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## What's Next For Trump's Alleged Co-Conspirators?

By **Hannah Albarazi**

Law360 (August 3, 2023, 10:00 PM EDT) -- Five unnamed attorney co-conspirators listed in the indictment charging former President Donald Trump with conspiracy and obstruction in his attempt to overturn his 2020 election loss are either already cooperating with the government or will be indicted, former prosecutors told Law360, predicting that the crime-fraud exception to attorney-client privilege will certainly work against them.

Any attempts by Trump or the attorney co-conspirators described in the D.C. federal grand jury **indictment** to claim that their communications are shielded by attorney-client privilege are "pretty much obliterated" by the crime-fraud exception, Brad Simon, a partner at Schlam Stone & Dolan LLP and a former prosecutor for the Eastern District of New York and the U.S. Department of Justice, told Law360.

While attorney-client privilege broadly works to keep communications between lawyers and their clients private, the crime-fraud exception to that privilege ensures that communications between a lawyer and client that are in furtherance of a crime or fraud do not remain shrouded in secrecy.

Ilene Jaroslaw, a white collar defense attorney at Elliott Kwok Levine & Jaroslaw LLP and a former assistant U.S. attorney in the Eastern District of New York, told Law360, "This is a textbook crime-fraud case."

"There is no question that special counsel Jack Smith and his team have the communications between Trump and these five attorneys," Jaroslaw said. "These five attorney conspirators will be indicted. It is only a matter of time."

The reason Trump's alleged co-conspirators haven't been charged is that prosecutors don't want to delay the former's president's trial, according to Jaroslaw.

Former federal prosecutors told Law360 that the five unindicted co-conspirator attorneys described in Trump's indictment are believed to be former New York City Mayor Rudy Giuliani, who served as Trump's personal attorney; John Eastman, a former Trump attorney and a onetime clerk to U.S. Supreme Court Justice Clarence Thomas; defense attorney Sidney Powell; former DOJ official Jeffrey Clark; and Trump-affiliated attorney Kenneth Chesebro.

Charles Burnham of Burnham & Gorokhov PLLC and Harvey A. Silverglate confirmed to Law360 that they are representing Eastman and that he is co-conspirator No. 2 in the indictment. The other attorneys or their counsel did not immediately respond to Law360's requests Thursday for confirmation they were referred to in the indictment. Trump's counsel, John Lauro of Lauro & Singer, also did not respond to requests for comment.

The sixth co-conspirator, whose identity has not been publicly confirmed, is described in the indictment as a political consultant.

"Special counsel Smith has mountains of evidence against Trump, including audio and videotape and innumerable credible witnesses," Jaroslaw told Law360. She said Smith doesn't need the co-conspirators to make his case.

Stuart Gerson, a partner at Epstein Becker Green PC, likewise thinks that perhaps some of these "radical" lawyers are going to be indicted separately.

Since the indictment is focused entirely on Trump, it also suggests that there are others not referred to in the document who may potentially show up as witnesses for the government, according to Gerson.

"It's pretty clear that there are unnamed co-conspirators that are cooperating with the prosecution," said Gerson, who formerly served as acting U.S. attorney general during the Clinton administration and as an assistant U.S. attorney general for the DOJ's Civil Division during the George H. W. Bush administration.

Smith is likely trying to squeeze the co-conspirators or turn them into cooperating witnesses, several former prosecutors told Law360.

Some of the attorney co-conspirators may already be cooperating with the government, according to Simon of Schlam Stone. But for those who aren't cooperating, the prosecution is likely "trying to scare them to death" in hopes that they will come on board, he said.

If they don't cooperate, Simon said, it is highly likely that Smith will present a superseding indictment to the grand jury adding them as co-defendants.

"If I were these individuals, I'd be very concerned," he said.

Communications between Trump and his team are fair game and will likely be allowed at trial, according to Simon and other former prosecutors.

The prosecution will most likely attempt to pierce attorney-client privilege on the basis of the crime-fraud exception, which will undoubtedly be the subject of intense pretrial motion practice, Simon said. The prosecution is likely to prevail on this issue, according to Simon.

There are a number of other reasons why the communications are not privileged, according to Jaroslaw of Elliott Kwok.

There would have been no attorney-client communications between Clark of the DOJ and Trump because Trump was never Clark's client, Jaroslaw said.

To the extent that Giuliani, Eastman, Powell or Chesebro spoke to Trump in front of other people, she said, there can be no attorney-client privilege because the presence of a third party not retained by Trump to provide legal advice "breaks the privilege."

The government will have to show that Trump was planning, engaged in or had committed criminal or fraudulent conduct when he sought the advice of these lawyers and that he obtained the assistance of these attorneys in furtherance of those crimes, according to Carol Starkey, a white collar defense attorney at Conn Kavanaugh Rosenthal Peisch & Ford LLP.

If the government does that, "a court should be able to find the crime-fraud exception applies here, allowing the government access to privileged communications," said Starkey, who previously headed the Economic Crimes Division of the Massachusetts Attorney General's Office.

The bottom line, Starkey said, is the court "uses a pretty low standard to make this determination — usually by a preponderance of evidence" — and if the communications are ordered to be disclosed, they may then come in at trial to prove the government's case.

The co-conspirators "don't need to be charged so long as their conspiracy agreement with Trump is proven beyond a reasonable doubt at trial," according to Starkey.

They can be charged later in a separate indictment, she said.

The prosecution, for now, is likely focusing its efforts on trying a case against Trump rather than multiple defendants who "could delay and complicate the trial and the presentation of evidence," she said.

--Additional reporting by Katie Buehler. Editing by Jill Coffey and Jay Jackson Jr.

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