The Crime-Fraud Exception Does Not Depend on Lawyers' Misconduct

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In his May 27, 2015 “Privilege Points” release, Tom Spahn discusses innocent lawyers and the crime-fraud exception to the privilege:

The so-called "crime-fraud exception" can strip away privilege protection from otherwise privileged communications that further clients’ future criminal or fraudulent conduct.

In United States v. Ceglia, Case No. 1:12-cr-876 (VSB), 2015 U.S. Dist. LEXIS 45027 (S.D.N.Y. Mar. 8, 2015), the court addressed the government's crime-fraud exception argument in its prosecution of Paul Ceglia — who allegedly forged a contract supporting his claim that Mark Zuckerberg promised him fifty percent ownership of Facebook. The government sought communications between defendant Ceglia and his law firms DLA Piper and Kasowitz Benson. The court ultimately found the crime-fraud exception applicable — after deliberately noting that "[a]ttorney communications and work product may be in furtherance of a crime or fraud even if the attorney is unaware of the client's ill intent." Id. at *12.

A nonlawyer reading headlines in such a highly-publicized criminal action might jump to the wrong conclusion upon learning that communications with DLA Piper and Kasowitz Benson lost their privilege protection under the crime-fraud exception. However, even innocent lawyers might find that clients have used their services for nefarious purposes.