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The Crime-Fraud Exception: A Defense Lawyer's Quandary

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James Mitchell and Kelly Lin

Your client Dash has been indicted for a federal crime and is currently on pretrial release, and the terms of his bond make it a crime to leave the country. Dash shows up at your office and asks you one question: what countries in North and South America do not have an extradition treaty with the United States?

Not really sure if he is serious about the question, as a responsible counselor, you tell Dash that it would be a crime to leave the country and a really bad idea. Nevertheless, he asks for the answer, which you provide. The next day, Dash is sitting on a beach in Cuba.

This familiar hypothetical, which for many a criminal defense practitioner may not be so hypothetical, offers a good starting point to consider the quandary often presented by the crime-fraud exception to the attorney-client privilege. Is your client's question to you, and your advice, protected by that privilege, or are you subject to disclosing it to a grand jury should an industrious assistant U.S. attorney serve a subpoena on you seeking information about any conversations you may have had with Dash about extradition? And if the crime-fraud exception applies, should you have also considered telling Dash of that possibility when he first asked you the question and avoiding the issue altogether?

Attorney-Client Privilege and the Crime-Fraud Exception

While "the oldest of the privileges for confidential communications known to the common law," *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981), the attorney-client is not absolute. The crime-fraud exception to the attorney-client privilege, though itself long-established, garners little attention until an industrious prosecutor like the one in our hypothetical decides to seek its application in a case that makes headlines. Indeed, recent prosecutions of former President Donald Trump have pushed the crime-fraud exception into the news.

The attorney-client privilege does not protect client communications in furtherance of contemplated or ongoing criminal or fraudulent conduct. As the U.S. Supreme Court has recognized, the privilege's purpose of encouraging frank discussion between clients and their counsel "ceases to operate at a certain point, namely, where the desired advice refers not to prior wrongdoing, but to future wrongdoing." *United States v. Zolin* 491 U.S. 554, 562-63 (1989).

While the crime-fraud exception's use is limited in practice, the standard of what confidential communications are subject to it remains vague and is thus a potential quagmire for counsel trying to represent their clients zealously. To that point, the communication at issue need only "reasonably relate" to a crime or fraud for the exception to apply. *See, e.g., SEC v. Collector's Coffee*, 338 F.R.D. 309, 316 (S.D.N.Y. 2021); *Enron Broadband Services v. Travelers Casualty & Surety Company of America (In re Enron Corp.)*, 349 B.R. 115, 127-28 (Bankr. S.D.N.Y. 2006).

Reluctance To Use the Exception

The crime-fraud exception's limited use appears tied to the fact that nobody in the criminal justice system really wants to use it. Courts recognize its potential to jeopardize the open client-attorney communications essential to the proper functioning of the criminal justice system. Indeed, as the Supreme Court noted in *Fisher v. United States*, "if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice." 425 U.S. 391, 403 (1976).

Beyond that is the concern that compelling an attorney and his client to produce their otherwise privileged communications may risk running afoul of the client's constitutional right against self-incrimination.

Prosecutors are fearful that using the exception may tread too deeply into the attorney-client relationship and potentially taint a case. Thus, the Department of Justice Manual cites the "potential effects upon an attorney-client relationship" in requiring that any subpoena to an attorney for information relating to a client's representation must be authorized by the Assistant Attorney General or a Deputy Assistant Attorney General for the Criminal Division. The manual also directs prosecutors to seek such information from "alternative sources" or voluntarily from the attorney before resorting to a subpoena. *See* Justice Manual, Section 9-13.410.

Finally, it goes without saying that the last thing defense attorneys want is to find themselves providing such evidence to a prosecutor or appearing in camera before the judge in a case involving their client so the court can assess the exception's applicability.

Where Is the Line Drawn?

The crime-fraud exception applies regardless of whether a crime occurs, so long as that misconduct is the objective of the client's communication. So, theoretically, even if Dash never made his way to Cuba, as long as he came to your office with the intent to do so, your conversation about extradition may nevertheless be discoverable. That is so even though, under the New York Rules of Professional Conduct, a lawyer is not required to reveal that very same communication. *See* Rule 1.6(b)(2) ("A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary . . . to prevent the client from committing a crime").

Again, the exception's application turns on whether the communication is "reasonably related" to a crime or fraudulent conduct. While our hypothetical conversation seems to easily meet that standard (i.e., "reasonably related" to the federal bail jumping crime, 18 U.S.C. §3146), not surprisingly, the case law highlights the type of delicate parsing courts must undertake in drawing this line.

For example, In *re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032 (2d Cir. 1984), involved a subpoena served on Marc Rich & Co. A.G's (AG) former counsel. In applying the exception, the U.S. Court of Appeals for the Second Circuit drew a line between various relevant documents. Communications regarding the attorney's advice concerning the sale of AG's subsidiary to its chief executive officer prior to the date of the sales agreement were subject to the exception because the advice was sought for the wrongful purpose of delaying or hindering the government's ability to fine AG for failing to respond to a subpoena.

However, the legal advice relating to employee compensation plans and a corporate reorganization were not sufficiently related to the misconduct to warrant application of the crime-fraud exception.

Some of the crime-fraud exception's parameters have been clarified by the case law. For example, it is well established that not all of the participants in the communication must have the wrongful intent. In *United States v. Richard Roe (In re Richard Roe)*, 168 F.3d 69 (2d Cir. 1999), the Second Circuit reversed the district court's ruling that the crime-fraud exception did not apply because one of the privilege holders was innocent. *See also Duttle v. Bandler & Kass*, 127 F.R.D. 46, 53 (S.D.N.Y. 1989) ("[T]he purported innocence of [Plaintiff's] personnel is irrelevant as long as the legal advice they were seeking was nevertheless advancing the fraudulent activity."); *Securities Investor Protection v. Bernard L. Madoff Investment Securities*, Nos. 08-01789 (SMB), 10-04216 (SMB), 2017 Bankr. LEXIS 519, at *23 (Bankr. S.D.N.Y. Feb. 17, 2017) (ordering production of otherwise privileged records under the exception as the fact that the other defendant "may not have been involved in the fraudulent scheme d[id] not alter th[e] result").

Another dilemma for defense counsel is those cases recognizing the potential applicability of the crime-fraud exception based on an intentional tort that may not even be a crime in the relevant jurisdiction. In *Madanes v. Madanes*, 199 F.R.D. 135 (S.D.N.Y. 2001), the court rejected the argument that the exception applied to a lawyer's representation of his former clients' adversary (and sister) in the same legal action and the disclosure of their confidential information because the conduct (while illegal in Argentina where the lawyer worked) was not a crime or a fraud in the jurisdiction where the case was pending.

The court did, however, agree to review the relevant documents in camera because the conduct may have represented an intentional tort and could thus provide a basis for the crime-fraud exception. *See also Sackman v. Liggett Group*, 173 F.R.D. 358, 364 (E.D.N.Y. 1997) ("[T]he crime-fraud exception applies to 'intentional torts moored in fraud'" (quoting *Cooksey v. Hilton International*, 863 F. Supp. 150, 151 (S.D.N.Y. 1994)).

A Lawyer's Dilemma

A defense lawyer's job in helping clients understand the law is grounded in the ability to have frank, confidential communications. And while the crime-fraud exception serves an important purpose, its often hazy contours add an element of uncertainty as to whether those frank conversations might wind up as evidence in a criminal trial.

All of that counsels a careful, measured approach to such delicate conversations and, perhaps, a warning at the outset that they could be subject to disclosure.

James Mitchell *is a partner in Ballard Spahr's New York office. He focuses on criminal and civil litigation, as well as security matters within the securities industry.* **Kelly Lin** *is an associate in the firm's litigation department, where she focuses on white-collar defense and internal investigations.*