Courts Apply the Crime-Fraud Exception

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In his March 13, 2013 “Privilege Points” release, Tom Spahn discusses the “crime-fraud” exception to the privilege:

Every court recognizes that neither the attorney-client privilege nor the work product doctrine should protect communications that further the client's criminal or fraudulent conduct. Although courts differ on some of the elements of the "crime-fraud" exception, they agree on some basic concepts.

In Everflow Technology Corp. v. Millennium Electronics, Inc., the court pointed to a California evidence rule stripping privilege and work product protection from communications if the moving party establishes "a prima facie case of crime or fraud," and "a reasonable relationship between the crime or fraud and the attorney-client communication." No. C07-05795 HRL, 2013 U.S. Dist. LEXIS 4810, at *5 (N.D. Cal. Jan. 11, 2013) (not for citation). The court found that plaintiff had carried this burden. At nearly the same time, the District of Nebraska declined to apply the crime-fraud exception, concluding that plaintiffs "have not offered sufficient evidence to show a factual basis adequate to support a good faith belief by a reasonable person that the crime-fraud exception applies." Davis v. Hugo Enters., LLC, No. 8:11CV221, 2013 U.S. Dist. LEXIS 3357, at *11 (D. Neb. Jan. 9, 2013). A week later, the Eastern District of Pennsylvania found that the government had satisfied its burden, and ordered grand jury targets' lawyer to testify about his conversations with his clients. In re Grand Jury Subpoena, G.J. No. 10-127-02, 2013 U.S. Dist. LEXIS 8127 (E.D. Pa. Jan. 18, 2013). As in Everflow Technology, the Grand Jury court articulated another universally applied rule: "The crime-fraud exception applies whether or not the attorney was actually aware that his or her advice was being used for nefarious purposes." Id. at *10.

Litigants should remember that merely alleging an adversary's crime or fraud does not result in forfeiture of privilege or work product protection. On the other hand, no court requires a litigant to actually prove the adversary's criminal guilt or fraud liability.