

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

STATE OF NEW MEXICO ex rel KENNETH GOMEZ,

Plaintiff,

vs.

No. CIV 10-00594 JP/LFG

ELEVENTH JUDICIAL DISTRICT COURT,

Defendant.

**DEFENDANT'S RESPONSE TO
MOTION TO VACATE ATTORNEY CLIENT PRIVILEGE [Docket No. 37]**

Defendant, Eleventh Judicial District Court, through its attorneys Robles, Rael & Anaya, P.C.

(Luis Robles, Esq.) states the following for its Response to Motion to Vacate Attorney Client Privilege [Docket No. 37]:

- I. GOMEZ CANNOT INVOKE THE CRIME-FRAUD EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE BECAUSE GOMEZ FAILED TO MEET HIS PRIMA FACIE BURDEN TO SHOW THAT ROBLES, RAEL & ANAYA, P.C. PARTICIPATED IN A CRIME OR FRAUD.**

Rule 26(b)(1) of the Federal Rules of Civil Procedure provides:

Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

Fed.R.Civ.P. 26(b)(1). Courts should liberally construe the scope of discovery under Rule 26: “the

rule contemplates discovery into any matter that bears on or that reasonably could lead to other matter[s] that could bear on any issue that is or may be raised in a case.” Bd. of Trustees of Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc., 237 F.R.D. 618, 621 (N.D.Cal. 2006) (citing Oakes v. Halvorsen Mar. Ltd., 179 F.R.D. 281, 283 (C.D.Cal. 1998)). The attorney-client privilege and work-product protection limit, however, the broad scope of permissible discovery. See Bd. of Trustees of Leland Stanford Junior University, 237 F.R.D. at 621-22.

The attorney-client privilege is the oldest and arguably most fundamental of the common law privileges recognized under Federal Rule of Evidence 501. See United States v. Zolin, 491 U.S. 554, 562 (1989). The assurance of confidentiality promotes open attorney-client communications, which are “central to the legal system and the adversary process.” United States v. Hodge & Zweig, 548 F.2d 1347, 1355 (9th Cir. 1977); see also Zolin, 491 U.S. at 562. The attorney-client privilege protects fundamental liberty interests by allowing individuals to seek the legal advice they need “to guide them through [the] thickets” of complex laws. United States v. Chen, 99 F.3d 1495, 1499 (9th Cir. 1996). “The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client’s reasons for seeking representation if the professional mission is to be carried out.” Trammel v. United States, 445 U.S. 40, 51 (1980). The privilege’s purpose is “to encourage clients to make full disclosure to their attorneys.” Fisher v. United States, 425 U.S. 391, 403 (1976).

Because it “withhold[s] relevant information from the factfinder,” United States v. Zolin, 491 U.S. 554, 562 (1989) (citation omitted), the “attorney-client privilege does not apply where the client consults an attorney to further a crime or fraud.” Motley v. Marathon Oil Co., 71 F.3d 1547,

1551 (10th Cir. 1995) (quoting In re Grand Jury Proceedings (Company X) v. U.S., 857 F.2d 710, 712 (10th Cir. 1988)). “It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the ‘seal of secrecy,’ between lawyer and client does not extend to communications ‘made for the purpose of getting advice for the commission of a fraud’ or crime.” Zolin, 491 U.S. at 563 (citations omitted). “Thus, the attorney-client privilege is forfeited inter alia where the client sought the services of the lawyer to enable or aid the client to commit what the client knew or reasonably should have known to be a crime of fraud.” United States v. Rakes, 136 F.3d 1, 4 (1st Cir. 1998) (emphasis added).

In order to successfully invoke the crime-fraud exception, Gomez must make a prima facie showing that the attorney’s assistance was sought in furtherance of a crime or fraud. See In re Grand Jury Subpoenas (“Subpoenas”), 144 F.3d 653, 660 (10th Cir. 1998). In order to invoke this exception, “the party opposing the privilege must present prima facie evidence that the allegation of attorney participation in the crime or fraud has some foundation in fact.” Id. “The evidence must show that the client was engaged in or was planning the criminal or fraudulent conduct when it sought the assistance of counsel and that the assistance was obtained in furtherance of the conduct or was closely related to it.” Id.

Neither in his motion or in his complaint does Gomez submit any evidence which make a *prima facie* showing that Eleventh Judicial District Court was engaged in or was planning criminal or fraudulent conduct when it sought the assistance of Robles, Rael & Anaya, P.C. Moreover, Gomez failed to present any facts which show the Eleventh Judicial District Court obtained the assistance of Robles, Rael & Anaya, P.C. in furtherance of the conduct or was closely related to the

commission of a crime or fraud. Thus, Gomez cannot successfully invoke the crime-fraud exception to the attorney-client relationship because Gomez cannot make a prima facie showing that Robles, Rael & Anaya, P.C.'s assistance was sought in furtherance of a crime or fraud.

WHEREFORE, Defendant respectfully requests that this Court enter an Order, which grants the following relief:

- A. Denies Gomez' Motion to Vacate Attorney Client Privilege [*Docket No. 37*];
- B. Awards Defendant its attorney's fees and costs; and
- C. Orders all other relief this Court deems just and proper.

Respectfully submitted,

ROBLES, RAEL & ANAYA, P.C.

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I hereby certify that on this
2nd day of August 2010, the
foregoing was electronically
served through the CM/ECF
system to the following:

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/s/ Luis Robles
Luis Robles