

A VIEW FROM THE ABA: CLIENT CONFIDENTIALITY

Posted on 01/01/2006



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America's judicial system, like most, is dependent upon the attorney-client privilege and the freedom it gives lawyers and clients to communicate about the laws and issues that impact clients without fear that such communications will be revealed to third parties.

As the United States Supreme Court has recognized, if "the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege ... is little better than no privilege at all."



Our Supreme Court has recognized that the privilege extends to corporations, stating that the absence of the privilege would "not only make it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threaten to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law."

Recently, members of the American bar have experienced demands from prosecutors and regulators that corporations under investigation waive the protections of privilege as a demonstration of cooperation. If a corporation discloses privileged material to a prosecutor or regulator, most existing case law holds that the privilege has been waived to third parties in civil litigation.

A corporation that complies with requests for privileged material may receive lenient treatment by the particular government agency, but at a considerable price. Employees' comfort level in fully disclosing all facts to a corporation's attorneys will be "chilled." Ultimately, employees will not fully divulge information and the corporation will be denied the ability to use counsel in assuring compliance with laws. Self regulation is the most effective way of assuring compliance with laws and it is bad policy to eliminate that approach in favour of jealous enforcement.

I feel strongly that the "deputization" of corporate lawyers by government agencies to develop evidence for such agencies' use will not only discourage disclosures but will undermine the trust and confidence in counsel that have historically been recognized as fundamental to an effective attorneyclient relationship.

While this approach may serve the prosecutor's interests in a particular investigation, it sacrifices the long-term, public interests that the Supreme Court has long associated with the attorneyclient privilege. For these reasons, the American Bar Association Task Force on the Privilege which I chair opposes any requests by prosecutors for waiver of the privilege. We are working with our Congress and with the Executive Branch to assure that such demands are not allowed in the future. Any intrusion by government on the ability of lawyers to effectively serve their clients is a great threat to a justice system.

Today in America, it is the corporate client under threat. If this is not stopped, tomorrow it will be the individual client globally that is threatened. Lawyers must unite globally to further justice by opposing such ill advised actions.