
Coates' Canons Blog: Politics, Poole, and the Government Attorney-Client Privilege

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An interesting government attorney-client privilege issue arose amidst the media hoopla surrounding former governor Mike Easley's appearance before the state Board of Elections last month.

Ruffin Poole, an attorney who served as executive counsel to then-Gov. Easley, sought to avoid testifying before the board based on attorney-client privilege and on facts submitted in a sealed affidavit. This despite the fact that Easley, through his current attorney, stated he had no objection to Poole's testimony.

Superior Court Judge Henry Barnette agreed to quash Poole's subpoena based not on the alleged attorney-client privilege but on another privilege asserted in Poole's affidavit. Curiously, Barnette's order refused to make public the nature and basis of the privilege on which his order turned. Two days later, the Court of Appeals reversed Barnette's decision without elaborating on its reasoning or Barnette's. Because the Board of Elections had adjourned by the time of the Court of Appeals ruling, Poole was not called to testify and may never be called unless the board reconvenes in the Easley matter.

Although the Poole controversy involved state officials and apparently turned on some other mysterious privilege, the attorney-client privilege issues involved in the dispute are instructive for local government attorneys. Before an attorney at any level of government can determine to whom he or she owes duties of confidentiality and privilege, the attorney must first determine exactly who is the client.

Poole served as counsel to the governor of North Carolina, not as private counsel to Mike Easley. This fact likely explains why Easley's apparent waiver of any privilege claims relating to Poole's testimony did not resolve the matter. Mike Easley the individual was never Poole's client and therefore could not waive a privilege claim. Any privilege would have been held by the office of the governor and not by the individual who previously served as governor. Does this mean that current Governor Beverly Perdue could have waived privilege claims relating to Poole's testimony? I think so, but North Carolina courts have yet to grapple with this question, and cases from other jurisdictions don't provide clear precedent.

My analysis assumes that an attorney-client privilege exists in this situation. Except for a few cases discussing the attorney-client privilege exception to public records law, North Carolina courts have not explored the nature of the privilege as it applies to state and local government attorneys. At the federal level, a few courts have concluded that no privilege exists when the federal government attempts to compel testimony from its own attorneys or officials. If this principle were adopted by our state courts, then an attorney for the governor could not refuse to testify before a state board based on privilege grounds.

Absent more judicial guidance, county and municipal attorneys must assume that a privilege exists and that their duties of privilege and confidentiality run to their governing bodies and not to individual members of those bodies or other government officials. If a county attorney is subpoenaed to testify about her conversations with the county manager, any attorney-client privilege that might apply to those conversations would be held by the county and not by the county manager. Only the county, acting through the board of commissioners, could waive that privilege. See North Carolina Ethics Opinion CPR 154 (not available on-line), which involved a related scenario. If a newly elected city council member asks the city attorney to describe past conversations with the council, the attorney must get permission from the council as a whole before revealing those conversations. For a 2002 Rhode Island ethics opinion concerning this situation, [click here](#).

Because the Easley controversy is far from resolved, Ruffin Poole's efforts to avoid testifying are likely to face additional judicial scrutiny down the road. We may yet obtain some needed clarity on the extent of the government attorney-client privilege in North Carolina—and along with it maybe even an explanation of Judge Barnette's "secret" privilege.

UPDATES: A subsequent court hearing revealed that Poole's privilege claim was based on his Fifth Amendment right



against self-incrimination. Poole was excused from testifying before the state elections board and later pleaded guilty to federal tax evasion charges. As part of that plea, Poole agreed to cooperate with the ongoing federal investigation involving former governor Mike Easley.

Poole later pled guilty to tax evasion and served 11 months in federal prison.

Links

- www.courts.state.ri.us/supreme/ethics/pdfadvisoryopinions/2002-02.pdf
- www.wral.com/news/local/politics/story/11189262/