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PERSPECTIVE

Crime-fraud exception to A/C privilege pierces Trump's communications with lawyers

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This past Wednesday, the D.C. Circuit Court of Appeals denied Former President Donald Trump's motion to stay a District Court Judge's monumental ruling that the attorney-client privilege between Trump and his lawyer, Evan Corcoran, can be pierced on the basis of the crime-fraud exception.

DAs a result, the grand jury investigation into Trump's mishandling of classified documents may now see evidence from Corcoran concerning communications he had with Trump, unless Trump's team manages to get the Supreme Court involved fast enough to overturn the District Court order.

The crime-fraud exception stems from a letter Trump's legal team sent to the Department of Justice that was arguably used in furtherance of obstructing DOJ efforts to obtain classified documents. In connection with the DOJ's year-long investigation into Trump's mishandling and possession of government documents, Corcoran authorized a written statement in June to the DOJ, indicating that no further classified documents had been located after a diligent search. Following the August 8 search and seizure at Mar-a-lago that bore 33 boxes of highly sensitive and classified government documents, Corcoran's statement was obviously untrue.

On Friday March 17, District Court Judge Beryl Howell ruled



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that special counsel Jack Smith met the burden for invoking the crime-fraud exception. On Tuesday March 21, Trump's lawyers appealed to a three-judge D.C. Circuit Court of Appeals panel. After an unprecedented overnight filing schedule that required Trump's briefing be submitted by midnight and the special counsel's response by 6 a.m., the D.C. Circuit Court of Appeals upheld the District Court ruling and dissolved the administrative stay this past Wednesday.

The D.C. Circuit courts require a two-step inquiry. First, there

must be a "prima facie showing of a violation sufficiently serious to pierce the privilege. Second, there must be a showing that the attorney's assistance was obtained in furtherance of or reasonably related to criminal or fraudulent activity. *In re Sealed Case* (1982) 676 F. 2d 793, 814-815; *Clark v. United States* (1933) 289 U.S. 1, 15.

Other Federal courts have slightly different formulations of the necessary degree of relatedness. For example, the 8th Circuit requires "close relationship," while the 10th circuit requires "potential relation-

ship." Nevertheless, the special difficulties of extensive inspection dictate that the standard not be too precise or rigorous. *In re Sealed Case* (1982) 676 F.2d 793, 814-815. In the Grand Jury subpoena context, to promote speed and efficiency, the circuit courts have ruled that a good faith statement by the prosecutor about the evidence can be sufficient.

While the court proceedings are sealed involving the DOJ investigation into Trump's mishandling of classified documents, the DOJ clearly met the *prima facie* stan-

dard based on the Circuit Court's ruling this past Wednesday, and the fact that 33 boxes of classified documents were found after the attorney-client communication between Trump and Corcoran.

In California, the Evidence Code provides the attorney-client privilege crime-fraud exception. The privilege is lost if the relation is abused by a client who seeks legal assistance to "enable or aid anyone to commit or plan to commit a crime or fraud." Cal. Evid. Code, § 956. It is not necessary to show every element of a fraud cause of action, nor a completed crime or fraud, because the statute applies to the plan to commit a fraud.

Like the Federal D.C. Circuit rule,

the proponent of the exception has the burden to prove a *prima facie* case of crime or fraud and that the information sought to be excepted from a claim of privilege is reasonably related to that crime or fraud. *BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal. App. 3d 1240, 1262. One need only to show: (1) a false representation of a material fact; (2) knowledge of its falsity (3) intent to deceive; and (4) the right to rely. *Id.* at 1263.

For evidentiary purposes, a *prima facie* case is one that "suffice[s] for proof of a particular fact until contradicted and overcome ... by other evidence. In other words, [a *prima facie* case is made by] evidence from which reasonable

inferences can be drawn to establish the fact asserted, i.e., the fraud." *Id.*, at 162, citing *People v. Van Gorden* (1964) 226 Cal. App. 2d 634, 636-637. Thus, while a preponderance of evidence need not be established, bare allegations are insufficient. *Travelers Ins. Companies v. Superior Court* (1983) 143 Cal. App. 3d 436, 447. In practice, parties can move the court to compel discovery on the basis of the crime-fraud exception. If the court rules that the exception applies and parties have disagreements as to the scope of the communications that will be excepted, parties may request an in camera review of the disputed documents under C.C.P. § 2031.285(d)(1).

While Trump's legal woes continue to worsen, valuable lessons can be gained from his missteps. As litigators, the antennas automatically stick up when crime or fraud is suspected. Although the burden of proof required at trial to prove crime or fraud is a preponderance, as explained above, the burden of proof required in discovery is far lower. Litigators must remain in tune with the objections to attorney-client communications and its exceptions because the information sought may indeed, one day, become discoverable.

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