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When the Government is Listening in

Advising Clients under Surveillance

By Thomas H. Nelson & Mark J. Fucile

The U.S. government's zeal in pursuing the "war on terror" has undermined a critical pillar of the American system of justice, the sanctity of attorney-client communications. The government's unprecedented exercise of warrantless wiretapping, already tacitly admitted and objectively provable in one instance, raises serious concerns for the entire legal community, not only those lawyers who are involved in matters touching national security. Oregon lawyers have a bedrock duty to protect confidential client communications. The need to communicate confidentially with clients, in turn, lies at the heart of effective representation. When a lawyer knows or reasonably suspects that the government is listening in — either with a warrant or without — that presents a very fundamental challenge to the lawyer-client relationship.

We are two Oregon lawyers who, respectively, have been involved in the litigation over the government's warrantless wiretapping program and have advised lawyers on confidentiality issues in that litigation. Although much of the national focus on lawyer-client confidentiality issues in this area has been on Guantanamo Bay detainees, we have chosen an illustration much closer to home: a documented case of warrantless eavesdropping on lawyers representing an Oregon client that was litigated in an Oregon court. This article first outlines the duty Oregon lawyers have to safeguard confidential communications with their clients, then discusses that duty in the context of the Oregon case, and then concludes with what we believe are the broader implications of that case to Oregon lawyers.

The Duty of Confidentiality

Oregon lawyers have a fundamental regulatory and fiduciary duty to safeguard their confidential communications with their clients. On the former, both ORS 9.460(3) and RPC 1.6 charge us with maintaining client confidentiality. On the latter, the Oregon Supreme Court held in *In re Obert*, 336 Or 640, 649 (2004), and several other decisions that "[a] lawyer-client relationship is a fiduciary relationship." The Oregon Supreme Court in *Frease v. Glazer*, 330 Or 364, 370, (2000), recognized that that the duty of confidentiality in the professional rules also embraces our obligations under the attorney-client privilege, OEC 503. With both, a central tenet is that the method of communication chosen must have a reasonable degree of privacy. Underlying the duty of confidentiality is the precept that the Oregon Supreme Court noted recently in *Reynolds v. Schrock*, 341 Or 338, 349 (2006): lawyers need to be able to communicate confidentially with their clients to effectively represent them.

The high standard recognized in Oregon mirrors the approach taken nationally. The American Bar Association's influential Model Rules of Professional Conduct on which Oregon and most other states have patterned their professional rules define the duty to safeguard confidential client communications as a basic element of competent representation:

> Acting Competently to Preserve Confidentiality [16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's

supervision. See Rules 1.1, 5.1 and 5.3.

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

ABA Model Rule 1.6, cmts. 16-17.

The Restatement (Third) of the Law Governing Lawyers (2000) echoes this view:

A lawyer's duty to safeguard confidential client information. A lawyer who acquires confidential client information has a duty to take reasonable steps to secure the information against misuse or inappropriate disclosure[.] . . . This requires that client confidential information be acquired, stored, retrieved, and transmitted under systems and controls that are reasonably designed and managed to maintain confidentiality.

Restatement, § 60, cmt. d.[1]

The *Al-Haramain* Case

The duty of confidentiality has particular resonance in a case that arose in Oregon. Al-Haramain Islamic Foundation, Inc., is an Oregon nonprofit corporation that, at the time of the events at issue, was based in Ashland. Its primary charitable mission was the distribution of information and printed material about Islam. In August 2004, after the Treasury Department had frozen Al-Haramain's assets pending an investigation, the department inadvertently turned over to Al-Haramain's attorneys a highly classified document (the "Secret Document") that establishes that the government had intercepted attorney-client telephone conversations. Those conversations were between an Al-Haramain director in Saudi Arabia and two of the charity's attorneys in Washington, D.C. Although the Treasury Department in September 2004 used those privileged communications to support its decision to impose sanctions on the charity and the Saudi Arabian director, there was no contention that the communications fell outside the attorney-client privilege.[2]

In late 2005, *The New York Times* broke the news that the National Security Agency had engaged in warrantless eavesdropping of persons located within the United States,[3] which led those who had seen the Secret Document to conclude that it was the "smoking gun" that could establish NSA culpability. Al-Haramain and the two Washington, D.C., attorneys whose conversations had been wiretapped filed a lawsuit in Oregon federal district court seeking, among other things, a declaratory judgment that such warrantless eavesdropping is illegal and an injunction against this practice.[4] At the outset of the case, they filed the Secret Document under seal with the court. The government moved to dismiss the case on the grounds that its resolution would require the disclosure of "state secrets," *i.e.*, that the program and/or the Secret Document could not be referred to in litigation because doing so could endanger national security.[5] The Ninth Circuit in *Al-Haramain Islamic Foundation, Inc., v. Bush*, 507 F3d 1190 (2007), recently refused to dismiss the case on "state secrets" grounds and remanded the matter to the trial court for a determination of whether the Foreign Intelligence Surveillance Act of 1978[6] supplants or preempts the common law "state secrets privilege."

Litigating the *Al-Haramain* case against the government also put the duty of confidentiality into stark relief in two further ways. With both, the Oregon Rules of Professional Conduct provided the controlling standard because, under the District of Oregon's Local 83.7(a), counsel involved in cases in this District must "comply with the standards of professional conduct required of members of the Oregon State Bar[.]"

First, the lawyers handling the case had to grapple with the challenges of advising clients who already had been subject to warrantless electronic surveillance of their attorney-client communications and might reasonably assume they were still subject to such surveillance. While the particular methods chosen remain confidential, they required significant ingenuity in an age when communications have largely moved to electronic means. As a general proposition, when a lawyer knows or reasonably suspects that communications are being intercepted by the government (whether legally or not), the lawyer needs to take steps such as face-to-face meetings with clients and disabling cell phones or pagers that might otherwise be subject to electronic surveillance or tracking that would allow advance placement of "bugs." If the lawyer and the client are not physically in the same area, this also presents the additional challenge of traveling to a location where direct, non-electronic communications can take place.

Second, the government sought to inspect the lawyers' computer systems supposedly to ensure that all descriptions of the Secret Document had been removed. This inspection would not only have exposed confidential work product for the very case being litigated but would have also potentially exposed the confidential information of many other clients whose files were being stored electronically on the same computers. A compromise was eventually reached that preserved the confidentiality of the computer systems involved. At the same time, the government's request also highlights how the duty to preserve client confidentiality extends to client files, which are now also increasingly in electronic form, as well as electronic communications.

Broader Implications

The *Al-Haramain* case has significant implications for both the legal profession as a whole and for our individual practices.

For the legal profession as a whole, we believe that lawyers must challenge the government's attempt through warrantless eavesdropping to undermine the confidentiality of attorney-client communications and with it the ability to effectively represent clients. From the earliest days of the republic, the government has had custody and control over its citizens' communications through its operation of the postal system. Citizens thought that they could give the government custody of their communications without fearing that the contents would be screened, in large part because of the protections afforded by the warrant requirement of the Fourth Amendment. Technological advances, however, have resulted in replacing "snail mail" with electronic voice and email communications. The NSA's warrantless screening of electronic communications is the equivalent of the Post Office opening all letters that pass through its system. These challenges are not merely the province of defense lawyers. Prosecutors have an ethical obligation under RPC 4.4(a) not to use illegal methods of gathering evidence.[7] And, under ORS 9.460(1), all of us have a statutory obligation as a condition of our admission as attorneys to support the constitutions of the United States and of the state of Oregon.

For individual practices, relatively few of us are involved in national security cases. But, all of us are involved in confidential communications with our clients. For many of us, maintaining the confidentiality of attorney-client communications may be as simple as making sure that we caution our clients not to discuss their cases in a crowded elevator following a deposition at an opposing counsel's office building. At the same time, most of us increasingly use electronic means to communicate with our clients. Again for many of us, we are able to rely on general statutory protections for such communications and the fact that NSA will not likely be interested in, from its perspective, the more mundane matters we handle.[8] Yet regardless of the kind of work involved, when discharging a duty as important as confidentiality, we must continually balance the sensitivity of the information involved with the methods chosen to communicate. While that may mean electronic communications are satisfactory in most instances, it may also mean that particularly sensitive matters should be discussed in person and in settings where we will not be overheard.

Summing Up

Both the United States and the Oregon Supreme Courts have described the attorney-client privilege in identical terms: "The purpose of the privilege is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."[9] The same can be said for the corresponding duty of confidentiality that is a part of both Oregon statutory law and our RPCs. The *Al-Haramain* case reminds us of the role that lawyer-client confidentiality plays in both matters of national import and in our everyday practices. It also reminds us that as a profession unless we are vigilant in protecting this fundamental value we run the risk of losing it. B

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Endnotes

1. By contrast, *see* OEC 512, which generally holds that privilege is not waived in situations when otherwise privileged statements are made "without opportunity to claim privilege."
2. Under OEC 503(4)(a) and comparable federal authority, no attorney-client privilege attaches if the services of a lawyer are being used to further a crime or fraud. *See generally* Laird C. Kirkpatrick, *Oregon Evidence* § 503.12[1] (5th ed 2007) (discussing the crime-fraud exception under both Oregon and federal evidence law). As noted, the government did not contend that the "crime-fraud" exception applied to the conversations intercepted. Rather, it effectively conceded that the conversations involved fell within the privilege.
3. "Bush Lets U.S. Spy on Callers Without Courts," *The New York Times*, Dec. 16, 2005.
4. Public proceedings in the *Al-Haramain* case at the trial court level are available on the District of Oregon's electronic docket site at *www.ecf.ord.uscourts.gov* under case number 06-274-KI. The description of the case related in this article is drawn from those public proceedings and the Ninth Circuit's decision in that case.
5. The "state secrets privilege" is a common law evidentiary privilege recognized in *United States v. Reynolds*, 345 US 1 (1953). The Ninth Circuit's decision in *Al-Haramain* discusses the "state secrets privilege" extensively
6. *Codified at* 50 USC §§ 1801-1811, 1821-29, 1841-46 and 1861-62.
7. *See also* RPC 8.4(a)(1), which prohibits lawyers from violating the RPCs through the acts of another. Although RPC 8.4(b), the so-called "***Gatti*** Rule," allows prosecutors to advise others on covert activities, it is limited to "lawful covert activity." *Accord* OSB Formal Ethics Op. 2005-173; ORS 9.528.
8. For a general discussion of electronic communications in daily practice, *see* Mark J. Fucile, "Brave New World: Risk Management in the Electronic Era," 65 Oregon State Bar Bulletin 34 (Oct 2007). *See also* ABA Formal Ethics Op. 99-413 (1999) (discussing confidentiality of electronic communications). Both discuss the federal Electronic Communications Privacy Act (18 USC §§ 2510-2522), and the former also discusses the federal Stored Communications Act (18 USC §§2701-2712).
9. *Upjohn v. United States*, 449 US 383, 389 (1981); *Frease v. Glazer*, 330 Or at 370.