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Electronic Surveillance and Offshore Legal Communications

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In May 2008, the D.C. federal trial court and the D.C. and Maryland Bars were asked whether antiterrorist interception by the government of communications between the U.S. and foreigners *ipso facto* extinguishes the legal protection of every such conversation as confidential, privileged, or constitutionally private. The question was posed by Newman, McIntosh & Hennesey, LLP (NMH), a Maryland law firm, after it received an advertisement by a legal process outsourcing (LPO) firm with offshore lawyers that provide legal services to be used in U.S. litigation. Shortly after the defendant LPO filed its motion to dismiss – a broad jurisdictional attack – NMH withdrew the lawsuit. *See NMH v. Bush and Acumen Legal Services, et al.*, Civ. No. 08-00787 (CKK) (D.D.C., [Am. Cmplt.](#) filed May 7, 2008; [Motion to Dismiss](#) filed Aug. 14, 2008; Notice of Dismissal filed Aug. 29, 2008).

Notwithstanding NMH's voluntary dismissal, its lawsuit is well worth considering for several reasons. First, the Rule 41(a) dismissal is without prejudice to NMH refiling the case. Press reports indicate that NMH's signing lawyer is considering whether to try again on behalf of a purported class. Second, the D.C. and Maryland ethics committees both have standing policies against opining on matters in active litigation, but the litigation is no longer active. Third, many commentators properly interpreted the case as squarely targeting the LPO industry, but the requested relief would apply to every U.S. lawyer and would directly affect the interests of every U.S. law firm with a foreign office and every U.S. business with overseas operations, contracts, or customers. NMH's complaint therefore provides unambiguous notice that LPOs were not the only ones whose interests would be drastically and negatively affected by that firm's gamesmanship. Finally, other commentators have not taken the lawsuit seriously enough to consider its underlying legal theory. Acumen's motion to dismiss, while vigorous and apparently effective, was jurisdictional and therefore only hinted at the case's substantive legal flaws.

While the lawsuit was pending, some large law firm commentary mistakenly suggested that NMH's allegations alone should cause persons to hesitate and then consider twice before entering any offshore arrangement for legal services. That suggestion is flawed conceptually because it would effectively hand to NMH (and to the mistaken commentators themselves) a self-serving victory that the lawsuit cannot achieve, and certainly has not achieved, on its merits. To support that criticism, this white paper considers NMH's allegations on their face and in light of the form and fora in which they were presented. For the numerous reasons set forth in the

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remainder of this white paper, the odd manner in which NMH posed its question, procedural and substantive legal doctrine, and public policy all suggest that the tribunals – had NMH remained before them -- should have declined to answer the questions presented or, if the tribunals decided to say anything, their answer to all the questions presented should have been “No.”

NMH alleged that its lawsuit and ethics requests were filed to obtain “guidance” after the firm receiving a solicitation from Acumen, the defendant LPO, offering to help write briefs, review documents, and do other law related work at prices well below prevailing U.S. lawyers’ market rates. LPOs can charge much lower prices because they do much of their work overseas with Indian (or other foreign national) lawyers and support personnel using web based technologies. The problem, according to NMH, is that all messages between the U.S. and any foreign terminus are electronically monitored on a key word basis through U.S. and allied governments’ antiterrorism programs, administered in the U.S. by the National Security Agency (NSA). NMH claimed that such surveillance negates any expectation of privacy or confidentiality protecting conversations with an offshore provider of legal services or litigation consulting advice – including electronic transmission via the internet of document images to be reviewed, drafted, or considered overseas by LPOs. Without a reasonable expectation of privacy, NMH asserts, any Fourth Amendment, privilege, or confidentiality protection would be waived for the documents or information shared with an LPO.

NMH’s lawsuit asked the D.C. federal court to issue declaratory judgments to that affect against every U.S. lawyer and even against NMH itself, an unusual tactic to say the least. Just as unusually, the law firm did not ask the D.C. and Maryland ethics committees for permission to do anything, but rather for opinions effectively forbidding D.C. and Maryland lawyers from transmitting client confidences or secrets to any foreign national overseas. Such tactics are downright suspicious inasmuch as NMH conceded in its papers that it already knew the answer to its own questions. “The view of [NMH] is that electronic transmissions to LPOs located overseas would, if made by our litigation adversaries (to whom we have produced documents in the course of civil discovery) effect a waiver of our client’s Fourth Amendment rights and, if made by our law firm, effect a waiver of otherwise attorney-client privileged communications and cause a prohibited disclosure of client secrets and confidences.”

As to NMH’s own actions, there was no need to seek input from any court or ethical committee. If NMH truly believed that using an LPO would have waived its clients’ privileges, confidentiality, or expectation of privacy, it simply should not have used an LPO. Indeed, that is exactly what NMH apparently decided to do inasmuch as it did not allege that it responded in any fashion to Acumen’s alleged solicitation. So what case or controversy would be resolved by a federal court judgment, declaratory or otherwise, and what actual injury would any remedy compensate? As to the actions of NMH’s opposing counsel, NMH could always seek a protective order in any case where it believed and could offer supporting evidence that opposing counsel’s actions would waive an NMH client’s rights or expectations with respect to particular

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evidence. Either way, NMH could show no legal need for an overly broad, abstract declaratory judgment that by its express terms would apply to every U.S. lawyer, every one of each lawyers' clients, and all U.S. based lawyer or client communications with any foreign national living abroad, including every transmission to any offshore LPO employee. NMH likewise could assert no real need for ethics opinions that would have advised every D.C. and Maryland court about the legal status of every communication between a U.S. firm or client and any foreign national abroad, whether or not an LPO employee.

In fact, because NMH did not use the services offered by the defendant LPO, the complaint provides no allegations – nor could there be any – that any specific document, communication, or evidence was actually intercepted or surveilled. Hence, the lawsuit provides no factual basis to decide whether any alleged interception resulted in an actual disclosure to any person, let alone someone at NSA or other governmental office. By the same token, no specific facts were alleged about any particular interception and the scope of any related disclosure by which to determine whether the actual interception and disclosure would be sufficient to support a finding of waiver. Even that would not end the findings that NMH would need before it could enforce its requested relief since details of what, how, and why confidential client information has been disclosed are necessary to evaluate whether and to what extent a waiver would permit evidentiary use of the disclosed materials. Without alleging any facts about the context of an actual interception and disclosure of a particular communication, NMH likewise provided no basis for any tribunal to consider whether another protection, such as the work-product doctrine, would nonetheless prohibit any evidentiary use and further disclosure.

So it should not be surprising that NMH failed to ask the court to declare anyone's rights or resolve any particularized case or controversy. Rather, NMH asked the court to “declare” forthrightly advisory opinions about what all “United States-based attorneys” must do whenever they transmit client data “to foreign nationals residing overseas.” The complaint asked for opinions on the following questions: “[W]ill the electronic transmission of data to foreign nationals residing overseas waive Fourth Amendment protections with respect to the data transmitted?” Will U.S. attorneys who transmit that data overseas be obligated to disclose the alleged waiver to, or obtain prior written waivers from, their clients? Will litigation opponents who receive documents in litigation have to obtain similar waivers before transmitting that material overseas for review? Similarly, NMH also asked the court to rule on whether foreign nationals who offer to provide overseas litigation support to U.S. clients “must ... disclose that any electronic transmission of data to a foreign national will waive Fourth Amendment rights” over the information.

By their express terms, “declarations” of such advisory opinions would apply to, and adversely and drastically affect, every U.S. law firm with a foreign office and every U.S. business engaged in foreign commerce. Every time a U.S. law firm staffs a transaction, litigation, or arbitration with any employee in a foreign office, they will transmit confidential client information to a

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foreign terminus. U.S. businesses routinely hire foreign counsel to enforce their contractual rights and protect their global economic interests. If NMH were correct, whenever an American lawyer or business provides information to local counsel in a foreign country, the client's secrets, privileges, and expectation of privacy about the underlying information will be waived - even if that information is necessary to prosecute a claim, recover damages, enforce a judgment, or enter a contract outside the U.S.

These procedural and pleading defects are significant if not insurmountable, even if the lawsuit is remolded as a class action. Just as importantly, however, NMH's lawsuit suffered from fatal, substantive weaknesses as a matter of privilege law.

On the most fundamental level, the mere fact that a confidential, privileged, or otherwise protected communication has been viewed by or is known to a third party does not in and of itself mean that confidentiality has been waived or lost. "Confidential Client Information" is "information relating to representation of a client, *other than information that is generally known.*" Restatement Third, The Law Governing Lawyers § 59 (2000) (emphasis added). By excluding only "generally known" information, the Restatement makes clear that "confidential" information can include communications that have become "known to some others." *Id.*, comment d. Even more to the point, the Restatement's commentary provides a corollary, negative definition that information is "not generally known" in situations where "a person interested in knowing the information could obtain it only by means of special knowledge or substantial difficulty or expense." *Id.* The major factual premise of NMH's lawsuit is its allegation of nearly total interception of U.S.-foreign communications by the NSA and agencies of chief U.S. allies, conducted with money and resources derived from the shared resources of five sovereign governments. Such interception is the very definition of a person trying to obtain information through substantial expense, with difficulty, and by using special knowledge. NMH's major factual premise is therefore entirely inconsistent with its basic legal claim, namely, that NSA's interception results in a loss of legal confidentiality and privacy expectations across the board for all communications between the U.S. and a foreign terminus.

As a matter of law, moreover, the attorney-client privilege does not require ruling out every foreseeable possibility that a communication might be heard by or delivered to a person outside the protected relationship. Rather, the privilege requires only that the communicators "reasonably believed" no outside person would learn the content of their discussion in light of the circumstances "reasonably evident" to them. Rest. 3d § 71, comment c. So, for example, "the presence of a surreptitious eavesdropper does not destroy confidentiality." *Id.* For many if not most communications, the surveillance alleged by NMH will not be known to the communicators (and almost certainly will not be known to apply to their particular conversation) making the interception surreptitious and enabling continued protection of the communication. Indeed, the very words interception and surveillance connote that the action is taken by an

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uninvited eavesdropper of which the communicators are unaware. Such communications are protected by the privilege so long as they otherwise demonstrate a reasonable intention by the participants to maintain secrecy from reasonably evident third parties.

To effect the general public policy justifications for the privilege, the requirement of maintaining confidentiality must be analyzed practically, particularly where “exigent circumstances may require communications under conditions where ordinary precautions for confidentiality are impossible,” in which situations the communicators need to take “reasonable precautions in the circumstances.” *Id.* & Reporter’s Note. The privilege will still apply “when the need for client-lawyer communications reasonably precludes more private arrangements.” *Id.* While arguments continue whether broad, warrantless governmental interception of the sort alleged by NMH is legally authorized, constitutional, or even right, the alleged NSA surveillance is undeniably another layer of exigent circumstance arising out of exigent circumstances. Even when the communicators know they may be audited, case law and commentary can acknowledge such circumstances and still protect conversations arising within them. *See* Rest. 3d § 69, comment c & Reporter’s Note; § 71, comment c & Reporter’s Note.

Even without exigent circumstances, interception alone, particularly mere mechanical searching and sorting, is insufficient to cause an automatic waiver of protection under the privilege.

“Waiver results only when a nonprivileged *person* learns the *substance* of a privileged communication.” Rest. 3d. § 79, comment e & Report’s Note (emphasis added). For instance, passing through airport security while carrying privileged documents can always provide a third party an opportunity to acquire their contents. The same is true of using a third party vendor to duplicate the documents or a messenger service to deliver them. But none of these situations is considered a reason to find that the privilege was waived because those types of presentations to third parties, without more, usually do not yield up the substance of the communications.

Likewise, the alleged presentation to the NSA of otherwise privileged communications usually does not provide their substance to a person at NSA. Press reports quoting government and NSA sources suggest that the volume of intercepted communications would require an overwhelming human effort to sort, make readable, and usefully prioritize. According to the *Baltimore Sun*, “an estimated 95 percent of the information gathered is discarded without being translated into an understandable form.” Indeed, the papers NMH itself submitted to the D.C. and Maryland ethics committees include a law journal Comment asserting that if the NSA’s machines do not find key words within intercepted communications, those messages are deleted from the system and are no longer examined by either machines or persons; that the majority of communications are discarded without ever being seen by any person; and that only a small percentage of communications get analyzed by NSA. Having not alleged that the plaintiff ever sent any document or information to Acumen, NMH cannot trace whether any communication was actually intercepted or surveilled, let alone whether such interception or surveillance disclosed the substance of any information to any person. And rulings in other judicial decisions about

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antiterrorism surveillance suggest, for good or ill, that no plaintiff will be able adequately to allege sufficient supporting factual information as a matter of law. Even under our notice pleading regime, that legal frustration cannot be wished away through conclusory allegations based on information and belief that an actual interception disclosed the substance of a particular communication to any third party.

The very substantial questions whether the pleading rules about, and the actual practices adopted in, antiterrorism surveillance programs are good, bad, unconstitutional, or illegal are relevant to whether the privilege is lost or waived by the alleged interceptions. Unlawful intrusions into a privileged relationship are routinely held not to waive the privileged protection of ensuing communications. Many argue that the warrantless interceptions alleged by NMH are unconstitutional and unlawful under the statute that created and empowered NSA. That law is “the exclusive means by which electronic surveillance . . . and the interception of domestic wire, oral, and electronic communications may be conducted.” 18 U.S.C. § 2511. To the extent that communications with both a domestic and foreign participant are considered “domestic,” that statute would preclude their interception pursuant to the executive orders upon which NMH bases its lawsuit. What’s more, the same statute, like many other statutes authorizing surveillance for police or security purposes, expressly protects the privileged character of intercepted communications. 18 U.S.C. § 2517(4) (“No otherwise privileged wire, oral, or electronic communication intercepted *in accordance with, or in violation of,* the provisions of [Chapter 119. Wire and Electronic Communications Interception and Interception of Oral Communications] shall lose its privileged character.”) (emphasis added). Regardless whether NSA’s interceptions are unlawful, therefore, the privileged nature of captured communications is statutorily preserved.

Given these procedural, pleading, and substantive defects, only astonishing changes to broad swathes of law could justify the judicial relief and ethical rules that NMH wants to apply to every U.S. lawyer and client and to every communication between or about them that includes a foreign national outside the U.S. More practically, however, reasonable public policy should take into consideration the fact that the money at stake in LPO and offshore legal services is dwarfed by the value of global commerce involving U.S. businesses who must communicate with foreign nationals abroad about confidential information necessary to protect their legal and commercial interests. Indeed, if NMH were to succeed in its unlikeliest of gambits, the biggest losers will not be LPOs.