A Question of Ethics

May 17, 2011

Reprinted from Roll Call (May 17, 2011)

Q: I have a question about the Senate Ethics investigation of former Sen. John Ensign (R-Nev.). I heard that one of the documents investigators used to demonstrate wrongdoing was a communication from Ensign’s attorney. This didn’t make sense to me. Aren’t communications with attorneys privileged? If so, how would investigators have a copy of a communication from Ensign’s attorney?

A: This is an excellent question, as its answer provides an important lesson for Members and staffers regarding the basics of the attorney-client privilege. While people often assume that communications with attorneys are privileged and confidential, Members and staffers should be aware that not all such communications are. Before turning to the reason for that, some context is in order.

Last week, the Senate Ethics Committee released a report regarding its investigation of Ensign’s conduct surrounding an extramarital affair. The report concludes that “substantial credible evidence” exists that Ensign committed several crimes in the aftermath of his affair. The Ethics Committee sent its report to the Department of Justice, citing the committee’s responsibility to contact the “proper authorities” when it has reason to believe that a violation of law has occurred.

One of the key issues in the report is whether a $96,000 payment by Ensign’s parents to Cynthia and Doug Hampton and two of their children was intended as a gift or as severance when the Hamptons left the Senator’s employ. Cynthia Hampton, who had the affair with Ensign, was employed by Ensign’s campaign, and Doug Hampton was a staffer in Ensign’s Senate office.

The report states that several significant consequences would flow if the payment was severance and not a gift. First, it would mean that a portion of the payment would be an illegal campaign contribution from Ensign’s parents to Ensign’s campaign. According to the report, this is because Ensign’s parents would technically have made a contribution for Cynthia Hampton’s severance — in an amount that far exceeds the maximum annual contribution permitted by law. In addition, the report says, if the payment was severance, it would mean that Ensign’s sworn statements to the contrary to the Federal Election Commission would be false and therefore would violate federal criminal statutes prohibiting false statements to the government.

The report cites several pieces of evidence that the payment was in fact severance. One piece of evidence, the report says, is an email from Ensign’s attorney raising concerns about a draft public statement in which Ensign planned to admit to his affair that included the word “severance.” The attorney warned: “If this statement doesn’t get the attention of the U.S. Attorney’s Office, then nothing will.”

Your question goes to how the Ethics Committee came to obtain a copy of a communication like this. After all, most of us consider communications with attorneys to be privileged and confidential.

As it turns out, the email from Ensign’s attorney was one of the 500,000 documents that Ensign provided to the committee in response to document requests. Initially, Ensign did not produce it to the committee, claiming that it was protected by the attorney-client privilege. After the committee challenged the privilege claim, however, Ensign produced the email.

Why? The email was not to Ensign. Rather, it was sent to the communications director for Ensign’s Senate office, who was helping Ensign draft his public statement regarding the affair.

In general, the attorney-client privilege protects confidential communications between clients and their attorneys for the purpose of obtaining legal advice. Under the privilege, no one, not even the government, can force you to produce documents reflecting privileged communications with your attorney. The idea behind the privilege is to allow you to be fully candid when seeking legal advice, without fear that your communications might one day be subject to review by someone else.

In Ensign’s case, however, the communication from his attorney was not to Ensign. With some exceptions, in order for a communication to be protected by the attorney-client privilege, the communication must be between a client and his attorney. Moreover, in order for the privilege to apply, the communication must be confidential, meaning, again with some exceptions, that no third party is privy to the communication. If a third party is privy to the communication, the privilege usually will not apply. In this case, Ensign’s attorney sent the email to his office’s communications director, to a Gmail address that she shared with her husband.

This episode is an excellent reminder for Members and staffers. Given the time constraints that Members’ busy schedules often impose on them, Members can grow accustomed to relying on staffers for important tasks. When it comes to dealing with attorneys, however, Members should be aware of the risks that arise when someone other than a Member communicates with his attorney. Confidentiality is far from assured.

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