UNITED STATES DISTRICT COURT

DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA

v. Cr. No. 91-115-T

STEPHEN A. SACCOCCIA, et al

MEMORANDUM AND ORDER

ERNEST C. TORRES, United States District Judge

Stephen A. Saccoccia, Donna Saccoccia, and Vincent "Mickey" Hurley (the "defendants") have been convicted of various money-laundering offenses and of RICO conspiracy to launder money derived from the illegal sale of narcotics. Their Judgment in a Criminal Case Orders require them to forfeit the sum of $136,344,231.87, which represents the proceeds of the racketeering activity in which they participated.

The Government, relying on 18 U.S.C. § 1963(k) and 21 U.S.C. § 853(m) as incorporated by 18 U.S.C. § 982(b)(1)(A), has applied for an order authorizing it to depose several attorneys who

represented the defendants at various stages of the criminal prosecution and further requiring the production of unspecified documents for the purpose of identifying and locating assets of the defendants that may be used to satisfy the forfeiture judgment. The principal questions presented are whether allowing the Government to depose counsel with respect to the fee arrangements between them and their clients would violate the attorney-client privilege, the Fifth Amendment's privilege against self-incrimination and/or the defendants' Sixth Amendment right to counsel. For reasons stated below, I find that the answer to each of these questions is, no.

Background

The forfeiture order constitutes a money judgment against the defendants and may be satisfied either from the proceeds of their racketeering activity, property derived from those proceeds or, if such proceeds or property have been concealed, from any other

property belonging to the defendants. 18 U.S.C. §§ 1963(a)(1)(3) and (m);[1] United States v. Saccoccia, ___ **F.Supp.___ [Josh, please match to pgs. which correspond w/pg. 13 & 21-22 of typed opinion and include the reference to the affirmance by the Fist Circuit**]; See, United States v. Navarro-Ordas, 770 F.2d 959, 970 (11th Cir. 1985); United States v. Ginsburg, 773 F.2d 798, 801 (7th Cir. 1985).

The Government's application is prompted by the fact that only a portion of the amount declared forfeited has been recovered and by indications that the defendants may have considerable sums of money at their disposal as evidenced by the number of attorneys they have employed.

At the time the Government filed its application, appeals by all of the defendants were pending and Stephen Saccoccia was

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[1]The money-laundering statute under which the defendants also were convicted contains similar forfeiture provisions. See 18 U.S.C. § 982. However, the amounts forfeited for those offenses are subsumed by the $136,344,231.86 forfeited under § 1963. See, ____F.Supp.____ [**Josh to match to judge's opinion matching 23-24.]**

awaiting trial in California on related conspiracy and money-laundering charges. In addition, unrelated litigation was pending regarding the Court's authority to adopt a local rule requiring prosecutors to obtain judicial approval before issuing subpoenas directing lawyers to provide evidence concerning their clients. Because of the likelihood that resolution of those cases would significantly affect the issues presented in this case, the Court deferred action on the Government's application until those cases were completed. That time, now, has arrived. The Court of Appeals for the First Circuit has affirmed the convictions and forfeiture orders against all of the defendants. **Cite 2 1st Cir. cases--the one that affirms the convictions of Donna, Hurley, etc. and the other which affirms conviction of Stephen.** In addition, the California indictment against Stephen Saccoccia was dismissed by the Government.[2] Finally, the First Circuit has upheld Local Rule

[2]The dismissal was without prejudice and occurred prior to the First Circuit's affirmance of Stephen Saccoccia's conviction. Presumably, it reflected a determination that, since Stephen

3.8(f) that requires prosecutors to obtain Court approval before issuing subpoenas that seek information from attorneys regarding their dealings with clients. **Whitehouse v. U.S. District Court**

[josh, this is a 1st Cir. case which was handed down on 4/20/95]

Discussion

The defendants and their counsel urge that the Government's application should be denied for a variety of reasons. In accordance with the admonition that courts should "avoid deciding constitutional questions presented unless essential to proper disposition of a case," Harmon v. Brucker, 355 U.S. 579, 581; 78 S.Ct. 433; 2 L.Ed.2d 503 (1958), the Court will first consider those arguments that do not raise Constitutional issues.

I. Attorney-Client Privilege

The purpose of the attorney-client privilege is to encourage

Saccoccia received a 660-year sentence, there was no reason to proceed with the California prosecution if his conviction was upheld. **Cite order in California case which is in file (docket #)**

the client to make full disclosure of all pertinent facts to the attorney so that the attorney may render informed legal advice with respect to the matters about which the attorney is consulted. Fisher v. U.S., 96 S.Ct. 1569, 1577 (1976); Cherney, 898 F.2d 565, 567 (7th Cir. 1990). The privilege is based on the concern that if damaging information communicated in confidence to an attorney later might be revealed to third parties, the client would be deterred from making a full disclosure. Fisher, p. 1577; See, In re Grand Jury Subpoena, 781 F.2d 238, 247 (2nd Cir. 1985).

The privilege sometimes may deprive the Government of evidence necessary to convict a criminal. However, that is the price extracted by a system of justice that places a premium on an individual's right to the effective assistance of counsel. Matter of Grand Jury Proceeding Cherney, 898 F.2d 565, 569 (7th Cir. 1990).

Nevertheless, because the privilege may cause relevant

information to be withheld from the fact finder, it applies only to the extent necessary to achieve its purpose. Fisher, p. 1577; Cherney, p. 567. Consequently, the attorney-client privilege does not extend to all occurrences and conversations between attorney and client. With respect to information provided by the client, the privilege "protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege." Fisher, p. 1577. To put it another way, communications by the client are privileged only if they are both confidential and made in order to obtain effective legal assistance. Cherney, p. 567; In re Grand Jury Proceedings (Doe), 602 F.Supp. 603, 607 (D.R.I. 1985); In re Grand Jury Subpoena, 781 F.2d 238, 247 (2nd Cir. 1985) **[josh, please put in proper order]**

Moreover, in the criminal context, the privilege is limited to communications regarding advice sought with respect to past conduct.

The "crime-fraud" exception renders the privilege inapplicable to information provided for the purpose of obtaining advice about on-going criminal activity or plans to commit future criminal acts. In re Grand Jury Proceedings (Doe), 602 F.Supp. 608 (D.R.I. 1985). The crime-fraud exception applies even though the attorney may be unaware that the client's purpose is to further an on-going or future criminal scheme. Such a purpose constitutes an abuse of the attorney-client relationship and, under such circumstances, the purpose of the privilege is not served by preventing disclosure. In re Grand Jury Proceedings (Doe), 602 F.Supp. 608-609 (D.R.I. 1985); Hodge and Zweig at p. 1355; Grieco v. Meachum, 533 F.2d 713, 714 n. 4 (1st Cir. 1976).

The party asserting the attorney-client privilege has the burden of proving its applicability. U.S. v. Wilson, 798 F.2d 509, 512 (1st Cir. 1986); U.S. v. Gertner, ---F.Supp-- (1/11/95 D.Mass.) However if the Government claims that the "crime-fraud" exception

applies, it has the burden of making a prima facie showing to that effect. In re Grand Jury Proceedings (Doe), 602 F.Supp. 608 (D.R.I. 1985).

Generally speaking, neither the identity of a client nor information regarding fee arrangements is protected by the attorney-client privilege. In re Grand Jury Subpoenas, 906 F.2d 1485, 1488 (10th Cir. 1990); In re Grand Jury Subpoenas, 781 F.2d 238, 247 (2nd Cir. 1985); See also U.S. v. Strahl, 590 F.2d 10, 11 (1st Cir. 1978). The reason for excluding fee information is that, ordinarily, such information does not constitute a confidential communication relating to the advice sought. Matter of Grand Jury Proceeding Cherney, 898 F.2d 565, 567 (7th Cir. 1990); In re Grand Jury Subpoena (Doe), 781 F.2d 238, 247-48 (7th Cir. 1986). In the words of the Second Circuit, "While consultation with an attorney, and payment of a fee, may be necessary to obtain legal advice, their disclosure does not inhibit the ordinary communication

necessary for an attorney to act effectively, justly, and expeditiously."

However, there may be exceptional cases in which fee information is so intertwined with the matter about which counsel is consulted that the threat of disclosure would deter the client from communicating information necessary to obtain informed legal advice. The case law reflects considerable confusion with respect to the criteria to be applied in determining when those circumstances exist. Some decisions seem to suggest that fee information is protected when it is likely to incriminate the client with respect to the matters that prompted him to consult counsel. **[supply cites] [See cases cited at 906 F.2d 1488 and 864 F.Supp. 1006]** That notion often is attributed to the Ninth Circuit case of Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960). Thus in U.S. v. Hodge and Zweig, 548 F.2d 1347 (9th Cir. 1977), the Court required disclosure of the fee information at issue but cited Baird

for the proposition that ". . . the nature of [a] client's fee arrangement may be privileged where the person invoking the privilege can show that a strong probability exists that disclosure of such information would implicate that client in the very criminal activity for which legal advice was sought." 548 F.2d at 1353.

However, the Ninth Circuit, itself, now has rejected the notion that fee information becomes privileged merely because it may be incriminating attorney-client communications. **In re Grand Jury Subpoenas, 803 F.2d 493, 497 (9th Cir. 1986).[josh, double check because judge has not read this case]** That view is shared by those circuits that have most recently addressed the issue. In re Grand Jury, 926 F.2d 348, 352 (4th Cir. 1991); Matter of Grand Jury Cherney, 898 F.2d 565, 567 (7th Cir. 1990); In re Grand Jury Subpoena, 781 F.2d 238, 248 (2nd Cir. 1985); Matter of Witnesses, 729 F.2d 489, 492 (7th Cir. 1984).**[insert parentheticals**

summarizing each holding]

The First Circuit has not yet ruled on whether the prospect of incrimination is, by itself, sufficient to render fee information privileged. In U.S. v. Strahl, 590 F.2d 10, 11-12 (1st Cir. 1978) the Court, citing Baird, impliedly recognized that the identity of a client may be privileged when "disclosure of [the identity] of the client would [have] implicate[d] that client in the very criminal activity for which legal advice was sought." Strahl at p. 11. However, the Court determined that in a prosecution for counterfeiting stolen treasury notes an attorney who had previously represented the defendant regarding unrelated matters could be required to identify the defendant as the man who had tendered stolen treasury notes in payment for past the legal services. The Court held that such payments were not privileged because there was "no indication that [the defendant] went to [the attorney] for legal advice concerning his counterfeiting activities and disclosed

confidential information to him" and because preventing disclosure of "a fraudulent act as well as a convenient means of unloading highly incriminating evidence, possession of which was itself a crime" did not further the policies underlying the attorney-client privilege. Strahl, pp. 11-12.

Strahl was decided long before the Ninth Circuit clarified its holding in Baird and there is no way of determining how that clarification might affect the First Circuit's views with respect to the "legal advice" exception. In any event, even under prior interpretations of Baird, the exception is inapplicable to this case. As already noted, all of the defendants now stand convicted of the offenses with which they were charged and their appeals from those convictions have been exhausted. Consequently, disclosure of information regarding the fees they paid can no longer implicate them in those offenses. See, Hodge and Zweig at pp. 1353-54.

Moreover, the defendants, in this case, have failed to

establish that information regarding the amount, form or source of the legal fees paid should be treated as confidential information necessary to obtain legal advice with respect to their money-laundering activities. Although payment of a fee undoubtedly was a prerequisite to retaining the services of counsel, the defendants presumably had the option to determine the form of payment and whether or not to divulge the sources. The mere fact that the amount of fees paid may constitute evidence of unexplained wealth that arguably could have been derived from criminal activity is insufficient to invoke the attorney-client privilege. In re Grand Jury Subpoena, 781 F.2d 238, 248 (2d Cir. 1986). **C.F.(?) U.S. v. Gertner [Josh: recent District Court opinion by Judge Brody rendered in a Mass. case]**

Finally, to the extent the defendants are suggesting that the fee information is confidential because the amounts paid were derived from the money-laundering activities about which they

consulted counsel, their claim of privilege would be defeated by the crime-fraud exception because it would amount to further laundering of illicitly-derived proceeds. **[**As already noted, all of the defendants now stand covicted of the offenses with which they were charged and their appeals from those convictions have been exhausted. Consequently, disclosure of information regarding their fees no longer can implicate them in those offenses. See, Hodge and Zweig at pp. 1353-54.**]**

II. THE STATUTES AUTHORIZING DISCOVERY

The defendants correctly observe that the Court has discretion to decide whether the Government should be permitted to depose counsel pursuant to 18 U.S.C. § 1963(k) and/or 21 U.S.C. § 853(m). Both statutes provide that:

> "...the Court may, upon application of the United States, order that the deposition of any witness relating to the property forfeited be taken by deposition..." [emphasis added]

The defendants argue that, in this case, the application should be denied because the Government has failed to demonstrate

a sufficient need for deposing counsel and there is a risk that such action may "drive a 'chilling wedge' between the attorney and client, create conflicts of interest, undermine an attorney's ability to represent his client and potentially lead to disqualification of the attorney." In support of their argument, the defendants point to Local Rule 3.8(f), which, as already noted, requires a prosecutor to obtain Court approval before issuing subpoenas that would compel lawyers to provide evidence concerning their clients that was obtained as a result of the attorney-client relationship.

The short answer to that argument is that the concerns underlying Rule 3.8(f) are not implicated in this case. The overriding purpose of the rule is to ensure that subpoenas do not become instruments of abuse that infringe on the attorney-client privilege; deprive a defendant of the Sixth Amendment right to effective assistance of counsel or otherwise unjustifiably

interfere with the defendant's legal representation. Here, those matters are no longer factors warranting consideration. There is no risk that counsel will be disqualified from continuing to represent their clients in this case or that such representation will be undermined by their testimony because the case has been terminated. **[NOTE: INSERT CITE; POSSIBLY <u>In re Grand Jury Subpoena</u>, 781 F.2d 238 (2d Cir. 1986), but check the case to see if it or other cases to insert supports this proposition]**

Furthermore, Rule 3.8(f) does not require the Government to demonstrate any greater need for information in order to obtain or enforce a subpoena directed to counsel than it would for any other subpoena. Rather, it provides a mechanism for determining in advance whether the Government should be precluded from seeking the information on the ground that is protected by the attorney-client privilege or that issuance of the subpoena infringes on a defendant's Sixth Amendment rights or otherwise constitutes an

abuse of the process. See, In re Grand Jury Subpoena (Doe), 781 F.2d 238, 244, 248 (2d Cir. 1986). **[NOTE: CONSIDER WHETHER THIS CASE IS DISTINGUISHABLE ON GROUND THAT IT DEALT WITH A GRAND JURY SUBPOENA.]**

In this case, there is ample reason for permitting the depositions of counsel pursuant to § 1963(k). As already noted, more than $136 million was laundered by these defendants and, to date, only a portion of the proceeds has been recovered or accounted for. Furthermore, the fact that the defendants have employed and continue to employ at least _____ attorneys provides reason to believe that they possess considerable assets. Whether those assets are "proceeds" of criminal activity or "substitute assets," they are subject to forfeiture. Since information regarding the amount, form and sources of any fees paid by the defendants to their counsel is likely to provide information that may be helpful in locating those assets; and, since that

information no longer implicates any of the concerns underlying Rule 3.8(f), the requirements of §§ 1963(k) and 853(m) have been satisfied.

III. SIXTH AMENDMENT RIGHT TO COUNSEL

Like most of their other arguments, the defendants' argument that granting the Government's application would violate their Sixth Amendment rights has been blunted by intervening events.

The Sixth Amendment protects against unwarranted interference with defense counsels' trial preparation and prevents unjustifiably placing defense counsel in a position that might result in disqualification. The prospect of disqualification looms especially large when an attorney is subpoenaed to testify regarding dealings with a client that is being investigated or prosecuted for a criminal offense. See In re Grand Jury Matters, 751 F.2d 13 (1st Cir. 1994) (expressing concern that subpoenaing an attorney while the client is awaiting trial may drive a wedge

between the attorney and client and may create a conflict of interest that could ultimately require disqualification of the attorney). However, that does not mean that counsel never may be subpoenaed merely because criminal charges are pending against the client. In re Grand Jury Matters, 71 F.2d 13, 19 (1st Cir. 1984) (even when trials are pending, the grand jury's right to unprivileged evidence may outweigh the right of a defendant not to have his counsel's representation disturbed); In re Grand Jury Subpoena, 781 F.2d 238, 250 (2d Cir. 1985) (the right to retain counsel of one's choice is not absolute but must give way when required by the fair and proper administration of justice).

In any event, the concerns underlying the Sixth Amendment no longer are implicated in this case. Since the trial has been completed and all appeals have been exhausted, the depositions sought by the Government will neither interfere with counsels' trial preparation nor create any risk that counsel will be

disqualified from continuing to represent their clients with respect to criminal charges for which they were prosecuted. That prosecution has been concluded and the defendants' Sixth Amendment rights are no longer applicable because their appeals have been exhausted. In re Grand Jury Subpoenas, 906 F.2d 1485, 1493 (10th Cir. 1990).

The mere possibility that counsel might represent the defendants in some future prosecution does not alter matters. First, there is no indication that any future prosecution is even contemplated. **[WHAT ABOUT THE TAX CASES THAT MAY BE PENDING?]**

More importantly, the defendants' Sixth Amendment rights with respect to any possible future prosecution have not yet attached. Id.; In re Grand Jury Subpoena, 781 F.2d 238, 243 (2d Cir. 1985) (Sixth Amendment rights do not attach prior to indictment). **[NOTE: THE ID. CASE {I.E., THE 10th CIR CASE? TAPE SAYS 4th CIR.} SAYS THE SAME AS THIS 2D CIR CASE; INDICATE THAT SOMEHOW]**

IV. FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

The defendants and some of their attorneys argue that granting the Government's application would violate their Fifth Amendment privileges against self-incrimination with respect to the money laundering activities at issue in this case.

A. Defendants' Fifth Amendment Rights

The defendants' claims are unfounded for two reasons. First, once a defendant's conviction becomes final, he no longer is in danger of incriminating himself with respect to the crime charged and, therefore, the privilege against self-incrimination ceases to apply. U.S. v. Hodge & Zweig, 548 F.2d 1347, 1352 (9th Cir. 1977). Furthermore, the Fifth Amendment protects a defendant from being compelled to bear witness against himself. See U.S. Const. amend. V. A defendant's Fifth Amendment rights are not violated by a subpoena directed to his attorney because such a subpoena does not compel the defendant, himself, to do anything. U.S. v. Fisher, 96

S.Ct. 1659, 1674 (1976). Any impediment to making inquiry of the attorney must be found in the attorney-client privilege, the Sixth Amendment right to counsel and/or the rules applicable to subpoenas, in general.

B. The Attorneys' Self-incrimination Rights

Counsels' rather surprising assertion of their privilege against self-incrimination presents different questions that are not as easily answered.

A party claiming the privilege against self-incrimination must establish that the testimony being compelled creates a "substantial and real" as opposed to a "trifling and imaginary" risk of criminal prosecution. Marchetti v. United States, 390 U.S. 39, 53 (1968). In this case, counsel assert that their testimony would subject them to possible prosecution for money laundering based on charges that they knowingly took tainted funds as payment for their services. The Court finds that argument unpersuasive for several

reasons.

First, among other things, conviction under the money-laundering statutes requires proof that a defendant engaged in a monetary transaction involving the proceeds of unlawful activity and that the defendant knew that the money came from illegal sources. See 18 U.S.C. §1957. [**NOTE: LOOK ALSO AT 18 USC § 1956(a)(1) and 1956(a)(2)]** Here, counsel do not even allege that they are under suspicion or investigation for money laundering. They argue that a possibility of prosecution exists because the Government apparently believes that the defendants used tainted funds to pay their legal fees. However, even assuming that the Government's belief is well-founded, counsel have provided no reason for inferring either that counsel knew that the money paid to them came from illegal sources or that their testimony would assist the Government in establishing such knowledge.

On the contrary, such an inference would be inconsistent with

counsel's argument that the information sought is protected by the attorney-client privilege. As already noted, the crime/fraud exception renders the privilege inapplicable to communications regarding continuing or future criminal activity. By arguing that the fee information in this case falls within the attorney-client privilege, counsel have implicitly represented that there was no reason for them to believe that the fees paid to them came from tainted sources because, if they had such knowledge_____.

Conclusion

For all of the foregoing reasons, I find that the Government should be permitted to depose counsel and require the production of relevant documents for the purpose of determining the amount, form and source of payments made to counsel in connection with their representation of the defendants. However, absent any showing that the defendants sought advice for the purpose of engaging in continuing criminal activity, the Government should not be

permitted to compel counsel to reveal the substance of communications with their clients that relate to other matters and that qualify to matters for protection under the attorney-client privilege.

Accordingly, it is hereby ORDERED that:

1. The Government's application for the issuance of subpoenas directing **[PLUG IN NAMES OF ATTORNEYS TO BE DEPOSED]** to appear and be deposed for the purpose of determining the amounts, form and sources of any payments made or to be made to them in connection with their representation of the defendants and for the purpose of eliciting any other relevant information not privileged is GRANTED.

2. The Government's application for the issuance of subpoenas directing the production of documents relating to the amounts, form, and/or sources of payments made to defendants' counsel in connection with their representation of defendants is GRANTED; provided, however, that any portions of such documents reflecting substantive communications regarding matters for which legal advice was sought may be redacted on the condition that counsel identify the portions redacted and the reason or reasons for the redaction.

Any disputes with respect to whether information not provided is privileged may be resolved by further motion and, to the extent applicable, the submission of supporting documents and/or affidavits for in camera inspection by the Court.

IT IS SO ORDERED,

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Ernest C. Torres
United States District Judge

Date: August , 1995