Matthew Lee Moore

UNDER SEAL

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DIVISION FOR THE PURPOSE OF
APPOINTING INDEPENDENT COUNSELS

ETHICS IN GOVERNMENT ACT OF 1978, AS AMENDED

In re	Madison Guaranty Savings & Loan Association (In re: William David Watkins and In re: Hillary Rodham Clinton)	:	Division No. 94-1

COMMENTS OF MATTHEW LEE MOORE ON THE INDEPENDENT COUNSEL'S FINAL REPORT

The following comments are submitted on behalf of Matthew Lee Moore in response to the Independent Counsel's Final Report ("Report") on the firings of employees of the White House Travel Office. These comments are limited to a single, narrow issue: the Report's unfair implication that Moore, a lawyer, acted improperly by identifying but not immediately producing potentially privileged documents in his possession in response to subpoenas from the House Committee on Government Reform and Oversight ("House Committee") and the Office of the Independent Counsel ("OIC") in 1996.

Moore's decision to withhold the documents arose from a claim of attorney-client privilege raised by David Watkins, who asserted that the documents reflected confidences revealed to Moore as part of an attorney-client relationship. Moore informed the House Committee and the OIC that he could not ethically produce the documents until Watkins relinquished his privilege claim or a tribunal of appropriate jurisdiction rendered a final decision on the validity of that claim.

As set forth below, Leonard H. Becker, former Counsel to the District of Columbia Bar, has reviewed Moore's actions and concluded that by declining to unilaterally produce the documents in the face of Watkins' privilege claim, "Mr. Moore did everything that a lawyer lawfully and ethically should do." Affidavit of Leonard H. Becker, ¶23 (Exhibit A hereto). In light of this fact, the current Report's implicit criticism of Moore's response to the 1996 subpoena should be deleted or altered to reflect that he fulfilled applicable ethical standards.

Background

The current OIC Report addresses actions relating to the firing of the staff of the White House Travel Office in May 1993, and subsequent White House responses to inquiries about the firings. At the time, Moore was a 25-year old junior staffer in the White House Office of Management and Administration.[1] He had graduated from the University of Michigan Law School in 1992, and began work at the Office of Management and Administration in March 1993. Moore himself had no involvement in, or material first-hand knowledge of, the firings. He left the White House in 1994, almost two years before the OIC's investigation of the Travel Office firings began.

Moore's involvement in the current investigation stems from assistance he provided his superior, David Watkins, months after the firings. Specifically, Watkins asked Moore in September 1993 to assist him in drafting a memorandum that provided Watkins' historical perspective on the firings. That memorandum, now known as the "Watkins Memorandum,"

[1] Moore's title when he left the White House in 1994 was "special counsel" within the Office of Management and Administration. As such, he was not part of the White House Counsel's Office. He instead reported to the Assistant to the President for Management and Administration, David Watkins.

triggered the OIC's review of the Travel Office firings. Moore's knowledge of the firings derives almost totally from the hearsay provided him by Watkins while assisting in preparation of the Watkins Memorandum.[2]

Moore believed that he had provided Watkins with all materials (including Moore's handwritten notes) in his possession relating to the Watkins Memorandum prior to leaving the White House in June 1994. After receiving subpoenas from Congress and the OIC in 1996, however, Moore determined that he still had in his possession several early drafts of the Watkins Memorandum that had been saved (in electronic format) on the hard drive of his home computer in 1993.

Moore retained the firm of Steptoe & Johnson, LLP (his current counsel) to advise him regarding his obligations in responding to the Congressional subpoena. Watkins, who in 1996 also received subpoenas that sought his memorandum, informed Moore through counsel that he considered his communications with Moore in 1993-94 to be privileged, and directed that Moore not produce documents reflecting those communications. Watkins specifically requested that drafts of the Watkins Memorandum not be produced.

Acting on the advice of his own counsel, Moore informed both the House Committee and the OIC that he had in his possession drafts of the Watkins Memorandum, but that he believed under applicable ethical guidelines he could not produce the documents pending resolution of Watkins' claim of privilege. When asked for his personal opinion whether Watkins' claim of privilege would be upheld, Moore consistently stated that he questioned whether Watkins and he

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[2] In addition, Moore obtained other after-the-fact knowledge of the firings as a result of assisting with the White House's production of documents to the General Accounting Office and other bodies that reviewed the firings.

had a personal attorney-client relationship, as Watkins had asserted. Moore also consistently testified, however, that he believed that Watkins' claim was sufficiently supportable as to preclude Moore from unilaterally producing the documents prior to review of Watkins' claim by an appropriate judicial body. This position was consistent with applicable District of Columbia ethics opinions, which Moore cited at the time, and the advice of Moore's own counsel. See Letter from William T. Hassler, Moore's counsel, to Hon. William F. Clinger, Jr., Chairman of the House Committee on Government Reform and Oversight, of 5/8/96 (Exhibit B hereto).

Watkins' privilege claim was never adjudicated. Instead, Watkins ultimately agreed to produce the copies of the memorandum in his possession to the OIC under a non-waiver agreement. Following Watkins' production of the memorandum to the OIC, Watkins informed Moore that he had no objection to Moore's providing testimony to the OIC about conversations between Moore and Watkins. Moore subsequently testified repeatedly before the grand jury about the drafting of the memorandum.[3]

Discussion

A passage in Appendix D to the Report now before this Court implies that Moore acted inappropriately by initially withholding production of drafts of the Watkins Memorandum that were still in Moore's control when he received subpoenas from the House Committee and the

[3] After Watkins' production to the OIC, copies of the draft memoranda in Moore's possession were provided to the House Committee. The Committee had initiated contempt proceedings in 1996 against Watkins, Moore, and more senior members of the Clinton Administration, including former White House Counsel John Quinn, in a vote that split along partisan lines. See H.R. Rep. No. 104-598, 104th Cong. 2d Sess. (May 29, 1996). The Democratic minority on the Committee opposed any contempt proceeding against Moore in light of Moore's need to comply with applicable ethical canons. Id. at 100-101. Following production of the drafts in Moore's possession, any question of further proceedings against Moore by the House Committee became moot.

OIC. The relevant passage states that after receiving subpoenas from the OIC and the House Committee,

> Watkins and Moore, through counsel, asserted attorney-client privilege. Moore subsequently testified that during the memorandum's preparation he did not have an attorney-client relationship with Watkins. In Moore's view, and despite his admission that he knew that no attorney-client privilege applied, Congress was wrong to hold him and the others in contempt because Congress bore the burden of "trying to resolve the attorney-client privilege."

OIC Travel Office Report, Appendix D at iii (citations omitted).

The quoted passage contains misstatements of both fact and law. First, Moore himself did not assert a claim of attorney-client (or any other) privilege with respect to his communications with Watkins. Instead, Moore repeatedly informed both the House Committee and the OIC that he took no position with respect to Watkins' claim, but could not ethically disregard that claim and produce the documents unilaterally. See Ex. B (Letter from William T. Hassler to Hon. William F. Clinger, Jr., of 5/8/96). The OIC's Report misleadingly glosses over this important distinction. Second, the House of Representatives never held Moore or others "in contempt." Although the House Committee initiated contempt proceedings, further proceedings regarding Moore were mooted after Watkins' production of the documents to the OIC. The House itself never took action on the Committee charges.

More fundamentally, the quoted passage completely misconstrues the ethical standards governing Moore's actions. Moore's personal opinion regarding the validity of Watkins' claim is irrelevant under applicable standards. The Report's suggestion that Moore should have immediately turned over the documents to the House Committee and the OIC based on his personal evaluation of the claim is contrary to the Rules of Professional Conduct governing lawyers.

The D.C. Bar Legal Ethics Committee, for example, has explicitly held that where a colorable claim of privilege has been asserted, the Rules of Professional Responsibility require an attorney to assert a claim of confidentiality pending adjudication of the claim even where the existence of the attorney/client relationship is in question:

> Obviously, the potential for unethical conduct – and the risk to be protected against – is that of disclosing confidences or secrets of one who is ultimately found to be a client or former client. Thus, if there is a colorable basis for asserting that the statements were made in the course of an attorney/client relationship, the lawyer must resolve the question in favor of preserving the confidentiality of the disclosures. This colorable basis standard obtains even when...the lawyer's personal view is that the attorney/client relationship never existed or was terminated prior to the disclosure at issue.

D.C. Bar Opin. No. 99 (Jan. 28, 1981) (Exhibit C hereto) (emphasis added).

The Bar Committee in the same matter went on to state:

> the supposed client's statements may be disclosed only with his consent after full discussion or as required by law or court order. Thus, assuming [the client] in the present inquiry does not consent to disclosure of his statements, [the attorney's] obligation is to assert before the grand jury the confidentiality of those statements....The ethical obligation of the [attorney] is simply not to compromise his client's position voluntarily, and that obligation continues until the relevant forum has resolved in the negative the question of the existence of the attorney/client relationship.

Id. (emphasis added). See also D.C. Bar Opin. No. 14 (Jan. 26, 1976) (Exhibit D hereto).

Under this standard, Moore had no choice but to withhold the relevant documents from the House Committee and the OIC pending an opportunity for Watkins to obtain judicial review of his privilege claim. For Moore to do otherwise would have been potentially unethical and could have subjected him to disciplinary sanctions.

The propriety of Moore's 1996 response to the OIC and House subpoenas is further supported by a leading expert on ethical standards in this jurisdiction. Exhibit A hereto contains the opinion of Leonard H. Becker, former District of Columbia Bar Counsel, regarding Moore's

conduct. Mr. Becker is a respected attorney whose accomplishments include seven years of service as D.C. Bar Counsel, where he was responsible for investigating and, where appropriate, prosecuting alleged violations of the D.C. Rules of Ethics. In his affidavit, Mr. Becker presents an exhaustive analysis of the factual and legal background of the issue and concludes that Moore's actions in withholding the documents were beyond reproach under the ethical standards applicable to his circumstances. See Ex. A (Becker Aff. ¶¶ 15-23). Moore properly respected Watkins invocation of the attorney-client privilege at the outset; produced immediately all responsive documents in his possession not subject to a claim of privilege; and then later testified at length about the documents originally withheld after their production to the grand jury by Watkins.

Although a minor matter in the context of the overall OIC investigation, the issue now raised is important to Moore, who respectfully requests that the above-quoted passage on page iii of Appendix D of the Report be deleted[4] or amended to remove any negative connotation.[5] As the Becker Affidavit concludes, "Mr. Moore acted correctly and in accordance with his ethical

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[4] Deletion of the cited passage is particularly appropriate given that the statement in question is found not in the main body of the OIC report, but in an attached Appendix, and that the subject of the passage is largely ancillary to the initial focus of the OIC investigation – that is, the substance of the Watkins Memorandum, and whether the Memorandum should have been produced in 1993-94.

[5] A fairer and more accurate version of the passage would read as follows:

> Watkins, through counsel, asserted attorney-client privilege. In light of Watkins' assertion, Moore also withheld drafts of the memorandum that were still in his possession. Moore subsequently testified that while he had significant reservations about whether a personal attorney-client relationship had ever existed between himself and Watkins, he was ethically bound to honor Watkins' privilege assertion until either Watkins withdrew the privilege claim or a tribunal of appropriate jurisdiction ordered him to turn over the documents.

obligations as an attorney." Aff., ¶23. The OIC Report should not be allowed to obscure this fact based on a misleading construction of applicable standards that, disturbingly, fails to acknowledge that Moore's conduct was dictated by his ethical obligations.

Respectfully submitted,

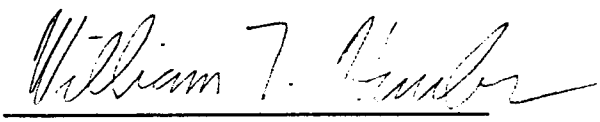

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Exhibit A

UNDER SEAL

UNITED STATES COURT OF APPEALS
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DIVISION FOR THE PURPOSE OF
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ETHICS IN GOVERNMENT ACT OF 1978, AS AMENDED

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WASHINGTON)

DISTRICT OF COLUMBIA)

AFFIDAVIT

LEONARD H. BECKER, being duly sworn, deposes and states:

1. I make this affidavit in support of the application of Matthew Moore, Esquire, to amend portions of the report of the Office of Independent Counsel (the "OIC"), following its investigation pursuant to this Court's order dated March 22, 1996, pertaining to the dismissals of personnel in the White House Travel Office (the "OIC Travel Office Report"). In specific, I address the circumstances pertaining to Mr. Moore's receipt of confidences of Mr. David Watkins in 1993 concerning the dismissals and Mr. Moore's subsequent response to subpoenas issued by the OIC and a Congressional Committee calling for the production of documents that memorialized those confidences.

Statement of Qualifications

2. I am a member in good standing of the District of Columbia Bar and a partner in the law firm Arnold & Porter in its Washington, D.C. office. I have been a partner in the firm from 1977 through 1991 and again from September 1999 to the present. From 1992 to September 1999, I served as District of Columbia Bar Counsel. In that capacity, I became familiar with the District of Columbia Rules of Professional Conduct (the "Rules"), promulgated by the District of Columbia Court of Appeals, the antecedent District of Columbia Code of Professional Responsibility (the "Code"), likewise promulgated by the District of Columbia Court of Appeals, and the Model Rules and Model Code, promulgated by the American Bar Association.

Statement of Facts

3. My understanding of the facts pertinent to the opinions expressed herein is based upon my review of the following materials: H.R. Rep. No. 104-598, 104th Cong. 2d Sess., entitled "Proceedings Against John M. Quinn, David Watkins, and Matthew Moore (Pursuant to Title 2, United States Code, Sections 192 and 194)" (May 29, 1996); a transcript of Mr. Moore's testimony before the House Committee on Government Reform and Oversight (the "House Committee"); excerpts from the OIC Travel Office Report and supporting materials (made available for review under seal); correspondence between counsel for Mr. Watkins on the one hand and the OIC and the House Committee on the other; a letter dated February 23, 1996 from Steptoe & Johnson, Mr. Moore's legal counsel, to Mr. Moore; a letter dated February 26, 1996 from Steptoe & Johnson to the Chair of the House Committee; and conversations with Steptoe & Johnson concerning Mr. Moore's background and employment history.

4. I am advised that Mr. Moore graduated from Michigan Law School in 1992 and was admitted to the Bar of the State of Arkansas in the same year. Currently he is employed as an associate with the New York firm Davis Polk & Wardwell. Previously he served as a law clerk to the Hon. Deborah A. Batts, United States District Judge in the United States District Court for the Southern District of New York. In 1996, he was admitted to practice before the Appellate Division of the Supreme Court of New York for the First Department.

5. In March 1993, Mr. Moore was hired as special hearings counsel to the White House Office of Management and Administration (the "Office"). He reported to Mr. Watkins, head of the Office. Subsequently the title of Mr. Moore's position changed to special counsel. In his position, he periodically performed functions as an attorney, for example, acting occasionally as the Office's liaison in consulting on legal matters with the Office of White House Counsel.

6. In September 1993, Mr. Watkins asked Mr. Moore to record Mr. Watkins' confidences concerning his dismissal of personnel in the White House Travel Office. At the outset of the conversation, Mr. Watkins made a point of confirming that Mr. Moore was a lawyer admitted to the Bar. Mr. Moore took handwritten notes in a series of meetings with Mr. Watkins, prepared drafts of a memorandum on the basis of the meetings, reviewed the drafts with Mr. Watkins, and revised them in accordance with Mr. Watkins' instructions. Mr. Watkins requested that the documents be marked as privileged and confidential. See OIC Travel Office Report, App. D, at ix, note 43. Mr. Moore followed this instruction, contemporaneously labeling the drafts "PRIVILEGED AND CONFIDENTIAL" at Mr. Watkins' request and according the drafts the level of

confidentiality that he believed was protected by the attorney-client privilege. See H.R. Rep. No. 104-598, supra, at 50. One early draft of the memorandum was addressed to the White House Chief of Staff; later drafts, to Mr. Watkins' retained legal counsel. Although Mr. Moore did not regard himself as having formed a personal attorney-client relationship with Mr. Watkins, he recognized that Mr. Watkins had reposed his trust and confidence in him on the basis of his status as a lawyer.[1]

7. During the period described above, Mr. Watkins retained counsel at the Washington, D.C. law firm Hogan & Hartson. See H.R. Rep. No. 104-598, supra, at 50.

8. In June 1994, Mr. Moore left his position at the White House. Prior to his departure, he turned over to Mr. Watkins his handwritten notes of his meetings with Mr. Watkins and copies of certain versions of the draft memorandum that he had retained in his possession.

9. In February 1996, Mr. Moore received a subpoena from the House Committee calling upon him to produce various materials. Thereafter, commencing in April 1996, he received a series of subpoenas from the OIC, likewise calling upon him to produce certain materials. Upon review of materials in his possession, he found draft versions of the Watkins memorandum in electronic form, stored on the hard drive of his personal computer. He retained legal counsel to advise him with respect to his proper

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[1] A third person was present during one of Mr. Moore's initial discussions with Mr. Watkins. Mr. Moore testified before the House Committee that he discussed with that person whether it was advisable to prepare the memorandum in accordance with Mr. Watkins' wishes. Mr. Moore could not recall whether he had shared a draft of the memorandum with the person. H.R. Rep. No. 104-598, supra, at 42. There is no indication in the materials made available to me for my review that that person or any other was present in subsequent conversations, that Mr. Moore made drafts available to any third person, or that he knew they had been made available.

response to the subpoenas. Counsel ascertained that Mr. Watkins, through his counsel, wanted Mr. Moore to assert an attorney-client privilege with respect to the responsive documents in his possession that recorded Mr. Watkins' confidences. Mr. Moore's legal counsel advised Mr. Moore that he should not produce the documents in question, but instead should inform the subpoenaing body of the existence of the documents and of the basis for declining to produce them pending a determination of the validity of Mr. Watkins' claim of privilege.

10. Mr. Moore acted in accordance with the advice of his counsel and the instructions of Mr. Watkins until Mr. Watkins independently produced the drafts in question to the OIC. In the interim, Mr. Moore through counsel produced, either directly to the House Committee or through the White House in accordance with previously agreed procedures, other responsive documents not subject to Mr. Watkins' claim of privilege. Subsequently, Mr. Moore testified before the grand jury as to all aspects of his communications with Mr. Watkins concerning the memorandum.

Statement of Opinion

11. The attorney's obligation to preserve the confidences and secrets of the client stands at the center of the attorney's ethical duties under the fiduciary laws and disciplinary rules governing attorney-client relations. Rule 1.6(a) of the Arkansas Rules of Professional Conduct, where Mr. Moore first was admitted to practice, provided at the time of his admission in 1992 and continues to provide: "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation," with further exceptions not relevant in this matter.

12. The rules of other jurisdictions are to the same effect, either in the same wording or in substance. See, e.g., D.C. Rule Prof. Cond. 1.6(a) (modifying Model Rule in certain respects); 22 N.Y.C.R.R. § 1200.19 (following Model Code, Discip. R. 4-101).

13. Even where the attorney doubts that he has formed an attorney-client relationship, he remains obligated to preserve the putative client's confidences and secrets so long as the client has a basis to believe that his communications with the attorney are shielded by the privilege and has relied upon that belief in communicating confidences and secrets to the lawyer or in entrusting the lawyer with responsibility to protect the client's interests. See, e.g., D.C. Bar Legal Ethics Op. No. 99 (Jan. 28, 1981) (construing antecedent Code provision and concluding that "if there is a colorable basis for asserting that the statements were made in the course of an attorney/client relationship, the lawyer must resolve the question in favor of the existence of that relationship and in favor of preserving the confidentiality of the disclosures") (emphasis added); cf. ABA Comm. on Ethics and Prof. Resp., Formal Op. No. 90-358, at *2 (holding that rule imposing ethical obligation to preserve client confidences and secrets derived during exploration of possible attorney-client relationship attaches even where no legal services performed and attorney ultimately declines representation).

14. Particularly where, as here, the putative client directs the attorney not to divulge the client's confidences, the attorney should protect the putative client's position until the client releases the attorney from the obligation or a tribunal of competent authority determines that the attorney should make disclosure. Legal Ethics Op. No. 99, supra. As noted in the "Scope" section of the Arkansas Rules:

> "[T]here are some duties, such as that of confidentiality under Rule 1.6, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact."

Cf. In re Lieber, 442 A.2d 153, 156 (D.C. 1982) ("client's perception of an attorney as his counsel is a consideration in determining whether a relationship exists") (citations omitted); In re Bernstein, 707 A.2d 371, 375 (D.C. 1998).

15. A review of the relevant events in 1993 should proceed in the context of the question currently presented – whether Mr. Moore acted appropriately in 1996 when he acceded to Mr. Watkins' request that Mr. Moore not unilaterally abrogate Mr. Watkins' claim of privilege by producing drafts of the Watkins memorandum to the subpoenaing bodies. That question in turn involves consideration whether Mr. Moore, in appraising his responsibilities in response to the subpoenas addressed to him and in relying upon the advice of counsel, could conclude fairly that events in 1993 had given rise to a reasonable basis for the assertion of the privilege.

16. Upon consideration of the facts set forth above, I conclude that Mr. Moore properly came to such a conclusion in 1996. In so concluding, I do not reach the question whether Messrs. Watkins and Moore entered into an attorney-client relationship in 1993.

17. Mr. Watkins entrusted Mr. Moore, an attorney, with his confidences and secrets. Mr. Moore's subsequent actions, in meeting with Mr. Watkins, taking handwritten notes, preparing drafts of a memorandum, reviewing the drafts with Mr. Watkins and making changes at Mr. Watkins' direction, constituted a core legal activity – one that lawyers regularly perform in connection with the representation of clients and

to which the presumption of the protection of the attorney-client privilege routinely attaches. The fact that Mr. Watkins contemporaneously asked Mr. Moore to treat the resultant drafts as privileged, and that Mr. Moore labeled them "privileged and confidential," reflects that both participants regarded the relationship and the subject-matter as confidential. Given that contemporaneous understanding, Mr. Moore properly could conclude that a court might find that Mr. Watkins' subsequent request to protect that confidentiality was based on Mr. Watkins' historic expectation rather merely than a late-arriving apprehension generated by legal developments before the OIC.

18. The fact that Mr. Watkins contemporaneously retained private counsel at a Washington, D.C. law firm is not dispositive of the question whether Mr. Watkins reasonably believed that Mr. Moore was acting on his behalf as a lawyer and in a confidential capacity. It is not uncommon for a client to retain two or more counsel in connection with a given legal matter, and it is not unethical for a lawyer to accept a legal representation in such circumstances. Nor do those circumstances, without more, give rise to a question concerning the bona fides of the attorney-client relationship on the part of any of the lawyers so retained.

19. Likewise, the fact that Mr. Watkins set forth in the memorandum his recollections of events pertinent to the dismissal of Travel Office employees, and thus generated a fact-bound memorandum rather than a legal brief or analysis, does not deprive Mr. Watkins' communication of the benefits of a privilege that otherwise would attach. The client typically communicates to the lawyer the facts known to the client and looks to the lawyer to supply legal advice based upon the information so imparted. Mr. Moore's labeling the drafts as privileged and confidential, in the course of his

preparing them, underscores his contemporaneous understanding that he was acting in a confidential capacity when he produced the successive drafts at Mr. Watkins' request.

20. Mr. Watkins' early designation of the White House Chief of Staff as the addressee of the memorandum arguably might suggest a lack of intent to subject the substance of his disclosures to the attorney-client privilege. However, that suggestion is counterbalanced, if not negated, by Mr. Watkins' contemporaneous request to Mr. Moore to label the drafts "privileged and confidential" and is equally susceptible of the explanation that Mr. Watkins did not appreciate that disclosure of the memorandum to a third party could compromise the privilege. In any event, Mr. Watkins ultimately substituted his privately retained counsel as the addressee in later versions of the memorandum, thereby rendering the earlier address academic. Mr. Moore cannot be faulted for having concluded, upon the advice of counsel, that he should respect Mr. Watkins' assertion of the privilege in 1996 notwithstanding the initial designation of the Chief of Staff as the recipient of the memorandum.

21. Mr. Moore's actions on behalf of Mr. Watkins in 1996 are not subject to criticism on the theory that Mr. Watkins did not pay Mr. Moore for his services rendered in 1993. The lawyer's duty to protect the client's confidences attaches without regard to whether the lawyer receives monetary compensation for his services.

22. Finally, the fact that Mr. Moore may have discussed issues relating to the memorandum with a third party, whether within or without Mr. Watkins' presence, did not provide a basis upon which Mr. Moore unilaterally could conclude in 1996 that Mr. Watkins had waived the privilege attendant upon the creation of the memorandum itself or its various drafts. Specifically, Mr. Moore's discussion with a third party whether it

was prudent for Mr. Watkins to prepare such a memorandum did not necessarily entail divulgence of the substance of Mr. Watkins' confidences, imparted to Mr. Moore, addressing the points to be made in the memorandum. Likewise, even if Mr. Moore knew contemporaneously with the event that Mr. Watkins had transmitted copies of certain drafts to a third party, that knowledge, without more, would not provide a basis to Mr. Moore in 1996, unilaterally and over Mr. Watkins' objection, to assume that the other drafts remaining in Mr. Moore's possession had ceased to enjoy the privilege and thus should be surrendered without objection to whichever investigative body might demand them. Nothing in the materials made available to me reflects that Mr. Moore was contemporaneously aware that any third person had reviewed or edited drafts of the memorandum.

23. In 1996, Mr. Moore acted correctly and in accordance with his ethical obligations as an attorney. First, he undertook a good-faith search in response to the subpoenas received from the OIC and identified documents in his possession that were responsive to the subpoenas. Second, he retained counsel to advise him of his responsibilities in the matter and acted consistently with counsel's legal advice. Third, pursuant to Mr. Watkins' instruction and upon the advice of counsel, he identified the responsive documents to the subpoenaing bodies but declined to produce them voluntarily until he was released from his ethical obligation either by the client's consent or by the direction of a competent tribunal. Fourth, he declined to reveal Mr. Watkins' confidences, because the privilege in dispute was that of the putative client to assert or waive, subject to order of a tribunal of appropriate jurisdiction. Fifth, he produced other responsive materials not subject to Mr. Watkins' claim of privilege. In

sum, Mr. Moore did everything that a lawyer lawfully and ethically should do when presented with the circumstances that confronted him in 1996.

24. If Mr. Moore unilaterally had produced the subpoenaed documents, over Mr. Watkins' objection and without the intervening determination of an appropriate tribunal, he would have subjected himself to charges of violation of his ethical duties and to potential civil damage liability to Mr. Watkins.

Leonard H. Becker

Sworn to before me this 28th day of September, 2000

My commission expires: May 14, 2004

Exhibit B

STEPTOE & JOHNSON LLP

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WILLIAM T. HASSLER
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May 8, 1996

BY HAND

Hon. William F. Clinger, Jr., Chairman
House Committee on Government Reform and Oversight
United States House of Representatives
Room 2157
Rayburn House Office Building
Washington, DC

Dear Chairman Clinger:

This in response to your letter of May 2, 1996, in which you raised concerns about the response of my client, Matt Moore, to the Committee's subpoena dated February 6, 1996. In that letter, you stated your intent to hold a meeting of the Committee on May 9 to consider whether to vote to compel the production of additional documents from Mr. Moore under penalty of contempt. Before the Committee takes such a serious step, it should be fully aware of the relevant facts of Mr. Moore's cooperation with the Committee to date, and the relevant ethical standards that constrain Mr. Moore's ability to produce the documents in question at this time.

First, Mr. Moore has produced to the Committee all of the responsive documents in his possession, other than those covered by a claim of privilege. Mr. Moore has also submitted a log of documents withheld on a claim of privilege asserted by Mr. David Watkins. This log clearly identifies the documents for which a claim has been asserted, so that the Committee is in a

position to resolve any dispute it has with Mr. Watkins over whether the documents should be produced.[1]

Second, on March 26 Mr. Moore voluntarily appeared at a deposition requested by the Committee, where he testified for approximately five hours. Mr. Moore appeared without being subpoenaed, and at his own expense. His deposition made clear that Mr. Moore has no first hand knowledge of the matters now of most interest to the Committee.

Third, I have stressed to counsel for the Committee throughout these proceedings that Mr. Moore himself is not asserting any privilege. Once Mr. Watkins' independent claims of privilege are finally resolved, Mr. Moore will promptly produce any documents found by a court not to be privileged. In light of this fact, there absolutely is no need for the contempt proceedings now under consideration by the Committee.

The lack of a rationale for the threat of sanctions is particularly true given the ethical constraints that bind Mr. Moore in this case. Under the D.C. Rules of Professional Responsibility an attorney may not release a confidence or secret of a client. Although the Committee has questioned whether an attorney-client relationship existed here, according to the D.C. Bar Legal Ethics Committee, Mr. Moore's ethical obligation is nevertheless to withhold the documents in question under the circumstances of this case. The Ethics Committee has explicitly held, for example, that where a colorable claim of privilege has been asserted, the Rules of Professional Responsibility require an attorney to assert a claim of confidentiality pending adjudication of the claim even where the existence of the attorney/client relationship is in question:

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[1] The privileged documents were identified in Mr. Moore's letters to the Committee of February 26 and 29. On May 3, Mr. Moore produced additional documents identified as potentially responsive to the Committee's subpoena after February 29. The May 3 production has no relation to the privilege issue now under consideration by the Committee.

> Obviously, the potential for unethical conduct -- and the risk to be protected against -- is that of disclosing confidences or secrets of one who is ultimately found to be a client or former client. Thus, if there is a colorable basis for asserting that the statements were made in the course of an attorney/client relationship, the lawyer must resolve the question in favor of the existence of that relationship and in favor of preserving the confidentiality of the disclosures. This colorable basis standard obtains even when . . . the lawyer's personal view is that the attorney/client relationship either never existed or was terminated prior to the disclosure at issue.

D.C. Bar Opin. No. 99 (Jan. 28, 1981) (copy attached) (emphasis added).

The Bar Committee in the same matter went on to state:

> the supposed client's statements may be disclosed only with his consent after full discussion or as required by law or court order. Thus, assuming [the client] in the present inquiry does not consent to disclosure of his statements, [the attorney's] obligation is to assert before the grand jury the confidentiality of those statements. . . . . The ethical obligation of the [attorney] is simply not to compromise his client's position voluntarily, and that obligation continues until the relevant forum has resolved in the negative the question of the existence of the attorney/client relationship.

Id. (emphasis added). See also D.C. Bar Opin. No. 14 (Jan. 26, 1976) (copy attached).

These opinions of the Ethics Committee make clear that the only proper course here for Mr. Moore is to withhold the documents from production, pending adjudication of Mr. Watkins' claim.

In summary, Mr. Moore has cooperated with the Committee to the extent possible under relevant ethical standards. Mr. Moore has fully disclosed to the Committee the existence of the documents now in dispute, and copies of the documents are readily available if needed once a court of competent jurisdiction has addressed the merits of the claim of privilege. In light of this background, I request on Mr. Moore's behalf that the Committee reconsider the course proposed in your letter of May 2, under which Mr. Moore could be found in contempt of the Committee for doing nothing more than living up to his ethical obligations. I greatly appreciate your consideration of this request.

Sincerely,

William T. Hassler

William T. Hassler

Attachments

cc: Hon. Cardiss Collins (by hand)

Exhibit C

DISTRICT OF COLUMBIA BAR
LEGAL ETHICS COMMITTEE

Opinion No. 99

Preserving Confidences When Existence of Attorney/Client Relationship Is Uncertain. DR 4-101.

Inquirer, a lawyer in the District of Columbia, has been subpoenaed to testify before a grand jury regarding alleged criminal activity of an individual identified as "B". B has made statements to inquirer which -- at least to inquirer -- tend to implicate B in the matter under investigation. It appears that, in a prior unrelated criminal proceeding, inquirer filed a motion on behalf of B and received some payment for his services. Inquirer expresses doubt and confusion as to whether B's recent statements were made in the course of an attorney/client relationship.

Resolution of the ultimate fact question -- whether a professional relationship existed between inquirer and B -- requires information concerning what B may have reasonably thought concerning the relationship. That information is simply not available to the Committee. On prior occasion, the Committee has declined to issue an opinion requiring factual determinations which cannot be made on the basis of an inquirer's representation (e.g., Opinion 88).

In this case, however, the ethical question arises precisely because of the unclarity of the fact situation. The

duty to preserve the confidences and secrets of a client is grounded in the existence of the attorney/client relationship. Canon 4; DR 4-101. Here, the existence of the attorney/client relationship is problematic. The question presented is whether there is a duty of nondisclosure in this uncertain circumstance. The Committee believes that it does.

Obviously, the potential for unethical conduct -- and the risk to be protected against -- is that of disclosing confidences or secrets of one who is ultimately found to be a client or former client. Thus, if there is a colorable basis for asserting that the statements were made in the course of an attorney/client relationship, the lawyer must resolve the question in favor of the existence of that relationship and in favor of preserving the confidentiality of the disclosures. This colorable basis standard obtains even when -- as here -- the lawyer's personal view is that the attorney/client relationship either never existed or was terminated prior to the disclosures at issue.

Under DR 4-101(C)(1) and (2), the supposed client's statements may be disclosed only with his consent after full discussion or as required by law or court order. Thus, assuming B in the present inquiry does not consent to disclosure of his statements, inquirer's obligation is to assert before the grand jury the confidentiality of those statements. Of course, inquirer may ultimately be compelled to disclose by court order upon a finding of nonexistence of the attorney/client relationship. However, as we pointed out in Opinion 83, disclosure

pursuant to court order is not unethical. The ethical obligation of the inquirer is simply not to compromise his client's position voluntarily, and that obligation continues until the relevant forum has resolved in the negative the question of the existence of the attorney/client relationship.

Inquiry No. 80-9-33
January 28, 1981

Exhibit D

Committee on Legal Ethics

The District of Columbia Bar

OPINION No. 14

We have been asked several questions concerning, in general, the duties an attorney owes a former client whom the attorney represented individually in connection with a civil investigation by a government regulatory agency when the attorney's files relating to the former client are subpoenaed by a grand jury. The former client was represented jointly with a corporate client that subsequently waived its attorney-client privileges. More specifically, we have been asked the following:

1. Whether and when an attorney who is served with a grand jury subpoena duces tecum to produce documents relating in whole or in part, or possibly relating in whole or in part, to a former client is required to notify that former client of the receipt of the subpoena.

2. Whether the attorney is required to provide the former client's successor attorneys with a copy of the subpoena in question and whether he is required to do so when the attorney believes that only portions of the subpoena call for documents relating solely to his representation of the former client and that other portions of the subpoena relate either to his representation of the former client

jointly with other clients, or relate solely to other, unrelated clients.

3. Whether the attorney should, prior to production of the documents in compliance with the subpoena, provide the former client's successor attorneys with access to, or copies of, the documents under subpoena that relate either solely to the former client or jointly to the former client and other clients so that the successor attorneys can present to the court claims of privilege or other objections prior to production, or whether the attorney, as the recipient of the subpoena, is the only one entitled to determine, prior to production, which documents are privileged or arguably so,

4. Whether the attorney may assert a work-product privilege against his former client as to internal attorney work-product documents in his files relating either solely to the client or jointly to him and other clients produced during the lawyer-client relationship, particularly when such documents are requested by the former client to assist him in preparing for a grand jury investigation or other legal proceeding, or whether the attorney may do as he wishes with such documents. Also, we are asked whether the attorney has a duty to assert a work-product privilege on behalf of his former client when work-product documents relating to representation of him are subpoenaed, and whether the attorney may assert the privilege against his client as to those documents he does in fact disclose to third parties or proposes to disclose.

We note at the outset of this opinion that in one case that has come to our attention a trial court in another jurisdiction ruled upon the professional responsibilities of members of the D.C. Bar in circumstances similar to those presented in the questions posed to us. This trial court opinion diverges from ours in some respects. The existence of this out-of-state opinion, far from foreclosing us from setting forth in this opinion guidelines for the future conduct of members of the D.C. Bar, emphasizes the desirability of our doing so. The questions presented are important and are not squarely answered by the terms of the Code of Professional Responsibility. In issuing the opinion, we do not mean to pass judgment on any actions inconsistent with this opinion that may have been taken by members of the bar before this opinion was published.

I

The Code of Professional Responsibility emphasizes that a lawyer should preserve the confidences and secrets of his clients, Canon 4; EC 4-1; DR 4-101, and that he should "not use information acquired in the course of representation to the disadvantage of the client," EC 4-5; DR 4-101(B)(2). Not only must the attorney preserve those client's "confidences" that are protected by the attorney-client privilege (which relates to communications from the client to the attorney)

but also "secrets," which the Code says include "information gained in the professional relationship . . . the disclosure of which would be embarrassing or would be likely to be detrimental to the client." DR 4-101(A). Moreover, this ethical obligation to guard the confidences and secrets of a client, unlike the evidentiary attorney-client privilege, "exists without regard to the nature or source of information or the fact that others share the knowledge." EC 4-4.

EC 4-6 provides that "the obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment." A lawyer's continuing obligation to a client whose representation he once undertook is underscored by those provisions of the Code that deal with the necessity of taking steps to avoid prejudicing a client as a result of termination of the representation. EC 2-31 provides generally that lawyers who undertake representation should complete the work involved and, more specifically, trial counsel for a convicted defendant should represent him through the appeal (unless new counsel is substituted). EC 2-32 provides further that when an attorney declines to proceed with a case on appeal he should endeavor "to minimize the possible adverse effect on the rights of his client," and DR 2-110(H)(2) provides: "In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client . . . ."

EC 2-32 provides specifically that an attorney not continuing a client's representation should, inter alia, deliver to the client all papers and property to which the client is entitled, cooperate with counsel subsequently employed and otherwise attempt to minimize the possibility of harm. See also ABA Informal Opinion No. 724, Dec. 27, 1963.

A lawyer is excused from his ethical duty to preserve a client or former client's confidences and secrets when he is required to disclose them by law or court order. DR 4-101(C)(2). The question before us is how the attorney discharges his ethical responsibilities when documents come into his possession or are obtained or produced by the attorney during the course of his representation of a client and those documents are subsequently subpoenaed by a grand jury.

It is our opinion that, when documents are subpoenaed or an effort is otherwise made to compel their disclosure, it is the lawyer's ethical duty to a former client to assert on the former client's behalf every objection or claim of privilege available to him when to fail to do so might be prejudicial to the client. This rule is settled in the case of an existing attorney-client relationship. See Schwimmer v. United States, 232 F.2d 855, 863 (8th Cir.), cert. denied, 352 U.S. 833 (1956), for a statement of an attorney's duty to assert any applicable attorney-client privilege.

Accord: EC 4-4, which provides: "A lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client." For reasons stated above, the rule should not be different in the case of an attorney-client relationship that has terminated.

We think, then, in answer to the first question posed, that in order to "minimize the possibility of harm" to a former client, EC 2-32, an attorney should promptly notify his former client when he receives a subpoena asking for documents that came into his possession during the course of the representation of that former client or documents that affect or may affect that former client, irrespective of whether the attorney knows at the time of the receipt of the subpoena that he still has in his possession any specific documents arising during the attorney-client relationship. If there is any possibility whatever that the attorney has in his possession any subpoenaed document affecting the interest of his former client, which came into his possession from any source whatever during the course of that representation, he should immediately, upon receipt of the subpoena, notify the former client.

II

Our answer to the second question is that the lawyer need not provide the former client's successor attorneys with a copy of the subpoena but, if the lawyer believes that the disclosure of extraneous portions of the subpoena would risk prejudice to other clients, only with a copy of those portions of the subpoena that the lawyer believes relate to the former representation. In fulfillment of his obligation to his former client the lawyer is not obliged to risk unwarranted disclosures of confidences or secrets of other clients and indeed is ethically forbidden to do so.

III

Our answer to the third question is that the lawyer should provide to the former client or to the attorneys now representing the former client copies of or access to all documents called for by the subpoena that relate either solely to the former client or jointly to the former client and other clients so that the successor attorneys can determine or assist in determining as to which documents claims of privilege should be made.

The attorney should zealously guard against the erroneous release, by production in court in response to the

subpoena, of any documents that represent confidences or secrets obtained by the attorney in the course of his representation of the former client.

The attorney should resolve any disagreements with his former client as to the validity of any claims of privilege in favor of the client or should let the former client have an opportunity prior to production to assert any objection or claim or privilege that he, or successor attorneys acting on his behalf, think applicable. As a practical matter, this means that the attorney should provide the client, or his successor attorneys, prior to production, with access to or copies of the documents at issue so that they can properly frame and present to the court their objections or claims of privilege.

EC 5-12 is apposite here. That provision requires that, when co-counsel are unable to agree on a matter vital to the representation of their client, "their disagreement be submitted by them jointly to their client for his resolution, and the decision of the client shall control the action to be taken." We believe that this precept applies also to those situations involving a client's present and former counsel.

We recognize, as does the Code of Professional Responsibility, that lawyers may disagree on a matter vital

to the representation of their client. We also note that "The bounds of the law in a given case are often difficult to ascertain." EC 7-2. In particular, attorneys can honestly differ among themselves over such issues as whether a grand jury subpoena is valid, or whether it calls for a particular document in question, whether a particular document is a privileged communication between the attorney and the client, or is otherwise privileged, or whether a particular document belongs to the client and contains self-incriminatory information that would form the basis for a claim of Fifth Amendment privilege.

Thus, where there are disagreements between present and former counsel as to the existence of any objections or privileges, with respect to subpoenaed documents that came into the possession of the former counsel from any source during the course of representing the client, the client should determine which attorney -- his former attorney or his present attorney or both -- should review the subpoena and documents at issue and present objections to the court, together with the documents in camera if requested by the court, prior to their production in compliance with the subpoena. The attorney should not disclose any document as to which the client, or his successor

attorneys acting on his behalf, assert an objection or privilege but as to which he believes the objection invalid or the privilege unavailable. Rather, the attorney should first present the document to the court and inform the court of the disagreement. At the same time, the client or his new attorneys can also present to the court their arguments for non-disclosure. Having thus satisfied his ethical duties towards his former client, the attorney is then free to comply with whatever directive the trial court gives. */

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*/ In the case of an existing attorney-client relationship, if an attorney disagrees with an existing client as to the validity of a particular objection or privilege, or whether failure to assert it entails potential prejudicial harm to the client, he should not prejudice his client or render the issue moot by himself producing the documents called for but rather should, prior to production, present the impasse to the appropriate court for adjudication, and give his client an opportunity to present his claims to that court also. See EC 7-7. By first allowing the client to assert whatever arguments against disclosure he thinks appropriate, the attorney best discharges his ethical duties to the client. The public interest is also protected since the court can review the documents at issue in camera and decide the validity of any claimed objections or privileges. (Of course the attorney may not suppress the fact that such documents are in his possession. EC 7-27.)

This is the course to be followed even when the attorney believes the client's assertion of privilege to be a frivolous one. An attorney may withdraw from representation of a client if he believes the client's claims to be frivolous and the client persists in asserting them, but he should not foreclose his client's opportunity to present his claims. See Anders v. California, 386 U.S. 738 (1967); McCartney v. United States, 343 F.2d 471, 472 (9th Cir. 1975).

IV

We turn now to the questions relating to documents in the attorney's files considered by the attorney or his former client to be the attorney's work product produced by him for the purpose of representing the client. Such work product may well be considered the property of the attorney, but we need not concern ourselves here with that issue. We believe that the attorney's ethical duty to preserve his client's confidences and secrets discussed above extends also to the attorney's work product produced during the course of the representation.*/ Certainly, if the attorney, for any reason, has breached this responsibility and made such work product available to third parties, under no circumstances should he refuse to make it available also to the former client for whose benefit, or at least joint benefit, it was produced. Moreover, we believe that there is no requirement in law or in ethics that an attorney not disclose such work product to his former client in any event. Indeed, under his general duty to cooperate with a former client's new counsel discussed

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*/ In this connection, see EC 4-6, providing that, when an attorney retires from practice, his work product should either be destroyed or delivered to another attorney and that the client's option as to method of disposition should be a dominant consideration.

above, and to do all that he can to minimize the possibility of harm arising as the result of his withdrawal from representation of that client in succeeding or related litigation, we think that he should turn over to his former client, or the client's successor attorneys, that portion of his work product which is necessary to the adequate representation of the client.

As with any privilege existing either wholly or partially for the benefit of clients, it is our opinion that an attorney has an ethical duty to assert the work-product privilege whenever applicable when documents in the attorney's files are subpoenaed. Even though the attorney work-product privilege is technically considered the attorney's to assert in a court rather than the client's, the underlying purpose of the privilege is, at least partially, to protect and further the effective representation of clients. See Hickman v. Taylor, 329 U.S. 495, 514-15 (1947) (Jackson, J., concurring). Therefore, the attorney should not divulge such work product when to do so would work to the disadvantage of a client.

* * *

None of our answers is affected by the fact that the representation of the client in question was a joint representation, along with a corporate client that subsequently waived its attorney-client privilege. That waiver frees the lawyer to produce documents that relate solely to the corporate client so far as any claims to confidentiality by it are concerned, but it does not free him to disclose documents that relate in any way to the former individual client. In this regard, we note that, when an attorney undertakes to represent a corporate officer in his individual capacity and also to represent the corporation, documents obtained or produced during such joint representation frequently, if not invariably, intertwine the interests of the joint clients. Such joint representation is fraught with potential conflict and a lawyer should represent a corporate official in his individual capacity and also represent the corporation only if the lawyer is convinced that differing interests, or potentially differing interests, are not presented. EC 5-15; EC 5-17; and EC 5-18.