UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	No. 08 CR 888
v.	)	
	)	Judge James B. Zagel
ROD BLAGOJEVICH, and	)	
ROBERT BLAGOJEVICH	)	

MOTION IN LIMINE TO DETERMINE THE APPLICABILITY OF ATTORNEY-CLIENT PRIVILEGE AND TO COMPEL COMPLIANCE WITH TRIAL SUBPOENAS

The UNITED STATES OF AMERICA, by its attorney, Patrick J. Fitzgerald, United States Attorney for the Northern District of Illinois, respectfully moves this Court, pursuant to Fed. R. Crim. P. 17 and Fed. R. Evid. 104(a), for an order determining that communications involving William J. Quinlan regarding matters relevant to the second superseding indictment are not protected by the attorney-client privilege, and compelling Quinlan to comply with trial subpoenas issued by the government. In support of this motion, the government states as follows.

BACKGROUND

Although defendant Rod Blagojevich has indicated that he does not intend to assert the attorney-client privilege to preclude disclosure of communications involving William J. Quinlan, former General Counsel and Counsel to the Office of the Governor of the State of Illinois, relevant to the issues raised in the second superseding indictment, he has declined to provide an express waiver of any such applicable privilege. Absent such a waiver, Quinlan, whom the government has served with two trial subpoenas requiring him to produce documents and testify in the trial of this case, has through his counsel refused to disclose communications that Quinlan believes could be subject to a claim of privilege by Blagojevich. To facilitate orderly trial preparation by both parties and to obviate the need for interruptions of the trial, the government seeks a final resolution of issues

related to the applicability of the attorney-client privilege to communications involving William J. Quinlan in this case.

A. Pending Charges

Rod Blagojevich and his brother, Robert Blagojevich, together with John Harris and Lon Monk, have been charged with RICO conspiracy, mail and wire fraud, extortion and theft offenses. The second superseding indictment charges that the defendants, together with others, used and agreed to use the powers of the Office of the Governor of the State of Illinois, and of certain state boards and commissions subject to influence by the Office of the Governor, to take and cause governmental actions, including: appointments to boards and commissions; the awarding of state business, grants, and investment fund allocations; the enactment of legislation and executive orders; and the appointment of a United States Senator; in order to obtain financial benefits for themselves and others, including campaign contributions for Rod Blagojevich, and employment for Rod Blagojevich and his wife. Rod and Robert Blagojevich are scheduled for trial beginning on June 3, 2010.

B. William J. Quinlan

Beginning in or about May 2005 and continuing through December 31, 2008, William J. Quinlan was an attorney employed by the State of Illinois, serving as, at various times, General Counsel and Counsel to the Governor of the State of Illinois. In his capacity as General Counsel, Quinlan oversaw legal operations of state agencies within the Governor's Office, appeared in court, worked with the State of Illinois Executive Inspector General's Office, and provided business as well as legal advice to Blagojevich and other state employees in their official, rather than personal, capacities. Quinlan reported directly to Rod Blagojevich ("Blagojevich"), who was then Governor

of the State of Illinois. While working as a state employee, Quinlan obtained permission to provide outside services to non-state employees; those services are not the subject of the government subpoenas, however.

C. Waiver of Any Applicable Attorney-Client Privilege by the State of Illinois

On February 20, 2009, Governor Pat Quinn, by counsel and on behalf of the Office of Governor of the State of Illinois, expressly waived, in writing, any "attorney-client privilege . . . determined to apply to the Federal Criminal Matter," specifically, "the federal criminal investigation and prosecution of Blagojevich and his associates."[1]

D. Discussions Regarding the Issue of Attorney-Client Privilege With Respect to Communications Involving William J. Quinlan

The parties have discussed the issue of attorney-client privilege with respect to communications involving William J. Quinlan, particularly in the context of four categories of evidence: (1) conversations recorded through a court-authorized eavesdropping device in Blagojevich's campaign office and wiretaps on various telephones used by Blagojevich and his associates; (2) documents obtained from the State of Illinois; (3) documents obtained from Friends of Blagojevich, which was defendant Rod Blagojevich's campaign finance organization; and (4) documents in Quinlan's possession, as well as Quinlan's prospective testimony.

[1] In doing so, the Office of the Governor expressed the view that, under controlling Seventh Circuit precedent, even without a waiver, no claim of attorney-client privilege could be raised, citing *In re A Witness Before the Special Grand Jury 2000-2*, 288 F.3d 289, 293 (7th Cir. 2002) (holding that in the context of a criminal investigation of a public official, the attorney-client privilege does not apply to communications between the official and government attorneys).

1. Recorded Conversations

Foreseeing potential assertions of privilege, and out of an abundance of caution, certain conversations recorded through court-authorized listening devices and wiretaps were not disclosed immediately to the Assistant U.S. Attorneys and law enforcement agents participating in the investigation and prosecution of this case (the prosecution team). Instead, the government established a filter team composed of Assistant United States Attorneys having no involvement in the prosecution, and this team reviewed recordings of conversations that might potentially be the subjects of claims of privilege. Rod Blagojevich and his counsel were provided with certain recordings of conversations involving Quinlan which the filter team determined potentially raised privilege issues, together with notice that, in the absence of specific assertions of privilege, the recordings would be turned over to the prosecution team.

In a court filing presented on September 18, 2009, Rod Blagojevich agreed that all of the recordings identified by the filter team, including all conversations involving Quinlan, could be shared with the prosecution team, but seemingly purported to reserve the right to assert the attorney-client privilege at subsequent stages of the litigation. R. 182 at 2.[2] Subsequently, Rod Blagojevich expressly waived any claim of privilege he might assert with respect to any of the recorded conversations, including conversations involving Quinlan, and sought an order from the Court permitting the admission of all recordings in evidence at trial. R. 241.

[2] The filing stated that Blagojevich's authorization "must not be construed as a waiver of one or more 'privileges' which might be the subject of presentation at subsequent stages of this litigation." R. 182 at 2. Before the recordings were provided to the prosecution team, counsel for Blagojevich was informed that the government considered any applicable attorney-client privilege waived.

2. Documents Obtained from the State of Illinois

The government obtained documents from the State of Illinois. As discussed above, the Office of the Governor expressly waived any attorney-client privilege deemed to apply to the federal investigation and prosecution of Rod Blagojevich, including any privilege deemed to apply to these documents. Nevertheless, in an abundance of caution, the government employed its filter team to conduct a review of the State documents. As the documents were reviewed, the government identified for Blagojevich those documents which the filter team determined potentially raised privilege issues. Blagojevich specifically agreed to the prosecution team's review of the first set of documents identified by the filter team, but contended that this authorization did not constitute a waiver of the right to assert privilege at a later date.[3] To date, Blagojevich has not asserted a claim of attorney-client privilege with respect to any of the documents identified by the filter team, or to any other documents obtained from the State of Illinois.

3. Documents Obtained from Friends of Blagojevich

The same filter team review process was followed with respect to documents obtained by subpoena from Friends of Blagojevich. To date, neither Rod Blagojevich nor Robert Blagojevich, who served as Chairman of the organization, has asserted any claim of privilege regarding the Friends of Blagojevich documents.

4. Documents and Testimony from Quinlan

The government solicited William J. Quinlan's voluntary cooperation in producing documents and testimony relevant to the charges contained in the pending superseding indictment.

[3] Before the documents were provided to the prosecution team, defense counsel was informed that the government viewed any applicable attorney-client privilege as waived.

Quinlan refused, despite the Office of the Governor's waiver of any privilege, on the ground that Blagojevich had suggested that he might have a right to assert privilege separate from that of the state, and had declined to provide an express waiver of any such claim.[4] The government thereafter served Quinlan with trial subpoenas for documents and testimony related to the events set forth in the second superseding indictment. Through counsel, Quinlan declined to comply with the government's requests in the absence of (1) an express waiver of any privilege from Rod Blagojevich; or (2) a court order.

On February 23, 2010, counsel for Rod Blagojevich sent a letter to counsel for Quinlan, copied to government counsel, stating that, "[i]n the interest of openness and fairness we have no objection to Mr. Quinlan speaking to the United States Attorney's Office." However, defense counsel's letter also included a number of "suggestions" related to the Quinlan interview. Specifically, defense counsel suggested that Quinlan decline to be interviewed without being given an opportunity to review wiretap conversations in which Quinlan participated. ("Many experts would say an effective lawyer should decline a government interview without knowing what his client has previously stated.") Defense counsel then suggested that the parties seek permission for Quinlan to review pertinent wiretap recordings, subject to the protective order previously entered by the Court. Defense counsel also suggested that a member of the defense team should be permitted to observe the government's interview of Quinlan, and the interview should be transcribed by a court reporter.

Blagojevich's refusal to provide Quinlan with a complete waiver of any applicable attorney-

[4] This suggestion is consistent with Blagojevich's attempts to reserve the right to assert privilege with respect to the recorded conversations and documents provided by the State of Illinois.

client privilege, together with his previous attempts to reserve the right to assert claims of privilege at a later date, create uncertainty as to whether, despite the State's waiver, and Blagojevich's waiver with respect to the recorded conversations, Blagojevich will attempt to assert claims of privilege with respect to communications involving Quinlan – before or during the trial. It is important to the parties' ability to prepare for trial in an orderly matter, and to prevent interruptions of the trial, that Blagojevich be required to take a firm position on this issue of attorney-client privilege and, if necessary, that the Court resolve the question of whether there is any legal basis for such claims to be asserted.

APPLICABLE LAW

The attorney-client privilege "protects confidential communications made between clients and their attorneys for the purpose of securing legal advice." *In re A Witness Before the Special Grand Jury 2000-2* ("*Bickel*"), 288 F.3d 289, 291 (7th Cir . 2002). Its purpose 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." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The privilege is construed narrowly, however, because it is "in derogation of the search for the truth." *E.g.*, *United States v. Evans*, 113 F.3d 1457, 1461 (7th Cir. 1997).

"[I]n order for the attorney client privilege to attach, the communication in question must be made: (1) in confidence; (2) in connection with the provision of legal services; (3) to an attorney; and (4) in the context of an attorney-client relationship." *United States v. BDO Seidman, LLP*, 492 F.3d 806, 814-815 (7th Cir. 2007). A client's communication is protected only if it was made in confidence and if it related to the seeking of legal advice; an attorney's statements to a client are protected "where those communications rest on confidential information obtained from the client,

or where those communications would reveal the substance of a confidential communication by the client." *Rehling v. City of Chicago*, 207 F.3d 1009, 1019 (7th Cir. 2000) (citations omitted). The presence of a third party typically establishes that a communication is not confidential. *Evans*, 113 F.3d at 1462. "Business or other advice is not privileged, and should be distinguished from professional legal services." *Matter of Walsh*, 623 F.2d 489, 494 (7th Cir. 1980).

The party asserting a privilege bears the burden of establishing each of its elements. *Evans*, 113 F.3d at 1461-62. Moreover, invocation of the privilege must be specific and must be asserted on a question by question or document by document basis; blanket claims of privilege do not justify a wholesale refusal to testify or produce documents. *See, e.g., United States v. Insurance Consultants of Knox, Inc.*, 187 F.3d 755, 760 (7th Cir. 1999) (citing *Holifield v. United States*, 909 F.2d 201, 204 (7th Cir. 1990)).

The applicability of the attorney client privilege is a question of federal law. *See* Fed. R. Evid. 501 (providing that, unless limited by the U.S. Constitution, an Act of Congress, or a Supreme Court Rule, privileges are "governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience"); Proposed Fed. R. Evid. 503, which the Seventh Circuit looks to "as a source of general guidance regarding federal common law principles." *BDO Seidman*, 492 F.3d at 814-15 (quoting *In re Grand Jury Investigation*, 399 F.3d 527, 532 (2d Cir. 2005)).

In this case, the question of whether any attorney-client privilege applies to Quinlan's communications is debatable in light of the Seventh Circuit's precedent holding that a state lawyer may not "refuse, on the basis of the attorney-client privilege, to disclose communications with a state officeholder when faced with a grand jury subpoena." *Bickel*, 288 F.3d at 293 (finding that "[i]t

would be both unseemly and a misuse of public assets to permit a public official to use a taxpayer-provided attorney to conceal from the taxpayers themselves otherwise admissible evidence of financial wrongdoing, official misconduct, or abuse of power," and holding that, "when another government lawyer requires information as part of a criminal investigation, the public lawyer is obligated not to protect his governmental client but to ensure its compliance with the law"). *See also, Sandra T.E. v. South Berwyn School District 100 and Sidley Austin LLP*, No. 08-3344 (slip op. at 15) (7th Cir. March 30, 2010)(clarifying that *Bickel* was limited to the criminal context and did not articulate "a generally applicable exception for communications between governmental employees and taxpayer-paid counsel" applicable to civil cases for damages). Although *Bickel* is the controlling precedent in the Seventh Circuit, there is circuit authority to the contrary, *In re Grand Jury Investigation*, 399 F.3d 527, 534-36 (2d Cir. 2005).

The attorney client privilege belongs to the client and may be waived by the client. *United States v. Smith*, 454 F.3d 707, 713 (7th Cir. 2006). Waiver may be express or implied, such as, for example by "relying on a legal claim or defense, the truthful resolution of which will require examining confidential communication," *e.g., United States v. Lorenz Valley Forge Ins. Co.*, 815 F.2d 1095, 1098 (7th Cir. 1987), or, in some circumstances, by partially or selectively disclosing communications or information, *see* Fed. R. Evid. 502 (providing that, where a client has intentionally disclosed communications or information in a federal proceeding or to a federal office or agency, the client's waiver of privilege with respect to that communication or information extends to undisclosed communications or information concerning the same subject matter that "ought in fairness to be considered together").

DISCUSSION

The government seeks documents and trial testimony from Quinlan regarding discussions he had with Rod Blagojevich and others relevant to the matters contained in the pending second superseding indictment. Blagojevich has stated that he believes that a potential claim of attorney-client privilege could be made but nevertheless has no objection to Quinlan's producing documents and submitting to an interview by the government.[5] Accordingly, it thus appears that Rod Blagojevich has waived any potential claim of privilege with respect to communications involving Quinlan, and to agree to the full airing of any relevant communications at trial. To date, however, Blagojevich has declined to provided an unequivocal waiver of any potential assertions of attorney-client privilege upon which both Quinlan and the government may rely and, on this basis, Quinlan has refused to disclose documents or provide the government with an opportunity to conduct a pretrial interview.

The absence of a clear waiver by Blagojevich impedes orderly trial preparation and creates a serious risk that the trial will be interrupted by the need to resolve privilege issues. Accordingly, the government respectfully requests that this Court make the determination that any applicable attorney-client privilege has been waived with respect to communications and information concerning Quinlan related to the charges contained in the second superseding indictment.

A. Any Applicable Privilege Has Been Waived.

At all relevant times, Quinlan served as General Counsel and Counsel to the Governor of the

[5] Blagojevich stated that both he and Robert Blagojevich maintained an attorney-client relationship with Quinlan, but given that Quinlan was employed by the State of Illinois rather than Friends of Blagojevich, it is unclear what basis there could be for Robert Blagojevich's asserting a claim of attorney-client privilege.

State of Illinois. As such, he provided legal advice and services to Blagojevich and members of his staff in their official, rather than personal, capacities. Given Governor Quinn's express waiver of any "attorney-client privilege [that] is determined to apply" to the federal criminal investigation and prosecution of Blagojevich and his associates, the attorney-client privilege does not protect relevant communications and information involving William J. Quinlan from disclosure. *See CFTC v. Weintraub*, 471 U.S. 343, 349 (1985) (organization's current management, not former individual managers, has the authority to decide whether to waive privilege).

In light of the State's waiver, this Court need not and should not reach the issue that has divided the circuits. *See CFTC v. Weintraub*, 471 U.S. 343, 349 (1985) (organization's current management, not former individual managers, has the authority to decide whether to waive privilege). Reliance on the inapplicability of the privilege could lead to protracted appellate litigation and further delay and uncertainty. In contrast, a ruling that any possible privilege has been waived will promote the efficient and final resolution of this issue for purposes of this prosecution, without engendering legal risk.

B. To Any Extent that Blagojevich Seeks to Prevent Disclosure of Communications or Information Involving Quinlan, He Must Make Specific Assertions of Privilege, Subject to the Court's Review.

To any extent that defendant Blagojevich seeks to assert attorney-client privilege, he bears the burden of specifically establishing each of its elements with respect to each particular document or topic he seeks to withhold from disclosure. *E.g.*, *Evans*, 113 F.3d at 1461-62; *Insurance Consultants of Knox, Inc.*, 187 F.3d at 760. Given the impending trial date, Blagojevich should be required to take a firm position regarding privilege without delay. Should Blagojevich choose to

assert any privilege claims, he should be required to make the requisite showing on an expedited basis.

CONCLUSION

WHEREFORE, the government respectfully requests that this Court enter an order:

(1) finding any attorney-client privilege applicable to relevant communications or information involving William J. Quinlan has been waived; and

(2) compelling William J. Quinlan to comply with the government's trial subpoenas.

In the event that defendant Blagojevich seeks to preclude the disclosure of any documents or testimony related to communications involving William J. Quinlan, the government respectfully requests that this Court set a short deadline for the assertion of any claims of attorney-client privilege and the submission of appropriate privilege logs sufficiently detailed to facilitate a determination of the validity of defendant's privilege claims, as well as a briefing schedule for purposes of resolving all attorney-client privilege issues with respect to communications involving William J. Quinlan.

Respectfully submitted,

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