

The Crime-Fraud Exception to the Attorney-Client Privilege: Communications That Are Not Privileged

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ABSTRACT

In three previous articles, “Assessing Confidentiality in the Lawyer-Client Relationship: A Client Perspective” (2022a), “Avoiding Common Conflicts of Interest in the Lawyer-Client Relationship” (2022b), and “The Lawyer-Client Relationship: Fee Arbitration” (2022c), the authors have described various aspects of the lawyer-client relationship. In this article, the authors describe an important exception to the principle of confidentiality found in the crime-fraud doctrine which permits a court to breach lawyer-client confidentiality upon the proper showing.

Keywords: Crime-fraud exception, lawyer-client relationship, confidentiality, fraud.

THE CONTEXT

Hudson (2023) writes that news reports involving former President Donald Trump and several of his lawyers alleged misuse of classified documents that were located in the former President's Mar-a-Lago estate. Hudson quotes ethics expert Peter Joy of the Washington University School of Law in St Louis: “The special counsel presented enough evidence that Trump committed the crime through his attorneys or with his attorneys' assistance, and that led the judge to find that his communications with his lawyer lost attorney-client privilege due to the crime-fraud exception.” Schultz (2023) added: “Recently, a judge ruled that attorneys had to testify about conversations they had with Donald Trump regarding classified documents at Mar-a-Lago. They were told they had to break attorney-client privilege and disclose what they said.”

As a result, Trump lawyer Evan Corcoran was required to testify under court order pursuant to the “crime-fraud exception” before the federal grand jury investigating former President Donald Trump's handling of sensitive government documents, in violation of the Espionage Act (Owen, 2023). Noted Kaufman (2022), “The Espionage Act of 1917, enacted just after the beginning of World War I, makes it illegal to obtain information, capture photographs or copy descriptions of any information relating to national defense, with the intent for that information to be used against the United States or for the gain of any foreign nation.”

U.S. District Judge Beryl Howell had signed off on the request by special counsel Jack Smith to force Corcoran to testify after finding that he had presented sufficient evidence to establish that

Trump had committed a crime through his attorney (see Kosnar, Dilanian, & Shabad, 2023; Gregorian & Barnes, 2023).

THE ATTORNEY-CLIENT RELATIONSHIP: “THE BED ROCK OF CONFIDENTIALITY”

The requirements for application of the lawyer-client privilege include:

- “There must be an attorney-client relationship;
- The communication must be confidential; and
- The communication must be for the purpose of obtaining legal advice, not business or personal advice” (see generally Cole, 2003).

The Spodek Law Group (2023) explains that “if these elements are met, neither the attorney nor the client can be forced to reveal the contents of their privileged discussions in court. The client is the holder of the privilege and can choose to waive it if they wish.”

The foundation of the attorney-client privilege is “the need for the advocate and counselor to know all that relates to the client’s reasons for seeking representation if the professional mission is to be carried out” (Adler-Paindiris & Satterfield, 2022; Singleton, 2023).

Hudson (2023) notes that “A sacrosanct concept in law is the attorney-client privilege—that a client can speak to his or her attorney knowing full well that what the client says will be kept secret. The evidentiary privilege ensures free and frank communications between attorney and client, a reality that generally serves the public interest.” Dean Wigmore (1985), author of *Wigmore on Evidence*, wrote that this was “the oldest of the privileges for confidential communications” (see also Tracy, 1940; *United States Ex Rel. Edney v. Smith*, 1976).

Rosenzweig (2018) provides a traditional justification for the principle of confidentiality. “First and foremost, the privilege encourages clients to be truthful with their lawyers”— “fostering the truth-finding function of the courts in a second-order way.” The second reason applies as “an important adjunct to the Fifth Amendment privilege against self-incrimination.” Since a defendant cannot be compelled to testify against himself in a criminal proceeding, the privilege would be strongly compromised if an attorney could be compelled to repeat what his or her client had said in confidence to the attorney.

The privilege generally protects litigants and their counsel from testifying or otherwise disclosing confidential communications between them *despite* the potential relevance or probative value of any communications (see *in re Grand Jury Proceedings*, 2005). “At the same time, it withdraws what might otherwise be relevant evidence and it acts as an ‘obstacle to the investigation of the truth’” (*U.S. v. Dyer*, 1983, p. 177).

The privilege also protects the “work product” of an attorney which “allows lawyers to investigate, prepare and develop strategy relating to litigation without worrying about adversaries obtaining their work and using it against their clients (Weber, 2023, p. 740). Rule 502 of the Federal Rules of Evidence provides: “work-product protection” means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial” (see also Parisi, 2023).

"[T]he privileges exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice" (Upjohn Co. v. United States, 1981, p. 390).

The Nature of Proof: Split in the Circuit Courts of Appeals

Circuit Courts of Appeals who have weighed-in on the nature of proof required in cases of the application of the attorney-client privilege have analyzed the privilege under one of two similar, but distinctly different, frameworks: "primary purpose" or "significant purpose."

Adler-Paindiris and Satterfield (2022) write that the Ninth Circuit Court of Appeals (covering Washington, Oregon, Idaho, Montana, California, Nevada, and Arizona) joined the Second Circuit (covering Vermont, New York, and Connecticut), the Fifth Circuit (covering Texas, Louisiana, and Mississippi), and the Sixth Circuit (covering Michigan, Ohio, Kentucky, and Tennessee) in adopting the "primary purpose" test. Minnesota courts have recognized a variation of the "common interest" test in its "common interest doctrine" (Singer, 2023). Under this test, "the scope of the attorney-client privilege is defined by the purpose of the communication." In effect, courts must determine the "*primary purpose*" of the communication. If that primary purpose is to provide legal advice, then attorney-client privilege attaches. Otherwise, the communication is not protected by the privilege. The U.S. Court of Appeals for the D.C. Circuit adopted the "significant purpose" test when analyzing potential dual-purpose communications. While a member of the D.C. Circuit Court, Supreme Court Justice Brett Kavanaugh applied the "significant purpose" test in *In re Kellogg Brown & Root, Inc.* (2014). Under this analysis, courts must inquire "Was obtaining or providing legal advice a primary purpose of the communication, meaning one of the significant purposes of the communication?" In other words, "if one of the significant purposes of the [communication] was to obtain or provide legal advice, the privilege will apply." Judge Kavanaugh in fact pointedly criticized the "primary purpose" test, stating:

"Trying to find the one primary purpose for a communication motivated by two sometimes overlapping purposes (one legal and one business, for example) can be an inherently impossible task. It is often not useful or even feasible to try to determine whether the purpose was A or B when the purpose was A and B. It is thus not correct for a court to presume that a communication can have only one primary purpose."

The U.S. Court of Appeals for the Seventh Circuit (covering Wisconsin, Illinois, and Indiana) remains as the only federal appeals court to reject both tests, albeit in the context of tax advice. In the Seventh Circuit, attorney-client privilege never attaches to dual-purpose communications that involve tax advice, regardless of the primary or significant purpose of the communication (Adler-Paindiris & Satterfield, 2022).

THE RELATIONSHIP BETWEEN THE PRIVILEGE OF CONFIDENTIALITY AND THE CRIME-FRAUD EXCEPTION: EXCEPTIONS TO THE RULE OF CONFIDENTIALITY

The United States Supreme Court explained the relationship between the attorney-client privilege and the crime-fraud exception in *United States v. Zolin* (1989, pp. 562-563):

"The attorney-client privilege must necessarily protect the confidences of wrongdoers, but the reasons for the protection – the centrality of open client and attorney communication to the proper functioning of our adversary system of justice – ceases to operate at a certain point, namely where the desired advice refers not to prior wrongdoing, but to future wrongdoing."

The *Zolin* court added: "It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the 'seal of secrecy' between lawyer and client does not extend to communications 'made for the purpose of getting advice for the commission of a fraud' or crime."

The ABA Model Rule of Professional Conduct (2024)1.2(d) provides: "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." Comment 9 to Rule 1.2 further provides, "There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity."

Richmond (2022, pp. 497-498) notes that Model Rule 1.6(b)(2) permits a lawyer to disclose a client's information "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services[.]" Model Rule 1.6(b)(3) permits a lawyer to reveal a client's information "to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services[.]" Richmond (2022, p. 497-498) further notes that "in both circumstances, the disclosure of information related to the client's representation must be limited to 'the extent the lawyer reasonably believes necessary' to accomplish the rule's purpose. This limitation on the information that a lawyer may reveal respects the general principle that exceptions to the duty of confidentiality should be narrowly construed" (see also Cunningham, 2003).

In the case of fraud, the attorney may be called upon to render advice on the discreet elements of fraud but *may not assist* a client in actual the commission of fraud. This advice might consist of parsing the following:

1. There must be a false representation or statement of a material or important fact.
2. The representation must be made with the knowledge that it is false or with reckless disregard of its truth or falsehood. This is referred to as the requirement of *scienter*.
3. The representation must have been made with the intention to deceive the other party.
4. The representation must have induced the other party to act upon it.
5. The party against whom the fraud is committed misled must have suffered some loss. There can be no fraud without damage (see generally *SG Home Assocs., LP, v. Marinucci*, 2013).

It is important to note that courts may be reluctant to find that a communication between a lawyer and his or her client is subject to discovery and eventual disclosure without strong pre-existing evidence of some fraudulent intent. In the absence of a *prima facie* showing of fraudulent intent, litigants could engage in essentially “fact-finding expeditions” in hopes of discovering information that would further an otherwise unsupported claim of fraud (see Steinberg & Weissler, 2018). Thus, a litigant must clearly demonstrate a connection between fraudulent intent and the communication at issue before a court will justify breaching the attorney-client privilege.

DISCUSSION

As the attorney-client privilege is a bed-rock principle of the American judicial system, it is designed to encourage clients to make full, frank, and complete disclosure of facts to their attorneys and to allow counsel to “properly, competently, and ethically” carry out their representation (*Idenix Pharm. V. Gilead Sci., Inc.*, 2016, p. 1). As such, the attorney-client privilege is recognized as a “nearly insurmountable” bar to discovery of confidential communications between an attorney and his or her client (see Schwartzbach, 2023).

Writing in the South Carolina Law Review, Richmond (2018) stated: “The idea that a lawyer can be compelled to testify about her representation of a client or to reveal confidential communications with a client is anathema to lawyers and clients alike.” However, a major exception to the general rule lies in the *crime-fraud exception* under which a client's communication to his or her attorney is not privileged if the client made it with the intention of committing or covering up a crime or fraud.

Noting the seriousness of breaching the lawyer-client relationship, Minnesota criminal defense attorney Andrew S. Birrell (quoted in Hudson, 2023) warns that the crime-fraud exception poses a threat to client-lawyer confidentiality. “Any intrusion into that privileged relationship constitutes a threat to the proper functioning of our justice system....” “Therefore, any mechanism invading that privileged relationship should be viewed with great caution—whatever standard is applied to pierce it.”

The privilege may be waived, either expressly by consent of a client or implicitly by the client disclosing the communications at issue to a third party, or by failing to timely assert the privilege (see *Serrano v. Chesapeake Appalachia, LLC*, 2014); *Law Office of Douglas T. Harris v. Phila. Waterfront Partners, L.P.*, 2008; *Nationwide Mut. Ins. Co. v. Fleming*, 2007). Because the attorney-client privilege belongs to the client, in deciding whether to honor the privilege, the client's intent is critical (see Sunshine, 2020). The exception will apply even if the attorney had no knowledge of, and did not participate in, the actual crime or fraud.

Elements and Nature of Proof in Breaking the Attorney-Client Privilege

The *prima facie* elements of the crime-fraud exception are:

- The client was in the process of committing or intended to commit a crime or a fraudulent act; and
- The client communicated with the lawyer with intent to further the crime or fraud, or to cover it up.

These elements are based on a “reasonable basis” standard and not on “absolute certainty.” In *In re Grand Jury Proceedings* (2005), the First Circuit Court of Appeals noted that “speculation or evidence that shows a distant likelihood of corruption” is not enough to satisfy the reasonable basis standard.

Andrews and Zorn (2022) explain the nature of proof required: “Invocation of the crime-fraud exception does not require definitive proof of a crime or fraud. There need only be prima facie evidence that “has some foundation in fact” (citing *Clark v. United States*, 1933).

In applying *Clark*, various Courts of Appeals have determined that the quantum of evidence needed to support a prima facie crime-fraud is evidence sufficient to support a verdict in favor of the party arguing for the exception” (Andrews & Zorn, 2022).

A party seeking to breach the attorney-client privilege is not required to show that an attorney is “actively participating” in the crime or even have knowledge of the alleged fraudulent scheme. Instead, the court’s focus is on the *client’s conduct*, demonstrating that the client acted on the communication with fraudulent intent. A client, however, must knowingly seek the assistance of counsel to further a continuing or future crime in order for the crime-fraud exception to apply (see *United States v. Doe*, 2005). The movant must show that the client misused or intended to misuse the attorney’s advice in furtherance of an improper purpose (see *in re Grand Jury Investigation*, 2006). In some states, the crime-fraud exception has been expanded to circumstances where the client’s object is the commission of a civil wrong or tort. An example might be where a client sought advice about *unlawfully* evicting a tenant.

Both the *content* and *context* of a communication between the lawyer and his or her client will determine whether a communication will remain subject to the privilege or whether the crime-fraud exception will apply. The exception covers communications between the lawyer and client in such circumstances as:

- “Suborning perjury” (asking an attorney to present testimony the attorney knows is false). Iverson (2023. p. 535 note 249) states: “Finally, courts have existing authority to address improper witness coaching, either on or off the record, through attorney discipline, criminal charges for suborning perjury, and/or waiver of the attorney-client privilege under the crime-fraud exception.”
- Destroying or concealing evidence. In *Hitch v. Pima County Superior Court* (1985, p. 594), the court said:

“Our holding is as follows: first, if the attorney reasonably believes that evidence will not be destroyed, he may return it to the source, explaining the laws on concealment and destruction. Second, if the attorney has reasonable grounds to believe that the evidence might be destroyed, or if his client consents, he may turn the physical evidence over to the prosecution. Applying this test to the instant facts, the trial court was correct in ordering the wristwatch to be turned over to the state.”

- Witness tampering. Segal and Sacopulos (2012, p. 67) state:
“As a criminal offense, obstruction of justice through witness tampering requires the mental intention (mens rea) to cause the result (i.e., using threats and

intimidation to prevent a witness from testifying openly and frankly). The United States Supreme Court clarified that, under federal law, witness requires proof of the wrongdoer's mens rea. State courts have also found that mens rea is an essential element of a witness tampering or intimidation claim. Dissecting the legal elements required to prove witness tampering, the defendant must have an unequivocal intention to prevent the witness from testifying through use of threats (and the like)."

- Concealing income or assets (see Lee & Lipman, 1999).

An important consideration relating to the application of the crime-fraud exception is whether the communication in question relates to a past wrong, or a present, or future one. Communications between a lawyer and his or her client relating to a past crime or fraud will uniformly be considered privileged, but communications about an ongoing or future crime or fraud are not subject to the privilege where the intent is deemed to be current. Enwright (1997, p. 1861) notes: "For instance, communications between client and attorney for the purpose of committing or continuing a crime or fraud are not protected by the attorney-client privilege. To fall within the crime-fraud exception, the communications must pertain to ongoing or future wrong- doing. If, however, the communication concerns only past illegal acts, the privilege survives."

The crime-fraud exception will not ordinarily apply if a client is merely seeking advice about the consequences of some possible future action. As might be expected, drawing a "bright line" between present intent and possible future intent or action may prove to be difficult. Ultimately, a court will be called on to decide whether a client was *about to commit a crime* or was merely *inquiring about the consequences of some action he or she might undertake in the future*.

If the crime-fraud exception applies, the moving party (the state or prosecution) can issue a subpoena for the attorney and force him or her to disclose the contents of the communication in question. Hudson (2023) adds: "And that is where the exception has real-world consequences: Lawyers can be forced to disclose the nature of their conversations with their clients under penalty of contempt of court." A lawyer risks a potential fine or even the imposition of jail time for refusal to comply with an order of a court (see Schmidt, Herbert, & Schwab, 2022; *United States v. Donziger* (2021)).

Under the Rules of Professional Conduct, in addition to the circumstances involving the crime-fraud exception, some situations require a lawyer to disclose certain other communications.

Examples Include the Following

Perjury:

If an attorney *knows* that a witness is about to give, or has given, perjured testimony, the lawyer is obligated to inform the court. However, this obligation may not apply if the witness is the client. Lidge (1995, p. 69, note 20) states: "As stated in ABA/BNA Manual, 'It is universally agreed that when a client in a civil or criminal case intends to lie under oath the lawyer's first step is to try to discourage the client from doing so. It is also generally agreed that where a client in a civil or criminal case has already committed perjury, applicable rules of ethics require that the lawyer request the client to rectify the

fraud.”

Missing Person:

If the client informs his or her attorney the location of a missing witness or victim whose life is in “imminent danger,” the attorney may be required to disclose it to the proper authorities (see Mohr, 2002)—sometimes referred to as the “public safety exception” (Miller, 2023).

Threats:

If the client threatens to harm someone—for example, a witness, attorney, prosecutor, or judge—the lawyer may be obligated to report the threat (see *United States v. Ivers*, 2020). Subin (1985, p. 1181) writes: “The client will know, however, that the lawyer will act to prevent others from suffering at his hands. It is difficult to imagine how one dealing with an honorable profession could expect anything else.”

State ethical rules permit—or may require—an attorney to disclose information learned from a client that will prevent a death or a serious injury. Many states have enacted a similar rule where revealing otherwise confidential information would prevent or remedy *financial injury* due to a crime or fraud (see Hicks, 2004; *St. John Haney v. Kavoukjian*, 2021)).

In *Tindall v. H & S Homes* (2011), the District Court addressed communications that were allegedly in furtherance of fraudulent transfers. The trial court conducted an *in-camera* review of the documents at issue in order to determine whether to apply the crime-fraud exception. In *In re Rosich* (2016), the court concluded that the movant provided sufficient evidence showing that his adversary’s attorney had advised his clients to affect a real estate transfer for the purpose of defrauding the movant. Lininger (2020, p. 116) argues that the privilege should not extend to

“Certain violations of civil environmental law. Attorney-client communication designed to further the knowing emission of hazardous pollutants does not deserve the same protection as attorney-client communication for legitimate purposes. There should be no privilege to pollute. Instead of shielding communication in which lawyer and client make plans to flout environmental regulations, the evidence rules should expose such communication and permit its use in court.”

State ethics rules may specify which communications lawyers must disclose. What many of these rules share in common is that they articulate procedures intended to *minimize* the amount of information the lawyer discloses which may implicate the client and thus breach the important principle of lawyer-client confidentiality.

CONCLUDING COMMENTS

A lawyer is required to “zealously represent a client within the bounds of the law” (Reliford & Davis, 2019) in our legal system, and in so doing, is also obligated to “keep the confidences” of his or her client as a “bed rock” or foundational principle of American jurisprudence. At the same time, however, a lawyer must recognize that if his or her services are used by a client in the commission of a crime or in committing fraud, confidence may be breached by a court and the attorney may be forced to testify against a client under the threat of being held in contempt of court for a refusal to do so. In addition, the lawyer may face *personal legal jeopardy* for his

actions independent of any request to break confidentiality, if it can be shown that the attorney orchestrated or conceived the fraudulent scheme or the commission of a crime as a matter of their own choice or design (see Brickman, 2019).

Sorting out these issues and competing values will no doubt be the responsibility of the United States Supreme Court, as it reviews the decision of the trial court that required former President Trump's attorney to respond to the court's subpoena eliciting his testimony in the matter of *United States v. Donald Trump* (2023).

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Rule 1.6(b)(2)

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