



Litigation

Litigating the Crime-Fraud Exception: *Chevron Corp. v. Donziger*

Obtaining full disclosure of incriminating documents requires patience to build a body of evidence demonstrating probable cause that the crime-fraud exception applies

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The two-part test for the crime-fraud exception in most jurisdictions appears deceptively simple. First, the party asserting the exception must demonstrate “probable cause” or “*prima facie* evidence” that a fraud or crime has been committed, meaning “a prudent person has a reasonable basis to suspect the perpetration or attempted perpetration of a crime or fraud.” Second, the material being sought must be “in furtherance of” the crime or fraud.

As a practical matter, however, there is a lot of discretionary gray area, and courts generally are reluctant to subject lawyers or their communications to discovery. In addition, parties engaged in acts of misconduct serious enough to breach the privilege may well be reluctant to make a complete production of responsive materials. Thus, merely satisfying the basic elements of crime-fraud may not be enough to procure a ruling piercing an attorney’s confidential communications, much less a meaningful production of the documents themselves. As a consequence, parties faced with claims of privilege or work-product asserted by parties or lawyers who appear to have engaged in a crime or fraud need to be prepared to employ a wider range of challenges and to engage in protracted, persistent litigation to obtain discovery.

As an initial matter, the party invoking the crime-fraud exception must recognize and work to surmount many judges’ reluctance to stigmatize parties (or their conduct) as fraudulent or even criminal. The process of building a crime-fraud case necessary to pierce the privilege may take many months and require repeated applications to

the court, as discrete indicia of wrongdoing are obtained. In the early stages of litigation, the party invoking the crime-fraud exception likely will be able to offer only circumstantial evidence, which may be sufficient to satisfy the elements of the exception but may not overcome the court’s hesitation. By developing stronger evidence of fraud, particularly by focusing on especially instructive episodes or subject-matters, the proponent of disclosure may overcome judicial reluctance to apply the exception.

For example, when Chevron initially commenced discovery under 28 U.S.C. § 1782 in connection with the Ecuadorian dispute, it invoked the crime-fraud exception by presenting evidence relating to the collusion of the Ecuadorian plaintiffs’ lawyers with an Ecuadorian court-appointed Special Master. Initially, the most revealing evidence consisted of a fleeting scene on the Netflix version of the documentary *Crude* depicting the collusion. Although that particular district court declined to find crime-fraud, it ordered production on a different ground. The resulting discovery produced additional evidence of collusion — including footage of a meeting between the Special Master and the Ecuadorian plaintiffs’ lawyers and consultants to discuss the Special Master’s report weeks before his appointment. After reviewing that footage, a number of courts applied the crime-fraud exception to documents relating to the Special Master’s report.

Similarly, providing courts with evidence of crime or fraud may lead to a more exacting examination of whether the opponent of disclosure has satisfied all the

elements of the privilege or work-product doctrine in the first place. This is because strong evidence of misconduct may also suggest that the resisting party is engaged in discovery evasions. And unlike crime-fraud, a finding of waiver on other grounds — such as failure to comply with the relevant privilege log rules — does not carry the same stigma. As one example, in a Section 1782 proceeding against attorney Steven Donziger, the district court noted that there was ample evidence for the crime-fraud exception, but found waiver as a result of Donziger's intentional failure to produce a timely privilege log.

In addition, presenting evidence of an attorney's knowledge of wrongdoing can be a powerful tool for convincing a court to apply the crime-fraud exception, even though such a showing is not required because the client's knowledge is sufficient. For example, Donziger's waiver (after numerous rounds of additional motions to compel) resulted in the disclosure of important evidence betraying attorney wrongdoing. One email to Donziger, from an Ecuadorian lawyer, agonized that "the problem is that the effects [of U.S. discovery] are potentially devastating in Ecuador (apart from destroying the proceeding, all of us, your attorneys, might go to jail)" When a district judge in the Southern District of New York recently found Donziger liable under civil RICO and fraud, the court described the "go to jail" email as "one of those blinding rays of candor that can occur even in clouds of lies" That email was not, itself, subject to a crime-fraud finding, but the court did rely in part on that email when it later found probable cause to invoke the crime-fraud exception against documents held by a nonparty.

Even after a court finds probable cause that the crime-fraud exception applies, obtaining relevant documents requires persistence. Often courts determine to review materials *in camera* in order to apply the "in furtherance" element, but that is not always necessary, and can be a

difficult process because the court operates with a full docket of other cases and often does not have the close familiarity with the intricacies of the underlying events and players necessary to appreciate what is and is not being "furthered." As a result, the proponent of disclosure should consider offering to assist the court by providing materials — such as a list of key individuals, key dates and events, summary of the evidence of the fraud, etc. — that may assist the court's review. While being mindful of the risk of revealing internal strategy of the case in any such publicly filed document, this can be useful in obtaining an accurate *in camera* review.

Finally, an order compelling a party (or attorney) to produce documents under the crime-fraud exception may be only the first step on the road to complete production of responsive documents. The proponent of disclosure must carefully review productions to ensure completeness. For example, in some Section 1782 proceedings, Chevron uncovered numerous instances of inadequate productions, necessitating multiple orders to compel production of documents already ordered to be produced. Eventually, this resulted in orders requiring the production of Donziger's and his associates' hard drives. But seeking repeated judicial intervention in such circumstances carries risks for all parties. The proponent of disclosure risks exhausting the court's patience, while the opponent risks further findings of crime-fraud for obstructing discovery.

In short, successfully obtaining privileged communications — even where there is strong evidence of fraud or criminal wrongdoing — is not a simple matter of alleging that the lawyer's communications were in furtherance of the alleged crime or fraud. Obtaining full disclosure of incriminating documents requires patience to build a body of evidence demonstrating probable cause that the crime-fraud exception applies and persistence to ensure that all documents subject to a crime-fraud finding are in fact produced.

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