawyers should always put the public interest above any other interest. This implies working and providing their knowledge to reach the objective of "doing justice". However, since the concept of "public interest" is so broad and imprecise, it is very difficult to determine exactly the level of fulfillment of professional responsibilities that have been established within the specific rules.

Therefore, it is not possible to speak clearly of a public interest but, on a case-by-case basis, the situation will be analyzed and decided. Even so, the government lawyer should determine if it is in the public interest simply or if there is an individual interest that must be resolved first. If basic requirements and due process and an effective defense of the client's legal needs are not met, then the "public interest" argument cannot be justified by the lack of due action in a legal process.

In addition, from a more cynical perspective, government lawyers, in their actual practice, tend to favor their own interests over alleged public interests. This is evident when many lawyers simply carry out their professional activity with the aim of consolidating

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<sup>34</sup> *Id.* at 1081.

their careers and advancing work positions; all in view of their own professional careers. It could even be that lawyers who want to make a transition to the private sector will do whatever they have to do to be hired by a specific firm. On the other hand, there has even been a tendency in which government lawyers seek the agency to which they belong to gain more power over another government entity. But also, some government attorneys “seek to avoid controversial cases, and instead seek cases to which the government would not likely object or about which the government is unlikely to come under political scrutiny or pressure.”<sup>35</sup> Personal priorities of individual government attorneys cause them to be less effective in serving the public interest implicated by civil rights laws than attorneys in the private sector are.”<sup>36</sup>

The Court of Appeals for the District of Columbia in the case *In re Lindsey*<sup>37</sup> has changed the status of the government attorney-client privilege in different ways.<sup>38</sup> One of the important aspects of this case is the idea that differentiates the official and the personal distinction of the government attorney-client privilege. “The government attorney-client privilege should apply to protect the communications of a public official who seeks advice from a government attorney only if those communications concern conduct that can reasonably be considered to be in furtherance of the official’s public duties.”<sup>39</sup> In other words, even though keeping a strong government attorney-client privilege in any context

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<sup>35</sup> Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?* at 810 (2000).

<sup>36</sup> *Id.*

<sup>37</sup> 158 F.3d 1263 (D.C. Cir)

<sup>38</sup> See, Amanda J. Dickmann, *IN RE LINDSEY: A Needless Void in the Government Attorney-Client Privilege*, Indiana Law Review, at 291 (1999).

<sup>39</sup> Khalil Gibran, *Maintaining Confidence in Confidentiality: The Application of the Attorney-Client Privilege to Government Counsel*, The Harvard Law Review, at 2005 (1999).

may seem to be against the public interest argument, the only way for society to protect the full and frank communications essential to the provision of complete and effective legal advice, courts should not attempt to distinguish between criminal and civil cases, even more, courts should recognize that “the government attorney-client privilege applies even against federal criminal grand jury subpoenas as long as the communications being protected relate to official government conduct.”<sup>40</sup>

The principle of confidentiality comes from professional ethics while the attorney-client privilege is rooted in the law of evidence. For the principle of confidentiality, the Model Rule of Professional Conduct 1.6 states:

A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation... A lawyer may reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or to establish a claim or defense on behalf of the lawyer...<sup>41</sup>

The most fundamental distinction between the attorney-client privilege and the principle of confidentiality is that the first applies in judicial and other proceedings and the latter applies where evidence is sought from the lawyer through compulsion of law.<sup>42</sup> Additionally there is also the executive privilege which is constitutionally derived privilege that protects frank debate between the President

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<sup>40</sup>*Id.* at 2012.

<sup>41</sup> MODEL RULES OF PROF'L CONDUCT RULE 1.6 (2016)

<sup>42</sup> Amanda J. Dickmann, *supra* note 38, at 295.

and advisers. In the case *United States v. Nixon*<sup>43</sup> the Court created the privilege in order to provide the President a similar protection that the members of the House of Representatives are afforded. However, the executive privilege is not absolute and must yield to specific need for evidence in a criminal investigation.<sup>44</sup>

## **9. Outsourcing of government legal work**

The legal market in the United States is changing rapidly. During the last years we have seen an increase of law school's tuition and private sector salaries are more attractive than government salaries. However, "no issue will pose a greater challenge or concern to employees of the Federal Government than outsourcing."<sup>45</sup> For economic reasons it is more difficult for the government to attract and retain the best attorneys available. Therefore, outsourcing seems to be the best alternative to compensate the supply deficit. However, this situation brings concerns about protecting the public interest, conflicts of interest and cost control.

"Legal outsourcing is in relative infancy in the United States, and the legal ethics community has barely begun to grapple with the host of ethical ramifications involved with the use of outsourced legal support."<sup>46</sup> When it comes to government lawyers the scenario is more uncertain. First there is a conflict between public versus private interests. In one

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<sup>43</sup> 418 U.S. 683 (1974).

<sup>44</sup> Amanda J. Dickmann, *supra* note 38 at 296.

<sup>45</sup> Patrick McFadden, *The First Thing We Do, Let's Outsource All The Lawyers: An Essay*, American Bar Association, at 443 (2004).

<sup>46</sup> James I. Ham, *Ethical Considerations Relating to Outsourcing of Legal Services by Law Firms to Foreign Service Providers: Perspectives from the United States*, Penn State International Law Review, at 323 (2008).

side we can save costs but in the other side we cannot know for sure the level of concern or rigor with which private attorneys might serve the public interest.<sup>47</sup> But this view relies in the assumption that government lawyers are motivated by public interest rather than personal or monetary interests.

The real problem with outsourcing is related to conflict of interests. When government agencies consider hiring private attorneys it is very important to have in mind that private attorneys are exposed to specific interests of their firms' clients. Perhaps most private attorneys make practical or strategic decisions rather than policy decisions. Perhaps this new trend needs to be analyzed case by case and we will have to wait for specific rules or standards to regulate this practice. I mentioned this new scenario just to bring more concern over a new trend. Not just outsourcing to the private attorneys but to foreign attorneys as well.

## **10. Conclusions**

We have analyzed the attorney-client privilege with a special focus in the government lawyer practice. This privilege is a fundamental pillar of procedural law in common law jurisdictions and it has maintained its preeminence based on the argument that it motivates clients to seek legal advice with total openness and full disclosure of information with the result of enhancing legal compliance. As any other privilege, it has

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<sup>47</sup> Patrick McFadden, *supra* note 45, at 448.

its costs. One of the most debatable costs comes when there is information that could be relevant and could also be withheld from courts.

For government lawyers the problem becomes more complex because of the public interest argument. Sometimes this argument could play against and for the same circumstance. If the public interest is defined as to “do justice” or to “protect the client” then the attorney-client privilege could be going back and forth. First the government lawyer has to be aware of who the client is. In general government lawyers represent organizations, and that means that these legal fictions are represented by agents of the organization. These agents have certain roles, and when these are high level agents, the problem of defining the individuality of the client is even bigger, because some of the activities of the agent may be entangled with his own personal activities or even in some cases could be indistinguishable at first sight. Government attorneys have to be very careful and remember to whom their ultimate fiduciary duty of loyalty is owed.

On the other hand, it is very clear that the lawyers of the government have special obligations that derive from the concept of service to the public interest. However, it is not clear what level of ethical or professional responsibility should be considered in specific cases. Therefore, it is the task of the courts to define the standards on which government lawyers can be held accountable for their actions in specific cases. Likewise, professional conduct rules must respond to the complex reality of the practice of government lawyers.