

Electronic Surveillance and Offshore Legal Communications

The D.C. federal trial court and the D.C. and Maryland Bars have been asked whether anti-terrorist interception of communications between the U.S. and foreigners by the government *ipso facto* extinguishes the legal protection of every such conversation as confidential, privileged, or constitutionally private. The question is posed in the context of hiring legal process outsourcing (LPO) firms to help with legal work using offshore lawyers and other support personnel. But the lawsuit and requests for ethics opinions will affect the interests of every U.S. law firm with a foreign office and every U.S. business with overseas operations, contracts, or exports.

The odd manner in which the question has been posed, along with legal doctrine and public policy, suggest that the tribunals should decline to answer or, if they say anything, to answer “No.”

Newman McIntosh & Hennessey, LLP, a Maryland law firm, alleges that it had to file the lawsuit and ethics requests after receiving a solicitation from an LPO offering to help write briefs, review documents, and do related work at prices well below prevailing U.S. market rates. LPOs can charge such low prices because they do their work overseas with Indian lawyers and support personnel using server and web based technologies. The problem, according to NMH, is that all conversations between the U.S. and a foreign terminus are electronically monitored on a key word basis by U.S. and allied governments’ anti-terrorism programs. NMH claims this surveillance negates any expectation that offshore legal conversations are private or confidential and, therefore, that any Fourth Amendment, privilege, or confidentiality protection is waived for any information shared with an LPO.

NMH’s lawsuit asks the D.C. federal court to issue a declaratory judgment against NMH itself (and against every other U.S. lawyer), an unusual tactic to say the least. Just as unusually, the firm does not ask the ethics committees for permission to do anything, but rather to forbid D.C. and Maryland lawyers from transmitting client confidences or secrets to foreign nationals overseas. These tactics are downright suspicious inasmuch as NMH concedes that it already knows the answer to its own question. “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 is no need to seek input from a court or ethical committee. If NMH truly believes that using an LPO will waive its clients’ privileges, confidentiality, or expectation of privacy, it should simply not use an LPO. As to the actions of NMH’s opposing counsel, NMH can seek a protective order in any case where it believes opposing counsel’s actions will waive a client’s rights with respect to particular evidence. Either way, there is no need for a stand-alone declaratory judgment that would apply to every U.S. lawyer, every client,

and all their communications with any foreign national living abroad, including any LPO employee. There is likewise no need for ethics opinions that would advise every DC and Maryland court about the legal status of every communication between a U.S. firm or client and any LPO.

So NMH must have some purpose other than what appears on the face of its lawsuit. Whatever that purpose is, the judicial rulings that NMH requests provide unambiguous notice that LPOs are not the only ones who should oppose NMH's gamesmanship. NMH does not ask the court to declare anyone's rights or resolve any particularized case or controversy. Rather, NMH wants 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 firm asks for advisory 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 asks the court to rule on whether foreign nationals who even offer to provide overseas litigation support to U.S. businesses "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 that engages in foreign commerce. Every time a U.S. firm staffs a transaction, litigation, or arbitration with any employee in a foreign office, they will be transmitting confidential client information to or discussing it with a foreigner abroad. U.S. businesses routinely hire foreign counsel to enforce their contractual rights and economic interests in the global marketplace. If NMH is 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.

An astonishing change in law and public policy would be needed to justify the judicial and ethical opinions that NMH wants to be applied in the abstract to every U.S. lawyer and client and to every communication about them that includes a foreigner outside the U.S. But the money at stake in LPO and offshore legal services is dwarfed by the value of global commerce involving U.S. businesses who must hire U.S. and foreign lawyers and related staff to protect their legal and economic interests. So if NMH succeeds in its gambit, the biggest losers will not be the LPOs.