KAUFMAN DOLOWICH VOLUCK

IT'S A PRIVILEGE, NOT A RIGHT

The Crime-Fraud Exception to the Attorney Client Privilege

Author:
Jack S. Kallus
Partner

Co-Author
Labeed Choudhry
Attorney

February 7, 2023

Jack S. Kallus, Partner
Florida
New York
Email: jkallus@kdvlaw.com
T: 954.408.2405

Labeed Choudhry, Attorney
Florida
Email: Labeed.Choudhry@kdvlaw.com
T: 954.408.2412

IT'S A PRIVILEGE, NOT A RIGHT

The Crime-Fraud Exception to the Attorney Client Privilege

Introduction

On February 18, 2011, Mark Arthur Ciavarella Jr. was found guilty of racketeering by a federal jury.[1] Ciavarella was involved in a scheme known as "Kids for Cash" and was sentenced to 28 years is federal prison.[2] On June 27, 2011, Rod Blagojevich was found guilty of 17 federal charges related to corruption and spent almost eight years in prison. On May 11, 2009, Marc Stuart Dreier pled guilty to eight charges of fraud in federal court.[3] Dreier's Ponzi scheme included an attempt to sell more than $950 million in fictitious promissory notes and he was subsequently sentenced to 20 years in federal prison. On July 14, 2022, Alex Murdaugh was indited by a grand jury in the murder of his wife and son.[4] Murdaugh had been, and continues to be, under investigation for financial crimes in the millions of dollars at the time of the murder. On January 27, 2010, Scott W. Rothstein pled guilty to five federal counts.[5] Rothstein ran a $1.2 billion Ponzi Scheme and was subsequently sentenced to 50 years in federal prison. On August 21, 2018, Michael Cohen pled guilty to eight federal counts including tax fraud and bank fraud.[6] Cohen was sentenced to three years in federal prison.

The individuals that committed these egregious frauds were not people that were living on the edge of society. Their shared profession granted them a veneer of respectability that they fully exploited. All these individuals were at one time or another well-known attorneys. Many would have argued that they would be the last people that would ever commit any type of fraud. Perhaps that was the very thing that allowed these frauds to remain undetected for so long because no person, or group of people, is completely above reproach.

These individuals used their position as attorneys, and in the case of Ciavarella, as a Pennsylvania State Court judge, to commit egregious frauds. Ciavarella used his seat on the bench to illegally sentence children accused of mild infractions to be incarcerated in a private prison in which he had a financial stake.[7] Drier used his position as a New York attorney to convince unsuspecting investors that the Ponzi scheme he was involved in was legally sound.[8] Drier was also able to perpetuate his scheme for years because his fraudulent promissory notes were allegedly issued by Solow Realty, an actual client of Drier.[9] Drier even dipped into his firm's escrow account to prop up his Ponzi scheme when it initially started unraveling.[10] Murdaugh was a South Carolina attorney who is alleged to have stolen millions in death settlement funds from the estate of his late housekeeper after concocting a lawsuit with the housekeeper's family to sue himself for the housekeeper's death.[11]

As personal counsel to a sitting United States President, Cohen was one of the most widely recognized and well-publicized lawyers in recent history. It became widely known that Cohen lied under oath, committed tax fraud, and made illegal hush money payments, all while ostensibly acting as a lawyer on behalf of his client. Cohen's actions are reminiscent of another lawyer who committed crimes and assisted another former president in a cover-up. John Newton Mitchell was the 67th Attorney General of the United States under Richard M. Nixon but was eventually sentenced to prison for the multiple crimes he committed for Nixon during Watergate.

Closer to home, Rothstein's Ponzi scheme was run out of a law office in Fort Lauderdale. Not only was Rothstein's $1.2 billion scheme one of the largest frauds ever perpetrated, but it is also perhaps the most egregious as it was predicated entirely on Rothstein's profession as an attorney. Rothstein, who had

been given an AV Preeminent peer review rating by Martindale-Hubble,[12] would claim to investors that his firm had settled sex discrimination cases for millions of dollars but that the settlement payout would be over time and his clients needed the money now. Rothstein offered potential investors the opportunity to buy the bogus settlements for a lump sum payment far less than the total settlement amount. Rothstein used his status as a lawyer and his knowledge of the legal system to dupe investors and perpetuate a scheme that only a lawyer could have concocted or executed.

While these lawyers committed these crimes and frauds mostly for personal pecuniary gain, lawyer misconduct is not limited to private lawyers. Prosecutors are routinely accused of misconduct that result in innocent people being jailed, sometimes for decades at a time.[13] The Death Penalty Information Center has found that a sizable portion of all death sentences that have been imposed since 1972 have been overturned because of prosecutorial misconduct. Not only can prosecutorial misconduct result in injustices being perpetuated and erode confidence in the justice system, but it can also take a financial toll on communities and taxpayers when the wrongly convicted invariably file suit. [14]

There have also been many instances of lawyers committing frauds and other unsavory acts that have not resulted in criminal prosecution but have spawned civil lawsuits. One recent example is of a lawsuit that was filed against a law firm that was involved with debt-counseling companies.[15] In that scheme, the lawyers and the debt relief companies would work together to force their clients, student loan debtors, into default and then file what essentially amounted to bogus TCPA[16] lawsuits against the loan providers without the knowledge or consent of the student loan debtors.[17] A lawsuit, Navient Solutions, LLC, v. Law Office of Jeffrey Lohman, P.C. ("Navient Lawsuit"), was eventually filed in 2019 against the lawyers and the debt relief company that resulted in a jury verdict of over $1 million in favor of the plaintiffs. In another civil case, lawyers were accused of working with their clients to obtain false chest x-rays as part of a scheme to get favorable settlements in asbestos litigation ("Asbestos Lawsuit").[18] In yet another case involving malfeasance on part of both a judge and a lawyer, a lawyer filed a frivolous lawsuit as part of a scheme to shield his client from creditors. The lawyer then bribed the judge overseeing the lawsuit by buying up a mortgage that the judge was personally liable for and making payments on that mortgage to influence the judge's rulings.[19]

During both the Navient Lawsuit and Asbestos Lawsuit, and during other civil and criminal lawsuits involving lawyer led or aided fraud, the lawyers attempted to thwart discovery or investigation into their wrongdoings by withholding documents and testimony on the basis of the attorney-client privilege. Specifically, the attorneys in the Navient Lawsuit attempted to shield their communications with the student loan debtors from discovery on the basis of the attorney-client privilege.[20] Similarly, the lawyers in the Asbestos Lawsuit attempted to shield their communications regarding the fraudulent x-rays from discovery by relying on the attorney-client privilege.[21]

Attorney-Client Privilege and the Crime-Fraud Exception

An attorney's communication with their client is generally protected by the attorney-client privilege. It is one the oldest and most well-recognized privileges in the law. Originating from English Common Law as early as the 16th century, it was explicitly recognized by the United States Supreme Court in the early 19th century and has since been codified in most jurisdiction in the United States.[22] The idea behind the law is to encourage full disclosure by clients to their lawyer without fear that the information will be revealed to others so that clients receive the best legal advice possible.[23]

Almost as soon as this right was established, it was abused by persons that wished to use their attorneys to commit frauds and crimes and use the privilege as a shield against disclosure. The potential for abuse of the attorney-client privilege was especially highlighted in the matter of *Annesley v. Earl of Anglesea*, *17 How. St. Trials 1139 (1743).* The plaintiff Annesley claimed that he was the son of one Arthur Baron Altham and the heir to one of the largest estates in England. The estate was now occupied by Altham's brother who became the Earl after Altham died. The Earl was accused of plotting to kidnap Annesley, his orphaned nephew, and indenturing him to service in the West Indies for thirteen years to make sure that Annesley would not inherit his father's estate. When Annesley was finally able to make it back to England, the Earl used to his attorney to bring false murder charges against Annesley. When Annesley was finally able to bring suit against the Earl, the Earl attempted to use the attorney-client privilege to prevent any examination of his attorney regarding the Earl's plotting. The English Courts held that given what was alleged by Annesley, the Earl could not claim privilege in refusing to allow the court to consider his attorney's testimony. It was this ruling that allowed Annesley to prevail in his lawsuit and regain his inheritance.[24] It was also this ruling that ultimately formed the genesis of the crime-fraud exception to the attorney-client privilege.[25]

In essence, the crime-fraud exception to the attorney-client privilege provides that otherwise privileged attorney-client communications are not protected from disclosure if they were made for the purpose of committing or furthering a crime or a fraud.[26] The courts in both the Navient Lawsuit and the Asbestos Lawsuit used the crime-fraud exception to the attorney-client privilege to compel the discovery sought by the parties alleging the fraud.

Importance of the Crime-Fraud Exception

Given the wide prevalence of attorney misconduct, both on their own behalf and on behalf of their clients, and clear legal authority recognizing this practicing, the justice system should not brush aside or take lightly claims of fraud committed by attorneys.[27] Instead, the justice system should be highly sensitive to such claims and should vigorously engage with these claims so that they can be adjudicated on the merits. In fact, "search for the truth, weigh[s] heavily in favor of denying the privilege" in circumstances where the crime-fraud exception is applicable.[28] The circumstances do not all need to involve billion-dollar Ponzi Schemes like Rothstein's or need to be repugnant as a judge accepting bribes to send children to jail or otherwise result in a front-page news article.

There are over 1.3 million attorneys in the United States[29] and to assume that no one in a population so large could commit fraud is a rather naïve notion[30], especially considering the glaring examples to the contrary. The mere fact that someone passed a perfunctory character and fitness evaluation as part of the process of being admitted to a bar does not mean that that person should be given the benefit of the doubt not afforded to the general public. As such, Courts have a duty to treat allegations against an attorney just as they would allegations against a non-attorney. While state bar organizations have become much

better disciplining attorneys for committing crimes or perpetrating frauds[31], the Courts cannot forego their duties and responsibilities as independent arbiters of justice when claims are raised against attorneys. In fact, while state bar organizations can initiate their own proceedings against an attorney for conduct that is deemed fraudulent or criminal, state bar organizations often do not take disciplinary action until after a conviction or guilty plea.[32] It could also be argued that a self-regulating profession such as ours should give greater credence to claims of fraud committed by an attorney to forestall any claims of favoritism or lax oversight.[33]

Courts are sometimes reluctant to invade the attorney-client privilege[34] on the basis of the crime-fraud exception but the law does not support any such reluctance. When it is alleged that a fraud has been committed, either by an attorney or by a lay person after consultation with an attorney, the Courts should not unduly shield the attorneys.

As the *Annesley* case shows, the crime-fraud exception to the attorney-client privilege was put in place specifically so that the privilege could not be used to shield bad acts. At its most basic level, the crime-fraud exception states that if a person communicates with an attorney regarding the commission of a future crime or fraud, then that conversation discoverable and admissible in court just as if the person had communicated with a non-attorney.[35] The crime-fraud exception also applies when it is the attorney alone that purportedly committed the crime or fraud.[36]

Application of the Crime-Fraud Exception in Civil Litigation

Civil litigators are often stymied in their discovery requests by claims of attorney-client privilege, especially when one of the defendants is an attorney.[3738] In many cases, especially in the context of commercial litigation, it can easily be established that there was a communication with an attorney and then the fraud or other wrong act was committed. For example, there was no dispute in the Navient case that the attorneys communicated with the student loan debtors.[39] Similarly, the plaintiffs in the Asbestos Lawsuit were seeking correspondences and communications between the lawyers alleged to have participated in the fraud and their clients.[40] The communications with the attorney can be critical to show knowledge or intent or for impeachment purposes.[41] Rather than being dismayed that such information will never see the light of day, litigators should not lose sight of the fact that the attorney-client privilege can be overcome.

Notwithstanding the fact that not all claims of attorney-client privilege are valid and can be overcome on their face once tested, even a validly asserted attorney-client privilege can be overcome through the application of the crime-fraud exception.[42]

In evaluating a request to invade the attorney-client privilege on the basis of the crime-fraud exception, Courts are not permitted to give any deference to upholding the privilege.[43] Instead, courts must address each request head-on and evaluate it on the merits.

The party seeking to invade the privilege must first make a prima facie case showing that the adverse party was engaged in criminal or fraudulent conduct when it sought the advice of counsel, was planning on such conduct when advice of counsel was sought, or that the party committed a crime or fraud after receiving counsel's advice.[44] While the initial burden is placed on the party seeking to invade the privilege, a prima facie showing is one of the lowest burdens recognized in the law as it requires but a simple proffer.[45] Thus, the simple showing that a crime or fraud was committed after a person consulted with an attorney may be enough, under certain circumstances, to make the prima facie showing to overcome the attorney-client privilege.

Once the prima facie showing has been made, the burden shifts to the party asserting the privilege to

show, by a preponderance of the evidence, that there is a reasonable explanation for the party's conduct.[46] This burden on the party asserting the privilege, preponderance of the evidence, is higher[47] than the burden on the party seeking to invade the privilege, prima facie case. The parties, and the Court, should keep this in mind when evaluating requests to invade the attorney-client privilege. It should also be noted that the assertion of attorney-client privilege in the corporate context is generally subject to an even higher level of scrutiny so the burden on a corporate party asserting the privilege may be even higher than preponderance of the evidence.[48]

This process was followed by the United States District Court for the Southern District of Florida in a federal securities law class action lawsuit brought by plaintiffs that had purchased stock but alleged that the company concealed and misrepresented facts related to the company's potential liabilities from potential products liability lawsuits regarding a product.[49] In that case, the plaintiffs sought discovery of documents that were claimed to be privileged, arguing in part that the crime-fraud exception vitiated such privilege. After the plaintiff made prima facie showing of fraud, the District Court found that burden then shifted to the defendants to overcome that showing by preponderance of the evidence. The District Court ultimately held that the defendants were unable to make such a showing and ordered a production of the documents sought to be withheld, demonstrating once again that that this evidentiary tool is applicable to all types of fraud, not just frauds that are especially egregious or otherwise newsworthy.

Conclusion

In the US legal system, the Courts not only serve as neutral arbiters of justice but are also instrumental in maintaining the integrity of the legal profession and in regulating lawyers. Courts are required to protect society at large from unscrupulous lawyers by ensuring that lawyers do not use their background to perpetrate crimes and frauds. The Crime-Fraud exception is a powerful tool in ensuring that the crimes and frauds committed by unscrupulous lawyers are not hidden behind the shield of the Attorney-Client privilege. Courts must apply the exception without hesitation when a proper showing has been made by the party seeking discovery so that all claims of crimes or fraud involving attorneys are adjudicated on the merits. Failure to do so perpetuates injustice and erodes the public's trust in the legal system.

References

1. Michael Sisak (August 13, 2011). "Ex-judge awaits transport in Philly". Standard Speaker.
2. Meisner, Jason; Pearson, Rick (February 18, 2020). "Rod Blagojevich released from prison after Trump commutes ex-Illinois governor's 14-year sentence". Chicago Tribune.
3. Weiser, Benjamin (14 July 2009). "Lawyer Gets 20 Years in $700 Million Fraud". The New York Times. p. A20.
4. https://www.nbcnews.com/news/crime-courts/alex-murdaugh-indicted-murder-charges-summary-timeline-rcna38026
5. https://www.forbes.com/sites/jordanmaglich/2014/10/31/on-fifth-anniversary-of-rothsteins-1-2-billion-ponzi-scheme-questions-re-main/?sh=1ae7aa15b145
6. https://www.cnbc.com/2018/12/12/trumps-ex-lawyer-and-fixer-michael-cohen-sentenced-to-3-years.html
7. https://www.mcall.com/news/pennsylvania/mc-nws-pa-kids-for-cash-20200128-zf3nokuykjh43gvoa55ohsfrja-story.html
8. https://www.cnbc.com/id/42572204
9. https://www.cnbc.com/id/42572204
10. Id.
11. https://www.nbcnews.com/news/crime-courts/alex-murdaugh-indicted-murder-charges-summary-timeline-rcna38026
12. https://www.martindale.com/attorney/scott-michael-dimond-772951/
13. https://innocenceproject.org/new-york-mans-conviction-overturned-prosecutorial-misconduct/
14. https://apnews.com/article/crime-new-york-lawsuits-manhattan-city-9206648e118591df824f0c37cd516a46
15. Navient Sols., LLC v. Law Offices of Jeffrey Lohman, L19CV461LMBTCB, 2020 WL 1917837, at *1 (E.D. Va. Apr. 20, 2020)
16. Telephone Protection Consumer Act 47 USC § 227
17. Id
18. CSX Transp., Inc. v. Robert V. Gilkison, CIV.A. 5:05-CV-202, 2009 WL 1528190, at *1 (N.D.W. Va. May 29, 2009)
19. Bankers Tr. Co. v. Rhoades, 859 F.2d 1096, 1099 (2d Cir. 1988)
20. Navient.
21. CSX.
22. Stacy Kochanowski, Attorney-Client Privilege: Expanding the Crime-Fraud Exception to Intentional Torts, 67 Buff. L. Rev. 1213 (2019).
23. Daniel Northrop, The Attorney-Client Privilege and Information Disclosed to an Attorney with the Intention That the Attorney Draft a Document To Be Released to Third Parties: Public Policy Calls for at Least the Strictest Application of the Attorney-Client Privilege, 78 Fordham L. Rev. 1481 (2009).
24. Brown, H. Lowell (1999) "The Crime-Fraud Exception to the Attorney-Client Privilege in the Context of Corporate Counseling," Kentucky Law Journal: Vol. 87. Iss. 4, Article 10.
25. Id.
26. Navient *4.
27. https://innocenceproject.org/ken-anderson-michael-morton-prosecutorial-misconduct-jail/
28. In re Impounded Case (Law Firm), 879 F.2d 1211, 1213–14 (3d Cir. 1989).
29. https://www.americanbar.org/news/abanews/aba-news-archives/2019/08/profile-of-the-profession-report/.
30. James J. Nolan III "Establishing the statistical relationship between population size and UCR crime rate: Its impact and implications" West Virginia University, Division of Sociology & Anthropology
31. Levin, Leslie C. "The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions." American University Law Review 48, no.1 (October, 1998): 1-83.
32. https://www.floridabar.org/news-release/disciplinary-action/supreme-court-disciplines-18-attorneys-5-31-22/
33. See Jonathan Macey, Occupation Code 541110: Lawyers, Self Regulation, and the Idea of a Profession, 74 Fordham L. Rev. 1079 (2005).
34. However, "courts have a duty to safeguard the sacrosanct privacy of the attorney-client relationship so as to maintain public confidence in the legal profession and to protect the integrity of the judicial proceeding."Sec. Inv'r Prot. Corp. v. R.D. Kushnir & Co., 246 B.R. 582, 587 (Bankr. N.D. Ill. 2000)
35. Hazard, Geoffrey C. Jr., "An Historical Perspective on the Attorney-Client Privilege" (1978). Faculty Scholarship at Penn Law. 1068.
36. Navient at *4.
37. Navient at *2.
38. CSX at *1.
39. Navient.
40. CSX at *1.
41. "[T]he crime-fraud exception or lawyer misconduct or both allow discovery of documents otherwise protected by the attorney-client privilege or the work product doctrine if the documents contain information which would impeach the testimony of the lawyer accused of misconduct, fraud or lack of knowledge." CSX *2.
42. Seasoned practitioner may see a similarity between this analysis and the analysis used to overcome a hearsay objection. For example, just because an attorney raises a hearsay objection does not mean that the testimony elicited or the document sought to be introduced is hearsay if it doesn't meet the definition of hearsay. At the same time, given the myriad of exceptions to the hearsay rule, even a properly asserted hearsay objection can be overcome. A similar analysis should be used to consider an attorney-client privilege objection. However, a full explanation of whether an attorney-client privilege objection is valid or not is beyond the scope of this article and this article presumes that the objection is valid but the party seeking the communication still wishes to overcome it.
43. Berry Plastics Corp. v. Intertape Polymer Corp., 3:10-CV-76-RLY-WGH, 2014 WL 840952, at *1 (S.D. Ind. Mar. 3, 2014)
44. Brown, H. Lowell (1999) "The Crime-Fraud Exception to the Attorney-Client Privilege in the Context ofCorporate Counseling," Kentucky Law Journal: Vol. 87 : Iss. 4 , Article 10.
45. "A prima facie standard of proof is relatively low." Prima Facie, Practical Law Glossary Item 2-518-8779
46. Brown, H. Lowell (1999) "The Crime-Fraud Exception to the Attorney-Client Privilege in the Context ofCorporate Counseling," Kentucky Law Journal: Vol. 87 : Iss. 4 , Article 10.
47. "It is far less demanding than the preponderance of the evidence" Prima Facie, Practical Law Glossary Item 2-518-8779
48. Batchelor v. Geico Cas. Co., 142 F. Supp. 3d 1220, 1243 (M.D. Fla. 2015)
49. Gutter v. E.I. Dupont De Nemours, 124 F. Supp. 2d 1291, 1293 (S.D. Fla. 2000)