

Legal Operations

# Michael Cohen's Troubles Don't End with His Guilty Plea

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Michael Cohen's guilty pleas to tax fraud and campaign finance violations likely will subject him to professional discipline, apart from any criminal penalties he incurs. And his statements that implicate President Donald Trump in alleged criminal acts may have violated Cohen's duty to keep Trump's confidences, a review of authorities suggests.

Lawyers can divulge client confidences if necessary to defend themselves against criminal allegations. But it's not clear if Cohen needed to defend himself by implicating his former client, Trump, in criminal conduct.

But Cohen's eventual disbarment is a near-certainty under New York Law, so protecting Trump's confidences was perhaps no longer a priority.

On Aug. 21 Cohen pleaded guilty to eight counts of tax evasion, making a false statement to a bank, and campaign finance violations.

The campaign finance violations stem from payments Cohen facilitated to two women who each allegedly had an affair with Trump, then-candidate for president. Cohen testified that he orchestrated the payments in 2016, "in coordination with, and at the direction of, a candidate for federal office." Both were done, he said, "for the principal purpose of influencing the election."

If there was any confusion about to whom Cohen was referring, Cohen's lawyer, Lanny Davis, cleared it up later that day. He tweeted that Cohen "stood up and testified under oath that Donald Trump directed him to commit a crime."

Cohen's plea and statements raise three main ethical issues:

- Did Cohen have a duty of confidentiality to Trump?
- Was Cohen allowed to implicate Trump in illegal conduct because doing so was necessary to defend himself?
- If an attorney-client relationship existed between Cohen and Trump, has any privilege been eliminated by the "crime/fraud exception," which doesn't protect advice from lawyers about how to commit a crime?

## Confidentiality Breach?

Under New York Rule of Professional Conduct 1.6, lawyers shall not reveal a client's confidential information.

This rule applies if Cohen was acting as Trump's lawyer, but it doesn't apply if Cohen was acting in a nonlawyer capacity, such as by giving him business advice.

Assuming Cohen has a duty of confidentiality, one exception to the rule against non-disclosure is that a lawyer can defend himself "against an accusation of wrongful conduct."

Professional responsibility lawyer David Atkins told Bloomberg Law that he questioned whether the exception applied "if the purpose of giving up the client is to secure a more lenient sentence rather than to establish a **defense** to the charge." Atkins represents lawyers in discipline and malpractice matters.

Atkins also questioned whether, "in light of the wording of the filed information," it was "reasonably necessary" for Cohen to state that Trump "directed" Cohen's conduct.

Legal ethics professor Roy Simon and professional responsibility partner Nicole Hyland also make this distinction in their book **Simon's New York Rules of Professional Conduct Annotated**.

Simon & Hyland point to this introductory language in the rule's exception: a lawyer may reveal confidential information "to the extent that the lawyer reasonably believes necessary" to defend himself.

Whether it was reasonably necessary to reveal confidences, Simon & Hyland say, is "determined on a case by case basis," but the "disclosures must be essential, as a legal matter or as a practical matter, to deny, disprove, or excuse the alleged wrongdoing."

Simon & Hyland also say that the exception permits a lawyer to "reveal confidential information only when the information is material to the lawyer's defense against the accusation of wrongful conduct."

Cohen may argue that anything he said in connection with his guilty plea is "to defend" himself and is thus subject to the self-defense exception. That "defense," he could argue, includes statements made to mitigate his conduct and obtain a more lenient sentence.

But Trump could counter that seeking lenience doesn't implicate guilt or innocence. Since guilt is already established, divulging Trump's confidences is not reasonably necessary for Cohen to "defend" himself against the individual elements of the crimes alleged.

While Cohen's plea agreement does not contain a formal cooperation agreement, it doesn't foreclose the possibility that he'll later enter into one.

Cohen may rely on an old Second Circuit case, **Meyerhofer**, which was decided under New York's old Disciplinary Rules (that were replaced by the rules of professional conduct in 2009). Atkins said that court read the self-defense exception as permitting the lawyer to "cough up client confidences inculcating his client including those that went beyond what was strictly 'necessary' to establish his defense."

## **Crime-Fraud**

As Nashville lawyer Todd Presnell stated on his privilege blog, the application of the crime-fraud exception entails a "complex, fact-specific analysis."