COMMENTS

THE GOVERNMENTAL ATTORNEY-CLIENT PRIVILEGE:
WHETHER THE RIGHT TO EVIDENCE IN A STATE GRAND JURY INVESTIGATION PIERCES THE PRIVILEGE IN NEW YORK STATE

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I. INTRODUCTION

Whether a New York State government official represented by a government attorney can invoke the evidentiary attorney-client privilege when faced with a state grand jury subpoena has not been explicitly addressed by either New York State courts or the New York State Legislature. If a New York State grand jury were to subpoena the Governor’s chief legal counsel to testify regarding private communications with the Governor, then it is currently uncertain whether the Governor’s chief legal counsel would be able to avoid testifying based on the evidentiary attorney-client privilege. If New York State follows the rulings of the United States Courts of Appeals for the Eighth, District of Columbia, and Seventh Circuits,1

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1 It is important to note that such non-binding precedent involves state and federal government officials confronted with federal grand jury subpoenas as opposed to state government officials confronted with state grand jury subpoenas. In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 915 (8th Cir. 1997), cert. denied, 521 U.S. 1105 (1997) (holding that the White House cannot invoke the evidentiary attorney-client privilege and must comply with a federal grand jury subpoena); In re Lindsey, 158 F.3d 1263, 1283 (D.C. Cir. 1998) (per curiam) (holding that the Deputy White House Counsel and Assistant to the President cannot invoke the evidentiary attorney-client privilege and must comply with a federal grand jury subpoena); In re A Witness Before the Special Grand Jury 2000-2, 288 F.3d 289, 290 (7th Cir. 2002) (holding that the Chief Legal Counsel to the Illinois Secretary of State cannot invoke the evidentiary attorney-client privilege and must comply with a federal
then the Governor’s chief legal counsel would be unable to successfully invoke the evidentiary attorney-client privilege and would be compelled to testify. However, if New York State follows the ruling of the Court of Appeals for the Second Circuit, then the Governor’s chief legal counsel would be permitted to invoke the evidentiary privilege. The recent circuit split among the United States Courts of Appeals magnifies the uncertainty regarding whether the governmental attorney-client privilege exists in the federal grand jury context. It should be noted, however, that governmental entities are generally afforded the protections of the attorney-client privilege outside of the grand jury context.

The existence of the evidentiary attorney-client privilege for federal government entities represented by federal government attorneys has been debated by academics in both the civil and criminal contexts. This Comment, however, focuses on whether New York State supports the extension of the evidentiary attorney-client privilege to state government officials represented by government attorneys who are under investigation by a New York

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2 In re Grand Jury Investigation, 399 F.3d 527, 535 (2d Cir. 2005) (holding that the Chief Legal Counsel to the Governor of Connecticut could invoke the evidentiary attorney-client privilege when confronted with a federal grand jury subpoena).

3 See supra notes 1–2.

4 The governmental attorney-client privilege refers to the disclosure of confidential communications between a government attorney and a government entity or government official that is the attorney’s client in a court proceeding. Unlike the private attorney-client relationship where the private individual is the client, the client of a governmental attorney-client relationship is not so easily defined. Possible clients include, but are not limited to, a government official, a government entity, or the public. See, e.g., Todd A. Ellinwood, “In the Light of Reason and Experience”: The Case for a Strong Government Attorney-Client Privilege, 2001 Wis. L. REV. 1291, 1315–17 (2001) (arguing that the specific government agency owns the governmental attorney-client privilege).


6 See, e.g., Lory A. Barsdate, Note, Attorney-Client Privilege for the Government Entity, 97 YALE L.J. 1725, 1744 (1988) (urging judicial restraint in extending the evidentiary attorney-client privilege to governmental agencies involved in civil litigation because of the importance of open government); Bryan S. Gowdy, Note, Should the Federal Government Have an Attorney-Client Privilege?, 51 FLA. L. REV. 695, 721 (1999) (arguing that a federal governmental attorney-client privilege should not exist based on the legislative history of the Freedom of Information Act (FOIA) and the need for open government).

State grand jury. Part II of this Comment explains attorney-client confidentiality as it currently exists in New York State by describing the two bodies of law governing confidences between attorneys and clients: the ethical obligation set forth by the legal profession and the evidentiary attorney-client privilege set forth by the judicial and legislative branches of government. Even though this Comment does not examine an attorney’s ethical obligations in state criminal proceedings, a brief discussion of the duty of confidentiality is necessary in ascertaining the importance that the legal profession ascribes to client confidences, which are at the heart of the evidentiary attorney-client privilege. Part III analyzes the United States Courts of Appeals cases that created the current split among the circuits. In determining which circuit New York State is inclined to follow, Part IV explores the competing interests between the need to protect client confidences and the public’s right to know every man’s evidence. Part V concludes that New York State government officials represented by government attorneys should be afforded the protections of the evidentiary attorney-client privilege in state grand jury proceedings based on New York State’s high regard for attorney-client confidentiality when faced with the public’s right to know.

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8 This Comment focuses on the evidentiary attorney-client privilege in the criminal context as the existence of the privilege in the civil context is practically absolute. See In re Lindsey, 158 F.3d 1263, 1271 (D.C. Cir. 1998) (per curiam). In 1967, Congress passed the Freedom of Information Act (FOIA) which permits public citizens to access official information from the government. Freedom of Information Act, 5 U.S.C. § 552 (2000). Of the nine exemptions contained in the FOIA, exemption five protects against disclosure of “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” Id. § 552(b)(5). Even though exemption five does not itself create a governmental attorney-client privilege, In re Lindsey, 158 F.3d at 1269, “[e]xemption [five] protects . . . materials which would be protected under the attorney-client privilege.” Coastal States Gas Corp. v. Dep’t of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980); see also NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 148–49, 154 (1975) (commenting on the relationship between the governmental attorney-client privilege and exemption 5 of the FOIA).

9 This Comment refers to the body of law governing communications between an attorney and his client as set forth by the legal profession—for example, the American Bar Association (ABA) and the New York State Bar Association (NYSBA)—as the “ethical obligation” or “duty of confidentiality.”

10 This Comment refers to the body of law governing communications between an attorney and his client as set forth by both statutory and common law as the “evidentiary attorney-client privilege.”
II. THE ATTORNEY-CLIENT PRIVILEGE IN NEW YORK STATE: BODIES OF LAW GOVERNING CONFIDENTIALITY BETWEEN ATTORNEYS AND CLIENTS

Confidences between an attorney and his client are governed in New York State by both the ethical obligation and the evidentiary attorney-client privilege. The ethical obligation of an attorney regulates his moral responsibilities and is set forth by the legal profession. In New York State, the New York Code of Professional Responsibility enacted by the New York State Bar Association governs the moral and ethical responsibilities of attorneys admitted to practice law. In contrast, the evidentiary attorney-client privilege, enacted by both the legislature and judiciary, governs the admissibility of attorney-client confidences in adjudicative proceedings and is set forth by both common law principles and statutory provisions. In New York State, the evidentiary attorney-client privilege is codified in the New York Civil Practice Law and Rules. In comparing the ethical obligation of an attorney to preserve client confidences to the evidentiary attorney-client

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15 §§ 1200.1–.46; NYSBA LAWYER'S CODE OF PROF'L RESPONSIBILITY (2002); see also MODEL RULES OF PROF'L CONDUCT (2002) (containing the most recent ethical obligations set forth by the ABA).
16 N.Y. C.P.L.R. 4503. The New York statute is consistent with John Henry Wigmore’s description of the privilege:
17 N.Y. C.P.L.R. 4503.
privilege, the ethical obligation is broader than the evidentiary privilege.\textsuperscript{18} The ethical obligation applies both to matters communicated in confidence and to any information relating to the legal representation of the client.\textsuperscript{19} Thus, the ethical obligation exists regardless of the nature or source of the information.\textsuperscript{20} Additionally, the ethical obligation exists even if the content of the communication is known by third persons.\textsuperscript{21} In contrast, the evidentiary attorney-client privilege applies solely to matters communicated by a client to his attorney in confidence and is waived when the communication is disclosed to third persons.\textsuperscript{22} Also, the evidentiary attorney-client privilege only “appl[ies] in judicial and other proceedings in which a lawyer may be called as a witness or otherwise [be] required to produce evidence concerning a client” whereas the ethical obligation “applies in situations other than those where evidence is sought from the lawyer through compulsion of law.”\textsuperscript{23}

Legal professionals practicing law in New York State must comply with both the ethical obligation and the evidentiary attorney-client privilege. However, the consequences resulting from a violation of the duty of confidentiality differ sharply from the repercussions facing attorneys who violate the evidentiary attorney-client privilege. The New York State Ethics Commission has the authority to investigate alleged ethical misconduct.\textsuperscript{24} If the Commission finds that a violation has occurred, it may impose civil penalties on the attorney and, in certain instances, refer the situation to the state prosecutor for punishment as a class A

\begin{thebibliography}{99}
\bibitem{Morgan} MORGAN \& ROTUNDA, supra note 11, at 23.
\bibitem{NYSBA} NYSBA LAWYER'S CODE OF PROF'L RESPONSIBILITY EC 4-4 (2002).
\bibitem{Id} Id.
\bibitem{Stroh} However, the presence of third persons does not destroy the confidential nature of attorney-client communications if the third person serves as the client's agent to facilitate communication between the attorney and the client. See, e.g., Stroh v. Gen. Motors Corp., 623 N.Y.S.2d 873, 874 (App. Div. 1995) (holding that the evidentiary attorney-client privilege applied where an elderly client’s daughter was present during attorney-client communications for the purpose of facilitating communication because the client had a reasonable expectation of confidentiality under the circumstances).
\bibitem{See} See, e.g., In re Sealed Case, 676 F.2d 783, 809 (D.C. Cir. 1982) (“[A]ny voluntary disclosure by the client to a third party breaches the confidentiality of the attorney-client relationship and therefore waives the [evidentiary] privilege [with respect to both] . . . the specific communication disclosed . . . [as well] as to all other communications relating to the same subject matter.”).
\bibitem{Morgan2} MORGAN \& ROTUNDA, supra note 11, at 23.
\end{thebibliography}
misdemeanor. In the most extreme cases where the ethical violation results in serious misconduct, the attorney may lose his license to practice law in New York State. In contrast, if an attorney testifies and discloses confidential information at trial in violation of the evidentiary attorney-client privilege, the trial judge may suppress the evidence and, in some instances, the attorney may be subject to contract or tort liability.

A. The Ethical Obligation of an Attorney as Set Forth by the Legal Profession

The legal profession sets high ethical standards for its practitioners. An attorney’s respect for and faith in his fellow members of the legal profession and of the society in which he serves provides the attorney with an incentive to strive for the highest possible degree of ethical conduct. Since 1969, the American Bar Association (ABA) has adopted three models of ethics rules governing the legal profession—the Model Code of Professional Responsibility and two versions of the Model Rules of Professional Conduct. The Model Rules serve as ethical obligations for the majority of states. For example, the ABA and

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28 See supra note 9.
29 See infra notes 33–36 and accompanying text.
30 See N.Y. JUD. LAW app. at 365 (McKinney 2003).
most state bar associations state that an attorney should assist in maintaining the integrity and competence of the legal profession, represent a client competently, and represent a client zealously within the bounds of the law. One of the most important ethical obligations of an attorney regarding the attorney-client relationship is the duty of confidentiality. Rule 1.6 of the Model Rules states that “[a] lawyer shall not reveal information relating to the representation of a client unless the client gives [his] informed consent.” Similarly, Canon 4 of the Model Code states that “[a] lawyer [s]hould [p]reserve the [c]onfidences and [s]ecrets of a [c]lient.” Under both models of ethics rules, an attorney may, however, within his discretion, reveal confidential information under certain circumstances.

Even though New York State has not adopted the Model Rules in its entirety, the New York State Bar Association has adopted

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33 See, e.g., MODEL CODE OF PROF’L RESPONSIBILITY Canon 1 (2002); NYSBA LAWYER’S CODE OF PROF’L RESPONSIBILITY Canon 1 (2002).
34 See, e.g., MODEL CODE OF PROF’L RESPONSIBILITY Canon 6 (2002); MODEL RULES OF PROF’L CONDUCT R. 1.1 (2002); NYSBA LAWYER’S CODE OF PROF’L RESPONSIBILITY Canon 6 (2002).
35 See, e.g., MODEL CODE OF PROF’L RESPONSIBILITY Canon 7 (2002); MODEL RULES OF PROF’L CONDUCT R. 1.3 (2002); NYSBA LAWYER’S CODE OF PROF’L RESPONSIBILITY Canon 7 (2002).
36 See, e.g., MODEL CODE OF PROF’L RESPONSIBILITY Canon 4 (2002); MODEL RULES OF PROF’L CONDUCT R. 1.6 (2002); NYSBA LAWYER’S CODE OF PROF’L RESPONSIBILITY Canon 4 (2002).
37 MODEL RULES OF PROF’L CONDUCT R. 1.6 (2002).
39 See MODEL CODE OF PROF’L RESPONSIBILITY DR 4-101(C) (2002) (“A lawyer may reveal: (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them. (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order. (3) The intention of his client to commit a crime and the information necessary to prevent the crime. (4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.” (footnotes omitted)); MODEL RULES OF PROF’L CONDUCT R. 1.6(b) (2002) (“A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm; (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services; (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services; (4) to secure legal advice about the lawyer’s compliance with these Rules; (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client; or (6) to comply with other law or a court order.”).
40 See supra note 32.
similar guidelines, including the preservation of client confidences.41 The New York Code of Professional Responsibility42 contains Canons, Ethical Considerations, and Disciplinary Rules.43 “Canons are statements of axiomatic norms, [which] express[] in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession.”44 Canons “embody the general concepts from which the Ethical Considerations and the Disciplinary Rules are derived.”45 Ethical Considerations are advisory and provide aspirational principles to guide an attorney’s future conduct.46 In contrast, Disciplinary Rules are mandatory.47 Disciplinary Rules prescribe the minimum level of professional conduct with which an attorney must comply.48 If an attorney falls below this minimum standard, the attorney is subject to disciplinary action by the legal profession for non-compliance.49 The Disciplinary Rules have been adopted by the Appellate Divisions of the Supreme Court of New York as joint rules and are promulgated in title 22, part 1200 of the Official Compilation of Codes, Rules & Regulations of the State of New York.50

Unlike the single standard articulated in Rule 1.6 of the Model Rules, the New York Code of Professional Responsibility adopted a two-pronged duty of confidentiality identical to Canon Four of the Model Code.51 In contrast to the Model Rules, which protects all information about a client “relating to the representation,” Canon Four of the New York Code of Professional Responsibility requires an attorney to preserve both the confidences and secrets of a client.52 Generally, the duty of confidentiality in New York State

41 Compare NYSBA LAWYER'S CODE OF PROF'L RESPONSIBILITY Canon 4 (2002), with MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002).
43 Id. at 365.
44 Id. at 366.
45 Id.
46 Id.
47 Id.
48 Id.
49 Id.; see supra notes 24–27 and accompanying text.
50 N.Y. COMP. CODES R. & REGS. tit. 22, §§ 1200.1–.46 (2001). The Appellate Division adopted the Disciplinary Rules effective September 1, 1990, but failed to adopt either the Canons or the Ethical Considerations. N.Y. JUD. LAW app. at 360.
51 MORGAN & ROTUNDA, supra note 11, at 191.
52 Compare NYSBA LAWYER'S CODE OF PROF'L RESPONSIBILITY Canon 4 (2002), with MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002). The Code defines confidence as “information protected by the attorney-client privilege under applicable law” and secret as “other
covers both information protected by the evidentiary attorney-client privilege as well as any information gained in the professional relationship. Similar to the Model Rules, New York State recognizes several exceptions to the duty of confidentiality, which permit an attorney to reveal confidential information within his discretion. It should be noted that the New York Code of Professional Responsibility, similar to the Model Rules, does not mandate that an attorney reveal client confidences and secrets under the circumstances delineated in Disciplinary Rule 4-101.


The origin of the evidentiary attorney-client privilege in the United States can be traced to the reign of Elizabeth I in England and is the oldest evidentiary common law privilege for confidential communications. Originally, the purpose of the privilege was to preserve the oath and honor of an attorney. Beginning in the late eighteenth century, however, the purpose shifted from preserving an attorney's integrity to protecting a client's secrets. In addition to being based on common law origins, the evidentiary attorney-
client privilege is strongly rooted in the constitutional right to counsel as provided by both the Sixth Amendment of the United States Constitution and article I, section 6 of the New York State Constitution. The constitutional right to effective assistance of counsel includes the right “to consult counsel in private, without fear or danger that the [government], in a criminal prosecution, will have access to what has been said . . . by forcing the attorney to [disclose] what he has learned” through communications with his client. The “effectiveness of counsel is only as great as the confidentiality” of the attorney-client relationship because if a client does not reveal all of the facts to an attorney out of fear of disclosure, the attorney is unable to provide the client with an adequate legal defense. Without the existence of the evidentiary attorney-client privilege to protect communications between attorneys and clients, the constitutional right to effective assistance of counsel is an “empty right.”

In addition to historical and constitutional roots, the federal evidentiary attorney-client privilege is defined by both federal common law and the Federal Rules of Evidence. Similarly, the

62 U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the Assistance of Counsel for his defence [sic].”)
63 N.Y. CONST. art. I, § 6 (“In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel . . . .”); Priest v. Hennessy, 409 N.E.2d 983, 988 (N.Y. 1980) (Fuchsberg, J., dissenting). But see In re Investigation to Locate Doe, 420 N.Y.S.2d 996, 998 (Sup. Ct. 1979) (stating that the evidentiary attorney-client privilege is a statutory provision that is not guaranteed by the Constitution (emphasis added)).
64 In re Lanza, 163 N.Y.S.2d 576, 583 (Sup. Ct. 1957) (quoting People v. Cooper, 307 N.Y. 253, 259 (1954)) (internal quotation marks omitted).
65 In re Doe, 420 N.Y.S.2d at 998 (quoting People v. Belge, 372 N.Y.S.2d 798, 801 (County Ct. 1975)) (internal quotation marks omitted).
67 Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (“[The] purpose [of the evidentiary attorney-client privilege] is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.”).

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law. Id.
state evidentiary attorney-client privilege is defined by both state statute and state common law.69 In New York State, the evidentiary privilege closely resembles the federal attorney-client privilege70 and is codified in section 4503 of the Civil Practice Law and Rules:

Unless the client waives the privilege, an attorney or his [or her] employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his [or her] employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency or by the legislature or any committee or body thereof.71

New York State courts have articulated a two-step inquiry in determining the applicability of the evidentiary attorney-client privilege.72 The first step is to determine whether the evidentiary attorney-client privilege meets the four elements set forth by case law, and the second step is to determine whether compelling public policy reasons override the applicability of the evidentiary privilege.73 The party asserting the privilege has the burden of proving the following elements to satisfy the first step of the analysis:74 (1) an attorney-client relationship; (2) an attorney acting in his professional capacity; (3) a confidential communication; and (4) a communication made for the purpose of providing legal advice or services.75 An attorney-client relationship exists where there is a professional relationship between an individual or an entity and an attorney admitted to practice law in New York State. The retainer of an attorney to render legal assistance, for example, may be used

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70 See NYSBA LAWYER’S CODE OF PROF’L RESPONSIBILITY DR 4-101 (2002).
73 Investigation into a Certain Weapon, 448 N.Y.S.2d at 953.
74 Hennessy, 409 N.E.2d at 986.
75 Mitchell, 448 N.E.2d at 123.
to establish this first element.\footnote{See, e.g., Spectrum Sys. Int’l Corp. v. Chem. Bank, 581 N.E.2d 1055, 1060 (N.Y. 1991).} In order for an attorney to act in his professional capacity in satisfaction of the second element, the attorney cannot provide advice for non-legal purposes, such as for business or personal reasons.\footnote{Id. at 1061 (“A lawyer’s communication is not cloaked with privilege when the lawyer is hired for business or personal advice . . . .”).} The third element requires that the communication between a client and his attorney is neither made in the presence of third persons nor subsequently disclosed to third persons.\footnote{See NYSBA LAWYER’S CODE OF PROF’L RESPONSIBILITY EC 4-4 (2002). But see supra note 21.} Even though the communication must be made for the purpose of providing legal advice to satisfy the fourth element, the communication may contain non-legal content so long as the communication is “predominantly of a legal character.”\footnote{Spectrum, 581 N.E.2d at 1060 (emphasis added).}

Although the party that bears the burden of proof may be successful in proving the four elements, and thus satisfying the first step of the inquiry, the evidentiary attorney-client privilege may nevertheless be inapplicable due to public policy reasons.\footnote{Priest v. Hennessy, 409 N.E.2d 983, 986 (N.Y. 1980).} For example, client confidences of a deceased person outweigh a beneficiary’s right to know information concerning the preparation, execution, and revocation of a decedent’s will in allocating the estate.\footnote{See N.Y. C.P.L.R. 4503(b) (McKinney 1992). There is a statutory exception to the will exception (an exception to the exception) that prohibits disclosure of secrets and confidences that would embarrass the decedent. \textit{Id.}} This public policy was recognized by the New York State Legislature when it articulated a specific statutory exception that allows an attorney to disclose information regarding the validity or construction of a deceased client’s will.\footnote{\textit{Id.} Section 4503, subsection (b) of the Civil Practice Law and Rules states: In any action involving the probate, validity or construction of a will, an attorney or his employee shall be required to disclose information as to the preparation, execution or revocation of any will or other relevant instrument, but he shall not be allowed to disclose any communication privileged under subdivision (a) which would tend to disgrace the memory of the decedent. \textit{Id.}}

III. THE CIRCUIT SPLIT AMONG THE EIGHTH, DISTRICT OF COLUMBIA, SEVENTH, AND SECOND CIRCUITS

Neither the United States Supreme Court nor the New York Court of Appeals have ruled on whether an evidentiary attorney-client privilege exists in the criminal context. It should be noted,
however, that the Rhenquist Court passed up such an opportunity in its 1997 denial of certiorari in In re Grand Jury Subpoena Duces Tecum.\textsuperscript{83} The recent split among the United States Courts of Appeals has provided the Supreme Court, as well as state courts and state legislatures,\textsuperscript{84} the opportunity to resolve the issue.\textsuperscript{85} Of the Courts of Appeals that were confronted with the issue of a governmental attorney-client privilege in the federal grand jury context, the Eighth, District of Columbia, and Seventh Circuits held that neither the government entity nor the government official could invoke the evidentiary attorney-client privilege when under federal criminal investigation by a grand jury.\textsuperscript{86} In contrast, the Second Circuit held that a governmental attorney-client privilege exists in the federal grand jury context.\textsuperscript{87} Even though these Courts of Appeals cases involved federal criminal investigations, they serve as the basis for determining whether New York State will extend the evidentiary attorney-client privilege to state government officials under state grand jury investigation because of the similarity between the federal evidentiary attorney-client privilege and the New York State evidentiary attorney-client privilege.\textsuperscript{88}

\textsuperscript{83} 112 F.3d 910, 915 (8th Cir. 1997), cert. denied, 521 U.S. 1105 (1997).
\textsuperscript{84} Amid the uncertainty as to whether the evidentiary attorney-client privilege exists in both state and federal courts, one neighboring jurisdiction to New York State has statutorily provided for a governmental attorney-client privilege in various proceedings. CONN. GEN. STAT. ANN. § 52-146r (West 2005). The Connecticut General Assembly passed unprecedented legislation creating an evidentiary attorney-client privilege between a government attorney and a government official that cannot be pierced by either a civil, criminal, legislative, or administrative proceeding absent a waiver by the client. H.B. 5432, Off. Legis. Res., Reg. Sess. (Conn. 1999); see also McLaughlin v. Freedom of Info. Comm’n, 850 A.2d 254, 258 (Conn. App. Ct. 2004) (stating that the Connecticut General Assembly resolved “[t]he battle between the two competing interests . . . in favor of the sanctity of the attorney-client privilege”). Section 52-146r, subsection (b) of the Connecticut statute states: “[i]n any civil or criminal case or proceeding or in any legislative or administrative proceeding, all confidential communications shall be privileged and a government attorney shall not disclose any such communications unless an authorized representative of the public agency consents to waive the privilege and allow such disclosure.” § 52-146r(b). A government attorney is defined as “a person admitted to the bar of this state and employed by a public agency or retained by a public agency or official to provide legal advice to the public agency or a public official or employee of such a public agency.” Id. § 52-146r(a)(3).
\textsuperscript{85} See supra notes 1–2.
\textsuperscript{86} See supra note 1.
\textsuperscript{87} In re Grand Jury Investigation, 399 F.3d 527, 536 (2d Cir. 2005).
\textsuperscript{88} See supra Part II.B.
A. Eighth Circuit: In re Grand Jury Subpoena Duces Tecum

In 1997, the Eighth Circuit directly addressed the issue of a governmental attorney-client privilege in the federal grand jury context in In re Grand Jury Subpoena Duces Tecum. Without the ability to rely on any case law directly on point, the Eighth Circuit held that a government entity may not hide behind the evidentiary attorney-client privilege to avoid complying with a federal grand jury subpoena. In this case, Independent Counsel Kenneth Starr conducted an investigation into the McDougals' and the Clintons' relationship with Madison Guaranty Savings & Loan Association, Whitewater Corporation Development, and Capital Management Services. The Whitewater investigation concerned an Arkansas real estate venture entered into by the Clintons and the McDougals, who were partners in the Whitewater Development Corporation. The partnership experienced severe financial difficulties, and the Clintons and the McDougals were subsequently accused of loan swapping schemes, fraud, and political and financial favors. During this investigation, the Office of Independent Counsel subpoenaed attorneys' notes from the Office of Counsel to the President. The White House refused to produce the documents claiming attorney-client privilege, executive privilege, and the work product doctrine. The Eighth Circuit ordered the Office of Counsel to the President to comply with the subpoena and produce the attorneys' notes. Although the Eighth Circuit found that the

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89. 112 F.3d 910 (8th Cir. 1997), cert. denied, 521 U.S. 1105 (1997).
90. Id. at 915; see Lisa E. Toporek, "Bad Politics Makes Bad Law": A Comment on the Eighth Circuit's Approach to the Governmental Attorney-Client Privilege, 86 GEO. L.J. 2421, 2423, 2440 (1998) (noting that the Eighth Circuit's decision forces government officials to adhere to the “better-safe-than-sorry approach” and act as if the evidentiary attorney-client privilege is inapplicable to government bodies, which in turn thwarts open communication between an attorney and his client).
91. Toporek, supra note 90, at 2424.
92. In re Grand Jury Subpoena Duces Tecum, 112 F.3d at 915. The Eighth Circuit did not decide whether the governmental attorney-client privilege exists in contexts other than the federal grand jury. Id.
93. Id. at 913.
95. Id.
96. In re Grand Jury Subpoena Duces Tecum, 112 F.3d at 913.
97. Id. at 913–14.
98. Id. at 913.
Supreme Court’s decision in *United States v. Nixon* was not controlling because it involved the executive privilege rather than the attorney-client privilege, the court recognized that “Nixon is indicative of the general principle that the government’s need for confidentiality may be subordinate[] to the needs of the government’s own criminal justice process[].” In distinguishing *Upjohn Company v. United States*, where the Supreme Court held that a corporate attorney-client privilege exists, the Eighth Circuit relied on the distinctions between government clients and corporate clients in holding that the governmental attorney-client privilege does not exist in federal grand jury proceedings. Foremost, the White House itself cannot be subject to criminal liability whereas corporations “may be subject to both criminal and civil liability for the actions of its agents.” Therefore, the court believed that it is irrelevant whether or not the White House receives legal advice because of the government entity’s lack of incentive to conform its conduct to the law. The second dissimilarity between government clients and corporate clients noted by the court is the difference between the public interests of the government and the private interests of corporations—“the general duty of public service calls upon [both] government employees and agencies to favor disclosure over concealment” whereas private attorneys representing corporations have no such obligation. According to the court, government attorneys are discouraged from concealing the wrongdoing of their government clients based on the statutory obligation of executive branch attorneys to report criminal wrongdoing pursuant to 28 U.S.C. § 535(b).

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99 418 U.S. 683, 686, 713–14 (1974) (holding that former President Richard Nixon could not claim the executive privilege and therefore must produce tape recordings and documents of conversations with former aides and advisors that were subpoenaed by a grand jury in a criminal investigation).

100 *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 919.

101 See infra note 112–13 and accompanying text.

102 *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 920.

103 Id.

104 Id.

105 Id.

106 However, Judge Kopf, in his dissenting opinion, noted that 28 U.S.C. § 535(b) does not abrogate the privilege because according to the Office of Legal Counsel, the statute must be interpreted in conformity with the evidentiary attorney-client privilege. Ellinwood, supra note 4, at 1309.

107 *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 920; see 28 U.S.C. § 535(b) (1994) (“Any information, allegation, or complaint received in a department or agency of the
In his dissenting opinion in *In re Grand Jury Subpoena*, Judge Kopf articulated a “Nixon-type approach” in which he balanced the White House’s need for open communication between government officials and government attorneys in order to promote compliance with the law against the grand jury’s need for the subpoenaed materials. Judge Kopf criticized the majority for its failure to recognize that “Nixon [does not] stand for the proposition that the [executive] privilege . . . must give way in the face of every subpoena in a criminal investigation[,]” rather, the Nixon Court rendered a decision only after it weighed the need for confidentiality against the need for the grand jury’s evidence. In articulating this balancing test, Judge Kopf recognized that the Supreme Court’s reasoning in *Upjohn*—the need for corporate policymakers to disclose facts to an attorney and receive legal advice based on those executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reported to the Attorney General by the head of the department or agency, unless—(1) the responsibility to perform an investigation with respect thereto is specifically assigned otherwise by another provision of law; or (2) as to any department or agency of the Government, the Attorney General directs otherwise with respect to a specified class of information, allegation, or complaint.

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108 112 F.3d at 926–40 (Kopf, J., dissenting).
109 Toporek, *supra* note 90, at 2439.
110 In re *Grand Jury Subpoena Duces Tecum*, 112 F.3d at 936 (Kopf, J., dissenting). Judge Kopf’s balancing approach was adopted by both the Department of Justice and former cabinet officials in their amicus briefs in support of the White House. Toporek, *supra* note 90, at 2441.
111 Toporek, *supra* note 90, at 2426; In re *Grand Jury Subpoena Duces Tecum*, 112 F.3d at 926 (Kopf, J., dissenting) (remarking that Nixon does not completely erase the privilege).
112 449 U.S. 383, 393, 395, 397 (1981) (holding that the federal attorney-client privilege includes conversations between a corporation’s attorney and a corporation’s employees who are outside the corporate managerial control group); see also Rossi v. Blue Cross & Blue Shield of Greater N.Y., 540 N.E.2d 703, 706 (N.Y. 1989) (holding that communications between the corporation’s employees and the corporation’s attorney that relate to legal matters fall within the evidentiary attorney-client privilege and stressing the aim of the privilege as encouraging honest communication). One court opinion and several law review commentaries have analogized the governmental attorney-client privilege to the corporate attorney-client privilege recognized by the Supreme Court in *Upjohn* and the New York Court of Appeals in *Rossi*. See, e.g., United States v. AT&T Co., 86 F.R.D. 603, 621 (D.D.C. 1979) (“The analysis to be used in mediating between the[] . . . situations in a Government bureaucratic structure should be the same as used in regard to a corporate bureaucratic structure.”); Jeffrey L. Goodman & Jason Žabokrtsky, *The Attorney-Client Privilege and the Municipal Lawyer*, 48 Drake L. Rev. 655, 664–67, 676 (2000) (analogizing the attorney-client privilege in the corporate setting to the privilege in the municipal setting and concluding that municipal attorneys should cautiously communicate with municipal employees and elected officials); Barsdate, *supra* note 6, at 1744 (urging that the case law trend of analogizing the governmental attorney-client privilege to the corporate attorney-client privilege should cease); Gibran, *supra* note 7, at 1996–98 (urging that the attorney-client privilege should extend to government entities because of its similarity to the corporate attorney-client privilege).
facts in order to conform the corporation’s conduct to the law—is equally applicable to the White House. The evidentiary attorney-client privilege, whether asserted by the White House, a corporation, or a government official, is intended to encourage employees and officials to disclose the truth in order to ensure the private organization’s or government entity’s compliance with the law. Specifically, the governmental attorney-client privilege “advances the public interest by assuring that the [government official] will receive well-founded, fact-specific legal advice based upon candid responses from [government attorneys].” In addition, Judge Kopf cited Supreme Court Standard 503 and the Restatement Third of the Law Governing Lawyers as support for the existence of a governmental attorney-client privilege. Pursuant to Federal Rule of Evidence 501, the court must decide whether federal common law extends the evidentiary attorney-client privilege to the White House. Supreme Court Standard 503—which accurately reflects the federal common law—includes public officers, public organizations, and public entities within the definition of client. Thus, the federal common law considered government officials and government attorneys within the cloak of the evidentiary privilege. This conclusion is further supported by the Restatement Third of the Law Governing Lawyers, which states that the “prevailing rule is that governmental agencies and agents enjoy the same privilege as [their] non-governmental counterparts.”

113 Upjohn, 449 U.S. at 392.
114 In re Grand Jury Subpoena Dues Tecum, 112 F.3d at 931–32 (Kopf, J., dissenting).
115 Id.
116 Id. at 926.
118 Restatement (Third) of The Law Governing Lawyers § 74 (2000) (“Unless applicable law otherwise provides, the attorney-client privilege extends to a communication of a governmental organization as stated in § 73 and of an individual employee or other agent of a governmental organization as a client with respect to his or her personal interest as stated in §§ 68–72.”).
119 In re Grand Jury Subpoena Dues Tecum, 112 F.3d at 930 (Kopf, J., dissenting).
120 Id. at 926.
121 Id.
122 Id. at 930 (quoting Restatement (Third) of The Law Governing Lawyers § 124 cmt. b) (internal quotation marks omitted).
B. District of Columbia Circuit: In re Lindsey

The following year, the District of Columbia Circuit agreed with the Eighth Circuit in In re Lindsey and held, in a two-to-one decision, that there is no governmental attorney-client privilege in the federal grand jury context. However, the court recognized that “[c]ourts, commentators, and government lawyers have long recognized a government attorney-client privilege in several contexts”—for example, when government agencies represent federal employees in their individual capacities. In this case, the Division for the Purpose of Appointing Independent Counsels investigated Monica Lewinsky’s commission of perjury, obstruction of justice, and intimidation of witnesses in violation of federal law in relation to the lawsuit filed by Paula Jones against former President William Clinton. The federal grand jury subpoenaed Bruce Lindsey, Deputy White House Counsel and Assistant to the President. The District of Columbia Circuit ultimately required Bruce Lindsey to testify concerning the alleged criminal misconduct. The District of Columbia Circuit’s decision focused on the differences between government attorneys and private attorneys. Unlike a member of the private bar, the loyalties of a government attorney do not lie solely with his client. A government attorney’s duty is to further the public interest of the agency in which he is employed and to uphold the public trust by uncovering illegal activity among elected and appointed government officials, rather than “to protect wrongdoers from public exposure.” Although not articulating a balancing test, the court believed that the government’s duty to uphold the law and expose criminal wrongdoings through the grand jury process outweighs the protection of state government officials’ confidences.

123 158 F.3d 1263 (D.C. Cir. 1998) (per curiam).
124 Chud, supra note 7, at 1698–99.
125 In re Lindsey, 158 F.3d at 1283. Similar to the Eighth Circuit’s decision, the District of Columbia’s decision is limited to attorney-client communications concerning criminal activities. Chud, supra note 7, at 1700.
126 In re Lindsey, 158 F.3d at 1268.
127 Id. at 1266–67.
128 Id. at 1267.
129 Id. at 1283.
130 Id. at 1272–73.
131 Id. at 1273.
132 Id.
133 Id. at 1272.
In his concurring and dissenting opinion in *In re Lindsey*, Judge Tatel stated that the evidentiary attorney-client privilege protects confidential communications between attorneys and clients regardless of whether the attorney is employed by the government or private sector.\(^{134}\) Judge Tatel believed that the majority ignored “the unique nature of the Presidency, its unique need for confidential legal advice, [and] the possible consequences of abrogating the attorney-client privilege for a President’s ability to obtain such advice.”\(^{135}\) Although Judge Tatel “conceded that the government attorney-client privilege may deny a grand jury some useful information,”\(^{136}\) the President remains accountable for his actions through the use of impeachment, public scrutiny, congressional oversight, and the need to maintain popular support.\(^{137}\)

**C. Seventh Circuit: *In re A Witness Before the Special Grand Jury***\(^{138}\)

In *In re A Witness Before the Special Grand Jury*, the Seventh Circuit held that there is no evidentiary attorney-client privilege between a state officeholder and a state government attorney in the context of a federal criminal investigation.\(^{139}\) In this case, federal prosecutors issued a grand jury subpoena to compel Roger Bickel, Chief Legal Counsel to former Illinois Secretary of State George Ryan, to testify regarding conversations with Ryan in his official capacity as Chief Legal Counsel in the “Operation Safe Road” investigation.\(^{140}\) “Operation Safe Road” was an investigation into the alleged issuance of licenses for bribes, improper use of campaign funds, and obstruction of justice by the Illinois Secretary of State’s Office.\(^{141}\) In refusing to extend the evidentiary attorney-client

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\(^{134}\) *Id.* at 1283 (Tatel, J., concurring in part and dissenting in part).

\(^{135}\) *Id.* at 1286.

\(^{136}\) Ellinwood, *supra* note 4, at 1314.

\(^{137}\) *In re Lindsey*, 158 F.3d at 1287 (Tatel, J., concurring in part and dissenting in part).

\(^{138}\) 288 F.3d 289 (7th Cir. 2002).


\(^{140}\) *In re A Witness Before the Special Grand Jury*, 288 F.3d at 290–91.

\(^{141}\) *Id.* at 290.
privilege to government officials, the Seventh Circuit relied on language of the Supreme Court in *Jaffee v. Redmond* and warned lower courts “to avoid either derogating existing privileges or extending privileges to new, uncharted waters absent compelling considerations.” Similar to the District of Columbia Circuit in *In re Lindsey*, the Seventh Circuit focused on the differences between government attorneys and private attorneys in concluding that the need for a governmental attorney-client privilege in the grand jury context outweighs the government attorney’s duty to uphold the law. The first reason given by the court is the government attorney’s duty to act in the public interest and report criminal violations. The court noted that in the case at-hand, Roger Bickel’s duty is not to shield George Ryan’s wrongdoings from public exposure by the grand jury. The Seventh Circuit’s second reason for holding the government attorney’s duty to uphold the law as the greater interest is that state agencies, unlike individuals and corporations, cannot be held criminally liable. Thus, it is unnecessary for government entities to receive legal advice from government attorneys because government entities have no incentive to comply with the law. 

D. Second Circuit: *In re Grand Jury Investigation*

In contrast to the decisions of the Eighth, District of Columbia, and Seventh Circuits, the Second Circuit held that the governmental attorney-client privilege exists in the federal grand jury context. In *In re Grand Jury Investigation*, the Second Circuit allowed Anne George, former Chief Legal Counsel to former Governor John Rowland, to invoke the evidentiary attorney-client

144 See supra notes 130–33 and accompanying text.
145 *In re A Witness Before the Special Grand Jury*, 288 F.3d at 293–94.
146 Id. at 294.
147 Id.
148 Id.
149 See id.
150 Id.
151 399 F.3d 527 (2d Cir. 2005).
152 Id. at 528. Even though section 52-146r(b) of the Connecticut General Statute recognizes the governmental attorney-client privilege in criminal proceedings, the Second Circuit held that the state statute was not determinative because federal law was applicable. Id. at 534.
In this case, the United States Attorney’s Office subpoenaed Anne George regarding her private conversations with former Governor Rowland and staff members in an investigation into alleged criminal violations by Connecticut public officials.154 “[D]espite [the Second Circuit’s] desire to foster uniformity among the circuits, the [Second Circuit] concluded [that] it could not resolve the apparent tension between the other circuit cases and its decision.”155 Nevertheless, throughout its opinion, the Second Circuit noted several reasons why it should depart from precedent. Foremost, the Eighth and District of Columbia Circuit cases are factually distinct insofar as they involve communications between federal government attorneys and federal public officials. The federal statutes relied on by the Eighth and District of Columbia Circuits, such as the duty of executive branch employees to report criminal wrongdoings,156 are inapplicable to state government officials.157 It should be noted, however, that the case facts from the District of Columbia Circuit are analogous to the case-at-hand in that both involve state government officials and federal grand jury subpoenas. Additionally, even though the Eighth and Seventh Circuits accurately held that government entities, such as the White House itself, cannot be held criminally liable, the Eighth and Seventh Circuits failed to recognize that individual government officials are subject to criminal prosecution. Therefore, individual government officials must have the opportunity to receive fact-based legal advice from government attorneys because the threat of civil and criminal liability provides an incentive to comply with the law. The Second Circuit reasoned:

[T]he traditional rationale for the privilege applies with special force in the government context. It is crucial that [individual] government officials, who are expected to uphold and execute the law and who may face criminal prosecution for failing to do so, be encouraged to seek out and receive fully informed legal advice.158

Similar to Judge Kopf,159 the Second Circuit considered the

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153 Id. at 536.
154 Id. at 528–29.
156 See supra note 106–07 and accompanying text.
157 See In re Grand Jury Investigation, 399 F.3d at 534.
158 Id.
159 In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 926 (8th Cir. 1997) (Kopf, J.,
Federal Rules of Evidence promulgated by the Burger Court in 1972, commonly referred to as Supreme Court Standard 503.\textsuperscript{160} These proposed rules were drafted by an advisory committee whose members—consisting of judges, attorneys, and academics\textsuperscript{161}—were appointed by the Supreme Court for the purpose of creating a comprehensive code of evidence.\textsuperscript{162} Proposed Rule 503 defined client as “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.”\textsuperscript{163} Commentary accompanying the proposed rule provided that “[t]he definition of ‘client’ includes governmental bodies.”\textsuperscript{164} Even though the general provision codified in Federal Rule of Evidence 501\textsuperscript{165} was adopted by Congress in lieu of this proposed provision,\textsuperscript{166} Supreme Court Standard 503, which restates the federal common law,\textsuperscript{167} is significant because it provides insight into the Supreme Court’s view as to whether a governmental attorney-client privilege exists in the criminal context. Even though the Supreme Court, in \textit{Jaffee v. Redmond}, warned lower courts to avoid “extending privileges to new, uncharted waters absent compelling considerations,”\textsuperscript{168} Supreme Court Standard 503 demonstrates a former Supreme Court’s inclination to extend the attorney-client privilege to government clients because of the overriding importance of maintaining client confidences.

IV. THE COMPETING INTERESTS

The Second Circuit, and Judge Kopf’s dissent in \textit{In re Grand Jury Subpoena Duces Tecum}, weighed the need to maintain client confidences against the public’s need for evidence.\textsuperscript{169} Although the
Second Circuit “decline[d] to fashion a balancing test,” the court considered the public interest for state government officials to receive and act upon legal advice against the public interest in collecting relevant evidence through grand jury proceedings.\footnote{In re Grand Jury Investigation, 399 F.3d at 534–36; see also In re Grand Jury Subpoena Ducas Tecom, 112 F.3d at 936 (Kopf, J., dissenting).} The Supreme Court adopted a similar balancing approach in United States v. Nixon.\footnote{418 U.S. 683, 707 (1974).} In predicting which non-binding precedent New York State will use as guidance, and ultimately be inclined to follow, it is necessary to consider the importance New York State has attributed to these competing interests.

\textbf{A. The Need to Maintain Client Confidences in New York State}\footnote{Similar to the purpose of the evidentiary attorney-client privilege, the ethical obligation of an attorney “facilitates the full development of facts essential to [the] proper representation of the client [and] also encourages non-lawyers to seek early legal assistance.” NYSBA LAWYER’S CODE OF PROF’L RESPONSIBILITY EC 4-1 (2002).}

The New York Court of Appeals has held that the purpose of the evidentiary attorney-client privilege in New York State is to ensure that non-attorneys who seek legal advice and services are “able to confide fully and freely in [an] attorney” without fear that such confidences will later be revealed to his detriment.\footnote{418 U.S. 683, 707 (1974).} It has been the long-standing policy of New York State to encourage full disclosure and unrestricted communication between attorneys and clients.\footnote{In re Lanza, 163 N.Y.S.2d 576, 583 (Sup. Ct. 1957).} There are three basic assumptions on which the evidentiary attorney-client privilege is founded: (1) the complex and ambiguous nature of the law requires a non-attorney to consult an attorney in order to avoid litigation and conform his conduct to the law; (2) a client must be able to fully disclose all of the facts to an attorney in order for the attorney to provide adequate legal assistance; and (3) a client will not disclose personal and uncomfortable facts without assurance that an attorney cannot

\footnote{Judge Kopf argued that the \textit{Nixon} balancing test, which weighs executive confidentiality against the public interest, should apply to the governmental attorney-client privilege. \textit{See Chud, supra note 7, at 1726.}}
subsequently be compelled to disclose such facts.\textsuperscript{175}

The first assumption on which the evidentiary attorney-client privilege is based centers on the need to exploit an attorney’s legal expertise.\textsuperscript{176} Chief Justice Shaw noted:

[S]o numerous and complex are the laws by which the rights and duties of citizens are governed, so important is it that they should be permitted to avail themselves of the superior skill and learning of those who are sanctioned by the law . . . without publishing those facts, which they have a right to keep secret, but which must be disclosed to a legal adviser and advocate, to enable him successfully to perform the duties of his office, that the law has considered it the wisest policy to encourage and sanction this confidence, by requiring that on such facts the mouth of the attorney shall be forever sealed.\textsuperscript{177}

Moreover, the ability to rely upon the consistent application of the evidentiary privilege over time is “necessary to promote the rule of law by encouraging consultation with lawyers, and ensuring that lawyers, once consulted, are able to render to their clients fully informed legal advice.”\textsuperscript{178} The second assumption is based on the theory that the confidential nature of attorney-client interaction increases the soundness and adequacy of an attorney’s legal advice.\textsuperscript{179} New York State’s high regard for the confidential nature of attorney-client communications is evidenced by the disciplinary sanctions imposed upon an attorney who destroys the secrecy of the communication by violating either the duty of confidentiality or the evidentiary attorney-client privilege.\textsuperscript{180} Such disciplinary sanctions can include, but are not limited to, civil penalties, disbarment, suppression of evidence, and contract or tort claims against the attorney.\textsuperscript{181} The third assumption is that in order for an attorney to


\textsuperscript{177} WIGMORE, supra note 16, § 2291 (quoting Hatton v. Robinson, 31 Mass. (14 Pick.) 416, 422 (1833)).

\textsuperscript{178} In re Grand Jury Investigation, 399 F.3d 527, 531 (2d Cir. 2005).

\textsuperscript{179} RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 cmt. c; Gowdy, supra note 6, at 698.


\textsuperscript{181} See supra notes 25–27 and accompanying text.
provide effective representation, an attorney must receive all of the facts from his client, including both the irrelevant and embarrassing facts, in order to fully understand and appraise the client’s situation.\textsuperscript{182}

The New York Court of Appeals recognized that the evidentiary attorney-client privilege is not absolute and, in fact, has limits.\textsuperscript{183} Since “the attorney-client privilege constitutes an obstacle to the truth-finding process, the invocation [of the evidentiary privilege] should be cautiously observed to ensure that its application is consistent with its purpose.”\textsuperscript{184} Therefore, the evidentiary attorney-client privilege “must be narrowly construed”\textsuperscript{185} because it “contravene[s] the fundamental principle that the public . . . has a right to every man’s evidence.”\textsuperscript{186} The New York Court of Appeals, however, recognized, in a dissenting opinion, that the mere fact that enforcement of the evidentiary privilege may frustrate the administration of justice and keep information from the government in a criminal investigation does not make it inapplicable.\textsuperscript{187} According to a lower New York State court, in each instance, the privilege should be sustained when the injury resulting from disclosure of the communication is greater than the benefit of piercing the privilege.\textsuperscript{188} Even though it is necessary to ensure the right of every person to freely and fully confide in an attorney, it is also the purpose of the law to determine the truth.\textsuperscript{189} In certain instances, “the privilege may give way to strong public policy considerations.”\textsuperscript{190}

\textsuperscript{182} \textit{Restatement (Third) of the Law Governing Lawyers} § 68 cmt. C; Gowdy, \textit{supra} note 6, at 698.

\textsuperscript{183} See Priest v. Hennessy, 409 N.E.2d 983, 985 (N.Y. 1980); People v. Belge, 376 N.Y.S.2d 771, 772 (App. Div. 1975) (“[T]he privilege is not all-encompassing and that in a given case there may be conflicting considerations.”).

\textsuperscript{184} Hennessy, 409 N.E.2d at 986 (quoting Jacqueline F. v. Segal, 391 N.E.2d 967, 969 (N.Y. 1979)) (internal quotation marks omitted).


\textsuperscript{187} Jacqueline F., 391 N.E.2d at 974 (Fuchsberg, J., dissenting).


\textsuperscript{189} Baird v. Koerner, 279 F.2d 623, 629–30 (9th Cir. 1960).

\textsuperscript{190} Spectrum, 581 N.E.2d at 1062.
B. The Public’s Right to Know Every Man’s Evidence in New York State

Even though New York State recognizes that the evidentiary attorney-client privilege is limited in certain instances, the public’s need for evidence as demonstrated by grand jury proceedings is not a strong enough public policy consideration to pierce the privilege. The grand jury in New York State is “deeply rooted as an institution within [its] system of justice.”\(^\text{191}\) A grand jury consists of sixteen to twenty-three individuals who “hear and examine evidence concerning offenses[,] ... misconduct, nonfeasance and neglect in public office.”\(^\text{192}\) The primary function of the grand jury is to “protect[] individuals from having to defend against unfounded serious criminal charges”\(^\text{193}\) and to investigate crimes in order to determine if sufficient evidence exists for an indictment.\(^\text{194}\) In order to execute its investigatory functions, the grand jury possesses broad, yet limited, powers.\(^\text{195}\) Since the evidentiary attorney-client privilege sometimes “prevents disclosure of relevant evidence and thus impedes the [g]rand [j]ury’s quest for truth, it must be strictly confined within the narrowest possible limits consistent with the logic of its principle.”\(^\text{196}\) The grand jury’s need for evidence, nevertheless, does not automatically trump the evidentiary attorney-client privilege. The purpose and nature of the grand jury in New York State, although important in ascertaining the truth and gathering evidence, are inferior to the need to maintain client confidences.

New York State cases that have addressed the existence of the evidentiary attorney-client privilege in the criminal context have

\(^{192}\) In New York State, the grand jury derives its power from article I, section 6 of the New York State Constitution and the Criminal Procedure Law of New York State. N.Y. CONST. art I, § 6; N.Y. CRIM. PROC. LAW §§ 190.05–.90 (McKinney 1993); In re Grand Jury Subpoena Dated June 30, 2003, 770 N.Y.S.2d at 571. The New York State Constitution grants grand juries the power “to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law.” N.Y. CONST. art I, § 6.
\(^{193}\) § 190.05. In New York State, the grand jury is part of the judiciary system. Id.; In re Grand Jury Subpoena Dated June 30, 2003, 770 N.Y.S.2d at 571.
\(^{194}\) Peter Preiser, Practice Commentary, in § 190.05; In re Grand Jury Subpoena Dated June 30, 2003, 770 N.Y.S.2d at 571.
\(^{195}\) Id.; In re Grand Jury Subpoenas Served Upon Field, 408 F. Supp. 1169, 1172 (S.D.N.Y. 1976).
\(^{196}\) In re Grand Jury Subpoena Dated June 30, 2003, 770 N.Y.S.2d at 572 (quoting In re Shargel, 742 F.2d 61, 62 (2d Cir. 1984)) (internal quotation marks omitted).
been reluctant to pierce the privilege and compel non-government attorneys to disclose non-government client confidences in grand jury proceedings. One New York State trial court recognized that the grand jury “must exercise its broad investigatory powers in accordance with the procedural and evidentiary rules laid down in the Criminal Procedure Law [of New York] and other statutes.”\(^{197}\) Similarly, in an opinion adopted by a second New York State trial court, the court noted that the subpoena power of the grand jury is not unlimited and that the grand jury may not violate a valid statutory, constitutional, or common law privilege.\(^{198}\) Although not authoritative, this language suggests that a state grand jury subpoena cannot pierce the evidentiary attorney-client privilege codified in the New York Civil Practice Laws and Rules and rooted in both the New York State and Federal Constitution as well as the common law.\(^{199}\) New York State courts and the New York State Legislature have articulated specific exceptions in which the evidentiary attorney-client privilege either does not exist or may be pierced—an attorney can disclose information regarding the validity or construction of a deceased client’s will,\(^{200}\) a client’s identity,\(^{201}\) terms of an attorney’s retainer agreement,\(^{202}\) fee arrangements,\(^{203}\) a client’s whereabouts in certain circumstances,\(^{204}\) and tangible property involved in criminal activity.\(^{205}\) However, none of these

\(^{197}\) Id. at 571 (internal quotation marks omitted).
\(^{198}\) In re Application to Compel the Testimony of Doe, 456 N.Y.S.2d 312, 315 (County Ct. 1982). But see In re Grand Jury Subpoena Dated June 30, 2003, 770 N.Y.S.2d at 571 (“[The] constitutional and statutory rights of the individual must sometimes yield to a Grand Jury’s search for evidence.”).
\(^{199}\) See supra Part II.B.
\(^{200}\) N.Y. C.P.L.R. 4503(b) (McKinney 1992).
\(^{201}\) In re Grand Jury Investigation, 669 N.Y.S.2d 179, 183 (County Ct. 1998).
\(^{203}\) In re Grand Jury Investigation, 669 N.Y.S.2d at 183; see, e.g., Hennessy, 409 N.E.2d at 986 (explaining that fee arrangements are not privileged because there is no confidential communication).
\(^{204}\) See Jacqueline F. v. Segal, 391 N.E.2d 967, 972 (N.Y. 1979) (holding that an attorney must disclose the address of his client in child custody litigation because of the court’s interest in protecting and advancing the interests of the child); In re Investigation to Locate Doe, 420 N.Y.S.2d 996, 999 (Sup. Ct. 1979) (holding that an attorney must testify regarding a defendant’s whereabouts where the defendant violated the terms of his plea bargain by leaving the hospital prior to sentencing without permission); In re Application to Compel the Testimony of Doe, 456 N.Y.S.2d 312, 315–16 (County Ct. 1982) (holding that an attorney must testify regarding a defendant’s whereabouts where the defendant was involved in the “continuing crime” of bail jumping).
\(^{205}\) People v. Investigation into a Certain Weapon, 448 N.Y.S.2d 950, 953 (Sup. Ct. 1982) (holding that a defendant’s attorney must produce the firearm and paraphernalia used in criminal activity which was given to the attorney by the defendant in order to perform
exceptions require an attorney to disclose confidential communications between him and his client during grand jury inquest regarding the legal rights and obligations of the client that are at the heart of the evidentiary attorney-client privilege. Even though these cases do not involve government officials and government attorneys, such reluctance on the part of New York State courts to pierce the evidentiary privilege in grand jury proceedings evidences the judiciary's high regard for attorney-client confidences. As such, this Comment posits that New York State courts have an equal amount of respect for the sanctity of communications between state government officials represented by government attorneys when faced with state grand jury inquest.

V. CONCLUSION

There is a lack of unanimity among the circuit courts that have addressed the question of whether a governmental attorney-client privilege exists in the federal grand jury context. However, based on New York State’s reconciliation of the competing public interests between the need to maintain client confidences and the public’s right to know, there is strong support in existing law and principles that an evidentiary attorney-client privilege exists between state government officials and government attorneys in New York State grand jury proceedings. The invocation of the evidentiary attorney-client privilege in New York State grand jury proceedings is consistent with the purpose of the privilege—full disclosure and unrestricted communication between attorneys and clients in which clients can confide fully and freely in an attorney without fear that such confidences will later be revealed to their detriment. New York State’s high regard for the confidentiality of the attorney-client relationship, as evidenced by the disciplinary sanctions imposed and the limitations on the grand jury’s power, implies that New York State will, in all likelihood, follow

scientific tests upon the objects related to a grand jury investigation).

206 Under these exceptions, the attorney was not "being asked to provide evidence against his client which is the very [essence] of the offense [being] charged." In re Grand Jury Investigation, 669 N.Y.S.2d at 184.

207 See supra Part IV.A.

208 See supra Part IV.B.

209 See supra notes 172–74 and accompanying text.

210 See supra notes 25–27 and accompanying text.

211 See supra Part IV.B.
the ruling of the Second Circuit in *In re Grand Jury Investigation*.  

Although not explicit in either New York State statutory or common law, the Governor’s chief legal counsel should be able to successfully invoke the evidentiary attorney-client privilege to avoid testifying about his private conversations with the Governor before a state grand jury. The existence of such privilege is necessary to ensure that the Governor of New York State receives well-founded, fact-specific legal advice from his chief legal counsel in order to conform his conduct to the law.  

Furthermore, as stated in Judge Tatel’s dissenting opinion, even though the invocation of the privilege impedes the grand jury’s quest for truth, the Governor of New York State remains accountable to the people through other avenues, including impeachment, public scrutiny, congressional oversight, and the need to maintain popular support.

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212 *In re Grand Jury Investigation*, 399 F.3d 527, 536 (2d Cir. 2005).

213 See *supra* notes 115–16 and accompanying text.

214 See *supra* note 137 and accompanying text.