Another Assault on the Attorney-Client Privilege?

3rd Circuit Applies Crime-Fraud Exception To Attorney Advice on Subpoena Compliance

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Introduction

A federal grand jury issues a subpoena duces tecum calling for a corporation to produce certain documents. The in-house lawyer charged with subpoena compliance contacts employees who may have responsive documents. The lawyer reviews with each employee the contents of the subpoena and provides instructions and legal advice about document retention and production of responsive documents. The purpose of these communications, initiated by the lawyer, is plainly to make sure that the employees identify and make available all potentially responsive documents.

Are these communications — seemingly classic examples of privileged attorney-client communications — protected by the corporation’s attorney-client privilege? Not necessarily, according to an April 2006 U.S. Court of Appeals for the 3rd Circuit decision that appears to significantly expand the scope of the “crime-fraud exception” to the privilege. The case, In re Grand Jury Investigation, 445 F.3d 266 (3d Cir. 2006), invoked the exception to compel an organization’s attorney to testify to the substance of his communications with one of the entity’s employees, where the government presented evidence that the employee was involved in deleting e-mails in order to obstruct its investigation. The court held that the communication was not privileged, even though the organization’s attorney and not the employee had initiated the discussions in order to help the company comply with a grand jury subpoena.

The Crime-Fraud Exception to The Attorney-Client Privilege

That attorney-client communications made “in furtherance of” a future or ongoing crime or fraud may not be shielded by the privilege, of course, is not new law. The crime-fraud exception traces its roots to British common law of the 1700s.1 It was recognized by the U.S. Supreme Court as early as 1891, when the court stated in dicta that “if a client applies to a legal adviser for advice intended to facilitate or to guide the client in the commission of a crime or fraud, the legal adviser being ignorant of the purpose for which his advice is wanted,” the communication is not privileged.2 The exception exists, according to Wigmore, because the rationale for the privilege “ceas[es] to operate at a certain point, namely, where the desired advice refers not to prior wrongdoing, but to future wrongdoing.”3 Moreover, as discussed below, these and other leading authorities recognize the exception even where the attorney is ignorant of the fraud, but the premise in those cases seems to be that the client sought the advice to further the crime.

The 3rd Circuit’s Decision

Background

The underlying facts in In re Grand Jury Investigation are somewhat obscure because the 3rd Circuit describes only minimal details in light of the ongoing grand jury investigation. However, based on what is revealed it appears that the 3rd Circuit has lowered the bar for piercing the attorney-client privilege on a crime-fraud theory. The case involves a federal grand jury investigation that was ini-
tially targeted at an individual who had certain business dealings with an organization.

At some point during the course of this investigation, the grand jury also began to investigate Jane Doe, the organization’s executive director, and issued a subpoena duxes tecum to the organization. The government was not satisfied with the organization’s initial response and followed up with a second subpoena to the organization. Just one day later the government also notified the organization’s attorney that it wished to have FBI and Internal Revenue Service experts scan the organization’s computers to recover deleted e-mails and other electronic records.

After receiving the subpoena and notice, the organization’s attorney called Jane Doe to discuss these subjects. Subsequently an FBI technician took mirror images of the organization’s hard drives and uncovered evidence suggesting that employees of the organization, including possibly Jane Doe, had attempted to delete e-mail.

The government later sought to compel production of the lawyer’s notes of his conversation with Jane Doe about the subpoena, as well as the lawyer’s testimony about the substance of that conversation. The lower court ruled that this evidence was not within the ambit of the attorney-client privilege, concluding after an ex parte hearing that the crime-fraud exception to the privilege applied. The court found sufficient evidence that, at the time of her conversation with the organization’s lawyer, Jane Doe was in the process of committing obstruction of justice and had used the lawyer’s advice in furtherance of her crime. The 3rd Circuit affirmed.

The Court’s Opinion Breaks New Ground

The court’s decision appears to expand the crime-fraud exception to garden-variety corporate attorney-client communications and could undermine the confidentiality on which corporations and their attorneys continue to rely (even in an era when government waiver demands have eroded the privilege in other respects). Federal courts of appeals had previously invoked the exception in circumstances where the attorney was unaware that the client was contemplating or committing a crime or fraud. However, none appears previously to have held routine legal advice by an entity’s lawyers to its employees about subpoena compliance to be unprotected. The 3rd Circuit even acknowledged that its holding was unique: “Concededly, there are no opinions of which we are aware that apply the crime-fraud exception in precisely these circumstances.”

Previous federal appeals court decisions compelling disclosure of attorney-client communications based on the crime-fraud exception appear generally to fall into one of three categories: cases in which the client sought the advice or assistance of an attorney with the intent of furthering a fraud or other crime; cases in which the attorney submitted false information on behalf of the client to another party, a government agency or a court; and cases in which the attorney was knowingly involved in the client’s wrongdoing (and in some cases actually induced or encouraged the client to engage in the crime or fraud).

In re Grand Jury Investigation does not fit into any of these categories. The first does not apply because Jane Doe did not solicit or initiate the communication with the intent to commit a crime; she received unsolicited advice from the organization’s lawyer. As for the second, the attorney transmitted no information on behalf of Jane Doe. Nor does the advice fit within the third category because there was “no suggestion that attorney did anything improper in transmitting this communication to Jane Doe and providing legal advice on how to respond” or “that attorney was aware of either past wrongdoing or potential future wrongdoing.” Id. at 279.

Client’s Initiation Not Required to Trigger Exception

One of the most striking aspects of the opinion is that the 3rd Circuit specifically rejected the argument that the crime-fraud exception did not apply because the employee, Jane Doe, did not initiate the conversation with the attorney or solicit his advice. Doe pointed out that in an earlier 3rd Circuit decision, United States v. Doe, 429 F.3d 450, 454 (3rd Cir. 2005), the court stated that “[o]nly when a client knowingly seeks legal counsel to further a continuing or future crime does the crime-fraud exception apply.”

However, the In re Grand Jury Investigation court brushed this point aside, asserting that the sentence in Doe merely “reflects the facts of that case.” The court concluded, without citation or analysis, that “[n]othing in [Doe], or in any opinion, suggests that the crime-fraud exception applies only if the client initiates the conversation.” 445 F.3d at 274.

The 3rd Circuit’s language in Doe about the need for the client to seek out the legal advice was actually more faithful to precedent applying the crime-fraud doctrine than is its statement in In re Grand Jury Proceedings. In each of the published appeals court decisions applying the doctrine in the first category described above, the communication was initiated by the client, who engaged in some affirmative act to elicit the assistance or advice of the attorney to effectuate a crime or fraud. (As noted above,
the second and third categories are irrelevant to the communications at issue in In re Grand Jury Investigation.) Courts have also emphasized that attorney-client communications are not subject to disclosure under the crime-fraud exception unless they “actually have been made with an intent to further an unlawful act.” United States v. White, 887 F.2d 267, 271 (D.C. Cir. 1989) (emphasis added). There would be no need to require that the client engaged in the communication with a criminal purpose and that the wrongdoer had set upon a criminal course before consulting counsel,” United States v. Jacobs, 117 F.3d 82, 88 (2d Cir. 1997), however, if the exception could be invoked even where a communication is initiated by a company’s attorney for the innocent purpose of assisting the company in satisfying its legal obligations.

Moreover, some of the seminal authorities on the crime-fraud exception contain language supporting a client-initiation requirement in cases where the attorney is unaware of the crime or fraud. For example, in United States v. Zolin, the Supreme Court opined that the exception applies only to “communications made for the purpose of getting advice for the commission of a fraud or crime.” 491 U.S. 554, 563 (1989) (emphasis added) (citation omitted). And Supreme Court Standard 503, which U.S. District Judge Jack B. Weinstein has described as “a powerful and complete summary of black-letter principles of lawyer-client privilege,” states that the privilege does not apply “if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud.” The “sought” and “obtained to” language suggests that a purposeful act by the client is required. Moreover, the 3rd Circuit’s opinion in Doe, on its face, plainly limits the application of the crime-fraud exception to cases where the client “knowingly seeks legal counsel” to further an illegal act, notwithstanding the holding of In re Grand Jury Investigation.

**Temporal Proximity Between Communications With Attorney and Client’s Alleged Crime Sufficient to Establish That Communications Were ‘In Furtherance’**

Another aspect of the 3rd Circuit’s holding reflecting an unusually expansive reading of the exception is the minimal nexus the court found sufficient to establish that the communications were “in furtherance of” the crime or fraud. The 3rd Circuit applies a fairly standard two-part test to evaluate whether the exception applies: The government must show that “the client was committing or intending to commit a fraud or crime, and the attorney-client communications were in furtherance of that alleged crime or fraud.” The lower court had concluded that the government satisfied the second prong of the test, citing an unpublished 3rd Circuit “not precedentual opinion” holding that merely showing that the communications with the attorney “were related to” the continuing or intended fraud is sufficient to meet the standard. Interestingly, the 3rd Circuit criticized this aspect of the lower court’s decision. The court rebuked the judge for improperly relying on a non-precedentual opinion and insisted that the privilege cannot be pierced unless the communication is actually “in furtherance of” the crime or fraud, rejecting what it termed “the more relaxed ‘related to’” standard.

This critique, however, rings hollow, because in application the court’s “in furtherance” test was virtually indistinguishable from the “more relaxed” standard the district court employed. The 3rd Circuit concluded that the communications were “in furtherance” of Doe’s obstruction of justice, because the attorney “made it clear” to Doe “what the government wanted and what was called for in response to the subpoenas,” and “[i]f, with knowledge of the government’s interest in retrieving any remaining e-mails, Jane Doe continued to receive e-mails that were arguably responsive to the subpoena and failed to use her position as an executive of the organization to direct that all e-mail deletions stop immediately, she may be viewed as furthering the obstruction of the grand jury’s investigation or the obstruction of justice.”

The court’s only caveat was its observation that perhaps it would not have reached the same result if Doe had been “a low-level employee.” In essence, all the court required to satisfy the “in furtherance” prong was some showing of “temporal proximity” between the alleged e-mail destruction and the attorney’s instructions to Doe regarding the subpoena. The court also stated that the government can show that “the lawyer’s advice or other services were misused … by evidence of some activity following the improper consultation, on the part of either the client or the lawyer, to advance the intended crime or fraud.”

This reasoning, like the court’s refusal to consider that the attorney initiated the contact in order to help the company satisfy its obligation to comply with the subpoena, seems to expand the exception beyond the bounds established by prior precedent. The opinion itself tacitly acknowledges as much. For example, even though the court relied on “the temporal proximity” between the communications and the alleged obstruction, it cited a D.C. Circuit case “noting that more than ‘mere coincidence in time’ is needed to support invocation of crime-fraud exception.” Likewise, the court’s statement requiring “some activity following the improper consultation … to advance
the intended crime or fraud” is telling, because it assumes that the consultation between the attorney and client was “improper,” which, of course, was not the case, because the attorney had initiated the communication for the entirely appropriate purpose of enabling the company to satisfy its legal obligations under the subpoena.

The extent to which the 3rd Circuit’s decision will actually lead to compelled disclosure of classic subpoena compliance advice by a corporation’s attorneys remains to be seen. Even if the decision is given a broad reading, however, attorneys responsible for overseeing an entity’s compliance with a government subpoena cannot responsibly fail to give advice regarding the interpretation and scope of subpoenas; they must continue to take prudent and reasonable steps to ensure that the entity preserves and produces responsive documents, including discussing the contents of the subpoena with employees while providing appropriate legal advice relating to the subpoena.

It is possible that the expansive language in In re Grand Jury Investigation will ultimately be narrowed in some way. Perhaps the egregiousness of the alleged obstruction, as described at the ex parte hearing but not made public, is what drove the unusual result in the case. Another potential basis for reading the opinion narrowly is that the government was unsatisfied with the organization’s compliance with its first subpoena, and took the unusual step of not only issuing a second subpoena but also sending a forensic expert to excavate deleted computer files and e-mails. A corporate attorney who learns that the government believes that responsive documents have been withheld or destroyed should exercise discretion in sharing that information with employees whom the government may suspect are involved in efforts to obstruct justice. In such a situation, the attorney may even wish to consider seeking the government’s advice as to the most prudent way to comply with a subpoena or other request for information without jeopardizing the integrity of the investigation.

Notes
1 See David J. Fried, Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds, 64 N.C. L. Rev. 443, 445 & n. 16 (1986).
4 In re Grand Jury Investigation, 445 F.3d at 268.
5 Id. at 280.
6 A complete review is not possible, because many cases, particularly those arising in the context of grand jury proceedings, omit or truncate discussion of the underlying facts.
7 In re Grand Jury Investigation, 445 F.3d at 278.
8 See, e.g., United States v. Edwards, 303 F.3d 606 (5th Cir. 2002) (defendant hired attorney for purpose of concealing bribery and fraud); United States v. Reeder, 170 F.3d 93 (1st Cir. 1999) (defendant asked lawyer for help in covering up his fraudulent use of insurance company money); United States v. Under Seal (In re Grand Jury Proceedings), 33 F.3d 342 (4th Cir. 1994) (clients were engaged in illegal conduct when they sought legal counsel and used attorneys to perpetuate criminal or fraudulent behavior); In re Grand Jury Subpoena 92-1 (SJ), 31 F.3d 826 (9th Cir. 1994) (corporation sought assistance of counsel in obtaining export licenses, one of which was used to facilitate export scheme involving dummy corporation); Doe v. United States, 13 F.3d 633 (2d Cir. 1994) (client sought to “solicit the assistance of an attorney in the commission of a crime”); United States v. Inigo, 925 F.2d 641 (3d Cir. 1991) (client hired attorney specifically to help further ongoing extortion); In re Grand Jury, 845 F.2d 896 (11th Cir. 1988) (defendants obtained advice of unknowing counsel for the purpose of tampering with jury).
9 See, e.g., United States v. Under Seal, 102 F.3d 748 (4th Cir. 1996) (innocent attorneys legitimized client bank’s crime or fraud by using false date on correspondence and statements); United States v. Chen, 99 F.3d 1495 (9th Cir. 1996) (innocent attorneys transmitted fraudulent information to Customs officials as part of tax evasion scheme; clients used attorneys’ prestige in Customs bar to shield their guilt); United States v. Collis, 128 F.3d 313 (6th Cir. 1997) (lawyer submitted client’s forged letter of recommendation to court); United States v. Edgar, 82 F.3d 499 (1st Cir. 1996) (attorney submitted false income tax return and fraudulent demand letter provided by client); United States v. Laurins, 857 F.2d 529 (9th Cir. 1988) (attorney transmitted false information to IRS on behalf of client); In re Sealed Case, 676 F.2d 793 (D.C. Cir. 1982) (attorneys prepared affidavit in which client may have lied); In re Berkeley & Co., 629 F.2d 584 (8th Cir. 1980) (company lawyer was involved in filing documents relating to alleged customs fraud).
10 See, e.g., In re Grand Jury Proceedings, 417 F.3d 18 (1st Cir. 2005) (attorney “directed his client to commit perjury, after initially advising him to tell the truth”); White v. Am. Airlines, 915 F.2d 1414 (10th Cir. 1990) (outside counsel for company repeatedly requested that company vice president perjure himself, thus vitiating company’s privilege); In re Sealed Case, 754 F.2d 395 (D.C. Cir. 1985) (Synanon Church began campaign of perjury and massive evidence destruction at the direction and with the knowledge of the church’s lawyers, who essentially served as “front men” in scheme to defraud government); United States v. Martin, 278 F.3d 988 (9th Cir. 2002) (after defendant created sham company, he hired lawyer to be sham general counsel); In re Grand Jury Proceedings, 680 F.2d 1026 (5th Cir. 1982) (criminal defendant was told by conspirator that he would be “taken care of” if arrested, so lawyer’s subsequent provision of legal services paid for by third party was part of explicit conspiracy); United States v. Ballard, 779 F.2d 287 (5th Cir. 1986) (client entered into financial arrangement where he deeded property to his attorney, in part to avoid tax lien); United States v. Harvath, 731 F.2d 557 (8th Cir. 1984) (lawyer conducted transactions in support of client’s business selling illegal drugs).
11 The court also found it irrelevant that the communication was made in the context of a pre-existing attorney-client relationship, reasoning that “the crime-fraud exception is equally applicable in
situations where there has been a prior attorney-client relationship and the communication at issue was made in the context of that relationship. There would be no reason to limit the applicability of the crime-fraud exception to client-initiated contact, as the exception’s purpose is to further frank and open exchanges between the client and his or her attorney, whether newly retained for purposes of the investigation or otherwise.” In re Grand Jury Investigation, 445 F.3d at 274. It is unclear precisely what the court meant. The purpose of the privilege, of course, is to “further frank and open exchanges between the client and his or her attorney,” leading to protection for attorney-client communications regardless of the age of the relationship; however, that is not the purpose of the exception, which ought to be limited to situations in which the client is abusing the otherwise privileged nature of the relationship in order to further some crime or fraud.

12 See also In re Grand Jury Subpoenas Duces Tecum, 798 F.2d 32, 34 (2d Cir. 1986) (exception applies “only when there is probable cause to believe that the communications with counsel were intended in some way to facilitate or conceal the criminal activity”) (emphasis added).

13 Supreme Court Standard 503(d)(1), reprinted in Jack B. Weinstein & Margaret A. Berger, Weinstein’s Evidence Manual § 18.03[1], at 18-16 (emphasis added).

14 See United States v. Doe, 429 F.3d at 454 (emphasis added).

15 In re Grand Jury Investigation, 445 F.3d at 274 (citations omitted).

16 Id. at 276-77.

17 Id. at 279.

18 Id. at 279 n.5.

19 Id. at 279.

20 Id. (citing In re Public Defender Serv., 831 A.2d 890, 910 [D.C. 2003]).

21 Id. (citing In re Sealed Case, 754 F.2d 395, 402 [D.C. Cir. 1985]).

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