

Privilege Pierced by Ongoing or Future Wrongful Conduct: The Crime-Fraud Privilege Exception is Broader Than You Think

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THE attorney-client privilege is an old and robust document intended to promote candor in attorney-client communications by keeping them confidential. There

are exceptions to this confidential treatment. One such exception includes communications between an attorney and client that are in furtherance of a crime or fraud.¹

¹ Knopf v. Sanford, 65 Misc. 3d 463, 471, 106 N.Y.S.3d 777, 784 (N.Y. Sup. Ct. 2019) (the attorney-client privilege does not extend to communications that may have

Such communications are not protected by privilege and must be produced.

Some practitioners take false comfort in the mistaken belief that this exception to privilege is only applicable to alleged criminal conduct. Fraud, of course, has criminal and civil causes of action. Increasingly, many courts have taken a broad view of this exception and applied it to types of conduct other than strict crimes or frauds. Specifically, some courts have determined that claims for breach of fiduciary duty and tortious interference with contract are, in appropriate circumstances, sufficient to trigger the exception.² The unwitting in-house or outside practitioner can trigger this exception, and vitiate privilege, through seemingly routine day-to-day counseling. Knowing the full reach of this exception is essential to protect the privilege and protect communications between attorney and client.

I. The Attorney-Client Privilege

The U.S. Supreme Court has summarized the privilege this way:

been in furtherance of a fraudulent scheme, an alleged breach of fiduciary duty or an accusation of some other wrongful act).

² *Nuss v. Sabad*, 976 F. Supp.2d 231, 237 (N.D.N.Y. 2013) (under New York law, the attorney-client privilege may not be invoked where it involves client communications that may have been in furtherance of a fraudulent scheme, an

We have recognized the attorney-client privilege under federal law, as the “oldest of the privileges for confidential communications known to the common law.” *Upjohn Co. v. United States*, 449 U. S. 383, 389 (1981). Although the underlying rationale for the privilege has changed over time, *see* 8 J. Wigmore, *Evidence* § 2290 (McNaughton rev. 1961), courts long have viewed its central concern as one “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.” *Upjohn*, 449 U.S., at 389. That purpose, of course, requires that clients be free to “make full disclosure to their attorneys” of past wrongdoings, *Fisher v. United States*, 425 U. S. 391, 403 (1976), in order that the client may obtain “the aid of persons having knowledge

alleged breach of fiduciary duty, or an accusation of some other wrongful conduct); *see also In re New York City Asbestos Litig.*, 109 A.D.3d 7, 9, 966 N.Y.S.2d 420, 421 (N.Y. S. Ct., App. Div. 2013) (crime-fraud exception to attorney-client privilege encompasses fraudulent scheme, alleged breach of fiduciary duty or accusation of some other wrongful conduct).

of the law and skilled in its practice,” *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888).³

While privilege promotes important public policies, it is not absolute. It must, and does, yield to competing public interests.⁴

II. The Crime-Fraud Exception

The crime-fraud exception is a common law doctrine that is often codified as a rule of evidence. The attorney-client privilege does not protect communications concerning ongoing or future wrongdoing. The U.S. Supreme Court has explained:

The attorney-client privilege must necessarily protect the confidences of wrongdoers, but the reason for that protection—the centrality of open client and attorney communication to the proper functioning of our adversary system of justice—ceases to operate at a certain point, namely, where the desired advice refers not to prior wrongdoing, but to

future wrongdoing. It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the “seal of secrecy” between lawyer and client does not extend to communications “made for the purpose of getting advice for the commission of a fraud or crime.”⁵

New Hampshire Rule of Evidence 502(d)(1) provides an apt example of how this exception has been codified by rule. It states “[t]here is no privilege . . . [i]f the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit in the future what the client knew or reasonably should have known to be a crime or fraud.”

The distinction between past conduct or ongoing and future conduct is critical. The exception permits the disclosure of otherwise privileged communications when a party “consults with an attorney in order to facilitate the party’s commission or concealment of ongoing or future wrongdoing.”⁶

³ *United States v. Zolin*, 491 U.S. 554, 562 (1989).

⁴ *In re Pfohl Bros. Landfill Litig.*, 175 F.R.D. 13, 18 (W.D.N.Y. 1997) (under New York law, attorney-client privilege is absolute and exceptions to privilege exist only to extent that public policy strongly weighs in favor of disclosure, such as to prove breach

of a fiduciary trust, criminal activity, or fraud).

⁵ *Zolin*, 491 U.S. at 562-563 (internal citations omitted).

⁶ *Harris Management, Inc. v. Coulombe*, 151 A.3d 7, 16 (Me. 2016) (quoting *In re Motion to Quash Bar Couns. Subpoena*, 982 A.2d 330, 336 (Me. 2009) (internal quotations omitted)).

III. The Expansion of the Exception

Many courts have taken a broad view of this exception and applied it to types of conduct other than strict crimes or frauds. Specifically, these courts have determined that a breach of fiduciary duty, tortious interference with contract, or other wrongful conduct may trigger the exception.⁷

Specifically, in *Koch*, the court addressed secretive, collusive, and tortious conduct and found that

"fraud" under the exception encompasses the tortious interference with prospective economic advantage and contractual relations.⁸ In addition to the extensive case law, the commentary to the Restatement (Third) of Law Governing Lawyers Section 82 comt. d (2000) supports broadening the crime-fraud exception to include other tortious conduct. The Restatement's commentary on the exception defines fraud "for the purpose of the exception as requir[ing] a

⁷ See, e.g., *Coulombe*, 151 A.3d at 17 ("In this context, fraud must be understood broadly as [a] generic term, embracing all multifarious means which human ingenuity can devise, and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth, and includes all surprise, trick, cunning dissembling, and any unfair way by which another is cheated."); *Mueller Indus., Inc. v. Berkman*, 927 N.E.2d 794, 808-809 (Ill. App. Ct. 2010), *abrogated on other grounds by* *People v. Radojcic*, 998 N.E.2d 1212 (Ill. 2013) (finding parallels between fraud and the intentional breach of fiduciary duties); *Koch v. Specialized Care Services, Inc.*, 437 F. Supp.2d 362, 373 (D. Md. 2005) (applying exception to tortious interference of contract claim); *Rambus, Inc. v. Infineon Technologies AG*, 222 F.R.D. 280, 288-289 (E.D. Va. 2004) (noting "other courts, when confronted with a variety of untoward conduct, have concluded that the exception is not confined to circumstances of crime or fraud"); *Cleveland Hair Clinic, Inc. v. Puig*, 968 F. Supp. 1227, 1241 (N.D. Ill. 1996) (finding exception extends to bad faith litigation conduct); *Cooksey v. Hilton Int'l Co.*, 863 F. Supp. 150, 151 (S.D.N.Y. 1994) (finding "intentional torts moored in fraud can trigger the crime-fraud exception," and

"that the crime-fraud exception does not require the commission of an actual crime or fraud"); *Steelvest, Inc. v. Scansteel Serv. Center, Inc.*, 807 S.W.2d 476, 487 (Ky. 1991) ("We would presume to place the breach of fiduciary relationship on an equal par with fraud and deceit."); *Horizon of Hope Ministry v. Clark Cty., Ohio*, 115 F.R.D. 1, 5 (S.D. Ohio 1986) (noting "Attorney/client communications which are in perpetuation of a tort are not privileged"); *In re Grand Jury Proc.*, 727 F.2d 1352, 1355 (4th Cir. 1984) (finding person cannot claim privilege when attorney consulted "for the purpose of committing a crime or tort"); *Fellerman v. Bradley*, 493 A.2d 1239, 1245 (N.J. 1985) (expanding definition of fraud "beyond the traditional tort or criminal law definition"); *Volcanic Gardens Mgmt. Co. v. Paxton*, 847 S.W.2d 343, 348 (Tex. App. 1993) (holding meaning of fraud within exception extends beyond common law fraud and criminal fraud to include "the commission and/or attempted commission of fraud on the court or on a third person," which happens when "a prospective client seeks the assistance of an attorney in order to make a false statement or statements of material fact or law to a third person or the court for personal advantage").

⁸ See *Koch*, 437 F. Supp.2d at 376-377.

knowing or reckless misrepresentation ... likely to injure another.”⁹

IV. Invoking the Crime-Fraud Exception

To protect against improper intrusions into privileged materials, courts have required more than just an allegation that the exception applies. Rather, the court often requires the party invoking the crime-fraud exception to “present evidence: (1) that the client was engaged in (or was planning) criminal or fraudulent activity when the attorney-client communications took place; and (2) that the communications were intended by the client to facilitate or conceal the criminal or fraudulent activity.”¹⁰

A reasonable basis to believe the client engaged in a crime or fraud is insufficient, as “[f]orfeiture of the privilege requires the client’s *use or aim to use* the lawyer to foster the crime or the fraud.”¹¹ “The client’s state of mind controls this analysis.”¹² For example, “the

attorney-client privilege is forfeited *inter alia* where the client sought the services of the lawyer to enable or aid the client to commit what the client knew or reasonably should have known to be a crime or a fraud.”¹³

V. *In Camera* Review of Withheld Documents

One court has observed that “[i]t is often hard to determine whether the attorney-client relationship has been misused by the client for crime or fraud without seeing the document, or hearing the testimony, as to which the privilege is claimed.”¹⁴ “To overcome this problem . . . judges have sometimes been willing to review privileged materials by themselves *in camera* and then decide whether the other side is entitled to it.”¹⁵

The U.S. Supreme Court has expressly endorsed *in camera* review of privileged material for purposes of determining whether the crime-fraud exception applies.¹⁶ In *Zolin*, the court noted that “*in camera* inspection . . . is a smaller

⁹ § 82 comt. d.

¹⁰ *In re Grand Jury Proceedings*, 417 F.3d 18, 22 (1st Cir. 2005) (internal citations omitted).

¹¹ *Rockwood Select Asset Fund XI, (6)-1, LLC v. Devine, Millimet & Branch, PA*, 113 F. Supp.3d 471, 478 (D. N.H. 2015).

¹² *Id.* at 477.

¹³ *Id.* at 477–478; *see also In re Grand Jury Investigation*, 445 F.3d 266, 274–276, 279 & n. 4 (3rd Cir. 2006) (noting that the exception applies regardless of whether client initiated contact or whether lawyer acted improperly or was even aware of client’s conduct).

¹⁴ *In re Grand Jury Proceedings*, 417 F.3d at 22.

¹⁵ *Id.*

¹⁶ *See Zolin*, 491 U.S. 554 (1989).

intrusion upon the confidentiality of the attorney-client relationship than is public disclosure.”¹⁷ Therefore, “a lesser evidentiary showing is needed to trigger *in camera* review than is required ultimately to overcome the privilege,” and the threshold “need not be a stringent one.”¹⁸ “Before engaging in *in camera* review to determine the applicability of the crime-fraud exception, the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.”¹⁹ The court observed:

Once that showing is made, the decision whether to engage in *in camera* review

rests in the sound discretion of the district court. The court should make that decision in light of the facts and circumstances of the particular case, including, among other things, the volume of materials the district court has been asked to review, the relevant importance to the case of the alleged privileged information, and the likelihood that the evidence produced through *in camera* review, together with other available evidence then before the court, will establish that the crime-fraud exception does apply.²⁰

¹⁷ *Id.* at 572.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* See, e.g., *United States v. Joyce*, 311 F. Supp. 3d 398, 407 (D. Mass. 2018) (quoting *Zolin*, 491 U.S. at 572) (“To justify a *Zolin* review, the [movant] must set forth a factual basis to support a good-faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies”); *Rockwood Select*, 113 F. Supp.3d at 482 (discussing the low bar set forth for *in camera* review of documents under *Zolin*, “[t]he court need not now decide whether the crime-fraud exception applies, only that a reasonable person could infer from the evidence submitted that [the fraudster]’s communications with [his lawyers] after that date may lead to evidence that [the fraudster] used [her lawyers] to further or conceal that fraudulent activity”).

VI. Takeaways

Attorneys should be mindful that no privilege exists if the advice counsel provides is in furtherance of an ongoing crime, fraud, or wrongful act. This can occur in routine or seemingly innocuous circumstances. For example, any group of employees bound by restrictive covenants who are in negotiations for positions with a new employer need to consider and assess whether, by virtue of any leadership positions they possess, they owe fiduciary duties to their current employer such that secret and undisclosed negotiations for new employment might be actionable as a breach of fiduciary duty. Legal advice provided in such a circumstance may not be protected by privilege.

Similarly, any employer negotiating with potential new employees who are bound by restrictive covenants must consider and assess whether its conduct improperly interferes with the contractual rights of the existing employer. Again, legal advice provided in such a circumstance may not be protected by privilege.

Providing advice in aid of a client's ongoing or future wrongful conduct is a material "trap for the unwary." Attorneys should know, understand, identify, and avoid these traps if the advice provided may be susceptible to claims of fraud, breach of fiduciary duty,

tortious interference with contract, or other wrongful acts.