Expert Analysis

Trump And Cohen: What Lawyers Can Learn

By **Arash Hashemi**
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In a tear-drenched speech, President Donald Trump's former lawyer Michael Cohen stood in a New York courtroom and asked for forgiveness after an investigation laid bare misdeeds that Cohen said he committed on behalf of his client.

"I felt it was my duty to cover up his dirty deeds," Cohen said. And in response to Trump's tweets belittling Cohen as weak, Cohen told a federal judge, "My weakness can be characterized as a blind loyalty to Donald Trump."

It was the end of a wrenching saga for Cohen, who wound up cooperating with prosecutors to avoid far worse than the three-year sentence he was given for his role in arranging hush money payments to women Trump had allegedly had affairs with — which Trump has claimed were a private matter, and unrelated to his presidential campaign.

We still don't know precisely what was said in the recorded conversations between Trump and Cohen. But had Cohen disclosed to authorities the wrongdoing he was aware of, would it have saved him from his current plight?

Under attorney-client privilege, an attorney may learn about, and keep confidential, information about a client's past crimes. But does attorney-client privilege extend to ongoing or planned future crimes? What is an attorney's obligation when confronted with such information?

Even without knowing in detail what information Cohen did and did not have access to, we can examine the ethical guidelines for when an attorney should consider information privileged, and what information the law says there is a duty to disclose.

A client's discussion of past crimes is clearly subject to attorney-client privilege. But if an attorney has reason to believe a client — or even a prospective client — may be planning to commit a future crime, the American Bar Association has a set of model ethics rules for disclosure.

The ABA's standards dictate that a lawyer may reveal information relating to the representation of a client if the lawyer reasonably determines that doing so is necessary to prevent death or serious injury, or to prevent a client from committing a crime or fraud likely to result in substantial injury to another party's financial interests or property.

However, the ABA's guidelines do not carry the force of law, and each state adopts its own laws governing attorney ethics. California's more lenient law differs from the ABA guidelines in that the duty to disclose only extends to death or serious injury, but makes no mention of fraud or property crimes.

California law also requires that the attorney "shall" (read: must), if circumstances permit, make a "good faith effort" to persuade the client not to commit the criminal act, and must inform the client that they plan to disclose the information.

New York's law, which governed the Trump/Cohen relationship, hews closely to ABA guidelines, specifying that the duty to disclose extends not only to prevention of death or injury, but also "to prevent the client from committing a crime."

The gap between the ABA's model and state laws leaves room for debate, and attorneys have taken both sides. While few debate the ethics of disclosures made in the name of preventing injury or death, reasonable minds differ when it comes to property crimes, While some conclude that the primary obligation is to client privacy, others conclude that an attorney has an obligation to prevent violations of the law.

Cohen disclosed that he was allegedly in the room with Trump when the president was informed about a Russian offer to provide damaging information about Hillary Clinton, which raises questions about a third party's impact on the privilege. But the presence of others in the room does not automatically negate attorney-client privilege, if it can be shown that the third party's presence is reasonably necessary for the attorney's representation of the client. However, Cohen's allegation that one of those people was Donald Trump Jr. does not fit that bill.

In this case, it seems that Cohen's fatal error was not a violation of attorney-client privilege, since the tapes and their contents were revealed not by Cohen himself but as the result of an FBI raid. Nor was Cohen's primary offense a failure to disclose malfeasance. Cohen's problem was committing malfeasance of his own, with actions that took him outside of the bounds of attorney-client privilege and into criminal conduct. It was not the things his client did, but the things that Cohen did, that put him where he is today.

Though we don't know exactly what Cohen has revealed, it seems that prosecutors have enough evidence on him to hold his feet to the fire. In a sentencing brief, Cohen's lawyer said his client wanted to move on with his life in the fastest way possible by taking responsibility for his actions, so it's likely that invoking attorney-client privilege is not a get-out-of-jail-free card.

With potential evidence of perjury, campaign finance law violations and financial crimes, prosecutors had enough on Cohen that he was likely, after a long fight, to be convicted anyway. So rather than undertaking that fight and then hoping for a pardon, Cohen is choosing the most expeditious end possible.

Cohen is far from the first attorney to become entangled in a client's legal troubles. When mob boss John Gotti was tried, prosecutors determined that his attorney, Bruce Cutler, had a conflict of interest, because his inside knowledge meant he was liable to be called as a witness in the case. And attorney Frank Ragano, who represented organized crime-

connected figures Santo Trafficante Jr. and Jimmy Hoffa, found himself convicted of tax evasion and was suspended from practice.

Though many details have yet to emerge, the takeaway for lawyers watching Cohen's case is a simple one: When it comes to being an attorney, you can act as a legal advocate, but don't let "blind loyalty" to your client — no matter how powerful they may be — direct your behavior.

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