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## Cohen Guilty Pleas Bode Poorly For Trump Privilege Stance

By **Andrew Strickler**

Law360 (August 22, 2018, 1:54 PM EDT) -- Michael Cohen's admissions that he broke federal tax and campaign finance laws — and his direct implication of his former client, Donald Trump, in two of those crimes — will severely restrict the president's ability moving forward to argue that related communications with Cohen are shielded by attorney-client privilege, experts say.

While the crime-fraud exception to the privilege is typically evoked amid discovery, experts say Cohen effectively leap-frogged the usual arguments about whether prosecutors have enough evidence of attorney-aided fraud to pierce the protection by jumping straight to a plea.

"If Cohen is ever called in front of a grand jury or has to make some kind of defense of himself, Trump will still have an opportunity to object to Cohen's testimony based on the attorney-client privilege," said Barry Temkin of Mound Cotton Wollan & Greengrass LLP. "But Trump's options for asserting privilege are narrowed with this."

In a hastily arranged hearing on Tuesday in lower Manhattan, Cohen **pled guilty** to eight criminal counts — five for tax evasion, one for making a false statement to a bank to get a home equity loan, and two campaign finance violations.

For those later charges, Cohen admitted that he facilitated two hush-money payments above corporate campaign contribution limits "at the direction of a candidate for federal office" and for "the principal purpose of influencing the election."

In one of those cases, Cohen made a \$130,000 payment to porn actress Stormy Daniels — real name Stephanie Clifford — who has claimed she had an affair with Trump. Another \$150,000 payment was reportedly made to former model Karen MacDougal in exchange for her silence about her alleged affair with Trump.

In a post-hearing statement yesterday, Cohen attorney Lanny Davis said his client "put his family and country first" and told the truth that Trump had directed him to make the payments.

"If those payments were a crime for Michael Cohen, then why wouldn't they be a crime for Donald Trump?" Davis said.

The issue of the crime-fraud exception has been widely discussed in the legal press since the April raids on Cohen, in which federal prosecutors were pursuing several investigative avenues, including into Cohen's taxi medallion business and the hush-money payments.

Typically, the crime-fraud exception is evoked after the government subpoenas attorney communications and the attorney or the client objects on privilege grounds. Prosecutors or an opposing party then attempt to convince a judge to override the objection by arguing about evidence, often in camera, showing that sought-after communications were made in furtherance of a crime or other fraud, thus exempting them from the privilege.

Adam Felsenstein, a white collar defense attorney at Gallet Dreyer & Berkey LLP, said Cohen's immediate guilty pleas will not foreclose "any and all arguments" that Trump, as a client and holder

of the privilege, might make in the future about whether his communications with Cohen are protected from disclosure.

But Cohen's admissions to committing fraud, and on Trump's behalf, "will meet the standard of probable cause to believe that a crime has been committed and that the communications were in furtherance of that crime," Felsenstein said.

"I don't believe there is any good-faith basis for President Trump to claim that his communications on the issue of payments to Stephanie Clifford are privileged," he said.

In a strange confluence of events, another New York federal judge on Tuesday **wrapped the special master-led privilege review** of the materials seized by federal agents from Cohen's office and residence. That review found some 7,100 items contained confidential legal counsel or related requests provided by or to Cohen — far less than 1 percent of the total. It is not known how many, if any, of the items deemed privileged in that review related to Trump directly.

Separately, a Virginia federal jury also convicted former Trump campaign chairman Paul Manafort on eight counts of **filing false tax returns and lying to banks**. It deadlocked on 10 other charges.

Thomas Spahn, a privilege expert at McGuireWoods LLP, said if Cohen does at some point feel compelled to reveal otherwise confidential information, his legal troubles could provide some cover in the form of the attorney "self-defense" privilege exception.

Under the theory that lawyers can be left powerless to defend themselves if completely bound by privilege constraints, at least some courts have made allowances for attorneys accused of wrongdoing by third parties to reveal protected client information, Spahn said.

"It may seem counterintuitive, that a lawyer accused by someone other than the client can defend themselves in that way over the client's objections, but it does happen," he said.

--Additional reporting by Pete Brush. Editing by Rebecca Flanagan and Emily Kokoll.