New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 258—NO. 107
TUESDAY, DECEMBER 5, 2017

White-Collar Crime

Expert Analysis

Government Makes Manafort's Lawyer A Key Witness Against Him—Ho-hum?

By **Robert J. Anello**

And **Richard F. Albert**

The indictment of former Trump campaign chairman Paul Manafort, and his longtime employee and business partner, Rick Gates, has garnered international attention, as has the other bombshell revealed the same day—the guilty plea and "active" cooperation with law enforcement by former Trump foreign policy adviser George Papadopoulos. Mostly lost among the headlines regarding the first charges to be brought by Robert Mueller and the Special Counsel's Office investigating Russian interference in the 2016 U.S. election was the simultaneous release of a court opinion compelling one of Manafort's own lawyers to testify in the grand jury. A review of the decision and the indictment indicates that the lawyer is likely to be a key witness against Manafort and Gates at trial.

Many explanations account for the comparative lack of attention to this development. After all, the substance of the charges and what they suggest about where the investigation has been and where it is going are far more intriguing subjects for speculation, and prior public reports reveal that law enforcement has taken aggressive investigative steps against Manafort, including tapping his phones pursuant to a foreign intelligence surveillance warrant and searching his residence. But part of the explanation may be that nowadays, moves by federal prosecutors to force a target's lawyer to testify in the grand jury against a client are not terribly unusual or controversial.

This has not always been the case. During the early 1980s, the Justice Department's broad expansion of its use of attorney subpoenas in criminal investigations ignited a firestorm of controversy that led to substantial litigation and years of tortured efforts to enforce ethics rules restricting the practice. The Manafort case provides a useful occasion to review the saga of how those efforts ultimately failed, ironically resulting in the legitimization of the practice. The recent decision in *In Re Grand Jury Investigations*, 2017 WL 4898143 (D.D.C. Oct. 2, 2017), by District of Columbia District Judge Beryl A. Howell illustrates how, despite the attorney-client privilege and protections for attorney work-product, a lawyer may find herself transformed into a critical witness against her own client in a criminal prosecution.

> A practice that was once highly controversial has become normalized.

Background of Attorney Subpoena Controversy

Before the 1980s, prosecutors rarely subpoenaed attorneys to

ROBERT J. ANELLO *and* RICHARD F. ALBERT *are partners at Morvillo Abramowitz Grand Iason & Anello, PC.* GRETCHAN R. OHLIG, *an attorney, assisted in the preparation of this article.*

testify about a client in regard to a matter in which the attorney was acting as an advocate. This practice increased dramatically in the early 1980s, which commentators attributed to the Reagan Administration Justice Department's aggressive approach to organized crime and drug trafficking and its view that attorney subpoenas were a "new investigative tool" that could be used to obtain non-privileged information. Practitioners sounded the alarm, pointing out that at the least, such subpoenas gravely damage the relationship of trust and confidence between attorney and client, and more often are fatal to that relationship, because the subpoenaed attorney will be disqualified from continuing the representation.

Defense counsel had some notable initial success in resisting the subpoenas, when panels of the Fourth and Second Circuit Courts of Appeals held that such subpoenas implicated the Sixth Amendment right to counsel of choice and would not be enforced without the government making a preliminary showing to a judge that no other reasonably available source for the information existed. These decisions were subsequently vacated or reversed after *en banc* review, however, and both circuits concluded that no preliminary showing of need was required. In so ruling, in *In re Doe (Slotnick)*, 781 F.2d 238 (2d Cir. 1986), the en banc Second Circuit relied on Supreme Court decisions stressing the grand jury's broad right to obtain all evidence not protected by privilege without judicial interference.

Meanwhile, in 1985, the Justice Department, taking its usual approach when the danger of outside regulation looms, sought to moot the debate by issuing its own internal guidelines. That guidance, now found at U.S. Attorneys Manual 9-13.410, requires that attorney subpoenas be approved at the most senior levels of the Department, upon a demonstration that: the information sought is not available by other means; it is necessary for the successful completion of the investigation; the subpoena is narrowly drawn; and the need for the information outweighs the risk that the attorney may be disqualified. Of course, the evaluation of these criteria is to be made by the Justice Department, and the guideline creates "no rights enforceable at law." Over the years, DOJ's internal guidance has been revised to include a long list of situations where lesser or no senior level preapproval is required, including, interestingly, "friendly" subpoenas for client-related information, where counsel states in writing a willingness to provide information but "requests the formality of a subpoena."

The private bar did not see the DOJ's insistence on self-regulation as a sufficient answer. A number of states and federal judicial districts enacted ethical rules making it unethical for prosecutors to subpoena defense counsel without prior court approval. Further, in 1990 the American Bar Association amended Rule 3.8 of the Model Rules of Professional Conduct to include the same requirement. The Justice Department did not go along; it issued regulations set forth in 28 C.F.R. §77 exempting federal prosecutors from state ethics rules that conflicted with DOJ policies, and asserting that federal courts likewise could not apply such rules. The Third Circuit agreed in its 1992 decision in *Baylson v. Disciplinary Board of the Supreme Court of Pennsylvania*, 975 F.2d 102, holding that a Pennsylvania state professional conduct rule that required prior judicial approval of attorney subpoenas could not be enforced against federal prosecutors.

But in 1999, Congress passed the McDade Amendment, codified at 28 U.S.C. §530B, re-injecting uncertainty into the question. The legislation was introduced by Congressman Joseph McDade, who was investigated and prosecuted by the Justice Department on corruption charges, but acquitted at trial. It provides that federal government attorneys are subject to state and local federal court conduct rules to the same extent as other attorneys in each state.

The First Circuit resolved the uncertainty in *Stern v. United States District Court for the District of Massachusetts,* 214 F.3d 4 (1st Cir. 2000), holding that a Massachusetts district

court rule imposing a judicial preapproval requirement exceeded local rulemaking authority and was not saved by the McDade Amendment because in substance it was not an ethical standard but a procedural rule that impermissibly interfered with federal grand jury practice.

In short, more than a decade and a half of hard fought battles by the private bar to impose limited procedural hurdles on federal prosecutors' ability to issue subpoenas that transform defense counsel into witnesses against their own clients ended in defeat. Along the way, prosecutors' authority to use this aggressive and troubling investigative tool received a clearer vote of approval from the federal courts.

The Manafort Decision

The lawyer whom Mueller's office successfully compelled to testify against him, (hereinafter, the lawyer), reportedly is an election law specialist, not a criminal defense lawyer. Nevertheless, based on the timing of her work, which followed Manafort's ouster from the Trump campaign amid public reports that he was under criminal investigation, the lawyer most likely would have been working with Manafort's criminal defense team.

In September 2016, Manafort and Gates were notified by the Chief of the Foreign Agent Registration Act (FARA) Registration Unit of the Justice Department's National Security Division that the government had reason to believe that Manafort and Gates may have engaged in activities through DMP International, an LLC owned and controlled by Manafort, on behalf of the pro-Russia Ukrainian Party of Regions (the party) that required registration under the FARA. Manafort and Gates engaged the lawyer to respond to the government's inquiry. She submitted two letter responses on their behalf in November 2016 and February 2017.

The letter submissions acknowledged that DMP, acting through Manafort and Gates, had been engaged to "provide strategic advice and services in connection with certain of the party's Ukrainian and European-facing political activities," but downplayed DMP's activities on behalf of the party. Specifically, the letters state that the activities did not include meetings or outreach within the United States and that no formal agreement was reached to provide services. The indictment against Manafort and Gates alleges that these representations were materially false and misleading in violation of federal law.

In the course of investigating those allegations, in August 2017, Mueller's office issued a grand jury subpoena seeking to compel the lawyer's testimony. Its areas of proposed questioning included the identity of the sources for the factual information contained in the letters, what those individuals said, how they conveyed that information to counsel, and the extent of those individuals' involvement in the review and preparation of the letters. Manafort and Gates, through separate defense counsel, objected, and Mueller's office moved to compel.

Judge Howell first addressed the question of whether the information sought from the attorney violated the attorney client privilege. Under the doctrine of the crime-fraud exception, no privilege attaches to attorney-client communications made "in furtherance of a crime, fraud, or other misconduct." The government need only make a *prima facie* showing of the crime or fraud.

Mueller's office asserted that the defendants consulted with their attorney to prepare the FARA submissions for the purpose of concealing from the U.S. government the true nature of their work for and the millions of dollars in payments from the Ukraine and its political parties. In its *in camera* submission to the court, Mueller's office pointed to five specific portions of the FARA submissions that it believed to be false or misleading. Although the specific alleged misstatements are set forth in the decision, Judge Howell's discussion of the evidence submitted by Mueller's office is heavily redacted. The court nevertheless clearly found that the government's evidence supported such a conclusion.

For example, although the FARA submission stated that "DMP's efforts on behalf of the Party of

Regions and Opposition Bloc did not include meetings or outreach within the United States," according to the decision, the government's evidence showed that Manafort and Gates actually were "intimately involved in significant outreach in the United States on behalf of" the Ukrainian government and its parties. Further, although the FARA submission stated that neither DMP nor the individual defendants "had any agreement" with the Ukrainian political parties to provide services, Judge Howell found that the evidence showed that Manafort and Gates "clearly had an informal agreement … to direct the government relations and public relations activities of [a third-party company], and also to fund these activities."

Finding that Mueller's office made a prima facie case that Manafort and Gates "likely violated federal law" by making materially false or misleading statements in their FARA submissions, the court concluded that even though the lawyer was an unwitting conduit of such information, the defendants' communications with their attorney fell within the crime-fraud exception to the attorney client privilege and work-product protection.

The court also found alternative grounds for compelling the lawyer to answer the specific proposed questions. The court ruled that because the FARA submission was sent to the Justice Department for the specific purpose of conveying such information, Manafort and Gates impliedly waived, through voluntary disclosure, any attorney client privilege in their contents. As to the protection of the work-product doctrine, the court also found that information sought by Mueller's office was fact work product and thus could be obtained by a showing of substantial need, rather than opinion work product that reveals counsel's mental impressions, conclusions or theories, which is subject to a higher degree of protection.

In asserting that the information sought qualified as opinion work product, Manafort and Gates relied on the Fourth Circuit decision in *In re Grand Jury Subpoena*, 2017 WL 3567824, holding that the question "What did [the witness] tell you?" solicited opinion work product. Judge Howell found the dissenting opinion authored by Fourth Circuit Judge Paul Niemeyer in *In re Grand Jury Subpoena* more persuasive and more consistent with D.C. Circuit precedent that takes a narrower view of opinion work product—a view similarly held by the Second Circuit. In his dissent, Judge Niemeyer observed that myriad factors played into why an attorney might recall a conversation with the client. Whatever the reason, he noted, the grand jury would never know.

For her part, Judge Howell distinguished between the question "What did the client tell you?" and the question "What of importance did the client tell you?" finding that only the latter question implicates opinion work product. She concluded that with one exception, the testimony requested from the lawyer by Mueller's office did not require her to reveal her mental processes. Judge Howell required counsel to reveal fact work product, finding that Mueller's office had demonstrated a substantial need for the information and undue hardship in acquiring it any other way.

Conclusion

Countless times, every day, lawyers and clients engage in conversations relying on the cloak of confidentiality, not thinking that the lawyer ultimately may serve as a witness against his or her own client. The history of the bar's failed efforts to restrict federal prosecutors from issuing subpoenas requiring counsel to become witnesses against their clients, and the D.C. district court's decision affirming that authority in the Manafort case, serve as a cautionary tale. A practice that was once highly controversial has become normalized.