

THE ASSOCIATION OF THE BAR
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COMMITTEE ON PROFESSIONAL RESPONSIBILITY

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April 8, 2002

Honorable Alberto Gonzales
Counsel to the President
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Dear Mr. Gonzales:

The Committee on Professional Responsibility of the Association of the Bar of the City of New York has issued a Statement on the rules issued by the Department of Justice on October 30, 2001 authorizing the Attorney General to eavesdrop on communications between certain detainees suspected of "terrorism" and their attorneys.

The Committee's Statement, which has been approved by the Association's Executive Committee, expresses the Committee's serious concerns with the Department of Justice's policy of recording conversations between designated inmates and their attorneys and concludes that the Administration's action poses serious risks for the time-honored roles of lawyers in this country. A copy of the Committee's Statement is attached.

Robert J. Anello
Chairman

**Statement of the Committee on Professional Responsibility
of the Association of the Bar of the City of New York
Regarding the United States Department of Justice Final Rule
Allowing "Eavesdropping" on Lawyer/Client Conversations**

The Association of the Bar supports the Department of Justice in its patriotic and zealous efforts to combat and prevent terrorism. Consistent with our duties under the Constitution and the Lawyer's Code of Professional Responsibility, the Bar also seeks to advise the Department of Justice and other agencies of the potential impacts of their efforts on the rights of citizens and others and upon the legal process. Recently, in its report on the newly created military tribunals, the Association's Committee on Military Affairs and Justice commented on certain constitutional problems in the Order establishing such tribunals. The Association's Committee on Professional Responsibility now wishes to add its thoughts on the Rule issued October 30, 2001, without prior comment, that allows the United States Attorney General to authorize eavesdropping on attorney/client communications upon a finding of "reasonable suspicion" of "terrorism."

The American Bar Association, in a statement by President Robert E. Hirshon on November 9, 2001, stated that it was "deeply troubled" by the Rule and that "prior judicial approval and the establishment of probable cause - the standard embodied in the Fourth Amendment - and not 'reasonable suspicion,' are required if the government's surveillance is to be consistent with the Constitution." The Committee on Professional Responsibility would add to that statement the concern that in eliminating the attorney/client privilege the Rule strikes at the core of our adversarial system of justice and may force an attorney to violate the Code of Professional Responsibility.

Essential to our system of justice is the attorney/client privilege, which is part of maintaining the fairness inherent in our adversarial system. The privilege is such a touchstone of the legal system that lawyers have an ethical obligation under the Code to maintain the privilege and are even cautioned about the use of cell phones, cordless phones and internet email so as not to allow the possibility of inadvertent interception of privileged communications and the resultant loss of the privilege.

Under the Rule, upon the Attorney General's finding of "reasonable suspicion," a lawyer and a client may be notified that nothing they say will be private. This means that the client will never have the ability to speak privately and confidentially with their counsel. Given the lawyer's duty to preserve the privilege and not to speak if he or she can not do so, this can have the effect of denying the client any counsel at all. Such an invasion of the lawyer/client privilege undermines the adversarial nature of the legal process. The Rule's provision for separate monitors within the Department of Justice, apart from the prosecutors, does not remove the chilling effect such monitoring would have on conversations between a lawyer and a client. In cases of organized crime

and the war on drugs, where an attorney was suspected of being a co-conspirator in or a conduit for further illegal acts by a client, warrants satisfying the probable cause standard have been obtained by prosecutors. As stated by the ABA, this should be the standard in the war on terrorism.

The Committee believes that, even in the war on terrorism, the basic principles on which our system of justice is balanced ought not to be tampered with. It is a fundamental premise of our system of justice that all persons, regardless of the crime or their circumstances, have access to legal counsel, be able to speak with their lawyer confidentially and be able to participate in the adversarial truth-seeking process. Any incursion on these premises must be done under the aegis of a neutral and detached magistrate and based upon probable cause. The requirement of a judicial finding of probable cause should not be replaced with an executive finding of reasonable suspicion in allowing the attorney/client privilege to be breached. Under the Rule as currently in force, lawyers may be forced to violate the Code of Professional Responsibility if they attempt to render to their clients their constitutional right to the effective assistance of counsel, and clients may be denied the right to an attorney if the attorney is forced by the Code not to speak.

Robert J. Anello,
Chair

Committee on Professional Responsibility

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