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E-Discovery as a Weapon

The crime-fraud exception to the attorney-client privilege is increasingly – and inappropriately – being invoked for collateral litigation-related conduct

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The attorney-client privilege is perhaps the oldest of the privileges for confidential communications known to common law. But the privilege is not available to a client who seeks legal advice to commit an ongoing or future crime or fraud. To prevent those abuses, courts have fashioned a limited exception to the privilege known as the crime-fraud exception.

Most attorneys understand that if they advise a client on how to rob a bank or perpetrate a fraud, their communications will not be shielded by the privilege. Yet, few attorneys realize that there is an increasing risk that their adversaries in litigation may use the crime-fraud exception to strip away the privilege protecting attorney-client communications in civil discovery. Most attorneys would view such an intrusion as an assault on the basic structure of the privilege. Without a strong, clear standard against such efforts in the civil arena, we expect there to be more attempts to expand the application of the crime-fraud exception to collateral litigation-related conduct in civil cases: particularly in the fast-evolving area of e-discovery and the unfamiliar and intimidating realm of information technology.

The strategy works as follows. The attorney planning to strip the privilege serves a typically overbroad set of document requests. She then follows up with a Federal Rules of Civil Procedure §30(b)(6) (or state law equivalent) deposition of the company's representative to determine the

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failures or weaknesses in the company's preservation, search and production of electronically stored information or ESI. Technological advances have significantly increased the ways in which ESI can be saved, including but not limited to folders on various network drives that reside on different servers, hard drives, laptops, handheld devices, home computers and external storage applications. This increasing complexity is compounded by hardware and software that is constantly being updated or replaced. Personnel changes can also result in leaving no one with knowledge of each employee's record-keeping habits. Faced with a broad-ranging document request, an attorney's task of preserving and locating all relevant data becomes extraordinarily challenging. To make matters worse, the opposing counsel may then move to compel the production of documents under the low threshold of what is discoverable, which does not require proof

of actual relevancy or admissibility at trial. The purpose is to create the impression that documents are missing or have been withheld.

Attorneys opposing this sort of motion to compel then face the difficult task of proving that all relevant documents were in fact preserved and produced, while at the same time ensuring the judge understands the company's technology infrastructure. Notwithstanding an attorney's reasonable and good faith effort to preserve and produce relevant documents, sources of potentially relevant data will inevitably go undiscovered. Or, the scope of preservation will be inadequate. If the opposing counsel obtains a sanctions order, it will characterize the discovery-related conduct as a "fraud," and seek to pierce the attorney-client privilege by invoking the crime-fraud exception.

The decades-long tobacco industry litigation played a critical role in leading to this now unhealthy development in the

law. For many years, the tobacco industry fended off cases against it by claiming that its research regarding the health hazards and addictiveness of smoking, along with related communications and reports, was privileged because it was conducted at the direction of counsel during litigation. The Minnesota attorney general successfully argued that the crime-fraud exception should apply to these documents because of the tobacco industry's allegedly unlawful and fraudulent practice of denying and minimizing the health risks of smoking. See *State ex rel. Humphrey v. Philip Morris Inc.*, No. C1-94-8565 (Minn. Dist. Ct. May 9, 1997). It is important to note, however, that in the tobacco cases the alleged litigation-related misconduct and the assertion of the privilege were integrally intertwined with the underlying claims of fraud against the tobacco industry.

The question confronting the courts today is whether the exception should be applied even where the litigation-related conduct has no direct connection to an underlying claim of fraud or does not itself amount to common law fraud. If the courts lose sight of the importance of that nexus, then the privilege itself will be substantially undermined, along with the relationship of candor and trust between counsel and client. As soon as attorneys know that their discovery-related communications with their own clients may be subject to disclosure and scrutiny by the court, the nature and content of those communications will un-

dergo a dramatic shift, and legitimate purposes of discovery are likely to be undermined as well. One need only look at the 18 months consumed in motion practice and sanctions related to the belated disclosure of relevant documents in the well-known *Broadcom v. Qualcomm* lawsuit to appreciate how defending against these claims can be extraordinarily burdensome.

The Second Circuit U.S. Court of Appeals addressed the question of whether general litigation conduct itself could warrant application of the crime-fraud exception. Recognizing the risk that a liberal application of the exception would undermine the privilege, the court held: "Where the very act of litigating is alleged as being in furtherance of a fraud, the party seeking disclosure under the crime-fraud exception must show probable cause that the litigation or an aspect thereof had little or no legal or factual basis and was carried on substantially for the purpose of furthering the crime or fraud. Absent such a showing, the requisite finding that an otherwise privileged or immunized communication was intended to further the fraud cannot be made." *United States v. Richard Roe Inc.*, 168 F.3d 69, 71 (2nd Cir. 1999). In *Laser Indus. v. Reliant Techs.*, 167 F.R.D. 417, (N.D. Cal. 1996), the court described the danger of applying the exception in civil contexts without appropriate safeguards in this way:

"We should not underestimate the threat posed to privilege values here. . . .if we

were to endorse procedures or standards that created significant risks of error by the trial judge and that increased substantially the prospects that challenges to assertions of privilege would succeed, we would increase the incentives, considerably, for launching such challenges. And if the incidence of challenges were to increase, and if the outcomes of such challenges were to become appreciably less predictable, parties would have much less confidence that they could communicate freely with their counsel. Eroding that confidence would reduce the flow of information from clients to lawyers, and would compromise the reliability of the advice that lawyers would provide in return. Such a spectre would strike at the heart of the goals that underlie the law's creation of the attorney-client privilege in the first place." *Laser Indus.*, 167 F.R.D. at 446 (emphasis added).

The strong societal interest in preserving the privilege, the economic interests in containing discovery costs, and the court's interest in managing litigation all weigh against expanding the crime-fraud exception to cover collateral discovery-related conduct. Applying the crime-fraud exception to litigation-related conduct that is untethered to an underlying claim of fraud, or that does not meet the elements of common law fraud, would represent a destructive expansion of the doctrine. The oldest and most sacrosanct privilege would be vulnerable to attack in every discovery battle.