

# DAILY KOS

## Attorney-client privilege is only as 'dead' as Trump's brain

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Donald Trump is incapable of understanding anything that doesn't involve complete and total absolution for him, which is why the nuance of when attorney-client privilege shields his communications with his attorney and when it doesn't has eluded him.

"Attorney-client privilege is dead!" Trump declared on Twitter Tuesday morning, in light of Monday's news that the office, house, and hotel room of his longtime personal lawyer Michael Cohen had been raided by the FBI.

The problem for Trump and Cohen is that privileged communication between an attorney and a client only applies to communication that isn't related to the intention to commit a crime or to continued perpetration of one. As Judd Legum at ThinkProgress writes:

Among the core exceptions to attorney-client privilege is the “crime-fraud exception,” which means that communications between you and your attorney about *future* criminal acts are not protected. This is a basic legal concept that has been recognized for decades. As a legal handbook on attorney-client privilege published last year explains:

The attorney-client privilege does not apply when a client consults a lawyer for the purpose of furthering an illegal or fraudulent act. [...] The so-called “crime-fraud exception” removes the protection of the attorney-client privilege for communications concerning contemplated or continuing crimes or frauds. This exception encompasses criminal and fraudulent conduct based on action as well as inaction.

What makes that exemption so damning in this case is that the only way law enforcement officials could have convinced a federal judge to grant a warrant to search the office of a lawyer—a relatively extraordinary occurrence—is if they provided extremely compelling evidence that a crime was likely committed by that lawyer at the location they would be searching. Additionally, they had to make a compelling case that there wasn't a less intrusive way of obtaining that evidence and that certain evidence was at risk of being destroyed.

As the *Washington Post* writes:

This was not just any search warrant; that the raid took place at a lawyer's office further highlights the seriousness of the investigation. Searches of an attorney's office are extremely rare and are not favored, due to their potential to impinge on the attorney-client

relationship. Prosecutors must jump through multiple hoops to get such a warrant approved, both within their own office and at the criminal division of Main Justice. (Notably, this would likely have included approval by Trump's own guy, the new interim U.S. attorney for the Southern District, Geoffrey S. Berman, who was just appointed by Attorney General Jeff Sessions this past January.)

Even during the search, certain precautions are taken to make certain that incidental handling of privileged communication doesn't taint the investigation or otherwise bias those who are working on it.

In a search like this, prosecutors typically set up a privilege team or "taint team" of investigators not involved in the case to review potentially privileged documents and shield those from the team actually involved in the prosecution.

So there's plenty of attorney-client privilege related to the communication between Trump and his lawyer, unless that communication involved something criminal. The fact that investigators met the standard to get a warrant doesn't mean that privilege is "dead," but rather that the argument investigators made was likely very sound.

"The spotlight on this is so bright and the measure is so extraordinary that they would have to be a little crazy to do this without pretty ironclad evidence of some kind of wrongdoing," said Julian Sanchez, a senior fellow at the Cato Institute who studies technology, privacy, and civil liberties.

It's worth remembering that the last time the FBI raided the premises of a Trump associate—Paul Manafort—he ended up being the target of dozens of indictments.

Even Kellyanne Conway's husband George couldn't resist schooling Trump on his braindead accusation by tweeting back at Trump a link to Justice Department rules outlining when attorney-client privilege can be pierced.

"There are occasions when effective law enforcement may require the issuance of a search warrant for the premises of an attorney who is a subject of an investigation, and who also is or may be engaged in the practice of law on behalf of clients," the Justice Department's website reads.

Sorry, Trump. Attorney-client privilege is very much alive and, if it doesn't apply to you and Cohen, that could be very bad news for you.