

## PROFESSIONAL LIABILITY UPDATE

### ATTORNEY-CLIENT PRIVILEGE

By Jennifer Becker

*People v. Delgado* (2017) 2 Cal.5<sup>th</sup> 544

*The Supreme Court holds the presence of correctional officers to protect an attorney representing a violent criminal defendant does not deprive the accused of the effective assistance of counsel by violating the confidentiality of attorney client communications.*

Inmate Anthony Delgado was serving a life sentence under California's Three Strikes law when he murdered two inmates as retribution for what he perceived as unfair punishment for his prior crimes. He vowed to kill again until he committed three crimes worthy of life imprisonment. He also repeatedly engaged in violent altercations with correctional officers and other inmates.

The trial court ordered two correctional officers, bound by the attorney-client privilege, present during Delgado's meetings with his attorney. The attorney agreed to this measure. Delgado never objected to the procedure in the trial court.

The Court found Delgado forfeited any objections by not raising them in the trial court. It rejected the argument that counsel, who agreed to the arrangement, could not be expected to object a stipulation made solely for her benefit. The Court disagreed the arrangement was solely for counsel's benefit. Criminal defendants often present security risks, and the court's measures provided Delgado the benefit of counsel.

The measure was within the discretion of the trial court. Delgado had killed two people with his bare hands, and had promised to kill again. It was reasonable for the court to place correctional officers, and forgo other measures such as physical restraints.

Delgado argued that correctional officers chilled his communications with counsel, and effectively deprived him of his right to counsel. The confidentiality of attorney-client communications is not a separate constitutional right; it is an aspect of the right to effective assistance of counsel.

To establish an effective assistance of counsel violation, a defendant must show his confidential communications were disclosed. There was no evidence the correctional officers revealed Delgado's confidential communications with his attorney, or offered any evidence.

The court would not presume that Delgado's confidential communications with his attorney were communicated by the correctional officers to the prosecution team. A presumption was not warranted, even if

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the correctional officers were members of the prosecution team, as Delgado insisted.

The court rejected Delgado's contention he was reluctant to speak to his attorney due to the correctional officers. Early in the process Delgado informed the court he had nothing to discuss with counsel, and expressed indifference to the criminal process. Later, Delgado changed his position, and spoke to his attorney extensively.

The court rejected the claim that correctional officers impeded Delgado's ability to speak softly to his attorney, or pass her confidential notes during trial. There was no evidence to support the claim, and Delgado's hands were unrestrained during trial.

The arrangement was not similar to a case where a government informant infiltrated meetings of joint criminal defendants, and then passed information to the prosecution. The constitutional violation of the right to effective assistance of counsel due to the breach of attorney-client confidentiality in that situation was egregious and warranted reversal.

There was no evidence that the outcome of the trial would have been different absent the presence of correctional officers during attorney-client meetings.

*Comment:* The right to confidential attorney-client communications is not a constitutional mandate, and courts handling dangerous defendants have the flexibility to protect counsel and provide due process.