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Client's answer puts lawyer in front of grand jury

Peter Geier

A Middle Eastern immigrant's statements to two FBI agents concerning advice his lawyer gave him constituted an implicit waiver of his attorney-client privilege, the 4th U.S. Circuit Court of Appeals has held.

As a result, his immigration lawyer must appear before a grand jury and respond to the government's questions that bear on otherwise privileged communications between her and her client, the 4th Circuit decided, affirming U.S. District Judge Alexander Williams Jr.'s ruling in a sealed proceeding.

Although the information sought by the government falls within the scope of the attorney client privilege, Chief Judge William W. Wilkins Jr. wrote for the appellate court, we agree with the district court that appellant waived that privilege through his statement to FBI agents.

The statements in question were made when FBI agents conducting a terrorism-related investigation were questioning the immigrant in the lobby of his apartment building. The agents noted that his green- card application, Form I-485, failed to reflect a shoplifting conviction, and asked why.

He told them he had filled out the form on the advice of an attorney, subsequently identifying the lawyer by name.

That was sufficient to waive the privilege as to those issues, the court affirmed.

Laura K. Rhodes, an immigration and criminal defense lawyer not involved in the case, called the opinion scary.

People always have questions about Form I-485, Rhodes said, concerning whether to report incidents as minor as accostings by authorities. It can be difficult to answer some of those questions.

For instance, most criminal lawyers without immigration experience likely would tell people not to worry about reporting probations- before-judgment because in Maryland they are not considered convictions, she said.

But this would only expose their clients to the federal charge of making a false statement on Form I-485, which asks if a person has ever ... been arrested, cited, charged, indicted, fined or imprisoned for breaking or violating any law or ordinance, excluding traffic violations, Rhodes said.

The 4th Circuit's new holding puts the attorney in a bind now, either by making them betray clients by saying 'No, I didn't tell him that,' or putting attorneys in the potentially unethical position of forcing them to turn their clients in, Rhodes said.

Timothy S. Mitchell, current first vice president and incoming president-elect of the Maryland Criminal Defense Attorneys' Association, said the attorney-client privilege is sacred and one of the most important aspects of our profession.

It's always unfortunate when a court will force an attorney to disclose confidential communications, Mitchell said, adding that he had not read the 4th Circuit opinion.

If a client wishes to reveal those confidences, that's certainly within his prerogative, but it's unfortunate that the court views that as an action on the part of the attorney, he said.

Vickie E. LeDuc, spokesperson for the U.S. Attorney Thomas M. DiBiagio, said the office does not comment on court opinions.

The 4th Circuit also rejected the immigrant's claim that he was deceived or coerced into waiving the privilege.

Appellant was not in custody, and the interview, which lasted less than an hour, was conducted in the lobby of his apartment building. Nor does the record reflect any other indicia of coercion, Wilkins wrote.

[T]he fact that during the course of the interview the agents asked appellant about a different subject - which was also related to law enforcement - does not establish that they deceived him into revealing privileged information concerning that subject, the court held.

WHAT THE COURT HELD

Case:

U.S. v. Under Seal and Under Seal, US4th No. 03-1269. Published. Opinion by Wilkens, C.J. Filed August 19, 2003.

Issue:

Did the circuit court err in ruling that a lawyer must answer the government's questions before a grand jury relating to voluntary answers her client gave FBI agents bearing on that lawyer's advice to her client?

Holding:

No; affirmed. Although the information the government sought falls within the scope of the attorney-client privilege, defendant waived that privilege when he voluntarily provided information in response to an FBI agent's general question.

Counsel:

Asst. Federal Public Defender Andrea Dennis Callaman for appellant; Asst. U.S. Atty. David Ira Salem for appellee.

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