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MPT-1: In re Hammond

FRANKLIN RULES OF PROFESSIONAL CONDUCT

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) . . . ;

(3) to prevent, mitigate or rectify substantial injury to the financial interest or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

...

FRANKLIN RULES OF EVIDENCE

Rule 513 Lawyer-Client Privilege

...

(b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client

...

(3) Who may claim the privilege. The privilege may be claimed by the client The person who was the lawyer . . . at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

...

(d) Exceptions. There is no privilege under this rule:

(1) Furtherance of crime or fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud.

...

Official Advisory Committee Comments

...

[3] A communication made in confidence between a client and a lawyer is presumed to be privileged. A party claiming that such a communication is not privileged bears the burden of proof by a preponderance of the evidence. The party claiming that such a communication is privileged must nevertheless disclose the communication to the court to determine the communication's status if the party claiming that the communication is *not* privileged presents evidence sufficient to raise a substantial question about the communication's status.

Franklin courts have not yet determined whether, to be sufficient, the evidence presented must establish probable cause to believe that the communication in question is not privileged, *see, e.g., State v. Sawyer* (Columbia Sup. Ct. 2002), or whether there must be "some evidence" to that effect, *see, e.g., United States v. Robb* (15th Cir. 1999).

FRANKLIN CRIMINAL CODE

§ 3.01 Arson of Building

Whoever, by means of fire, intentionally damages any building of another without the other's consent may, upon conviction, be imprisoned for not more than 15 years, or fined not more than \$50,000, or both.

§ 3.02 Arson of Building with Intent to Defraud an Insurer

Whoever, by means of fire, intentionally damages any building with intent to defraud an insurer of that building may, upon conviction, be imprisoned for not more than 10 years, or fined not more than \$10,000, or both.

...

§ 5.50 Fraudulent Claims

Whoever knowingly presents or causes to be presented any fraudulent claim for the payment of a loss or injury, including payment of a loss or injury under a contract of insurance, may, upon conviction, be imprisoned for not more than 5 years, or fined not more than \$10,000, or both.

United States v. Robb

United States Court of Appeals (15th Cir. 1999)

John Robb appeals his conviction for mail fraud in the sale of stock of Coronado Gold Mines, Inc. The indictment alleged that Robb caused Coronado's stock to be sold on misrepresentations that the company was producing gold and earning money, that the price of the stock on the New York Mining Exchange was manipulated through such misrepresentations, and that the mails were used to facilitate the scheme.

Robb acquired a gold mine in Idaho that did not produce any ore that could be mined at a profit. The ore extracted contained only an average of \$2.00 to \$2.50 of gold per ton, with a cost of mining of at least \$7 per ton. Robb claimed through advertisements and stockholder reports that the mine was yielding "ore averaging \$40 of gold per ton." Robb caused Coronado's stock to be distributed to the public by high-pressure salesmanship, at prices that netted a \$158,000 profit.

The sole error alleged on appeal is the district court's decision to admit the testimony of Ralph Griffin, a former attorney for Robb. At trial, Griffin's testimony for the Government showed that Robb controlled all mining operations and that Robb knew that the public information disseminated was false. Robb claims that allowing such testi-

mony violated the attorney-client privilege. We disagree and affirm the conviction.

We have long recognized the attorney-client privilege as the oldest of the privileges for confidential communications known to the common law. It encourages full and frank communication between attorneys and clients. But because the privilege has the effect of withholding information from the fact finder, it should apply only where necessary.

The purpose of the crime-fraud exception to the attorney-client privilege is to lift the veil of secrecy from lawyer-client communications where such communications are made for the purpose of seeking or obtaining the lawyer's services to facilitate a crime or fraud.

To release an attorney from the attorney-client privilege based on the crime-fraud exception, the party seeking to overcome the privilege must do more than merely assert that the client retained the attorney to facilitate a crime or fraud. Rather, there must be some evidence supporting an inference that the client retained the attorney for such a purpose.

Once such evidence is presented, the district court must review, *in camera* (in chambers,

without the parties being present), the attorney-client communications in question to determine their status. The court may properly admit the disputed communications into evidence if it finds by a preponderance of evidence that the allegedly privileged communications fall within the crime-fraud exception.

Contrary to Robb's claim, the Government satisfied the "some evidence" standard here, thereby triggering *in camera* review of the attorney-client communications and ultimately resulting in a decision that the communications were within the crime-fraud exception. The Government's evidence raised an inference that Robb retained Griffin in the midst of a fraudulent scheme; that during this time, Griffin was the primary source of legal advice to Robb, had access to all of Coronado's information, and had regular contact with Robb; and that records of the actual mining results demonstrated misrepresentations in the publicly disseminated information.

Subsequently, Robb had an opportunity to present evidence that he retained Griffin for proper purposes, but he failed to do so. Instead, the Government presented further evidence which was sufficient to enable it to carry its burden to prove by a preponderance of the evidence that Robb retained Griffin for *improper* purposes. As a result, the district court properly ruled that the communi-

cations between Robb and Griffin were not privileged.

We understand that the modest nature of the "some evidence" standard could lead to infringement of confidentiality between attorney and client. At the same time, a higher standard could improperly cloak fraudulent or criminal activities. On balance, we are confident that the "some evidence" standard achieves an appropriate balance between the competing interests and that the district courts may be relied upon to keep the balance true.

Affirmed.

State v. Sawyer

Columbia Supreme Court (2002)

Mark Sawyer appeals his conviction after a jury trial for bribery of a public official. Sawyer claims that the trial court erred in excluding the testimony of Attorney Anthony Novak regarding Novak's conversations with his client Connor Krause, the alderman whom Sawyer was convicted of bribing. The court of appeals affirmed Sawyer's conviction. We agree with the court of appeals that the trial court properly excluded the testimony.

Sawyer owned an automobile dealership in the City of Lena, Columbia, which was located on property to which the city had taken title in order to widen the street. As first proposed, the plan required razing Sawyer's business. The plan was later changed so that Sawyer's business would be untouched. A corruption investigation of the City Council led to charges against Sawyer for bribing Krause to use his influence to change the plan.

Before trial, Sawyer subpoenaed Krause's attorney, Novak, to testify. When Novak refused to testify, Sawyer moved the court to compel him to do so, claiming that (i) Krause was currently in prison having been convicted of taking bribes while he was an alderman; (ii) Krause initially told police that Sawyer had not bribed him; (iii) Krause retained and met with Novak, his attorney;

and (iv) Krause later agreed to testify against Sawyer in exchange for a reduced prison sentence. On those facts, Sawyer argues that Krause planned to testify falsely to obtain a personal benefit; that he retained Novak to facilitate his plan; and that, as a result, Krause's communications with Novak were not privileged.

Although the attorney-client privilege has never prevented disclosing communications made to seek or obtain the attorney's services in furtherance of a crime or fraud, in Columbia the mere assertion of a crime or fraud is insufficient to overcome the presumption that such communications are privileged. Rather, the moving party must present evidence establishing probable cause to believe that the client sought or obtained the attorney's services to further a crime or fraud.

Upon presentation of such evidence, the party seeking to establish the attorney-client privilege must disclose the allegedly privileged communications to the judge for a determination of whether they fall within the crime-fraud exception. The judge's review of the communications is conducted *in camera* to determine if the moving party has established that the communications fall within the crime-fraud exception.

Some courts have required disclosure of the disputed communications to the court upon the presentation merely of “some evidence” supporting an inference that the client sought or obtained the attorney’s services to further a crime or fraud. *See, e.g., United States v. Robb* (15th Cir. 1999). We believe Columbia’s “probable cause” standard strikes a more appropriate balance than the “some evidence” test because it protects attorney-client communications unless there is a strong factual basis for the inference that the client retained the attorney for improper purposes.

Applying the “probable cause” standard here, the trial court concluded that Sawyer failed to present evidence establishing probable cause to believe that Krause sought or obtained Novak’s services to facilitate any plan to commit perjury. We agree. While the evidence would indeed support an inference that Krause retained Novak to facilitate perjury, it supports an equally strong inference that Krause retained him to ensure that his choices were informed—and that he failed to cooperate earlier because he was afraid he might expose himself to prosecution with no countervailing benefit. A greater showing of the client’s intent to retain the attorney to facilitate a crime or fraud is needed prior to invading attorney-client confidences.

Affirmed.