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ATTORNEY-CLIENT PRIVILEGE

High Cost of a Low Threshold: The Policies and Practicalities Underlying the Crime-Fraud Exception to the Attorney-Client Privilege

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In both civil and criminal matters, the efficient and fair administration of justice requires that attorneys and clients engage in frank, open communication, without fear of disclosure to adversaries, third parties, or the government.

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This is particularly important in criminal matters where the specter of crippling fines and imprisonment possibly await defendants. In such cases, individual prosecution often hinges upon small-yet-revealing details found within evidence. Both attorney-client privilege and the work-product doctrine permit and encourage a defendant to mount a vigorous defense while requiring the prosecution to meet its burden of proving guilt beyond a reasonable doubt without the assistance of the defendant. As reflected by the U.S. Constitution, and particularly the Fifth Amendment, the American tradition unquestionably protects a defendant from having to say anything that would incriminate himself.

The threat of indictment does not just open a company to vast exposure to criminal and civil sanctions, it is often the death knell for a corporation. Investors, vendors, and customers often abandon indicted companies as if they were a strain of plague. A criminal indictment is a powerful weapon. The prosecutor can destroy in a matter of hours what may have taken decades, or even centuries, for a company to construct.

When faced with a criminal indictment, corporations are under significant pressure to avoid the public embarrassment and financial risks associated with it, making the attorney-client privilege and work-product doctrine essential elements of an effective defense. Even if corporate management is required to make substantial concessions to the government, issues of privilege should be guarded jealously behind an iron portcullis. Once privilege is waived, or pierced, nothing prevents

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sensitive communications and work product from becoming government exhibits and used in furtherance of the prosecution. The loss of attorney-client privilege potentially disarms what would be an otherwise effective defense. As the case of Arthur Andersen taught, exoneration from criminal wrongdoing is no salve for the damage caused by criminal charges.

Attorney-client privilege and the work-product doctrine are not untouchable legal constructs, although the U.S. Supreme Court has recognized their value as almost without peer. Criminal defendants can unwittingly waive these privileges through various means of disclosure, but even when all precautions are taken to avoid waiver, prosecutors possess a powerful weapon in their arsenal: the crime-fraud exception.

At the heart of the crime-fraud exception is the philosophy that a claimed privilege should not be used to conceal advice rendered by an attorney for the purpose of aiding a client in the commission of a crime or fraud. As the Supreme Court noted in *Clark v. United States*,[1] ''A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told.'' As such, the crime-fraud exception removes the protection afforded to otherwise privileged and protected documents and evidence.

Triggering the Crime-Fraud Exception

Attorney-client privilege serves ''to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.''[2] Given the broad public considerations underlying the application of attorney-client privilege, it is little wonder that the privilege is subject to a labyrinth of exceptions. Much like Odysseus's perilous course between Scylla and Charybdis, the legal practitioner must carefully steer between those ethical obligations imposed upon all members of the bar with the duties owed to an often desperate, shaken client. The path is fraught with ethical dangers, and the consequence of error is immense and often irreparable.

Condition One. Currently, the crime-fraud exception is triggered upon the existence of four conditions. First, a client must intend to commit a crime or engage in some fraudulent activity. Intent to engage in a particular criminal or fraudulent line of conduct is generally sufficient for the exception to apply, but a substantial minority of jurisdictions—and the *Restatement of the Law Governing Lawyers*—requires that a crime or fraud actually take place before allowing prosecutors access to otherwise-privileged information.

The intellectual soundness of the minority rule is questionable because the principles justifying the exception are predicated upon the notion that the advice of an attorney used for illicit purposes does not warrant the protection of the law; accordingly, under this logic, legal advice should not be protected even if the client is unable to execute its ignominious plan.

Nevertheless, in practical terms, the minority rule makes sense in that it comports with the idea that courts are not in the business of issuing opinions absent a genuine controversy. There are few reasons to pierce attorney-client privilege if no crime or fraud has been committed.

Condition Two. Second, it is the intent of the client, not the lawyer, that is relevant to a privilege-challenge analysis. The crime-fraud exception applies even if the attorney had no knowledge that the advice sought or received by a client was intended for use in furtherance of a crime or fraud. Various treatises indicate that privilege is not lost if an innocent client's confidential information is compromised by a crooked attorney. Nevertheless, the U.S. Court of Appeals for the Third Circuit—among others—indicates that an attorney will not be permitted to conceal illicit conduct by using a guiltless client's privileged communications as a shield.

Condition Three. Third, the communications sought by a challenger to the privilege must relate to communications in furtherance of the alleged crime or fraud. All other communications remain privileged, and only those involved in the illicit behavior are subject to disclosure. For example, if a client discusses a past crime with his attorney, and in the course of that conversation discusses ways to illegally flee from a jurisdiction to avoid prosecution, the privilege is preserved with regard to the former advice but pierced with regard to the latter. The crime-fraud exception applies only to ongoing or future activities, not to those already committed. In contrast, a client who seeks legal advice for the purpose of withdrawing from a particular criminal activity would be entitled to keep such communications confidential.

Condition Four. Fourth, the party seeking to obtain privileged information must overcome the burden required to prove that the crime-fraud exception applies. Until the Supreme Court's opinion in *United States v. Zolin*,[3] prosecutors were unable to include the sought-after material itself as part of the evidentiary showing in support of their argument for broaching attorney-client privilege; however, in the *Zolin* case, the court adopted a procedure in which the material in question could be presented to a trial court, in camera, and be evaluated. For a trial court to consider an in camera review, the movant bears the burden of presenting ''evidence sufficient to support a reasonable belief that in camera review may yield evidence that establishes the exception's applicability.''[4] This requires ''a lesser evidentiary showing . . . than is required ultimately to overcome the privilege.''[5]

Disturbing Trend

Careful observation of this final condition reveals a troubling trend in modern privilege jurisprudence: a tendency to grant exceptions in favor of piercing and an increase in judicial discretion. The standard required to invoke the crime-fraud exception is weak, and the standard to compel the production of privileged information for in camera review is appallingly low. The once impenetrable citadel of privilege is slowly evolving into an increasingly meaningless anachronism.

[1] 289 U.S. 1 (1933).
[2] See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).
[3] 491 U.S. 554 (1989).
[4] *Id.* at 574-75.
[5] *Id.* at 572.

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The amount of proof necessary to overcome the privilege remains unclear, and a split among the federal circuit courts exacerbates the confusion. In *Clark*, the Supreme Court enunciated a standard test that the crime-fraud exception applies only upon the ''showing of a prima facie case sufficient to satisfy the judge that the light should be let in.''[6] The precise meaning of the prima facie standard remains elusive.

For instance, in the District of Columbia Circuit, ''the government satisfies its burden of proof if it offers evidence that if believed by the trier of fact would establish the elements of an ongoing or imminent crime or fraud.''[7] In the Sixth Circuit, ''the evidence produced . . . must raise more than a strong suspicion that a crime was committed to establish a prima facie violation, but it need not be as strong as that needed to effect an arrest or secure an indictment.''[8]

In *Zolin*, the Supreme Court recognized that its holding in *Clark* left confusion as to what constitutes a prima facie showing, but it did not attempt to provide any clarification. With significant splits among the circuits, it is now time for the Supreme Court to provide further guidance.

Challenging Ex Parte Order Piercing Privileged Communications

In the context of criminal investigations, most applications to obtain privileged communications are made by prosecutors on an ex parte basis. Although an ex parte request to pierce attorney-client privilege is generally considered a derogation of due process in civil litigation, the importance of protecting the secrecy of grand jury proceedings appears to trump confidential communications as a matter of policy. Given the vast control prosecutors retain over the investigative process, and particularly over the grand jury, it is questionable whether this policy reflects sound jurisprudence. The current policy defies common sense and runs counter to the idea that criminal defendants are constitutionally entitled to a presumption of innocence.

When a grand jury subpoena is issued to a client's lawyer, it often seeks the disclosure of both oral conversations and physical documents. The scope of the subpoena can extend only to those communications made in furtherance of the specific crime or fraud, and any subpoena extending beyond such limited boundaries should be challenged in a motion to quash. In fact, some commentators argue that an attorney—as the guardian of a client's secrets—has an ethical responsibility to challenge any attempt by prosecutors to pierce attorney-client privilege or gain access to work product. In response to an attorney's opposition motion, the prosecutor will raise the crime-fraud exception and, presenting evidence to the court on an ex parte basis, attempt to meet the prima facie standard. Courts have wide discretion to allow challenges to the prosecutor's petition, but they will often defer to the government's request to maintain the secrecy of the grand jury investigation. Attorneys rarely get the opportunity to make an effective challenge.

Seek the Application. An attorney facing a grand jury subpoena should use the government's request as an opportunity to obtain information counsel would otherwise have little chance of receiving. For instance, in challenging the subpoena, the attorney should request to see the government's ex parte application. Absent an opportunity to examine the prosecutor's submission, the attorney will have no understanding as to the court's basis for piercing important privileges and will not be able to mount an effective challenge. This information could reveal crucial details about the nature and target of the grand jury's investigation. Although Federal Rule of Criminal Procedure 6(e) requires that the details of a grand jury proceeding remain secret, an attorney's challenge to an ex parte application can permit the court to release some information, even if that information is disclosed only to the attorney. If the court will not allow the attorney to see this confidential information, counsel can request to see redacted portions of the grand jury's proceedings. This is established precedent in both the Third and Tenth circuits.

Primary Defense. The primary defense against an order invoking the crime-fraud exception is to rebut the government's contention that it met its prima facie standard. For instance, if the prosecutor does not articulate all the elements of a particular crime allegedly committed by the client, or if there is a lack of evidence illustrating a nexus between the crime or fraud and advice rendered by the attorney, the government is not entitled to the privileged information it seeks. This is particularly true for corporate clients operating in complex industries and in environments where company executives routinely consult their attorneys concerning a myriad of government regulations.

Conclusion

Attorneys are called upon to counsel their clients in often complex, abstruse areas of the law, and this frequently involves balancing on the ambiguous line often separating illegal conduct from fair business practices. Innocent conversations about the legality of certain actions should not raise a presumption of illicit conduct by a client or an attorney merely because advice is sought in an area of uncertainty. Given that the lawyer is often the target of ex parte applications under the crime-fraud exception, prosecutors and courts must work to ensure that their use of this broad weapon does not serve to discourage attorneys from providing effective legal advice or allow prosecutors to sidestep important constitutional protections. Attorneys must be able to counsel their clients as to the intricacies of various laws and regulations, and they need to do so without fear of the government having the right to search through their private files or to compel their testimony.

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[6] *Clark*, 289 U.S. at 14.

[7] *In re Sealed Case*, 754 F.2d 395 (D.C. Cir. 1985).

[8] *In re Antitrust Grand Jury (Advance Publications Inc.)*, 805 F.2d 155, 166 (6th Cir. 1996).