



Recorded Conversations with In-House Counsel Permitted as Evidence in FCPA Trial

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Both Weisman and Hammarskjold pleaded guilty for their roles in the conspiracy in November 2013 and February 2014, respectively. Sigelman, charged with separate conspiracies to violate the FCPA and commit money laundering, along with four substantive counts of violating the FCPA and transacting in criminal proceeds, was arrested in the Philippines in January 2014. Sigelman pleaded not guilty to the charges in May 2014 and is scheduled to proceed to trial in the United States District Court in New Jersey in April 2015.

In September 2014, Sigelman moved to suppress a key piece of evidence to be used by the government against him at trial—an audio and video recording of a conversation between Weisman and him on December 15, 2012, in which they purportedly discussed details of the conspiracy and Sigelman’s attempts to evade prosecution. Referring to Weisman as Sigelman’s “longtime personal lawyer,” Sigelman’s attorneys argued that recordings and transcripts of the conversation are subject to the attorney-client privilege and should be excluded from trial. In addition, Sigelman’s attorneys argued that the government “exploited this attorney-client bond” by causing Weisman to wear a wire and engage Sigelman in conversation about allegedly criminal conduct, in violation of Sigelman’s due-process rights.

The government denied that Weisman was Sigelman’s “personal and perpetual attorney” and challenged Sigelman’s assertion that the recorded conversation was privileged. The government referenced Sigelman’s remarks during the recorded conversation, reasoning with Weisman, “I need us to always be on the same page . . . have your lawyer coordinate with mine,” as evidence that Sigelman understood that he and Weisman each had separate counsel for purposes of the government’s investigation. Moreover, the government argued that Sigelman was not seeking legal advice from Weisman during the recorded conversation. Instead, referencing Sigelman’s suggestion that “Knut is the one who you should throw under

a bus for that, 100 percent,” the government suggested that Sigelman was “advising Weisman on how best to evade detection.”

In addition, the government argued that, even if Sigelman were seeking legal advice from Weisman, any potentially applicable attorney-client privilege was vitiated by Sigelman’s attempts during the conversation to obstruct the government’s investigation, for example, by instructing Weisman to “change [his] memory” and make sure their stories were “on the same page.” Citing the crime-fraud exception to the attorney-client privilege, the government argued that the conversation between alleged co-conspirators should be allowed into evidence.

On December 30, 2014, Judge Irenas denied Sigelman’s motion to suppress the recordings as privileged, holding that communications are subject to the attorney-client privilege only if they occur for the purpose of obtaining legal advice. After reviewing the recorded conversations, Judge Irenas held that he could not find “a shred of indication that Weisman is there with the intention of giving legal advice to Sigelman, or the converse, that Sigelman was seeking legal advice from Weisman.”

Judge Irenas’ decision turned on the fundamental principle that the attorney-client privilege applies only to protect communications from disclosure when they are between employees and counsel for the purpose of obtaining legal advice. Communications that do not meet these requirements may not be protected by the privilege. Further, even when they are for the purpose of seeking legal advice, if those communications are sought or used in furtherance of committing a crime or fraud, the privilege may be vitiated—and the communications may be left unprotected—by the applicability of the crime-fraud exception.

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