

# The US crime-fraud exception to the attorney-client privilege

By Thomas Hall

The recent seizure by United States federal agents of documents in the possession of President Trump's personal lawyer, Michael Cohen, has generated much press and speculation concerning the scope of protection over those documents afforded by the attorney-client privilege. While many of those documents are reportedly unrelated to Cohen's representation of President Trump, there has been speculation that some of the investigators' focus is on possible campaign contribution violations. Reports of a \$130,000 payment allegedly made by Cohen to an adult film actress to obtain her silence could perhaps provide grounds for the assertion of such violations, depending on the source of those funds. In that event, according to continued press speculation, otherwise privileged communications between Trump and Cohen may lose their privileged status, should the court decide that the crime-fraud exception applies to documents dealing with that payment and the source thereof.

## The US attorney-client privilege

The attorney-client privilege is the oldest privilege recognised by the Anglo-American system of jurisprudence, its use being firmly established in English law as of the 16th century. Grounded in the concept of honour, the privilege works to bar any testimony by the attorney against the client.<sup>1</sup> The attorney-client privilege has been defined in the US as follows: '(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his [or her] capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his [or her] instance permanently protected (7) from disclosure by [the client] or by the legal adviser, (8) except the protection be waived.'<sup>2</sup>

At bottom, the privilege ensures 'that one who seeks advice or aid from a lawyer should be completely free of any fear that his secrets will be uncovered'. The principle underlying the privilege is for the attorney to provide 'sound legal advice [and] advocacy'.<sup>3</sup> With the protection of the privilege, the client can speak openly with counsel, disclosing all relevant information and creating a zone of privacy. Shielded by the privilege, the client may be more willing to communicate to counsel things that might otherwise be suppressed. By promoting such candour and honesty, the attorney can provide more accurate advice and the client can be secure in the knowledge that statements to the lawyer will not be used against his or her interest.

Under the protection of the privilege, the attorney may neither be compelled to, nor may he or she voluntarily disclose matters conveyed in confidence to him or her by the client for the purpose of seeking legal counsel. Likewise, the client may not be compelled to testify regarding communications with the lawyer for the purpose of seeking legal counsel.<sup>4</sup>

## The crime-fraud exception

Communications that would otherwise be protected by the attorney-client privilege generally are not protected in the US if they relate to client communications in furtherance of contemplated or ongoing criminal or fraudulent conduct. The rationale of the exception is that the privilege protects the provision of sound legal advice, but advice in furtherance of a fraud or illegal goal cannot be considered 'sound'. Rather, it is socially perverse and the client's communications seeking advice do not merit protection. Because the client and lawyer become instruments of a crime or fraud, their communications are no longer sacrosanct.<sup>5</sup>

To establish the crime-fraud exception under US law, a party must demonstrate that there is probable cause to believe that a fraud or crime has been committed and that the communications in question were in furtherance of the crime or fraud. Probable cause is the equivalent of 'a reasonable basis for believing that the objective was fraudulent'.<sup>6</sup> This 'require[s] that a prudent person have a reasonable basis to suspect the perpetration or attempted perpetration of a crime or fraud, and that the communications were in furtherance thereof'.<sup>7</sup> The criminal or fraudulent nature of the objective need not be conclusively established for the crime-fraud exception to apply; demonstrating a reasonable basis for believing that the objective was criminal or fraudulent may be adequate. A reasonable basis to suspect the perpetration or attempted perpetration of a crime or fraud may be demonstrated by a showing that the client was engaged in planning a wrongful scheme when seeking advice from counsel, or committed or attempted to commit a crime or fraud after receiving the benefit of counsel's work.<sup>8</sup>

Communications in furtherance of the crime or fraud are those that reasonably relate to the subject matter of the crime or fraud<sup>9</sup> or have some relationship between the communication at issue and the prima facie violation.<sup>10</sup> That is, there must be 'purposeful nexus' between the communications at issue and the criminal or fraudulent activity as opposed to mere 'temporal nexus'.<sup>11</sup> Probable cause for the application of the crime-fraud exception may be found without a finding that the attorney had criminal or fraudulent intent.<sup>12</sup>

## Privileged communications outside the US

When privileged communication takes place in a country outside the US, US courts generally defer 'to the law of the country that has the "predominant" or "the most direct and compelling interest" in whether those communications should remain confidential, unless that foreign law is contrary to [US] public policy'.<sup>13</sup> 'Under this test, communications that relate to activity in a foreign country are governed by that country's privilege law, while communications that "touch base" with the United States are controlled by United States privilege law'.<sup>14</sup>

One US court has noted that 'the communications in dispute do not touch base with the United States and thus United States privilege law does not apply to these documents. As these communications clearly "relate to activity in a foreign country [they] are governed by that country's privilege law," which in this instance is the law of Sweden'.<sup>15</sup> Finally, '[t]he party invoking a foreign privilege has the burden of proving the applicability of the foreign law and must establish that the foreign law protects the communication from discovery. The burden then shifts to the opponent of the privilege to present evidence to contest the existence of the privilege'.<sup>16</sup>

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### Notes

<sup>1</sup> Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine*, 2 (4th Ed. 2001).

<sup>2</sup> 8 John Henry Wigmore, *Evidence In Trials At Common Law*, § 2292 at 554 (McNaughton 1961 & Supp. 1991).

<sup>3</sup> *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

<sup>4</sup> Cathryn M. Sadler, *The Application of the Attorney-Client Privilege to Communications Between Lawyers Within the Same Firm: Evaluating United States v. Rowe*, 30 Ariz. St. L. J. 859, 859 (1998).

<sup>5</sup> *In re Grand Jury Subpoena Duces Tecum Dated September 15, 1983*, 731 F.2d 1032, 1038 (2d Cir. 1984); see *United States v. Jacobs*, 117 F.3d 82, 87 (2d Cir. 1997); *John Doe, Inc. v. United States*, 13 F.3d 633, 636 (2d Cir. 1994).

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<sup>6</sup> *United States v. Jacobs*, 117 F.3d at 87 (2d Cir. 1997); *John Doe, Inc. v. United States*, 13 F.3d at 637; *S.E.C. v. Herman*, No. 00-5575, 2004 WL 964104, at \* 2 (S.D.N.Y. May 5, 2004).

<sup>7</sup> *In re Grand Jury Subpoena Duces Tecum Dated September 15, 1983*, 731 F.2d at 1039.

<sup>8</sup> *In re Bairnco Sec. Litig.*, 148 F.R.D. 91, 100 (S.D.N.Y. 1993).

<sup>9</sup> *Id.*

<sup>10</sup> *In re Sealed Case*, 754 F.2d 395, 402 (D.C. Cir. 1985).

<sup>11</sup> *In re Grand Jury Subpoenas Duces Tecum*, 798 F.2d 32, 34 (2d Cir. 1986).

<sup>12</sup> *Clark v. United States*, 289 U.S. 1, 15 (1933); *In re Sealed Case*, 754 F.2d 395, 402 (1st Cir. 1985); *S.E.C. v. Herman*, 00 Cv. 5575, 2004 WL 964104, at \*2.

<sup>13</sup> *Astra Aktiebolag v. Andrx Pharm., Inc.*, 208 F.R.D. 92, 98 (S.D.N.Y. 2002).

<sup>14</sup> *AstraZeneca LP v. Breath Ltd.*, CIV. 08-1512, 2011 WL 1421800, at 3 (D.N.J. Mar. 31, 2011).

<sup>15</sup> *Id.*

<sup>16</sup> *Cadence Pharm., Inc. v. Fresenius Kabi USA, LLC*, 13-CV-00139, 2014 WL 370132, at \*3 (S.D. Cal. Feb. 3, 2014) (internal citations omitted).

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