

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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:
IN RE GRAND JURY SUBPOENA : **G.J. No. 10-127-02**
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MEMORANDUM (REDACTED)

PRATTER, J.

JANUARY 18, 2013

In this grand jury matter, the Government seeks to compel the testimony of Attorney, over the objections of his former clients (and grand jury targets), a business organization and its president, who are now grand jury targets (collectively, “Intervenors”). The Government concedes that Attorney did act as counsel to Intervenors and that, therefore, some of the testimony it seeks could normally be covered by the attorney-client privilege. However, the Government contends that the crime-fraud exception applies – or may apply – to overcome the privilege as to certain aspects of the communications between Attorney and his former clients. As part of its motion to enforce its subpoena of Attorney, the Government asked the Court interview the attorney *in camera* to question him about his relationship with Intervenors, and the Court granted this request. After undertaking this *in camera* interview with Attorney, the Court agrees that the crime-fraud exception applies to vitiate Intervenor’s privilege with respect to discussions of a particular transaction.

FACTUAL AND PROCEDURAL BACKGROUND

The following factual and procedural background is necessarily limited by concerns for grand jury secrecy. To the extent that the Government has provided the Court with facts in

support of its motion to compel by way of an *ex parte* declaration and Attorney has answered questions *in camera*, those facts will not be disclosed herein.¹

A grand jury subpoena was served on Attorney, ordering him to appear and give testimony in relation to the grand jury investigation of Intervenors. Attorney rented office space on Business-Intervenor's premises and acted in a limited, intermittent way as general counsel for Business-Intervenor during that time by providing legal services when requested in return for use of office space and services. Attorney was free to pursue business and professional activities other than for or with Intervenors. Attorney and Individual-Intervenor were also business partners for a brief period of time in a venture. Attorney, through his own counsel, advised the Government that he was not acting as a lawyer with respect to this brief foray into the business; however, Individual-Intervenor, through his current attorney, tells the Court that Attorney did act as a lawyer for the venture.

The government investigation of Intervenors centers on alleged violations of the Foreign Corrupt Practices Act, and, more specifically, on allegedly corrupt payments made indirectly to a foreign official, who facilitated consulting relationships between Intervenors and others. Attorney served as a legal advisor for Intervenors with respect to one such relationship ("the Transaction") during his tenure as general counsel to Business-Intervenor. According to the Government, some of the allegedly illegal payments were connected to that particular Transaction and were made not long after Attorney served as a legal advisor with respect to that Transaction. Far greater detail regarding the Transaction as well as other business transactions is provided in the Government's *ex parte* affidavit.

¹ The Court acknowledges that the Intervenors are vociferous in their expressions of frustration with these circumstances and addresses such issues, *infra*.

Believing at least part of his likely testimony regarding the Transaction and other transactions involving the Bank to be protected by the attorney-client privilege, Attorney informed the Government that he would not testify before the grand jury until the Court resolves the question of whether any exceptions to the privilege apply that would allow him to testify as to those topics. The Government moved to compel Attorney's testimony and asked this Court to examine Attorney *in camera* to determine whether the crime-fraud exception to the attorney-client privilege applies. Intervenors also moved (and were allowed) to intervene in this matter and filed briefs opposing not only Attorney's appearance before the grand jury but also any *in camera* examination of Attorney.

On November 13, 2012, the Court granted the Government's motion in part, ordering the examination of Attorney *in camera* and setting the terms for that examination. In the interest of protecting both grand jury secrecy and potentially privileged information, the Court examined Attorney absent any counsel other than Attorney's own counsel, drawing from questions submitted by both the Government and the Intervenors. Those questions generally covered topics such as Attorney's relationship with Intervenors, the type of work he performed for them, and any discussions he had with them about the transactions that form the basis for the potential charges against Intervenors. After hearing Attorney's answers to those questions, the Court concludes that, as to discussions between Attorney and Intervenors regarding the Transaction, the crime-fraud exception can apply. Thus, as discussed more fully below, the Government may question Attorney about that issue, as well, of course, as any other factual issues that do not implicate on the attorney-client privilege before the Grand Jury.

DISCUSSION

As an initial matter, despite the Court's decision that the balance between the need for grand jury secrecy and the protection of the attorney-client privilege could only be met if neither counsel for the Government nor the Intervenors were present at the *in camera* examination of Attorney, the Intervenors continue to urge the Court to release to them all or some of the transcript from the *in camera* interview of Attorney. They argue that due process would be violated by refusing them an opportunity to review the transcript and rebut the Government's crime-fraud arguments directly.

The Intervenors reiterate arguments that they raised in favor of permitting them to attend the *in camera* interview, noting that secrecy concerns are lessened here because the nature and existence of the investigation are well known to them already. The Court previously addressed this concern, holding that because "there appears to be a significant amount of information before the grand jury that is not known to the Intervenors," "the secrecy of the grand jury investigation is still entitled to protection by the Court." *See In re Grand Jury*, G.J. No. 10-127-02, 2012 WL 5587438, at *5 (E.D. Pa. Nov. 13, 2012) (citing *In re Grand Jury Subpoena*, 223 F.3d at 219, which denied a target's request for access to the Government's *ex parte* affidavit, even though the investigation had long been pending and its nature was public knowledge).

Intervenors also note that other circuit courts have publicly reviewed questions posed to witnesses before a grand jury, which they contend is even more sensitive than the information they seek here and therefore weighs in favor of allowing them to review the transcript or portions thereof. *See, e.g., In re Grand Jury Proceeding*, 68 F.3d 193, 196 (7th Cir. 1995); *In re Grand Jury Subpoenas*, 144 F.3d 653, 657 (10th Cir. 1998); *In re Matter of Grand Jury Empanelled October 18, 1979 (Appeal of Hughes)*, 633 F.2d 282, 291-92 (3d Cir. 1980). However, each of

these cases involves disclosure of grand jury questions, not answers, except to the extent that the answers were non-responsive. Here, Intervenors themselves drafted a set of proposed questions, which were submitted to the Court, were substantially similar to those submitted by the Government, and were used in large part by the Court for the *in camera* interview; therefore, they have already received as much information as was disclosed in the cases they cite.

Ultimately, Intervenors' arguments are unpersuasive. Because the grand jury proceeding at issue here is ongoing and because the transcript almost certainly reflects a preview of Attorney's eventual grand jury testimony, *i.e.*, for the same reasons that the Court excluded Intervenors from the *in camera* interview of Attorney, secrecy concerns outweigh any need for Intervenors to review the transcript of Attorney's *in camera* interview. Just as the Court may rely on an *ex parte* affidavit to determine that the crime-fraud exception applies without violating the due process rights of a grand jury target, *see In re Grand Jury Subpoena*, 223 F.3d at 219, so, too, may the Court rely on the substance of an *in camera* interview specifically held to aid the Court in determining the whether the crime-fraud exception applies. The Court further notes that because Intervenors are the holders of the privilege challenged here, they are in a unique position to know the salient facts involved without having access to the *in camera* interview, in that the key facts all relate to interactions between Intervenors and Attorney. Therefore, their need for this *in camera* information is even further lessened because the information is already in their possession.

Moving on to the matter at hand, the attorney-client privilege, "one of the oldest recognized privileges for confidential communications," *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998), bars the disclosure of communications when:

"(1) legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence,

(5) by the client, (6) are at his insistence permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection [may] be waived.”

In re Impounded, 241 F.3d 308, 316 n.6 (3d Cir. 2001) (quoting *In the Matter of the Grand Jury Empaneled February 14, 1978*, 603 F.2d 469, 474 (3d Cir. 1979)). “Courts have long viewed [the privilege’s] central concern as one to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” *In re Grand Jury Investigation*, 445 F.3d 266, 273 (3d Cir. 2006).

The privilege, however, is not without limits. “Because the attorney-client privilege obstructs the truth-finding process, it is construed narrowly.” *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1423 (3d Cir. 1991); *see also In re Grand Jury Investigation*, 599 F.2d 1224, 1235 (3d Cir. 1979) (“[B]ecause the privilege obstructs the search for truth and because its benefits are, at best, ‘indirect and speculative,’ it must be ‘strictly confined within the narrowest possible limits consistent with the logic of its principles.’” (quoting 8 Wigmore on Evidence § 2291, at 554)); *United States v. D’Amario*, 330 Fed. Appx. 409, 419 n.3 (3d Cir. 2009) (“[T]he attorney-client privilege is narrowly construed . . .”).

The Court finds that the crime-fraud exception applies to vitiate the attorney-client privilege as to the interactions between Attorney and Intervenors regarding the Transaction. The crime-fraud exception to the attorney-client privilege applies when “(1) the client was committing or intending to commit a fraud or crime . . . and (2) the attorney-client communications were in furtherance of that alleged crime or fraud.” *In re Grand Jury Subpoena*, 223 F.3d 213, 217 (2000) (internal citations omitted).

The crime-fraud exception applies whether or not the attorney was actually aware that his or her advice was being used for nefarious purposes. *Clark v. United States*, 289 U.S. 1, 15 (1933). Indeed, “[a]ll that is necessary is that the client misuse or intend to misuse the attorney’s

advice in furtherance of an improper purpose.” *In re Grand Jury*, Nos. 12-1697, 12-2878, --- F.3d ----, 2012 WL 6156176, at *18 (3d Cir. Dec. 11, 2012). For instance, in *In re Grand Jury Investigation*, 445 F.3d 226 (3d Cir. 2006), the Third Circuit Court of Appeals held that the crime-fraud exception applied when an attorney instructed his client as to what types of documents were responsive to a Government subpoena because the client used that information to target and destroy responsive documents, thereby committing the crime of obstruction of justice. *Id.* at 278-79. The court held that the attorney’s knowledge of the client’s intent to use the information in such a way was irrelevant. *Id.*

The Third Circuit Court of Appeals has recently clarified the quantum of proof necessary to make a *prima facie* showing that the crime-fraud exception applies. *See In re Grand Jury*, 2012 WL 6156176. In that decision, the Third Circuit Court of Appeals held that the “reasonable basis” standard applies to crime-fraud exception determinations. *Id.* at *15. That is, “[w]here there is a reasonable basis to suspect that the privilege holder was committing or intending to commit a crime or fraud and that the attorney-client communications or attorney work product were used in furtherance of the alleged crime or fraud, that is enough to break the privilege.” *Id.* at *16. This means that “the party opposing the privilege is not required to introduce evidence sufficient to support a verdict of crime or fraud or even show that it is more likely than not that the crime or fraud occurred.” The Third Circuit Court of Appeals explained that this relatively low standard of proof is particularly appropriate in the grand jury context, given “the need for speed simplicity, and secrecy.” *Id.*

Here, the Government has submitted evidence by way of its *ex parte* affidavit sufficient to establish a reasonable basis for the Court to conclude Intervenors intended to commit a crime when Attorney was consulted for legal advice regarding the Transaction and could have easily

used it to shape the contours of conduct intended to escape the reaches of the law. In other words, from Attorney's testimony and the Government's affidavit, the Court concludes that there is a reasonable basis to conclude that Attorney's advice was used by Intervenors to fashion conduct in furtherance of that crime. Therefore, the Court concludes that invocation of the crime-fraud exception here does no violence to the attorney-client privilege and does not call into question its continued importance and viability. Thus, the Court will grant the Government's motion to compel Attorney's testimony.

CONCLUSION

For the foregoing reasons, the Court will grant the Government's Motion to Enforce Grand Jury Subpoena. More specifically, the Government may question Attorney about conversations that he had with Intervenors regarding the Transaction, as well as any other non-privileged topics.

BY THE COURT:

S/Gene E.K. Pratter
GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE

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ORDER (REDACTED)

AND NOW, this 18th day of January, 2013, upon consideration of the Government's Motion to Enforce Grand Jury Subpoena (Docket No. 7), Intervenors' Response (Docket No. 18), the Government's Reply (Docket No. 19), Intervenors' Sur-reply (Docket No. 21), and Intervenors' Post-Argument Brief (Docket No. 22), and other submissions from Intervenors, it is hereby **ORDERED** that the Government's Motion (Docket No. 7) is **GRANTED**. Attorney shall appear for examination before the Grand Jury to answer questions relating to the Transaction and any other non-privileged topics.

BY THE COURT:

S/Gene E.K. Pratter
GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE