

**James R. Silkenat**  
President

**AMERICAN BAR ASSOCIATION**

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February 20, 2014

General Keith B. Alexander, USA  
Director  
National Security Agency  
9800 Savage Road  
Fort George G. Meade, MD 20755-6272

Rajesh “Raj” De  
General Counsel  
National Security Agency  
9800 Savage Road  
Fort George G. Meade, MD 20755-6272

Re: Preservation of Attorney-Client Privilege for U.S. Law Firms and their Overseas Clients

Dear General Alexander and Mr. De:

On behalf of the American Bar Association (“ABA”), which has almost 400,000 members, I write to express our concerns over allegations raised in recent press reports concerning possible foreign government surveillance of American lawyers’ confidential communications with their overseas clients, the subsequent sharing of privileged information from those communications with the National Security Agency (“NSA”), and the possible use of that information by the U.S. Government or third parties. Whether or not those press reports are accurate given the principles of “minimization” under the law, we request your support in preserving fundamental attorney-client privilege protections for all clients and ensuring that the proper policies and procedures are in place at NSA to prevent the erosion of this important legal principle.

The attorney-client privilege is a bedrock legal principle of our free society and is important in both the civil and criminal contexts. It enables both individual and organizational clients to communicate with their lawyers in confidence, which is essential to preserving all clients’ fundamental rights to effective counsel. The privilege also encourages clients to seek out and obtain guidance to conform their conduct to the law, facilitates self-investigation into past conduct to identify shortcomings and remedy problems, and enables lawyers to fulfill their ethical duties to their clients, all of which benefit society at large.

The ABA has consistently fought to preserve the attorney-client privilege and opposes government policies, practices and procedures that erode the privilege. While governmental threats to the privilege have taken different forms over the years, the ABA has recently focused on the growing threat of intrusions into the computer systems of lawyers and law firms that risk undermining unfettered attorney-client communications and compromising client confidences. The ABA adopted a policy last August condemning this practice and urging the U.S. Government to work with other nations and organizations to develop legal mechanisms, norms and policies to deter, prevent and punish these illegal intrusions (*See* ABA Resolution and Report 118, available at: [http://www.americanbar.org/content/dam/aba/administrative/law\\_national\\_security/resolution\\_118\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/law_national_security/resolution_118_authcheckdam.pdf))

In light of the ABA’s longstanding support for the privilege and the confidential lawyer-client relationship, we are naturally concerned by recent press reports alleging that confidential communications between an American law firm and a foreign government that it represented on trade issues may have been monitored and intercepted by another nation’s intelligence service and

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then shared with NSA. The interception and sharing of attorney-client privileged communications by government agencies—or any third party—raises concerns, including chilling the full and frank discussion between lawyer and client that is essential for effective legal representation. Any government surveillance and interception of confidential communications between law firms and their clients threaten to seriously undermine and weaken the privilege, because as the U.S. Supreme Court noted in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), “an uncertain privilege...is little better than no privilege at all.”

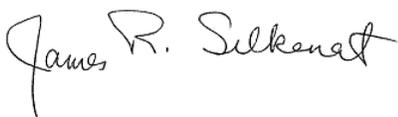
While we realize that, under U.S. law, NSA is prohibited from conducting surveillance against American citizens or U.S. based law firms or other organizations without a warrant, it is our understanding that NSA may be authorized, under certain circumstances, to intercept the communications of U.S. citizens and organizations if they are in contact with foreign intelligence targets abroad, subject to specific minimization rules designed to protect their privacy. We were encouraged by recent NSA statements indicating that as a general matter, the agency’s Office of General Counsel typically is consulted when issues of potential attorney-client privilege arise and that it often recommends that certain steps be taken to protect the privileged information. Having you further clarify the principles and policies in this area would be extremely helpful to the legal community.

The ABA understands the critical role that NSA plays in gathering intelligence information and protecting our national security, and we acknowledge that during the course of these activities, it is inevitable that certain communications between U.S. law firms and their clients may be collected or otherwise obtained by the agency. However, irrespective of the accuracy of the recent press reports, we would like to work with NSA on this issue and urge the agency not to actively seek confidential communications between U.S. law firms and their clients. In addition, if NSA obtains such confidential information inadvertently—or such information is obtained by foreign intelligence services or others and then shared with NSA—we would expect NSA to respect the privilege and take all appropriate steps to ensure that any such privileged information is not further disseminated to other agencies or any other third parties.

We know that NSA, as a federal agency committed to the rule of law, recognizes the attorney-client privilege, and thus the agency should act in a manner consistent with the principles underlying the privilege. Therefore, we respectfully request that you clarify and explain NSA’s current policies and practices that are designed to protect the attorney-client privileged status of information that it collects or receives, and whether these policies and practices were followed with respect to the alleged interception of privileged communications between the U.S. law firm and its overseas client referenced above.

Thank you for your consideration of these issues. I look forward to your reply and working with you to ensure that the public has appropriate confidence that our intelligence institutions respect the role of privileged communications.

Sincerely,

A handwritten signature in cursive script that reads "James R. Silkenat". The signature is written in dark ink and is positioned to the left of the typed name.

James R. Silkenat  
President, American Bar Association