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Privileged Communications and the One-Sided Nature of Crime-Fraud Litigation

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An Insider's Perspective on How the DOJ Attempts to Pierce the Attorney-Client Privilege, and Lessons Learned from the Recent Stevens Dismissal

The attorney-client privilege is viewed as the most sacred of all legally recognized privileges. The preservation of the privilege is essential to the fair operation of our legal system as it promotes and encourages open communications between the client and the attorney; this, in turn, allows the attorney to provide effective and comprehensive advice. The privilege is not absolute, but as demonstrated on May 10, 2011, by the dismissal under Rule 29 of a criminal indictment charging GlaxoSmithKline associate general counsel Lauren Stevens, the piercing of the privilege should occur only in exceptional circumstances. *See United States v. Stevens*, Case No. RWT-10-694 (D. MD).

As today's regulatory environment becomes more invasive, the government is more frequently attempting to examine and evaluate legal advice provided by corporate attorneys to their clients when it believes that a client is using a lawyer to commit a crime or fraud. The crime-fraud exception to the attorney-client privilege allows the government, often *ex parte*, to obtain a court order demanding the production of what were once thought to be privileged communications.

Issuance of a Grand Jury Subpoena

In the context of a criminal investigation, litigation involving crime-fraud usually appears in the context of the issuance of a grand jury subpoena. Given the sensitivity of the communications sought, the Department of Justice (DOJ) requires specific approval from the Assistant Attorney General before such a subpoena is issued.

When determining whether to approve the issuance of a subpoena to an attorney, the United States Attorney's Manual instructs federal prosecutors to strike a balance between an individual's right to the effective assistance of counsel and the public's interest in the fair administration of justice and effective law enforcement. *See* USAM 9-13.410. In making that determination, the DOJ considers the following factors:

- Is the information sought privileged?
- Have all reasonable attempts been made to obtain information from other sources?
- Are there reasonable grounds to believe that a crime has been or is being committed and is the information sought reasonably needed for the successful completion of the investigation?
- Does the need for the information outweigh the risk that the attorney may be disqualified from the representation?
- Is the subpoena narrowly drawn and directed at material information regarding a limited subject matter?

Following an analysis under the above criteria, approval is routinely granted by the Assistant Attorney General. Thereafter, the attorney in question is served with a federal grand jury subpoena seeking specific client communications. After receiving the subpoena, the attorney then may file a motion to quash, asserting that the communications sought are privileged. In turn, the DOJ may file a motion to compel production of certain

communications, contending that the information sought is not privileged.

Once litigation ensues, the attorney for the defendant usually contends that the communications with the client are privileged. The burden is on the client to demonstrate that an attorney-client relationship existed and that the particular communication was privileged. The client must show that the communication was made to the attorney confidentially, in the attorney's professional capacity, and for the purpose of securing legal advice or assistance. If the client was seeking business advice as opposed to legal advice, the privilege would not be triggered. Further, communications made to an attorney which, in turn, are disclosed to third parties, also are not privileged.

Government's *Ex Parte* Communications to Establish Fraud

Once the client establishes that the communications sought by the grand jury subpoena are in fact privileged, the burden shifts to the government to demonstrate whether the crime-fraud exception to the privilege applies. Surprisingly, the government must meet a relatively low threshold in order to pierce the privilege, and the threshold is often met through a series of *ex parte* communications between the government and the judge. The result is that the client frequently is left in the dark wondering what it is the government is even investigating.

The government must meet a two-prong test for the crime-fraud exception to apply. First, the government must make a *prima facie* showing that the client engaged in criminal or fraudulent conduct when the client sought the advice of counsel; that the client was planning such conduct when seeking the advice of counsel; or that the client committed a crime or fraud subsequent to receiving the benefit of the counsel's advice. Second, the government must make a showing that the attorney's assistance was obtained in furtherance of the criminal or fraudulent activity, or was closely related to the criminal or fraudulent activity. The attorney-client communications may be deemed non-privileged even in a case where the attorney did not know that the advice was going to be used in furtherance of the criminal activity, and the privilege does not apply where the criminal activity is ongoing.

Invoking grand jury secrecy, the government makes its *prima facie* showing of criminal conduct through a series of *ex parte* submissions to the court. As previously noted, the privilege holder often is not aware of the specific allegations of criminal activity, especially in view of the denial of access to *in camera* submissions by the government to the court. Courts rarely hold adversarial hearings when determining whether the crime-fraud exception applies, thus making it nearly impossible for the privilege holder to present any rebuttal evidence, or even to cross-examine government witnesses. In lowering the prosecution's burden, the Supreme Court has held that the government can even rely on the allegedly privileged materials in order to make its *prima facie* showing of criminal conduct by producing *in camera* to the court the allegedly privileged material. *See United States v. Zolin*, 491 U.S. 554 (1989).

Ironically, in civil litigation, privilege holders are often provided notice of the alleged conduct constituting crime-fraud and frequently are given an opportunity to rebut the claims through an evidentiary hearing. In denying a client similar rights in criminal cases, courts cite the importance of a grand jury's investigative role and the need for secrecy in the context of a grand jury's ongoing criminal investigation.

Lessons Learned from the *Stevens* Dismissal

The one-sided nature of crime-fraud litigation in the criminal context recently came to light in the highly publicized prosecution of former GlaxoSmithKlein associate general counsel Lauren Stevens. During the grand jury investigation, the government sought and obtained confidential privileged communications between Stevens and GlaxoSmith Klein. Armed with these once privileged communications, the government charged Stevens with making false statements and obstructing a federal investigation into drug marketing. Stevens was accused of lying to the Food and Drug Administration in a series of letters where, acting in her capacity as corporate counsel, she denied that the company had promoted a drug for off-label uses.

Stevens illustrates that communications made by employees or agents other than a corporation's Directors or Officers may be privileged, and therefore, subject to the low threshold of the crime-fraud exception, *ex parte* communications, and *in camera* review.

In its brief to the court, the government alleged that Stevens materially misrepresented information she obtained regarding the use of promotional materials at GSK-sponsored events. Specifically, the government alleged that Stevens was aware that 28 GSK-paid speakers used slides and other promotional materials that contained

unapproved uses of the drug in question in violation of FDA regulations. The government alleged that Stevens was aware that physicians in Michigan and Vermont made presentations at approximately 500 promotional events sponsored by GSK, and repeatedly promoted numerous unapproved, off-label uses of the GSK drug.

After hearing 10 days of evidence during a jury trial in Greenbelt, MD, U.S. District Judge Roger W. Titus took the unusual step of dismissing the indictment against Stevens before her lawyers even offered a defense. Judge Titus ruled that no jury could reasonably have found that Stevens violated the law.

When dismissing the indictment, Judge Titus was very critical of the government's evidence, which it had obtained pursuant to the crime-fraud exception during the grand jury investigation. Judge Titus stated that there are "profound implications for the free flow of communications between a lawyer and client when the privilege is abrogated." He further noted that the communications turned over to the government in the *Stevens* case were not communications made in furtherance of a crime, but rather were communications that showed a "studied, thoughtful analysis" of a request from the FDA.

Conclusion

Given the unfair approach allowed under the law to determine whether crime-fraud applies in a criminal setting, it is not surprising to hear in a case like *Stevens* such strong words from a district judge about the importance of preserving the attorney-client privilege. Judge Titus concluded his ruling by saying that "a lawyer should never fear prosecution because of advice that he or she has given to a client who consults him or her, and a client should never fear that its confidences will be divulged unless its purpose in consulting the lawyer was for the purpose of committing a crime or a fraud."

One would hope the government listens to Judge Titus' advice and proceeds accordingly in such significant situations.

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