Revisiting The Crime-Fraud Exception After Key Trump Cases

By **Robert Hoff and Paul Tuchmann** (October 3, 2024)

Robert Hoff

Paul Tuchmann

On Aug. 27, special counsel Jack Smith secured a superseding indictment of former President Donald Trump, accusing him, for a second time, of crimes arising out of the Jan. 6, 2021, U.S. Capitol riot.

The superseding indictment was written to comply with the U.S. Supreme Court's July 1 decision in Trump v. United States, in which the court held that a U.S. president is entitled to absolute immunity from criminal prosecution for actions within his or her constitutional authority.[1]

The superseding indictment relies, in part, on evidence otherwise protected by the attorney-client privilege or work product doctrine.

Those documents were obtained from one of the former president's attorneys under the crime-fraud exception, pursuant to two 2022 decisions in Eastman v. Thompson from the U.S. District Court for the Central District of California.[2]

In the special counsel's other case against the former president, accusing him of crimes involving his withholding of classified documents, the government also relied, in part, on evidence gathered pursuant to the crime-fraud exception.

In the July 15 decision from the U.S. District Court for the Southern District of Florida in United States v. Trump, U.S. District Judge Aileen Cannon dismissed that case on the grounds that the appointment of the special prosecutor was unconstitutional, a ruling now on appeal.[3]

Prior to the dismissal, Trump's team moved to suppress evidence the government had obtained pursuant to the crime-fraud exception after U.S. District Judge Beryl Howell of the U.S. District Court for the District of Columbia, where the investigative grand jury was sitting, had ordered that evidence produced in the 2023 decision in In re: Grand Jury Subpoena GJ 42-17 and GJ 42-69.[4]

If Judge Cannon's decision is reversed, the court will once again have to consider the scope of the crime-fraud exception.

In light of these recent high-profile matters, we revisit the crime-fraud exception and remind counsel and their clients of its elements and practical implications.

Elements of the Crime-Fraud Exception

The attorney-client privilege and work product doctrine are central to our adversary system. They, respectively, protect confidential communications between attorney and client made for the purpose of sharing legal advice, and protect documents prepared in anticipation of litigation.

These centuries-old doctrines serve to foster open communications between attorneys and their clients so clients can obtain fully informed legal advice and counsel can prepare for litigation and trial without fear that others can learn what attorneys and their clients discuss.[5]

But these protections are not absolute, and the crime-fraud exception is one way for an adversary to obtain such otherwise protected communications.

As the U.S. Court of Appeals for the Second Circuit articulated in 1995 in its In re: Richard Roe Inc. decision, this exception applies to otherwise protected communications or information when two elements are satisfied, and there is evidence that: "a crime or fraud has been attempted or committed" and "that the communications were in furtherance thereof."[6]

Although there is a societal interest in enabling clients to get confidential legal advice, that interest is not compelling when the communications or advice are intended to further the commission of a crime or fraud.[7]

Different courts have articulated the burden of proof in crime-fraud analyses differently. The Second Circuit has described it as a "probable cause" standard.[8] Other circuits apply a prima facie standard.[9]

Still others have articulated a "reasonable basis" standard.[10] And different burdens may apply in criminal versus civil cases.

Although the Second Circuit's probable cause standard is arguably more stringent than a prima facie or reasonable basis standard, regardless of the standard applied, all courts take seriously their obligation to scrutinize the proof required to invalidate attorney-client or work product protections.

A critical component of the crime-fraud exception is the client's intent. If the client intends to use the attorney's services to further a crime or fraud, privilege and work product protections are forfeited.[11]

The client's intent can be inferred from circumstantial evidence, such as the timing and content of communications or the nature of the legal advice sought. For example, when a client seeks legal advice before acting in order to determine if their conduct is appropriate, privilege and work product typically apply.

However, if a client had already set out on a course of illegal conduct, and then consulted with counsel and did not change course, that timing could contribute to a finding that the crime-fraud exception applies.[12]

The proponent of the crime-fraud exception must meet the standard on a document-by-document or question-by-question basis.[13] Therefore, the proponent of the exception needs to build a compelling evidentiary record for each document or communication it seeks on the basis of the exception.

How the crime-fraud exception was applied in the Jan. 6 Capitol riot and classified documents cases involving Trump are illustrative.

The Congressional Investigation of Jan. 6

In the Eastman cases, the House of Representatives' select committee investigating the Jan. 6 attack on the U.S. Capitol subpoenaed documents from Chapman University, where John Eastman, an attorney who worked for then-President Trump in December 2020, and early January 2021, was employed.

The subpoena sought emails Eastman sent or received on Chapman's email system concerning the 2020 presidential election and the events of Jan. 6, 2021.

Eastman and the former president objected to Chapman producing certain documents on privilege and work product grounds.

The select committee first had to prove under the U.S. Court of Appeals for the Ninth Circuit's "preponderance of the evidence" standard for civil cases that the former president attempted or committed the alleged offenses of obstruction of a congressional proceeding, an agreement to defraud the U.S., and common law fraud.

The select committee produced evidence that the former president attempted to overturn the 2020 election results by launching a pressure campaign to convince then-Vice President Mike Pence to disrupt and interfere with the Jan. 6, 2021, Senate vote to certify the election.

This evidence included meetings and communications involving Trump, Eastman and Pence, as well as otherwise protected communications with Eastman, all designed to convince the then-vice president not to certify the election results.

The court held that the then-president consulted with his counsel as part of the commission of the alleged offenses because he "more likely than not" sought Eastman's advice with the intent to obstruct the Jan. 6 election certification vote, knowing it was illegal.[14]

Turning to the "in furtherance of" prong of the crime-fraud exception, in Eastman I, the court held that emails or attachments discussing pending lawsuits concerning challenging the 2020 election results were not in furtherance of the charged offenses.

They included draft filings, oral argument strategy and planning future litigation strategy. Although the lawsuits dealt with claims of election fraud, the court held that pursuing legal recourse itself did not advance any crimes.

A 10th email, sent on Jan. 6, 2021, discussed the fact that Pence refused to reject or delay the electoral count, but the email was not itself in furtherance of the alleged plan to stop the count.

However, the court found that one document did implicate the crime-fraud exception. It was an email chain forwarding a memo to Eastman that was written for the former president's attorney Rudy Giuliani, which recommended that Pence reject electors from contested states. As the court described it:

> This may have been the first time members of President Trump's team transformed a legal interpretation of the Electoral Count Act into a day-by-day plan of action. The draft memo pushed a strategy that knowingly violated the Electoral Count Act, and Dr. Eastman's later memos closely track its analysis and proposal. The memo is both

> intimately related to and clearly advanced the plan to obstruct the Joint Session of Congress on Jan. 6, 2021.[15]

In Eastman II, several months later, the court analyzed a larger set of documents. This included another set of emails relating to litigation strategy. But unlike the documents about litigation strategy it considered earlier, the court concluded that some of these documents suggested that the "primary goal" of filing litigation was to delay or otherwise disrupt the Jan. 6 vote.

These documents, according to the court, made clear that the former president "filed certain lawsuits not to obtain legal relief, but to disrupt or delay the Jan. 6 congressional proceedings through the courts."[16]

Thus, the communications about litigation strategy were sufficiently related to, and in furtherance of, the scheme to unlawfully disrupt the Jan. 6 congressional vote.

Another set of documents the court ordered produced were emails describing Eastman relaying concerns from the then-president's team about including in a court complaint certain statistics about votes in Fulton County, Georgia, which were first cited in state court cases but were subsequently proven to be inaccurate.

The then-president and his attorneys "ultimately filed the complaint with the same inaccurate numbers without rectifying, clarifying, or otherwise changing them."[17]

The emails showed that Trump "knew that the specific numbers of voter fraud were wrong but continued to tout those numbers, both in court and to the public."[18]

The court held that these emails were in furtherance of the alleged scheme because they showed that the former president knew statistics about voter fraud were wrong but continued to use those numbers in a federal court complaint and in public.

The Classified Documents Case

The classified documents case involved charges that the former president orchestrated a scheme to hide documents he unlawfully retained in violation of numerous laws.[19]

In response to grand jury subpoenas issued in the District of Columbia, Trump's attorneys withheld certain documents on attorney-client privilege or work product grounds and refused to testify as to certain topics concerning compliance with the government's subpoenas.

The government moved to compel, and the former president and his counsel opposed.

The government first had to prove the crimes were attempted or committed, which Judge Howell in In re: Grand Jury Subpoena GJ 42-17 and GJ 42-69 analyzed under the prima facie evidence standard.

The court held that the government satisfied this element because Trump knowingly and willfully withheld classified documents he was not entitled to retain that were responsive to grand jury subpoenas.

The government's evidence included that the former president: initially produced only a "small fraction" of classified documents; moved documents between locations with the

intent to "hide boxes" from his attorneys' search efforts; caused his representatives to sign false certifications about compliance with grand jury subpoenas; and was advised that what he was doing was wrongful.[20]

Turning to the second prong of the analysis, the court held that some of counsel's otherwise privileged testimony about efforts to comply with grand jury subpoenas were "in furtherance" of the charged crimes because it would tend to show that Trump used his counsel to advance his own alleged hiding and wrongfully withholding documents.

The testimony would reveal that the former president told counsel one thing about the location of responsive documents, when, in fact, Trump did not reveal to his counsel where all responsive documents were stored.[21]

The court also held that certain documents were "in furtherance of" the illegal conduct because they reflected counsel's work in response to the grand jury subpoena — work that the former president subverted in service of his own criminal scheme.

Because these documents would tend to show that counsel believed one thing based on conversations with the former president when he actually knew those facts to be wrong, the documents were in furtherance of the ultimately charged crimes.[22]

Potential Challenges for Prosecutors in Some Evidence-Gathering Situations

In both of the disputes discussed above, litigation over the crime-fraud exception was teed up by investigators issuing subpoenas. Often during criminal investigations, however, prosecutors confront the crime-fraud exception where judicial adjudication of the crime-fraud assertion may not be so simple to obtain.

Prosecutors regularly obtain potentially privileged information in the course of their investigations without issuing a subpoena, such as through search warrants; or from the voluntary provision of such items by an employer; or by another person under investigation.

Often, the target of the investigation does not know, and may not suspect, they are being investigated, and the government may believe that informing the target is likely to compromise the investigation in some way.

If the investigative team has in its possession communications that may be covered by the attorney-client privilege and work product doctrine, how do the investigators determine whether the crime-fraud exception applies if they don't want to alert a target?

Most potential options are unappealing to investigators. They could try to bring an entire email account or hard drive to a judge and ask the judge to rule, but a judge is unlikely to rule on such a request for a variety of reasons, including:

- The burden on the court's relatively limited resources of reviewing a large volume of material;
- Wariness about making a definitive ruling on an ex parte basis; and
- A concern about the lack of a constitutionally required "case or controversy" to adjudicate — with no indicted case, no pending dispute before the grand jury, and only one party contesting the issue.

This leaves the investigators in a difficult position. They could try to create a case or controversy by indicting a case first, or issuing a grand jury subpoena, but they can't indict a case before they have sufficient evidence, even leaving aside strategic reasons they might wish to wait before doing so.

And depending on the context, issuing a grand jury subpoena to the target for the same material might lead to the flight of targets or witnesses, witness tampering, or destruction of evidence.

As such, investigators may consider other steps. They could set up a so-called taint team — also known as a "filter team" — which is permissible in some jurisdictions, of prosecutors and agents who are walled off from the investigative team that is conducting the investigation.

The taint team would review the subject materials, filtering out any privileged materials before providing the nonprivileged materials to the investigative team.

Then, if the investigative team has obtained other evidence showing that otherwise privileged materials may be subject to the crime-fraud exception, the investigative team will provide this evidence to the taint team, and the taint team will make a determination as to whether the crime-fraud exception applies to any of the otherwise privileged materials it has segregated. The taint team would then provide any such materials deemed subject to the crime-fraud exception to the investigative team for use in the ongoing investigation.

Prosecutors may not be comfortable with this process. The taint team's determination that the crime-fraud exception applies could later be contradicted by a court. And in that case, not only will that evidence be precluded from the case, but other evidence that the investigative team obtained as the fruit of that poisonous tree could be precluded as well.

If a target is eventually indicted, the defense will likely argue one or more of the following:

- The taint procedures were insufficient;
- The taint team didn't follow the government's own taint procedures;
- The government should have consulted with counsel for the defendant before implementing the taint procedures and/or before making a crime-fraud determination; and
- Perhaps most dauntingly for the prosecutors, the prosecutors recklessly, if not purposefully, invaded the privilege, thereby violating the defendant's rights, and they should be subject to bar discipline on that basis.

Conclusion and Lessons Learned

Courts will carefully scrutinize privileged or work product communications when crime-fraud challenges arise.

Therefore, even though the attorney-client privilege and work product doctrine encourage full and frank communication, it is always wise to be careful and thoughtful in communications over sensitive legal matters.

It likely goes without saying, but this also means that counsel should be wary of client conduct that raise suspicions about commission of a crime or fraud. In rare cases, it might be obvious to an attorney that a client is engaging in a crime or fraud. But often when the exception arises, counsel may be unwitting pawns in a client's misconduct.

Counsel should not hesitate to carefully evaluate a client's conduct when concerns arise. Indeed, Model Rule of Professional Conduct 1.6 expressly recognizes the lack of societal interests in a lawyer's advice used to further the commission of a crime or fraud:

> A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: … (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services.[23]

On the other hand, counsel and their clients must not roll over when the government challenges privilege or work product on crime-fraud grounds.

Counsel should dispute efforts to invoke the exception by challenging each element as it applies to each and every document and answer that would otherwise be protected.

Even if a client is engaged in a crime or fraud, or even if the opposing party has met the initial burden of proof on the first element, that doesn't mean every privileged communication or document is in furtherance of that misconduct.

In addition, when defense counsel is confronted with a crime-fraud challenge, they should carefully scrutinize how the government obtained and analyzed the information being challenged if it is already in the government's possession.

Defense counsel could challenge taint procedures. Check whether those procedures were followed or even allowed in the relevant circuit, and challenge any unilateral prosecution-made determinations that the crime fraud exception applied, as well as any ex parte efforts by the government to get judicial blessing for its invocation of the crime-fraud exception.

Robert Hoff is a partner, leader of the e-discovery and electronic data practice group, and co-chair of the auditor and accountant liability defense practice group at Wiggin and Dana LLP.

Paul Tuchmann is a partner at the firm. He is a former assistant U.S. attorney for the Eastern District of New York.

[1] Trump v. United States, 603 U.S. _, 144 S. Ct. 2312, 219 L. Ed. 2d 991 (Jul. 1, 2024).

[2] Eastman v. Thompson, 594 F. Supp. 3d 1156 (C.D. Cal. 2022) ("Eastman I"). Eastman v. Thompson, 636 F. Supp. 3d 1078 (C.D. Cal. 2022) ("Eastman II").

[3] United States v. Trump, Case No. 23-80101-CR-Cannon, 2024 WL 3404555 (S.D. Fla. Jul. 15, 2024.)

[4] In re Grand Jury Subpoena GJ 42-17 and GJ 42-69, Case No. 23-gj-10 (BAH) (D.D.C. Mar. 17, 2023) (not currently published; attached, with redactions, to a related public filing).

[5] United States v. Jacobs, 117 F.3d 82, 87 (2d Cir. 1997), abrogated on other grounds by Loughrin v. United States, 573 U.S. 351 (2014) (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)).

[6] In re Richard Roe, Inc., 68 F.3d 38 (2d Cir. 1995).

[7] Id.

[8] Id.

[9] E.g., Lewis v. Crochet, 105 F.4th 272, 282 (5th Cir. 2024) ("'In order to invoke [the crime-fraud] exception, the party seeking to breach the walls of privilege must make out a prima facie case.' To make such a showing, the party must produce evidence that will satisfy the determination that the exception applies until contradicted or overcome by other evidence."). Accord In re Grand Jury 2021 Subpoenas, 87 F.4th 229, 254 (4th Cir. 2023); Vidal-Martinez v. United States Dep't of Homeland Sec., 84 F.4th 743, 748–49 (7th Cir. 2023); Drummond Co., Inc. v. Conrad & Scherer, LLP, 885 F.3d 1324, 1335 (11th Cir. 2018); Stone Surgical, LLC v. Stryker Corp., 858 F.3d 383, 391 (6th Cir. 2017); In re Grand Jury Subpoena GJ 42-17 and GJ 42-69 at 43 (stating that the D.C. Circuit follows the prima facie standard but defining it as "requiring the government to offer 'evidence that if believed by the trier of fact would establish the elements of an ongoing or imminent crime or fraud.'" (citation omitted)).

[10] In re Grand Jury Matter #3, 847 F.3d 157, 165 (3d Cir. 2017) ("[A] party seeking to apply the crime-fraud exception must demonstrate that there is a reasonable basis to suspect (1) that the [lawyer or client] was committing or intending to commit a crime or fraud, and (2) that the ... attorney work product was used in furtherance of that alleged crime or fraud."); In re Grand Jury Proceedings, 417 F.3d 18, 22-23 (1st Cir. 2005).

[11] "[T]he crime-fraud exception pierces the attorney-client privilege even when the attorney is an unknowing tool of his client. The attorney need not have the intent of furthering the misconduct; rather, '[t]he privilege is the client's, and it is the client's fraudulent or criminal intent that matters." In re Grand Jury Subpoena GJ 42-17 and GJ 42-69 at 65 (citation omitted).

[12] Jacobs, 117 F.3d at 88.

[13] See, e.g., In re Grand Jury Subpoena, 419 F.3d 329, 340–45 (5th Cir. 2005) ("We conclude that the proper reach of the crime-fraud exception when applicable does not extend to all communications made in the course of the attorney-client relationship, but rather is limited to those communications and documents in furtherance of the contemplated or ongoing criminal or fraudulent conduct.").

[14] Eastman I, 594 F. Supp. 3d at 1189-95.

[15] Id. at 1196-97.

[16] Eastman II, 636 F. Supp. 3d at 1090-91.

[17] Id. at 1091-92.

[18] Id.

[19] 18 U.S.C. §§ 793(e) (willful and unauthorized retention of national defense information) and 1512(b), 1512(c)(1), and 1519 (obstruction of justice), among other crimes.

[20] In re Grand Jury Subpoena GJ 42-17 and GJ 42-69, at 54-58.

[21] Id. at 70-72.

[22] Id. at 75.

[23] MRPC 1.6(b)(2).