

Questionable Communications

BY ARTHUR D. BURGER

Attorneys need to understand where the boundaries of the crime-fraud exception to privilege lie.

Ethics

In the arena of privileged communications, the crime-fraud exception is one of the central pressure points. Clients want to know whether their starkly incriminating disclosures are protected: After all, what good is a privilege if it only shields innocuous information?

A lawyer with an understanding of where the line is drawn with respect to questionable communications is better equipped to advise a client when a discussion enters dangerous territory.

The crime-fraud exception applies to communications that are in furtherance of an ongoing or future crime or fraud. But not every jurisdiction applies the crime-fraud exception in precisely the same way, and the varying formulations can be significant. In *In re Public Defender Service*, 831 A.2d 890 (decided Sept. 11, 2003), the D.C. Court of Appeals recently, and for the first time, defined the scope of the exception in a wide-ranging opinion.

A pivotal premise of the court's analysis was that an important function of a lawyer is "to urge the client as forcefully and emphatically as necessary, to abandon illegal conduct or plans." The court quoted from a famous statement attributed to Elihu Root: "About half the practice of a decent lawyer is telling would-be clients that they are damned fools and should stop."

In re Public Defender Service arose from a subpoena to criminal defense counsel with respect to a client's effort to obtain coerced testimony from a witness. The trial court found that the crime-fraud exception applied and that the privilege could not be claimed. When the attorney refused to comply with the subpoena, the attorney was held in contempt and a dollar-per-day fine was imposed (and suspended during appeal) so that an appeal could be pursued.

The appeals court stated that communications relating to past conduct are privileged and do not trigger the exception. Only communications related to ongoing or future fraud or crime can fall within the exception. The court went further, however, and distinguished between categories of communications relating to

an ongoing or future crime or fraud. Not all such communications, the court said, lose their privilege.

In fashioning a test for applying the exception, the D.C. court carved a path between two extremes. The court disagreed, on the one hand, with those courts which have held that the underlying crime or fraud must actually be accomplished in order for the exception to apply.

The court found that to be "too stringent a requirement" and noted that there can be instances of an abuse of the attorney-client privilege without the crime or fraud ultimately succeeding. The court stated: "Such abuses may occur whether or not a crime or fraud is brought to fruition."

The court thus departed from the formulation of the U.S. Court of Appeals for the D.C. Circuit in *In re Sealed Case*, 107 F.3d 46, 49 (1997), which stated that a crime or fraud must be "carried out" for the exception to apply. (*In re Sealed Case* also made an important distinction between a crime or fraud carried out by a company, which was the client, and one carried out by an individual constituent of the client, such as an officer of the company.)

On the other hand, the D.C. Court of Appeals in *In re Public Defender* also disagreed with those courts that have held that the critical element for the exception to apply is merely whether the client intended that the discussion with the lawyer be in furtherance of a crime or fraud. The court stressed that when an attorney succeeds in convincing a client to abandon the scheme, then the system has worked as intended and the privilege should be upheld.

The court stated:

When an attorney dissuades or prevents his client from engaging in illegal conduct, the attorney-client relationship has not been abused; rather the relationship has served the administration of justice by promoting legal conduct. [citation omitted]. Whatever the client's initial intentions, attorney-client communication in such a case did not further the commission of a crime or fraud; it furthers obedience to the law.

In *In re Public Defender*, the evidence showed that the attorney had succeeded in stopping the client's plan in its tracks. The court therefore reversed the trial court and held that the exception did not apply, and the privilege was upheld.

Generally speaking, under the court's analysis, if the client's bad intent is not sufficient to invoke the exception, yet completion of the crime or fraud is not necessary, under what circumstances, short of completion of the crime or fraud, will the exception apply?

The court provided the following test:

The [proponent] does not have to show that the intended crime or fraud was accomplished, only that the lawyer's advice or other services were misused. Typically, this can be shown by evidence of some activity following the improper

consultation, on the part of either the client or the lawyer, to advance the intended crime or fraud.

The message from the court to lawyers is unmistakable. In trying to talk clients out of an illegal or fraudulent plan, we can and should tell them that if they go ahead with it, there may be no privilege to the discussion, and we could be compelled to testify against them. This is a powerful club that should be used skillfully.

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