

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIAIn Re: Subpoena to Testify Before Grand
JuryCase No. [15-mc-80207-JSC](#)**ORDER RE: MOTION TO QUASH
SUBPOENA DUCES TECUM**

Re: Dkt. No. 1

Nikhil Bhatnagar (“Bhatnagar”) moves to quash a grand jury subpoena duces tecum directing him to produce documents related to and communications with certain entities and individuals for which he served as counsel on the grounds that the materials are protected by the attorney-client and work-product privilege. (Dkt. No. 1.) The Government contends that the documents and communications furthered an ongoing or future fraud, and therefore should be ordered disclosed under the crime-fraud exception to the attorney-client privilege. (Dkt. No. 9.) The Court finds the motion suitable for resolution without oral argument. See Civ. L.R. 7-1(b). Having considered the parties’ submissions, the Court ORDERS Bhatnagar to produce the documents and communications sought to the Court for in camera review.

BACKGROUND

Bhatnagar is an attorney admitted to practice in California. (Dkt. No. 4 ¶ 1.) At some point in 2012, Bhatnagar interviewed with a law firm for a full-time position. (Id. ¶ 3.) Bhatnagar thought that one of the men who interviewed him was an attorney associated with the law firm, but he later learned that he was a real estate developer associated with various commercial entities. (Id. ¶ 3.) The firm did not offer Bhatnagar a full-time position, but instead hired him on a contract basis. (Id. ¶ 4.) Bhatnagar performed legal work for the firm between June 2012 and March 2014.

1 Much of the work he did involved representing the real estate developer's companies in litigation
2 against the same defendant. (Id. ¶¶ 4-9.) In each case, Bhatnagar represented the companies in an
3 action to set aside a deed of trust to residential property in favor of the defendant. (Id.) Each case
4 resulted in a stipulated judgment cancelling the deeds. (Id.)

5 As it turns out, the litigation that Bhatnagar worked on is the subject of an ongoing
6 investigation into real estate fraud. (See generally Dkt. No. 9-2.) Bhatnagar initially spoke with
7 investigating agents, but declined to discuss the matter further in light of his obligation not to
8 disclose privileged information. (Dkt. No. 4 ¶ 10.) The government subsequently issued a grand
9 jury subpoena duces tecum on March 25, 2015 directing Bhatnagar to produce "any and all
10 documents and communications related to or involving" the entities and individuals involved in
11 the supposed fraud, which includes Bhatnagar's former clients. (Dkt. No. 4-1 at 7.) The
12 subpoena also directs Bhatnagar to produce "any and all communications and documents between
13 him and the [firm] in connection with the residential property dealt with in the lawsuits. (Id.)
14 Bhatnagar's motion to quash followed, in which he candidly submits that the crime-fraud
15 exception may well apply, but a court order is required to make such determination. (See Dkt. No.
16 2 at 4-6.) The government has submitted a declaration by the investigating agent outlining the
17 evidence of fraud uncovered in its investigation to date, and describing Bhatnagar's role in relation
18 to the fraud. (Dkt. No. 4-1.) The Court has reviewed this evidentiary submission in camera. The
19 government urges the Court to deny Bhatnagar's motion to quash and order the documents
20 disclosed.

21 DISCUSSION

22 A party seeking disclosure of attorney-client communications or attorney work product
23 under the crime-fraud exception bears the burden of demonstrating that the privilege does not
24 apply. Specifically, "[a] party seeking to vitiate the attorney-client privilege [or work product
25 doctrine] under the crime-fraud exception must satisfy a two-part test." *In re Napster, Inc.*
26 *Copyright Litig.*, 479 F.3d 1078, 1090 (9th Cir. 2007), abrogated on other grounds by *Mohawk*
27 *Indus., Inc. v. Carpenter*, 558 U.S. 100 (2009); see also *United States v. Edison*, No. 07-cr-00074
28 *WHA*, 2008 WL 170660, at *5 (N.D. Cal. Jan. 17, 2008) (noting that the crime-fraud exception,

most commonly applied to attorney-client communications, “applies with equal force in the work-product setting”). First, the party must show that “the client was engaged in or planning a criminal or fraudulent scheme when it sought the advice of counsel to further the scheme.” *In re Napster, Inc. Copyright Litig.*, 479 F.3d at 1090 (citing *In re Grand Jury Proceedings*, 87 F.3d 377, 381 (9th Cir. 1996)). “Second, it must demonstrate that the attorney-client communications for which production is sought are ‘sufficiently related to’ and were made ‘in furtherance of [the] intended, or present, continuing illegality.’” *Id.* (quoting *In re Grand Jury Proceedings*, 87 F.3d at 381) (emphasis and alterations in original).

The government must raise more than a mere suspicion of illegal activity, *United States v. Martin*, 278 F.3d 988, 1001 (9th Cir. 2002) (citation omitted); rather, “the exception only applies when there is reasonable cause to believe that the attorney’s services were utilized in furtherance of the ongoing unlawful scheme.”¹ *Id.* (internal quotation marks and citation omitted). In this context, reasonable cause is “more than suspicion but less than a preponderance of the evidence.” *United States v. Chen*, 99 F.3d 1495, 1503 (9th Cir. 1996). It means “evidence that, if believed by the jury, would establish the elements of an ongoing violation.” *Id.* (internal quotation marks and citation omitted). Thus, “the Government must [only] make a prima facie showing that a crime has been committed, and demonstrate the nexus between the prima facie showing and the communications sought.” *United States v. Kerr*, No. CR 11-2385-PHX-JAT, 2012 WL 2919450, at *2 (D. Ariz. July 17, 2012) (citing *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985)). The prima facie showing must be made from evidence independent of the purportedly privileged communications. *In re Grand Jury Proceedings*, 867 F.2d at 541. The scope of reviewable evidence is broad, “because the Court is not bound by the hearsay rules in making the initial determination of whether a privilege applies.” *Roe v. White*, No. CV 03-4035-CRB-NC, 2014 WL 842790, at *3 (N.D. Cal. Feb. 28, 2014) (citing Fed. R. Evid. 104(a) and *United States v. Zolin*, 491 U.S. 554, 574 (1989)).

¹ The standard is different in civil cases than in grand jury cases. See *In re Napster, Inc. Copyright Litig.*, 479 F.3d at 1094-95. In “a civil case the burden of proof that must be carried by a party seeking outright disclosure of attorney-client communications under the crime-fraud exception [is] preponderance of the evidence.” *Id.*; see, e.g., *Roe*, 2014 WL 842790, at *3.

1 Importantly, “[t]he attorney need not himself be aware of the illegality involved; it is
2 enough that the communication furthered, or was intended by the client to further, that illegality.”
3 United States v. Friedman, 445 F.2d 1076, 1086 (9th Cir. 1971) (citation omitted); see also United
4 States v. Laurins, 857 F.2d 529, 540 (9th Cir. 1998) (noting that the crime-fraud exception applies
5 even if “the attorney is unaware that his advice may further an illegal purpose”). Instead,
6 “[b]ecause both the legal advice and the privilege are for the benefit of the client, it is the client’s
7 knowledge and intent that are relevant.” In re Napster, Inc. Copyright Litig., 479 F.3d at 1090
8 (citations omitted).

9 The Ninth Circuit permits district courts to examine evidence of the crime-fraud exception
10 in camera to determine whether the exception eviscerates attorney-client privilege or work-
11 product doctrine where disclosure of sensitive grand jury materials could seriously impede the
12 function of the grand jury. In re Grand Jury Proceedings, 867 F.2d at 540 (citation omitted); see
13 also In re Grand Jury Proceedings, 2009 WL 226163, at *1 (9th Cir. Jan. 23, 2009) (stating that a
14 district court has discretion to review the government’s evidence in support of the crime-fraud
15 exception in camera). At bottom, once the Court finds reasonable cause to believe that an
16 attorney’s services were employed in furtherance of a crime—whether by in camera review of
17 evidence or otherwise—“the seal of secrecy is broken.” Clark v. United States, 289 U.S. 1, 15
18 (1933).

19 Where the party challenging the privilege lacks sufficient evidence to establish reasonable
20 cause to believe the crime-fraud exception applies, the court may instead review the actual
21 documents sought in camera if the moving party can meet a lower threshold. Specifically, the
22 moving party need only demonstrate a “factual basis adequate to support a good faith belief by a
23 reasonable person” that in camera review of the documents will reveal evidence showing that the
24 crime-fraud exception applies. In re Grand Jury Investigation, 974 F.2d 1068, 1072 (9th Cir.
25 1992) (citing Zolin, 491 U.S. at 574). Once that initial showing has been made, “the decision
26 whether to engage in in camera review rests in the sound discretion of the district court.” Zolin,
27 491 U.S. at 572.

28 However, in United States v. Christensen, --- F.3d ----, Nos. 08-50531 et al., 2015 WL

1 5010591, at *23 (9th Cir. Aug. 25, 2015), the Ninth Circuit implied that the two-step Zolin
2 analysis is always required, even if the government has met the higher “reasonable cause” burden.
3 See *id.* at *24 (“Zolin requires a district court to follow a two-step *ex parte* process to determine
4 whether the crime-fraud exception applies to potentially privileged materials.”) (citing *Zolin*, 491
5 U.S. at 572). The Christensen court determined that the district court erred by not applying
6 Zolin’s two-step framework initially, but found the error harmless because the court “recognized
7 its own error and reconsidered its decision under the correct framework.” *Id.* at *23.

8 Here, the Court’s *in camera* review of the material the government submitted establishes
9 reasonable cause to believe that there was an ongoing crime and that Bhatnagar’s legal services
10 were utilized by his client in furtherance of the ongoing unlawful scheme. The Court declines to
11 disclose the basis of this belief in light of the sensitive nature of the government’s ongoing
12 investigation, see *In re Grand Jury Proceedings*, 867 F.2d at 540; *In re Grand Jury Proceedings*,
13 2009 WL 226163, at *1, and in light of the grand jury secrecy requirements of Federal Rule of
14 Criminal Procedure 6(e). While earlier case law appears to hold that *in camera* review of the
15 documents sought is therefore unnecessary given that the government has met its burden of
16 establishing a “reasonable belief” that Bhatnagar’s legal services were used by his client in
17 furtherance of an ongoing crime, see *In re Napster, Inc. Copyright Litig.*, 479 F.3d at 1090
18 (citation omitted); see also *In re Grand Jury Proceedings*, 87 F.3d at 382-83, out of an abundance
19 of caution in light of the Ninth Circuit’s recent decision in *Christensen*, the Court will instead
20 review the documents sought *in camera* under the two-part Zolin test to confirm that the crime-
21 fraud exception applies. See *Christensen*, 2015 WL 5010591, at *23.

22 CONCLUSION

23 For the reasons explained above, the Court ORDERS Bhatnagar to submit the documents
24 for *in camera* review by September 25, 2015.

25 **IT IS SO ORDERED.**

26 Dated: September 14, 2015

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JACQUELINE SCOTT CORLEY
United States Magistrate Judge

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