THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

MARGRETTY RABANG, OLIVE OSHIRO, DOMINADOR AURE, CHRISTINA PEATO, and ELIZABETH OSHIRO, Plaintiffs, v. ROBERT KELLY, JR., RICK D. GEORGE, AGRIPINA SMITH, BOB SOLOMON, LONA JOHNSON, KATHERINE CANETE, RAYMOND DODGE, ELIZABETH KING GEORGE, KATRICE ROMERO, DONIA EDWARDS, and RICKIE ARMSTRONG, Defendants.	Case No. 2:17-cv-00088-JCC MOTION TO QUASH SUBPOENA **NOTED FOR HEARING: SEPTEMBER 8, 2017**

I. INTRODUCTION

Plaintiffs have served subpoenas on Defendants' law firms seeking documents related to the representation of Defendants. These documents are attorney-client privileged and/or work product. Plaintiffs are seeking documents relating to the Kelly Defendants who have sought appellate review of the sovereign immunity decision. As such, these subpoenas are also an effort to circumvent the appellate stay. This motion seeks to quash the subpoena served on Schwabe, Williamson & Wyatt ("Schwabe"), the firm representing the Kelly Defendants (all Defendants except for Mr. Dodge). That subpoena should be quashed.

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010
Telephone: 206.622.1711

II. RELIEF REQUESTED

Schwabe moves this court on its own behalf and on behalf of its clients for an order quashing the subpoena served on it by Plaintiffs Margretty Rabang, Olive Oshiro, Dominador Aure, Christina Peato, and Elizabeth Oshiro ("Plaintiffs") calling for attorney-client privileged, work product, and client confidential information. Plaintiffs served the subpoena on Schwabe on August 21, 2017. This motion is timely.

III. FACTS

This matter arises out of the disenrollment by the Nooksack Tribe ("the Tribe") of certain former tribal members. Some of disenrolled former tribal members, Plaintiffs in this action, and their counsel, have initiated 27 separate proceedings, including this action, as ancillary attacks and challenges to the disenrollment decisions. These various actions have included, among other tactics, the filing of State Bar grievances against at least five (5) of the attorneys involved in the defense of and/or in the employment of the Tribe.[1]

In the present action, Plaintiffs have alleged a RICO conspiracy against several employees and/or agents of the tribe. The issue of sovereign immunity is currently the subject of an interlocutory appeal by the Kelly Defendants. Counsel for Plaintiffs are aware of the automatic stay and have been provided with authority supporting the stay.[2]

Schwabe represents all of the Defendants subject to the stay. The documents sought in this subpoena do not relate to issues involving Mr. Dodge, for whom this matter is not stayed. Counsel for Plaintiffs are seeking discovery from the Kelly Defendants and Schwabe relating specifically to the allegations against the stayed Defendants. And, they are doing so by serving subpoenas on their opposing counsel for attorney-client privileged and work product files.

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[1] *See* Declaration of Ricky Armstrong, Document 35, page 2, and Exhibit 1 to that Declaration.

[2] *See* ¶ 11 and Exhibit E to Declaration of Christopher Howard.

SCHWABE, WILLIAMSON & WYATT, P.C.
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On August 16, 2017, a subpoena *duces tecum*, missing attachments, was served by mail on Schwabe. On August 21, 2017, a corrected subpoena with attachments was personally served on Connie Sue Martin as partner in charge for Schwabe's Seattle office.[3] Schwabe timely served an objection to that subpoena the same day by mail on counsel for the plaintiffs, with a courtesy copy provided by email. LCR 37 (a)(1) does not place the burden to arrange a discovery conference on the party resisting a subpoena, but Schwabe offered a LCR 37 conference and participated in it the next day.

During the discovery conference, counsel for Plaintiffs indicated they felt the stay did not apply because Schwabe was a third party and not a party to the appeal. They did not directly address the appellate stay except to say that they will be bringing a motion to compel. They further stated there was no attorney-client privilege because of the "crime/fraud exception." They asserted, as an example, complicity in the crime/fraud by the fact that this firm had defended lawyers in bar grievances filed by Michelle Roberts, which have been dismissed by the Bar.[4]

This motion to quash is timely brought before the response date required in the subpoena.

IV. AUTHORITY AND ARGUMENT

A. The subpoena should be quashed.

Plaintiffs seek to subpoena their opposing parties' attorneys to obtain information that is attorney-client privileged, work product, and otherwise confidential pursuant to RPC 1.6 information as an inappropriate effort to circumvent the stay on discovery against these Defendants based upon the pending appeal. This should not be allowed. Federal Rule of Civil

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[3] *See* Exhibit A to Decl. of Howard in Support of Motion to Quash Subpoena.

[4] Ms. Roberts was a Plaintiff in the original Complaint. When Plaintiffs filed their First Amended Complaint, they dismissed the claims that had been asserted by Ms. Roberts and she does not appear to be a party in this proceeding any longer.

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Procedure 45 (d)(3)(A) provides this mechanism to quash such a subpoena:

> (A) *When Required.* On timely motion, the court for the district where the compliance is required must quash or modify a subpoena that: … (iii) requires disclosure of privileged or other protected material, if no exception or waiver applies;

The subpoena served on Schwabe by Plaintiffs seeks information that is privileged and/or attorney work product and all of what is sought is confidential under RPC 1.6.[5] The subpoena should be quashed.

Plaintiffs' counsel offered no argument nor suggestion of waiver of privilege. Schwabe initiated a Rule 37 Conference with Plaintiffs. During this conference, no suggestion of waiver was raised by counsel for Plaintiffs. Instead, Plaintiffs' counsel baldly assert the crime/fraud exception to attorney-client privilege.

Plaintiffs have not met the threshold tests to seek to apply the crime/fraud exception to attorney-client privilege. There has been no evidence, nor even ample allegations, produced of any crime or fraud - much less evidence of ongoing or future crime or fraud. Plaintiffs should not be allowed to use a fishing expedition against opposing counsel to build their case against the Kelly Defendants based upon mere allegations, or to bypass the stay on discovery during the appeal.

B. Plaintiff's fail the threshold test for an exception to the attorney-client privilege.

The attorney-client privilege is intended to encourage and broadly protect frank communication between a client and his or her attorney. As the U.S. Supreme Court explained:

> Questions of privilege that arise in the course of the adjudication of federal rights are "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Fed.Rule Evid. 501. We have recognized the attorney-client

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[5] *See* Ex. A to Declaration of Christopher Howard in Support of Motion to Quash Subpoena.

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> privilege under federal law, as "the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States,* 449 U.S. 383, 449 U.S. 389 (1981). Although the underlying rationale for the privilege has changed over time, *see* 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961), [Footnote 6] courts long have viewed its central concern as one "to encourage full and frank communication between attorneys and their clients, and thereby promote broader public interests in the observance of law and administration of justice."

United States v. Zolin, 491 U.S. 554, 562, 109 S. Ct. 2619, 105 L. Ed. 2d 469 (1989).

Plaintiffs do not meet the threshold tests for vitiating the attorney-client privilege. The sole authority plaintiffs provided during the discovery conference was *U.S. v. Zolin*, 491 U.S. 554 (1989). But *Zolin* does not support their subpoenaing their opposing counsel in the instant case. Under *Zolin*, the fraud or crime exception requires actual evidence of future crimes or fraud, not allegations of past events.

> The attorney-client privilege must necessarily protect the confidences of wrongdoers, but the reason for that protection -- the centrality of open client and attorney communication to the proper functioning of our adversary system of justice -- "ceas[es] to operate at a certain point, namely, where the desired advice refers *not to prior wrongdoing,* but to *future wrongdoing."* 8 Wigmore, § 2298, p. 573 (emphasis in original); *see also Clark v. United States,* 289 U. S. 1, 15 (1933). It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the "seal of secrecy," *ibid.* between lawyer and client does not extend to communications "made for the purpose of getting advice for the commission of a fraud" or crime. *O'Rourke v. Darbishire,* [1920] A. C. 581, 604 (P.C.).

Zolin, 491 U.S. at 562-3.

Zolin requires evidence to be produced before this exception can be considered and the case specifically does not condone fishing expeditions, such as Plaintiffs are attempting here. A request to apply this exception must be justified and supported by evidence.

> There is no reason to permit opponents of the privilege to engage in groundless fishing expeditions, with the district courts as their unwitting (and perhaps unwilling) agents. Courts of Appeals have suggested that *in camera* review is available to evaluate claims of crime or fraud only "when justified," *In re John Doe Corp.,* 675 F.2d at 490, or "[i]n appropriate cases," *In re Sealed Case,* 219 U.S.App.D.C. 195, 217, 676 F.2d 793, 815 (1982) (opinion of Wright, J.). Indeed, the Government conceded at oral argument (albeit reluctantly) that a district court would be mistaken if it reviewed documents *in camera* solely

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Attorneys at Law
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Seattle, WA 98101-4010
Telephone: 206.622.1711

> because "the government beg[ged it]" to do so, "with no reason to suspect crime or fraud." Tr. of Oral Arg. 26; *see also id.,* at 60. We agree.

Zolin, 491 U.S. at 571

> To invoke the crime-fraud exception, Plaintiffs bear the burden to:
>
> (1) "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"; and
>
> (2) "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."

In re Napster, Inc. Copyright Litig., 479 F.3d 1078, 1090 (9th Cir. 2007) (internal citation marks removed).

Plaintiffs cannot simply make allegations and assert this exception in an effort to vitiate attorney-client privilege and to bypass the appellate stay. Speculations and legal conclusions are inadequate. *Ekeh v. Hartford Fire Ins. Co.,* 39 F. Supp. 2d 1216, 1219 (N.D. Cal. 1999); *United States v. Chen*, 99 F.3d 1495, 1503-04 (9th Cir. 1996). If a plaintiff could simply make a RICO allegation to seek past privileged documents in the hopes of discovering some evidence that might include some future plan, then there would be no attorney client privilege. Plaintiffs' subpoena *duces tecum* to Schwabe should be quashed.

C. <u>Plaintiff's effort to bypass the appellate stay should be rejected.</u>

This court should also quash Plaintiffs' subpoena because it is an attempt to bypass and defeat the appellate stay. In this Circuit, the filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the Court of Appeals and divests the District Court of its control over those aspects of the case involved in the appeal. *Chuman v. Wright*, 960 F.2d 104 (9th Cir. 1992). Where the aspects of the case involve whether a defendant may be subjected to trial at all, discovery is not allowed. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (until the threshold immunity question is resolved on appeal, discovery not allowed before the trial court); *Apostol v. Gallion*, 870 F.2d 1335, 1337-1338

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Attorneys at Law
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Seattle, WA 98101-4010
Telephone: 206.622.1711

(7th Cir. 1989) (cited with approval in *Chuman v. Wright*, 960 F.2d at 105).

Finally, the subpoenas issued by the Plaintiffs – including the subpoenas directed to the Kelly Defendants' counsel – impermissibly seek solely attorney-client communications and attorney work product, and are unrelated to the Plaintiffs' claims against Judge Dodge. The information they seek bears only on the Plaintiffs' claims against the Kelly Defendants.

Under the binding authority of *Harlow*, 457 U.S. at 818, until the threshold sovereign immunity question is resolved on appeal, discovery directed to the Kelly Defendants is not allowed before this Court. If Plaintiffs were allowed to bypass the stay merely by subpoenaing that Defendants' counsel, there would be no stay. The subpoena should be quashed.

V. CONCLUSION

Plaintiffs' subpoena *duces tecum* to their opposing counsel, Schwabe, should be quashed. There is no evidence to support plaintiffs' bald assertion of the crime fraud exception for a future crime or fraud. Plaintiffs are inappropriately seeking to bypass the appellate stay. This motion to quash should be granted.

A Proposed Order is attached.

Dated this 24th day of August, 2017.

SCHWABE, WILLIAMSON & WYATT, P.C.

By: /s/ Christopher H. Howard

Connie Sue Martin, WSBA #26525
Email: csmartin@schwabe.com
Christopher H. Howard, WSBA #11074
Email: choward@schwabe.com
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010
Attorneys for Defendants Robert Kelly, Jr., Rick D. George, Agripina Smith, Bob Solomon, Lona Johnson, Katherine Canete, Elizabeth King George, Katrice Romero, Donia Edwards, and Rickie Armstrong

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on the 24th day of August, 2017, I electronically filed the foregoing MOTION TO QUASH SUBPOENA with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

Gabriel S. Galanda
Anthony S. Broadman
Ryan D. Dreveskracht
Bree R. Black Horse
Galanda Broadman, PLLC
P.O. Box 15146
8606 35th Avenue NE, Suite L1
Seattle, WA 98115

Rachel Saimons
Rob Roy Smith
Kilpatrick Townsend & Stockton LLP
1420 5th Avenue, Suite 3700
Seattle, WA 98101

/s/ Christopher H. Howard
Christopher H. Howard

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
U.S. Bank Centre
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010
Telephone 206-622-1711