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INTRODUCTION

The evidentiary privilege protecting a client's confidential communication with an attorney from disclosure to third parties is a central element of the relationship between attorney and client.[1] This attorney-client privilege is generally regarded as the oldest of the common law privileges,[2] dating back to the reign of Elizabeth I.[3]

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[1] Professor Geoffrey C. Hazard has observed:

> The attorney-client privilege may well be the pivotal element of the modern American lawyer's professional functions. It is considered indispensable to the lawyer's function as advocate on the theory that the advocate can adequately prepare a case only if the client is free to disclose everything, bad as well as good. The privilege is also considered necessary to the lawyer's function as confidential counselor in law on the similar theory that the legal counselor can properly advise the client what to do only if the client is free to make full disclosure.

Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1061 (1978).

[2] *See* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (recognizing the attorney-client privilege as "the oldest of the privileges for confidential communications known to the common law").

[3] *See* JOHN HENRY WIGMORE, 8 EVIDENCE IN TRIALS AT COMMON LAW § 2290, at 542 (McNaughton rev. ed. 1961). Indeed, it has been suggested that the privilege has its origins in Roman law. *See* Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191, 216 (1989); Maureen H. Burke, *The Duty of Confidentiality and Disclosing Corporate*

The underlying rationale of the privilege is the encouragement of "full and frank communication between attorneys and their clients" in order to "promote broader public interests in the observance of law and administration of justice."[4] Quite simply, the privilege recognizes that in the absence of a guaranty of confidentiality, a client would be reluctant to confide possibly damaging information to an attorney, thereby hampering or preventing the attorney from rendering informed legal advice.[5] Thus, the

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Misconduct, 36 BUS. LAW. 239, 242 (1981); J.T. Fisher, Comment, *Witnesses–Competency–Whether Confidential Revelations By Client to Attorney Regarding Future Criminal or Fraudulent Transactions Must Be Divulged*, 33 CHI.-KENT L. REV. 271, 272 (1955); Note, *The Lawyer-Client Privilege: Its Application to Corporations, the Role of Ethics and Its Possible Curtailment*, 56 NW. U. L. REV. 235, 235 (1961) [hereinafter Note, *The Lawyer-Client Privilege*].

[4] *Upjohn Co.*, 449 U.S. at 389; *accord* Jaffee v. Redmond, 518 U.S. 1, 11 (1996); Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348 (1985); *see also* Trammel v. United States, 445 U.S. 40, 51 (1980) ("The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out."); Fisher v. United States, 425 U.S. 391, 403 (1976) ("The purpose of the privilege is to encourage clients to make full disclosure to their attorneys."); Hunt v. Blackburn, 128 U.S. 464, 470 (1888) ("[The attorney-client privilege] is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure."); Scott R. Flucke, *The Attorney-Client Privilege in the Corporate Setting: Counsel's Dual Role as Attorney and Executive*, 62 UMKC L. REV. 549, 551 (1994) (citing *Upjohn Co.*); David B. Merchant, Note, *Defense Counsel As Prosecution Witness: A Combined Doctrine to Govern Attorney Disclosure*, 66 WASH. L. REV. 1081, 1082-83 (1991) (citing *Upjohn Co.* and presenting three policies underlying the privilege). That the privilege in the corporate setting encourages candor appears to be born out empirically. *See* Alexander, *supra* note 3, at 244 ("A solid majority of both the attorneys and the executives in the survey said they believed the privilege does, in fact, encourage candor.").

[5] *See Fisher*, 425 U.S. at 403 ("As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice."); *Hunt*, 128 U.S. at 470; *In re* Grand Jury Proceedings, 517 F.2d 666, 674 (5th Cir. 1975) ("The purpose of the privilege would be undermined if people were required to confide in lawyers at the peril of compulsory disclosure every time the government decided to subpoena attorneys it believed represented particular suspected individuals."); 8 WIGMORE, *supra* note 3, § 2291, at 545 ("In

order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; hence the law must prohibit such disclosure except on the client's consent. Such is the modern theory."); *see also* David S. Caudill, *Sympathy For the Devil?: Reflections on the Crime-Fraud Exception to Client Confidentiality*, 8 ST. JOHN'S J. LEGAL COMMENT. 369, 374 (1993) ("[I]f expansive exceptions to the rule of confidentiality are created, lawyer-client relations will suffer and one of the foundations of lawyering as we know it will begin to collapse."); Steven A. Migala, *I.R.C. § 6050I and the Attorney-Client Privilege: The Misplaced Emphasis on Incrimination over Confidentiality*, 1996 U. ILL. L. REV. 509, 527 ("If lawyers cannot confidently advise their clients in the initial stages of a consultation that specific facts will be protected by the privilege, clients will not feel free to engage in open discussion with their attorneys. This uncertainty will ultimately result in a suboptimal level of representation."); Merchant, *supra* note 4, at 1090 ("Clients who fear that their attorneys will disclose damaging information may forego representation. Without adequate legal representation, clients may not be able to fully assess their legal claims and may fail to receive justice."); E. Elizabeth Perlman, Note, *The Attorney-Client Privilege: A Look at Its Effect on the Corporate Client and the Corporate Executive*, 55 IND. L.J. 407, 408 (1980) ("[A]s executives realize that they may not be protected by the corporation, the corporate attorney-client privilege will not serve to encourage the executive to provide corporate counsel with the information necessary to make legal decisions for the corporation.") (footnotes omitted). This premise has been questioned. *See, e.g.*, Note, *The Attorney-Client Privilege: Fixed Rules, Balancing and Constitutional Entitlement*, 91 HARV. L. REV. 464, 469-72 (1977) [hereinafter Note, *Fixed Rules*]. Indeed, it has been suggested that, in a criminal proceeding, the attorney-client privilege is of constitutional dimension in light of the defendant's Fifth and Sixth Amendment rights. *See id.* at 485-86 ("[W]hen the fifth and sixth amendments are considered together, the individual accused of crime does seem to have a right to attorney-client privilege. Without a right to privilege, the exercise of either constitutional right would require a waiver of the other."); Christopher Paul Galanek, Note, *The Impact of the* Zolin *Decision on the Crime-Fraud Exception to the Attorney-Client Privilege*, 24 GA. L. REV. 1115, 1118 (1990) ("The defendant's testimonial privilege against self-incrimination is violated if the court forces his personal representative to testify to information disclosed by the defendant."). Professor Hazard has noted in this regard that abolition of the attorney-client privilege

> would mean that an accused in a criminal case could not explain his version of the matter to his lawyer without its being transmitted to the prosecution. Defense counsel would become a medium of confession, a result that would substantially impair both the accused's right to counsel and the privilege

attorney-client privilege shields from disclosure not only the legal advice provided by the lawyer, but also the giving of information to the lawyer by the client upon which the lawyer's advice is based.[6]

Nevertheless, the attorney-client privilege also interferes with the truth-finding process by shielding otherwise probative evidence from disclosure.[7] One noted commentator has observed:

> There may be a sufficient justification for the privilege; indeed the verdict of our legal history is to that effect. But no argument of justification should ignore the fact that the attorney-client privilege, as far as it goes,

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> against self-incrimination. Hence, it is common ground that the privilege ought to apply at least to communications by an accused criminal to his counsel, in contemplation of defense of a pending or imminently threatened prosecution, concerning a completed crime.

Hazard, *supra* note 1, at 1062 (footnotes omitted). Of course, a corporation does not enjoy a Fifth Amendment right against compelled self-incrimination. *See* Braswell v. United States, 487 U.S. 99, 102 (1988); Curcio v. United States, 354 U.S. 118, 122 (1957); Hale v. Henkel, 201 U.S. 43, 74-75 (1906).

In addition, preservation of the attorney-client privilege has also been viewed as essential to the attorney's ethical responsibilities to the client. *See* Ellen R. Peirce & Leonard J. Colamarino, *Defense Counsel as a Witness for the Prosecution: Curbing the Practice of Issuing Grand Jury Subpoenas to Counsel for Targets of Investigations*, 36 HASTINGS L.J. 821, 838 (1985) ("[W]ithout the attorney-client privilege it would be difficult to maintain a sense of loyalty between the attorney and his client, or to comply with the fundamental ethical requirements inherent in the fiduciary relationship between the two.") (footnotes omitted); *see also* Migala, *supra*, at 519 ("[A] strong tradition of loyalty attaches to the relationship of attorney and client. This tradition would be undermined by routine examination of the lawyer as to a client's confidential communications.").

[6] *See Upjohn Co.*, 449 U.S. at 390 ("[T]he privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice.").

[7] This may be particularly so in the corporate setting. *See* Alexander, *supra* note 3, at 195. Alexander states:

> Unlike the individual client, a corporation can "speak" to counsel only through agents–its officers and employees. In a large corporation, cloaking all such communications with an inflexible privilege may produce a veil of darkness so impenetrable in some cases as to preclude effective discovery of the truth. The modern trend toward increased participation of house counsel in the day-to-day affairs of large corporations makes this prospect all the more likely.

Id. (footnotes omitted).

> is not only a principle of privacy, but also a device for cover-ups. That, of course, is what makes contemplation of it both interesting and troubling.[8]

In recognition of this "troubling" effect, the privilege is construed narrowly and applied "only where necessary to achieve its purpose."[9] In

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[8] Hazard, *supra* note 1, at 1062. Jeremy Bentham was a critic of the privilege for this reason as well. Bentham stated:

> A rule of law which, in the case of the lawyer, gives an express licence to that wilful concealment of the criminal's guilt, which would have constituted any other person an accessory in the crime, plainly declares that the practice of knowingly engaging one's self as the hired advocate of an unjust cause is, in the eye of the law, or (to speak intelligibly) in that of the law-makers, an innocent, if not a virtuous practice. But for this implied declaration, the man who in this way hires himself out to do injustice or frustrate justice with his tongue, would be viewed in exactly the same light as he who frustrates justice or does injustice with any other instrument.

8 WIGMORE, *supra* note 3, § 2291, at 551 (quoting Jeremy Bentham, *Rationale of Judicial Evidence*, 7 THE WORKS OF JEREMY BENTHAM 479 (Bowring ed., 1842)). However, as Professor Louisell observed:

> Anglo-American analysis commonly proceeds from the premise that recognition of the privileges constitutes a perpetual threat to the ascertainment of truth in litigation. Assuming for present purposes the validity of this premise (which should be further tested by comparative law inquiry), it is nevertheless submitted that there are things even more important to human liberty than accurate adjudication. One of them is the right to be left by the state unmolested in certain human relations.

David W. Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 110 (1956); *accord* Gregory I. Massing, Note, *The Fifth Amendment, the Attorney-Client Privilege, and the Prosecution of White-Collar Crime*, 75 VA. L. REV. 1179, 1198 (1989) ("Although invocation of the attorney-client privilege in the corporate setting may at times frustrate prosecutions by creating a 'zone of silence' around corporate affairs, this general criticism of the attorney-client privilege is outweighed by the broader goal of encouraging the giving and receiving of sound legal advice.") (footnote omitted).

[9] *Fisher*, 425 U.S. at 403; *accord In re* Grand Jury Investigation, 974 F.2d 1068, 1070 (9th Cir. 1992); Clarke v. American Commerce Nat'l Bank, 974 F.2d 127, 129 (9th Cir. 1992); Fausek v. White, 965 F.2d 126, 132 (6th Cir. 1992); Westinghouse Elec. Corp. v. Republic of the Phil., 951 F.2d 1414, 1423-24 (3d Cir. 1991); *In re* Grand Jury Proceeding, Cherney, 898 F.2d 565, 567 (7th Cir. 1990); *In re* Antitrust Grand Jury, 805 F.2d 155, 162 (6th Cir. 1986); *In re* Grand Jury Proceedings, 727 F.2d 1352, 1355-56 (4th Cir. 1984); *In re* Grand Jury Investigation No. 83-2-35, 723 F.2d 447, 451 (6th Cir. 1983); *In re* Sealed Case,

order for the privilege to be effective in achieving the goal of compliance with law resulting from sound legal advice based on client candor, however, there must be predictable certainty that the confidentiality of client communications will be preserved.[10]

Increasingly, prosecutors and civil litigants are seeking to invade attorney-client confidences by claiming that the client's consultation with counsel was not bona fide[11] but, instead, was for the purpose of furthering

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676 F.2d 793, 806-07 (D.C. Cir. 1982); Permian Corp. v. United States, 665 F.2d 1214, 1221 (D.C. Cir. 1981); *In re* Horowitz, 482 F.2d 72, 81 (2d Cir. 1973); Garner v. Wolfinbarger, 430 F.2d 1093, 1100-01 (5th Cir. 1970); Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 323 (7th Cir. 1963). As Wigmore has commented:

> [T]he privilege remains an exception to the general duty to disclose. Its benefits are all indirect and speculative; its obstruction is plain and concrete. . . . It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.

8 WIGMORE, *supra* note 3, § 2291, at 554.

[10] *See Upjohn Co.*, 449 U.S. at 393.

> [I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.

Id.; *see also* Jaffee v. Redmond, 518 U.S. 1, 17 (1996) ("Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege."); John William Gergacz, *Attorney-Corporate Client Privilege: Cases Applying* Upjohn, *Waiver, Crime-Fraud Exception, and Related Issues*, 38 BUS. LAW. 1653, 1663 (1983) ("[F]or the attorney-client privilege to have any practical value, the communicator must be able to predict whether any given communication will be within the privilege at the time the communication is made."); Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424, 426 (1970) ("If the privilege is to achieve its purpose of encouraging communications, the communicants must be able to discern at the stage of primary activity whether the communications will be privileged.").

[11] Indeed, it has been suggested that communications with a lawyer for an illegal purpose would not be privileged in the first instance.

> [There] are situations in which the client is doing or planning to do something that is very bad, such as committing a crime or destroying evidence, or where the client wants the lawyer to do something very bad,

an intended crime or fraud.[12] This "crime-fraud" exception to the attorney-client privilege is similarly of common law origin[13] and is well-established in American law.[14]

The application of the crime-fraud exception to communications made in the course of counseling, particularly when the client is a corporation, is still troubling. The evaluation of whether the communication was in furtherance of a crime is made after the communication itself and often long after the crime. Further, it is the client's intent in consulting with

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such as suborning perjury or aiding in fraud. In such circumstances, it is arguable that the privilege, by its own terms, is not applicable. That is, if the client has in mind anything but a "legitimate" purpose in consulting a lawyer, it might be said that communications between them are neither "in the course of" the attorney-client relationship nor in "professional" confidence.

Hazard, *supra* note 1, at 1063-64 (footnotes omitted); *accord* Note, *The Lawyer-Client Privilege*, *supra* note 3, at 237. This is Dean Wigmore's view as well. *See* 8 WIGMORE, *supra* note 3, § 2298 ("It has been agreed from the beginning that the privilege cannot avail to protect the client in concerting with the attorney a crime or other evil enterprise; and for the logically sufficient reason that no such enterprise falls within the just scope of the relation between legal adviser and client.").

[12] One court recently observed:

> Until recently, federal prosecutors rarely subpoenaed attorneys to compel testimony relating to their clients. This practice changed in the 1980s as the federal government stepped up its fight against organized crime and narcotics trafficking. Most significantly, Congress passed several new federal statutes which, in the eyes of federal prosecutors, make attorneys fertile ground for eliciting incriminating information about the targets of federal investigations and prosecutions.

Whitehouse v. United States Dist. Ct. for the Dist. of R.I., 53 F.3d 1349, 1352 (1st Cir. 1995); *see also* Max D. Stern & David Hoffman, *Privileged Informers: The Attorney Subpoena Problem and a Proposal for Reform*, 136 U. PENN. L. REV. 1783, 1800 (1988); *White Collar Crime Meeting Addresses Issues of Privilege, Corporate "Good Citizenship,"* 61 Crim. L. Rep. (BNA) 1020, 1023 (Apr. 2, 1997).

[13] See, for example, *Annesley v. Anglesea*, 17 How. St. Trials 1139 (1743), a case which Professor Hazard has observed, "reads like source material for a Dickens novel–indeed, its facts make *David Copperfield* seem a pale contrivance." Hazard, *supra* note 1, at 1073; *see also* David J. Fried, *Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds*, 64 N.C. L. REV. 443, 446-461 (1986); Galanek, *supra* note 5, at 1122-24.

[14] For a listing of numerous citations to early American cases, see *Clark v. United States*, 289 U.S. 1, 15-16 (1933).

counsel, rather than counsel's knowledge of the client's purpose, that determines whether the communication was in furtherance of an intended crime or fraud and therefore unprivileged.

In effect, the crime-fraud exception allows for the transformation of an attorney into a witness against the attorney's client (or the individual who acts on behalf of a corporate client) simply because the client disregarded counsel's legal advice and subsequently committed an allegedly criminal act. Even the possibility that counsel may later be compelled to be a witness undermines the trust between client and attorney and the assurance of confidentiality that is the essence of legal counseling and "preventive law."

Two recent decisions of the United States Court of Appeals for the Ninth Circuit cast this issue in sharp relief. In the first, *In re Grand Jury Proceedings*,[15] a panel of the Ninth Circuit held that the crime-fraud exception applied "even if the attorney does nothing after the communication to assist the client's commission of a crime, and even though the communication turns out not to help (and perhaps even to hinder) the client's completion of a crime."[16] In the second decision, *United States v. Chen*,[17] the crime-fraud exception was upheld even though "the lawyers in this case were innocent of any wrongful intent, and had no knowledge that their services were being used [to commit the alleged crime]."[18]

These rulings infuse the attorney-client relationship with uncertainty about whether the confidentiality of the client's communication will be preserved from later scrutiny and raise the unsettling prospect of counsel becoming a witness against the client.[19] This uncertainty is only exacer-

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[15] *In re* Grand Jury Proceedings, 87 F.3d 377 (9th Cir. 1996).

[16] *Id.* at 382. The court went on to say that "inasmuch as the government need not establish, for purposes of the crime-fraud exception, that the crimes succeeded . . . the government is not required to prove that the communications with [the attorneys] *in fact* helped the targets commit the crimes." *Id.*

[17] United States v. Chen, 99 F.3d 1495 (9th Cir. 1996).

[18] *Id.* at 1504.

[19] Indeed, it has been observed that attorneys should give "*Miranda*-like warnings" when counseling clients.

> Today, when a client consults an attorney for legal advice, the attorney can no longer confidently tell the client that all the information entrusted to the attorney is privileged and therefore will be kept in strict confidence. The traditional expectations about the scope of the attorney-client and work-product privilege no longer hold true. Indeed, more than one commentator has suggested that under the emerging case law of "no attorney-client privilege," the attorney would be well advised to give each new client a *Miranda*-like warning about the manner in which the client's disclosures to

bated by the fact that, as the law currently stands, the attorney-client privilege can be vitiated on the basis of a minimal evidentiary showing in an *ex parte* proceeding in which the beneficiary of the privilege is neither informed of the evidence upon which the privilege is challenged nor given the opportunity to rebut the allegations as to why the privilege should not apply.

This Article seeks a balance between protecting the significant social interests served by the attorney-client privilege, and the legitimate interests of litigants in obtaining evidence of crimes or frauds which are not entitled to the protections of the privilege in the context of providing counsel to a corporate client. To that end, Part I discusses the federal common law basis[20] of the crime-fraud exception,[21] Part II examines the procedure for establishing the exception,[22] and Part III offers several concluding observations.[23]

In sum, despite being deeply rooted in law, courts (and prosecutors) should be more hesitant and deliberate in their invocation of the crime-fraud exception lest the privilege be swallowed by the exception in every case in which a client is alleged to have committed a crime or fraud after consulting with counsel.

I. THE CORPORATE ATTORNEY-CLIENT PRIVILEGE AND THE CRIME-FRAUD EXCEPTION

The privilege protecting the confidentiality of communications between attorney and client arises when one communicates with a lawyer

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> the attorney could be used against her by means of forced disclosure from the mouth of the attorney!

Stern & Hoffman, *supra* note 12, at 1804 (footnotes omitted). Such warnings can only be expected to chill (to say the least) a client's willingness to be frank and candid with the attorney.

[20] Under Rule 501 of the Federal Rules of Evidence, "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." FED. R. EVID. 501. Thus, in the course of adjudicating federal rights, questions of privilege are governed by federal common law. *See* United States v. Zolin, 491 U.S. 554, 562 (1989); Clarke v. American Commerce Nat'l Bank, 974 F.2d 127, 129 (9th Cir. 1992); *In re* Feldberg, 862 F.2d 622, 626 (7th Cir. 1988).

[21] *See infra* notes 24-113.

[22] *See infra* notes 114-77.

[23] *See infra* notes 178-91.

in the course of an attorney-client relationship.[24] In the corporate setting, however, the "client" is the corporate entity and not any of the human constituents who act on behalf of the corporation.[25] This distinction between the client, a legal fiction,[26] and those individuals through whom

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[24] Wigmore formulated the rule as follows:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

8 WIGMORE, *supra* note 3, § 2292 (emphasis in original not shown). The court in *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357 (D. Mass. 1950), agreed, saying:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Id. at 358-59.

[25] Thus, for example, under Canon 5 of the Code of Professional Responsibility, Ethical Consideration 5-18 provides:

> A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-18 (1983). Similarly, Model Rule 1.13 of the Model Rules of Professional Conduct provides in part that "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 (1998).

[26] *See* Flucke, *supra* note 4, at 551 ("In general, a corporation is an inanimate and artificial entity created and governed by individual state law."); Gergacz, *supra* note 10, at 1679 ("[A] corporation is an artificial entity, existing only in the eyes of the law."); Ralph Jonas, *Who is the Client?: The Corporate Lawyer's Dilemma*, 39 HASTINGS L.J. 617, 617 (1988) ("A corporation is a legal fiction. Its independent existence has been created out of statutory 'whole cloth.' Only by reason of

the corporation acts, imposes on the corporate counsel unique ethical duties and concomitantly vexing issues as to what communications are subject to the corporation's attorney-client privilege.[27] In like fashion, vitiating the

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legislative fiat has this 'entity' been separated from its owners and its managers."); James R. McCall, *The Corporation as Client: Problems, Perspectives, and Partial Solutions*, 39 HASTINGS L.J. 623, 626 (1988) ("While rigidly adopting the fiction that corporations are 'persons' may produce some confusion, the basic structure of English and American law was designed for regulating persons' activities. It is thus inevitable that the law will view corporations, to the greatest possible degree, as if these abstract entities were individuals."); Michael L. Waldman, *Beyond* Upjohn*: The Attorney-Client Privilege in the Corporate Context*, 28 WM. & MARY L. REV. 473, 475 (1987) ("The corporate client differs from the individual client in important ways. The most obvious but critical difference is that corporations are inanimate, artificial entities created by the state; they lack the human qualities–the basic human dignity and rights–that our legal system recognizes and respects.").

[27] Thus, it has been observed:

> The [ABA Code of Professional Responsibility] is keyed to the relationship between a lawyer and a client, but a corporate lawyer must deal not with an entity as a client in abstraction but with individuals having authority to act on behalf of the entity–employees, managers and officers, members of the board of directors and, in some cases, controlling shareholders.

Brian D. Forrow, *The Corporate Law Department Lawyer: Counsel to the Entity*, 34 BUS. LAW. 1797, 1799 (1979). However, because the corporation has no will of its own or capacity to act except through its human constituents–directors, officers, employees, or stockholders–corporate counsel's relationship with those who act on behalf of the corporation is fraught with ambiguity. Corporate counsel regularly solicits information, often of a highly confidential nature, from individuals associated with the corporation with whom corporate counsel deals and then must segregate the interests of the individuals as manifestations of the corporate client (which must be protected) from the individual interests of those same persons (which the lawyer has no obligation to protect). Robert Kutak observed, "No matter which way we approach it I think all recognize that an attorney's duty runs to the corporation and this will require that the attorney act to protect the interest of the corporate client apart from the interests of its many constituents." Robert J. Kutak, *Proposed Model Rules of Professional Conduct*, 36 BUS. LAW. 573, 577 (1981); *see also* Perlman, *supra* note 5, at 415 ("When a lawyer represents a corporation he owes his primary allegiance to the corporate entity, and not its agents, shareholders or any other person associated with the corporation."). This situation has been described by one commentator as being "perverse" in that the lawyer is engaged by, advises, and can be discharged by persons who are not the lawyer's clients while the shareholders, who most closely approximate the "client," are largely uninvolved and uninformed of the lawyer's representation.

corporation's privilege on grounds that the communication was intended to further an ongoing or future crime or fraud also requires a careful analysis of the corporation's intent, if, indeed, a noncorporeal being can be said to possess an "intent" in the first instance.[28]

A. The Attorney-Client Privilege in the Corporate Setting

The availability of the attorney-client privilege to corporations has been the subject of scholarly debate.[29] Although recognition of a corporate

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> [W]e have the perverse situation in which the lawyer who represents a publicly held corporation is selected and retained by, and reports to and may be fired by, the principal officers and directors of the corporation–*who are not his clients*. Moreover, the shareholders of a corporation, who, collectively, are the owners of the mythical beast, typically do not participate in the process by which the lawyer is selected, retained, or fired.

Jonas, *supra* note 26, at 617. Thus, "[g]iven the difficulty of accommodating the corporation concept into the framework of a legal system premised upon individual action, it is not surprising that the rules governing lawyers, the technicians of the legal system, have been unclear on the subject of an attorneys' [sic] obligations to corporate clients." McCall, *supra* note 26, at 626.

[28] *See* Upjohn Co. v. United States, 449 U.S. 383, 390 (1981).

[29] It is arguable that the lawyer-client privilege, as a rule to encourage full disclosure by eliminating the client's fear that his secrets will be told, has no application where the client is an impersonal entity, such as a corporation, and as such is free from human reticence and fear. Indeed, because of their impersonal nature, corporations have been denied the protection of the constitutional privilege against self-incrimination. But, unlike the privilege against self-incrimination, the lawyer-client privilege does not exist out of deference to any personal right. Rather, it is a rule of policy designed to facilitate the workings of justice. Viewed in this light, it appears that the policy of the privilege gives it full application to corporate communications, since the group of agents and directors who motivate a corporation need the incentive of the privilege fully as much as do the private clients to encourage full disclosure to counsel.

Note, *The Lawyer-Client Privilege*, *supra* note 3, at 241 (footnote omitted); *see also* David Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L.J. 953, 990 (1956) ("The more deeply one is convinced of the social necessity of permitting corporations to consult frankly and privately with their legal advisers, the more willing one should be to accord them a flexible and generous protection."). *Cf.* James A. Gardner, *A Personal Privilege for Communications of Corporate Clients–Paradox or Public Policy?*, 40 U. DET. L. REV. 299 (1963) (arguing that the attorney-client privilege should not extend to corporate clients);

privilege is relatively recent in the federal courts,[30] the question was settled by the Supreme Court in *Upjohn Company v. United States*.[31]

In *Upjohn*, the Supreme Court made it clear that the corporate attorney-client privilege was not confined to the "control group"[32] of the entity, but instead, the privilege extends to communications at all levels of the corporation.[33] Accordingly, the attorney-client privilege will attach if:

Elizabeth G. Thornburg, *Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client Privilege*, 69 NOTRE DAME L. REV. 157 (1993); Note, *Fixed Rules*, *supra* note 5, at 473.

[30] The applicability of the attorney-client privilege to corporations appears to have been assumed for many years. *See, e.g.*, United States v. Louisville & Nashville R.R. Co., 236 U.S. 318, 336 (1915). However, it was not until the Seventh Circuit's decision in *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314, 323 (7th Cir. 1963), that a corporate attorney-client privilege was specifically recognized. *See* Simon, *supra* note 29, at 953 ("It is generally assumed that corporations and other legal entities are entitled to the privilege just as much as individuals are. The idea seems to go unchallenged–perhaps because in law, as in life, many of the most deeply believed assumptions are unspoken.").

[31] *See Upjohn Co.*, 449 U.S. at 397; *see also In re* John Doe Corp., 675 F.2d 482, 487 (2d Cir. 1982) ("*Upjohn* affirmed the 'assumption' that a corporation may assert the privilege on its behalf.").

[32] The "control group test" for applying the attorney-client privilege to corporate communications was formulated in *Philadelphia v. Westinghouse Electric Corp.*, 210 F. Supp. 483, 485 (E.D. Pa. 1962). *See generally* Waldman, *supra* note 26, at 481-84; Howard N. Wollitz, Comment, *The Privileged Few: The Attorney-Client Privilege as Applied to Corporations*, 20 UCLA L. REV. 288, 297-303 (1972). The "control group test" was rejected by the Supreme Court in *Upjohn Co.* because it "overlooks the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Upjohn Co.*, 449 U.S. at 390; *see* Stephen A. Brown & Paul M. Hyman, *The Scope of the Attorney-Client Privilege in Corporate Decision Making*, 26 BUS. LAW., 1145, 1148-49 (1971); Bryson P. Burnham, *The Attorney-Client Privilege in the Corporate Arena*, 24 BUS. LAW. 901, 906-08 (1969); Flucke, *supra* note 4, at 554-55; Perlman, *supra* note 5, at 409-11; Waldman, *supra* note 26, at 489-91.

[33] As the Supreme Court stated in *Upjohn*:

> In the case of the individual client the provider of information and the person who acts on the lawyer's advice are one and the same. In the corporate context, however, it will frequently be employees beyond the control group as defined by the court below–"officers and agents . . . responsible for directing [the company's] actions in response to legal advice"–who will possess the information needed by the corporation's lawyers. Middle-level–and indeed lower-level–employees can, by actions

1) the communication was made to corporate counsel, acting as such; 2) the communication was made at the direction of management in order to secure legal advice from counsel; 3) the communication concerned a matter within the scope of the employee's duties; and 4) at the time the communication was made, the employee was aware that the communication was for the purpose of rendering legal advice to the corporation.[34]

Upjohn also makes clear that the privilege protects both the communication of legal advice and the gathering of information upon which the advice is given.[35] This protection extends to corporate internal investigations of possible wrongdoing[36] as well as to communications in the course of day-to-day corporate counseling.[37] The privilege protects only those communications that are primarily for the purpose of obtaining legal advice, not business advice,[38] although it is recognized that

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within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties.

Upjohn Co., 449 U.S. at 391.

[34] *See id.* at 394; *see also* Massing, *supra* note 8, at 1195.

[35] *See Upjohn Co.*, 449 U.S. at 390.

[36] *See id.* at 383; United States v. Rowe, 96 F.3d 1294, 1297 (9th Cir. 1996); *In re* Grand Jury Subpoena, 599 F.2d 504, 510 (2d Cir. 1979); Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 610 (8th Cir., 1977) (en banc); *In re* Leslie Fay Cos., Inc. Sec. Litig., 161 F.R.D. 274, 282 (S.D.N.Y. 1995); *In re* LTV Sec. Litig., 89 F.R.D. 595, 600-01 (N.D. Tex. 1981).

[37] *See* United States v. Chen, 99 F.3d 1495 (9th Cir. 1996).

Much of what lawyers actually do for a living consists of helping their clients comply with the law. Clients unwittingly engage in conduct subject to civil and even criminal penalties. This valuable social service of counseling clients and bringing them into compliance with the law cannot be performed effectively if clients are scared to tell their lawyers what they are doing, for fear their lawyers will be turned into government informants.

Id. at 1500 (citations omitted).

[38] One commentator explained:

It is a basic principle that the privilege extends only to confidential communications made by the client to his lawyer acting as such. Accordingly, it does not protect disclosures made to a person who happens to be a lawyer but is not acting in that capacity. This aspect of the privilege raises difficulties when applied to lawyers who, as advisers to businessmen, participate in business decisions. The problem is particularly perplexing for the legal advisers of today's corporate giants. . . . Indeed, corporate

> attorneys are often employees, directors, or officers of their clients. Whether they be "outside" counsel or "house" counsel, they can rarely confine themselves to purely legal matters. Questions of policy, as well as executive guidance for matters that are partly legal, often fall within their domain. There is hardly a corporate record or memorandum of any importance that does not pass through their hands at one time or another.

Simon, *supra* note 29, at 969; *see* Flucke, *supra* note 4, at 556 ("To assert the privilege, corporations must clearly demonstrate that the communications to be protected were given in a professional legal capacity and that they concern legal rather than business matters. However, corporate dealings are not made confidential merely by funneling them routinely through an attorney.") (footnote omitted); Susan F. Jennison, *The Crime or Fraud Exception to the Attorney-Client Privilege:* Marc Rich *and the Second Circuit*, 51 BROOK. L. REV. 913, 932-33 (1985) ("In order for the attorney-client privilege to apply, the attorney must be acting in his or her capacity as an attorney, and not as a business advisor.") (footnotes omitted). Thus, the proponent of the privilege must show, as an initial matter, that the communication was for the purpose of obtaining legal counsel and not business advice. *See, e.g.*, United States v. Abrahams, 905 F.2d 1276, 1283 (9th Cir. 1990) ("[The attorney] failed to introduce evidence that his clients had communicated this information *in confidence and in order to seek legal advice.* Absent such evidence, the claim of privilege must fail."); *In re* Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1037 (2d Cir. 1984) ("[T]he privilege is triggered only by a client's request for legal, as contrasted with business, advice."); *In re* Fischel, 557 F.2d 209, 211 (9th Cir. 1977) ("The purpose of the privilege is to protect and foster the client's freedom of expression. It is not to permit an attorney to conduct his client's business affairs in secret."); Colton v. United States, 306 F.2d 633, 638 (2d Cir. 1962) ("Attorneys frequently give to their clients business or other advice which, as least insofar as it can be separated from their essentially professional legal services, gives rise to no privilege whatever."); United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961) ("What is vital to the privilege is that the communication be made *in confidence* for the purpose of obtaining *legal* advice *from the lawyer.*"); McCaugherty v. Siffermann, 132 F.R.D. 234, 238 (N.D. Cal. 1990) ("No privilege can attach to any communication as to which a business purpose would have served as a sufficient cause, i.e., any communication that would have been made because of a business purpose, even if there had been no perceived additional interest in securing legal advice."); Valente v. Pepsico, Inc., 68 F.R.D. 361, 367 (D. Del. 1975) ("Where house counsel is engaged in giving business advice or mere technical information, no privilege attaches."). Similarly, compilations of information from nonprivileged sources for a business purpose, even if prepared by an attorney, will not be considered privileged. *See, e.g.*, *Abrahams*, 905 F.2d at 1284 (upholding denial of privilege for questionnaire responses for purpose of preparing tax returns); United States v. El Paso Co., 682 F.2d 530, 541 (5th Cir. 1982) (finding as nonprivileged a tax pool analysis

protected professional advice may serve a business purpose.[39]

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prepared for financial reporting purposes); *In re Fischel*, 557 F.2d at 212 (affirming finding that summaries of transactions with third parties were not privileged); American Cyanamid Co. v. Hercules Powder Co., 211 F. Supp. 85, 90 (D. Del. 1962) (finding an analysis of patents to be unprivileged). Thus, communications with a lawyer, as a friend, would not be privileged, *see* Modern Woodmen of Am. v. Watkins, 132 F.2d 352, 354 (5th Cir. 1942), nor would any communication with a lawyer as a parent, *see In re* Kinoy, 326 F. Supp. 400, 403-05 (S.D.N.Y. 1970). Instead, the communications must have been with a lawyer acting as such. *See Upjohn Co.*, 449 U.S. at 394. One court observed:

> Since the privilege is intended to facilitate the rendition of legal representation, it does not cover communications with the attorney if intended to assist counsel in performing other services, such as the provision of business advice or the performance of such functions as negotiating purely commercial aspects of a business relationship.

Note Funding Corp. v. Bobian Investment Co., No. 93 Civ. 7427, 1995 U.S. Dist. Lexis 16605, at *5 (S.D.N.Y. Nov. 9, 1995). For that reason, no attorney-client relationship was found to exist where the lawyer and the client were in business together, *see* United States v. Rosenstein, 474 F.2d 705, 714 (2d Cir. 1973); Lowy v. Commissioner, 262 F.2d 809, 812 (2d Cir. 1959); or where the attorney effectively controlled the corporation, *see* United States v. Faltico, 586 F.2d 1267, 1269-70 (8th Cir. 1978); or was a director of the corporation, *see* Securities Exch. Comm'n v. Gulf & Western Indus., Inc., 518 F. Supp. 675, 683 (D.D.C. 1981); United States v. Vehicular Parking, Ltd., 52 F. Supp. 751, 753 (D. Del. 1943). Likewise, the privilege has not been recognized when counsel's activities were not primarily those of a lawyer, as when counsel acted as a "scrivener," *see* Pollock v. United States, 202 F.2d 281, 286 (5th Cir. 1953); *Gulf & Western Indus., Inc.*, 518 F. Supp. at 683; as a conduit for client's funds, *see* United States v. Horvath, 731 F.2d 557, 561 (8th Cir. 1984); as a transfer agent, *see* United States v. Palmer, 536 F.2d 1278, 1281 (9th Cir. 1976); as an accountant, *see* Olender v. United States, 210 F.2d 795, 805-06 (9th Cir. 1954); as a claims investigator, *see* Bird v. Pennsylvania Cent. Co., 61 F.R.D. 43, 46 n.3 (E.D. Pa. 1973); as a business advisor, *see* United States v. Davis, 636 F.2d 1028, 1044 (5th Cir. 1981); as a marketing advisor, *see In re* Feldberg, 862 F.2d 622, 626 (7th Cir. 1988); United States v. Huberts, 637 F.2d 630, 640 (9th Cir. 1980); as a negotiator, *see* Georgia-Pacific Corp. v. GAF Roofing Mfg. Corp., No. 93 Civ. 5125, 1996 U.S. Dist. Lexis 671, at *11-12 (S.D.N.Y. Jan. 24, 1996); Attorney General v. Covington & Burling, 430 F. Supp. 1117, 1121 (D.D.C. 1977); or as a lobbyist, *see* North Carolina Elec. Membership Corp. v. Carolina Power & Light Co., 110 F.R.D. 511, 517 (M.D.N.C. 1986).

[39] Thus, in *Note Funding Corp.*, 1995 U.S. Dist. Lexis 16605, at *6-7, the court noted:

> In pursuing large and complex financial transactions, commercial entities

The privilege has been held to attach equally to both in-house counsel and outside counsel.[40] However, because of their unique position as both

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often seek the assistance of attorneys who are well equipped both by training and by experience to assess the risks and advantages in alternative business strategies. When providing this assistance, counsel are not limited to offering their client purely abstract advice as to the rules of law that may apply to their situation. Of necessity, counsel will often be required to assess specific tactics in putting together transactions or shaping the terms of commercial agreements, and their evaluation of alternative approaches may well take into account not only the potential impact of applicable legal norms, but also the commercial needs of their client and the financial benefits or risks of these alternative strategies.

The fact that an attorney's advice encompasses commercial as well as legal considerations does not vitiate the privilege. If the attorney's advice is sought, at least in part, because of his legal expertise and the advice rests "predominantly" on his assessment of the requirements imposed, or the opportunities offered, by applicable rules of law, he is performing the function of a lawyer.

Id. Judge Wyzanski had made a similar observation in *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357 (D. Mass. 1950).

The modern lawyer almost invariably advises his client upon not only what is permissible but also what is desirable. And it is in the public interest that the lawyer should regard himself as more than predicter of legal consequences. His duty to society as well as to his client involves many relevant social, economic, political and philosophical considerations. And the privilege of nondisclosure is not lost merely because relevant nonlegal considerations are expressly stated in a communication which also includes legal advice.

Id. at 359; *accord In re LTV Sec. Litig.*, 89 F.R.D. at 601 ("Information gathered in such a manner as to be privileged does not become discoverable solely because management makes other business use of the information."); *see also* Flucke, *supra* note 4, at 565 ("The mere fact that business advice or other nonlegal advice is simply incorporated into legal advice does not vitiate the attorney-client privilege."); Gergacz, *supra* note 10, at 1680. Gergacz states:

One of the general requirements of the attorney-client privilege is that the communications with an attorney be for the purpose of securing legal advice. However, there is no set formula or list which clearly defines the contours of legal advice. Often lawyers' communications with clients will involve legal as well as nonlegal considerations. This factor alone will not cause the privilege to fail.

Id.

[40] As Judge Wyzanski also stated:

[T]he apparent factual differences between these house counsel and outside

lawyers and employees of the corporation, in-house counsel are often called upon to provide business advice as well as legal counsel.[41] For this

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> counsel are that the former are paid annual salaries, occupy offices in the corporation's buildings, and are employees rather than independent contractors. These are not sufficient differences to distinguish the two types of counsel for purposes of the attorney-client privilege. And this is apparent when attention is paid to the realities of modern corporate law practice. The type of service performed by house counsel is substantially like that performed by many members of the large urban law firms. The distinction is chiefly that the house counsel gives advice to one regular client, the outside counsel to several regular clients.

United States Mach. Corp., 89 F. Supp. at 360; *accord In re* Sealed Case, 737 F.2d 94, 99 (D.C. Cir. 1984) ("The lawyer whose testimony the government seeks in this case served as in-house attorney. That status alone does not dilute the privilege."); Natta v. Hogan, 392 F.2d 686, 692 (10th Cir. 1968) (opining that members of in-house law department are "within the ambit of the confidential communications rule."); *In re LTV Sec. Litig.*, 89 F.R.D. at 601 ("Whatever doubt may have existed, *Upjohn* laid to rest suggestions that house counsel are to be treated differently from outside counsel with respect to activities in which they are engaged as attorneys."); O'Brien v. Board of Educ. of City Sch. Dist., 86 F.R.D. 548, 549 (S.D.N.Y. 1980) ("The fact that [a] document was prepared by in-house counsel rather than by an independent attorney is of no significance."); *Valente*, 68 F.R.D. at 367 ("This Court has long adhered to the rule that house counsel are to be treated in the same fashion as outside counsel with respect to activities in which they are engaged as attorneys."); Malco Mfg. Co. v. Elco Corp., 45 F.R.D. 24, 26 (D. Minn. 1968) ("The weight of authority appears to be that legal advice rendered to a corporation by an attorney in its employ as so-called "house" counsel falls within the rule of attorney-client privilege."); 8 in 1 Pet Products, Inc. v. Swift & Co., 218 F. Supp. 253 (S.D.N.Y. 1963) ("It is also clear that legal advice rendered to a corporation by an attorney in its employ falls within the attorney-client privilege."); Georgia Pac. Plywood Co. v. United States Plywood Corp., 18 F.R.D. 463, 464 (S.D.N.Y. 1956) ("House counsel are required to have the same degree of training, skill, knowledge and professional integrity as outside counsel."); *see* Flucke, *supra* note 4, at 559; Michael Goldsmith & Chad W. King, *Policing Corporate Crime: The Dilemma of Internal Compliance Programs*, 50 VAND. L. REV. 1, 24 n.108 (1997).

[41] Thus, it has been observed that in-house counsel

> may serve as company officers with mixed business-legal responsibility; whether or not officers, their day-to-day involvement may blur the line between legal and nonlegal communications; and their advice may originate not in response to the client's consultation about a particular problem but with them, as part of an on-going, permanent relationship with the organization.

Georgia-Pacific Corp. v. GAF Roofing Mfg. Corp., No. 93 Civ. 5125, 1996 U.S. Dist. LEXIS 671, at *9-10, *summ. j. granted by* 1996 U.S. Dist. LEXIS 12811

reason, assertions of privilege for communications with in-house counsel do not enjoy the same presumption of privilege afforded to communications with outside counsel.[42] Instead, communications with in-house counsel have been subjected to stricter and more skeptical scrutiny than similar communications with outside counsel.[43]

(S.D.N.Y. Jan. 25, 1996).

[42] *See* United States v. Chen, 99 F.3d 1495, 1502 (9th Cir. 1996).

> [A] matter committed to a professional legal adviser *is prima facie so committed for the sake of the legal advice* which may be more or less desirable for some aspect of the matter, and is therefore within the privilege unless it clearly appears to be lacking in aspects requiring legal advice.

Id. (quoting 8 WIGMORE, *supra* note 3, § 2296, at 566-67)); *see also* Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 610 (8th Cir. 1977) ("Here, the matter was committed to . . . a professional legal adviser. Thus, it was prima facie committed for the sake of legal advice and was, therefore, within the privilege absent a clear showing to the contrary."); *see also* United States v. Chevron Corp., No. C-94-1885, 1996 U.S. Dist. LEXIS 4154, at *9 (N.D. Cal. Mar. 13, 1996) ("[T]he presumption is logical since outside counsel would not ordinarily be involved in the business decisions of a corporation."); Zenith Radio Corp. v. Radio Corp. of Am., 121 F. Supp. 792, 794 (D. Del. 1954) ("'Outside counsel' for corporations almost invariably, and 'house counsel' ordinarily, qualify [as acting as a lawyer]."). However, in the case of in-house counsel, one commentator has suggested:

> Because attorneys often participate in corporate affairs in other than a purely legal capacity, rendering commercial and even technical advice, it is frequently more difficult to determine whether a professional relationship has been established between a corporation and an attorney than a conventional lawyer-client relationship. For this reason, a professional relationship cannot be presumed from the mere fact of consultation, by a corporation, as it is when an individual consults with an attorney.

Note, *The Lawyer-Client Privilege*, *supra* note 3, at 244. In addition, at least one court has noted the possibility of an implicit conflict between the in-house lawyer's desire to see the company prosper and the lawyer's ethical and legal obligations. *See In re* John Doe Corp., 675 F.2d 482 (2d Cir. 1982).

> The lawyers' professional relationship to the corporation may extend well beyond aspects relating to criminal liability and leave them torn between a desire to see the firm prosper and their professional and legal obligations. In such cases, the wiser course may be to hire counsel with no other connection to the corporation to conduct investigations . . . .

Id. at 491.

[43] As noted in *Georgia-Pacific Corp. v. GAF Roofing*, 1996 U.S. Dist. LEXIS 671, at *9, "[w]here the communication in issue . . . is from an in-house attorney to management, difficult fact specific questions are involved." *Id.* Thus, a corporation asserting the privilege with respect to communications with in-house counsel has been required to make a clear showing that the communication was in

Even though the corporation enjoys the full protection of the attorney-client privilege for its confidential communications, unlike the individual attorney-client relationship, a corporation must communicate with its attorney through one or more of its employees.[44] The acts of any of these employees may subject the corporation to criminal and civil liability even though the senior management of the corporation neither intended nor condoned the misconduct.[45] Indeed, even a low-level employee can consult

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furtherance of an attorney-client relationship and not in the capacity of business advisor. *See In re* Sealed Case, 737 F.2d 94, 99 (D.C. Cir. 1984) ("The [c]ompany can shelter [in-house counsel's] advice only upon a clear showing that [in-house counsel] gave it in a professional legal capacity."); *Chevron Corp.*, 1996 U.S. Dist. LEXIS 4154, at *9 ("While an attorney's status as in-house counsel does not dilute the attorney-client privilege . . . a corporation must make a clear showing that in-house counsel's advice was given in a professional capacity.") (citations omitted); *see also* Flucke, *supra* note 4, at 556 ("To assert the privilege, corporations must clearly demonstrate that the communications to be protected were given in a professional legal capacity and that they concern legal rather than business matters. However, corporate dealings are not made confidential merely by funneling them routinely through an attorney.") (footnotes omitted).

[44] *See* Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348 (1985) ("As an inanimate entity, a corporation must act through agents. A corporation cannot speak directly to its lawyers. Similarly, it cannot directly waive the privilege when disclosure is in its best interest.").

[45] A corporation is subject to liability for the acts of employees in the course of employment which are at least arguably intended to benefit the corporation. *See* New York Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 493, *aff'd*, 212 U.S. 500 (1909) (holding corporation liable for employee's payment of illegal rebates for sugar shipments); United States v. Hilton Hotels Corp., 467 F.2d 1000, 1005 (9th Cir. 1972) (holding corporation liable under the Sherman Act for participation by a hotel purchasing agent in boycott of suppliers who did not contribute to a trade association). Moreover, vicarious liability is not confined to the acts of senior managers. Instead, corporate liability can result from the actions of mid-level managers. *See* United States v. Twentieth Century Fox Film Corp., 882 F.2d 656 (2d Cir. 1989) (holding company liable for act of regional distribution manager who engaged in "block booking" in violation of permanent injunction); United States v. Cincotta, 689 F.2d 238 (1st Cir. 1982) (holding company liable for acts of treasurer and a dispatcher engaged in a scheme to defraud the U.S. Army by charging for undelivered heating oil); United States v. Koppers Co., 652 F.2d 290 (2d Cir. 1981) (holding company liable for acts of district sales manager engaged in bid-rigging); United States v. Cadillac Overall Supply Co., 568 F.2d 1078 (5th Cir. 1978) (attaching liability for acts of sales manager engaged in conspiracy to allocate customers); Continental Baking Co. v. United States, 281 F.2d 137 (6th Cir. 1960) (holding company liable for plant

with the corporation's counsel and thereafter commit a crime or perpetrate a fraud, thereby subjecting the corporation to liability without the knowledge or acquiescence of those who are responsible for conducting the affairs of the corporation.[46]

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manager's price-fixing activities); United States v. Van Riper, 154 F.2d 492 (3d Cir. 1946) (finding corporate liability for gasoline station manager's violation of Office of Price Administration Regulations); C.I.T. Corp. v. United States, 150 F.2d 85 (9th Cir. 1945) (holding lender liable for branch manager's conspiracy to violate the National Housing Act).

[46] Corporations have long been held vicariously liable even for the acts of low-level employees. *See* United States v. Bank of New England, 821 F.2d 844 (1st Cir. 1987) (holding bank liable for head tellers' failure to report currency transactions); United States v. Automated Med. Lab., Inc., 770 F.2d 399 (4th Cir. 1985) (holding company liable when employees falsified records to conceal violations of FDA regulations); United States v. Gold, 743 F.2d 800 (11th Cir. 1984) (holding optometrist liable for employees' submission of false insurance claims); United States v. Demauro, 581 F.2d 50 (2d Cir. 1978) (holding bank liable when bank employees failed to report currency transactions); Apex Oil Co. v. United States, 530 F.2d 1291 (8th Cir. 1976) (finding corporate liability when oil facility employees failed to report oil spill); United States v. Harry L. Young & Sons, Inc., 464 F.2d 1295 (10th Cir. 1972) (attaching corporate liability when truck drivers left explosives unattended); Boise Dodge, Inc. v. United States, 406 F.2d 771 (9th Cir. 1969) (holding car dealer liable when employees removed manufacturers' labels from windshields); Standard Oil Co. v. United States, 307 F.2d 120 (5th Cir. 1962) (holding oil company liable for employee's falsification of "run tickets" from oil pumping station); United States v. Chicago Express, Inc., 273 F.2d 751 (7th Cir. 1960) (attaching corporate liability when truck driver failed to post signs that truck carried poison); Riss & Co. v. United States, 262 F.2d 245 (8th Cir. 1958) (finding corporate liability when truck terminal clerk failed to report violations of ICC limits on operation of motor vehicles); United States v. Milton Marks Corp., 240 F.2d 838 (3d Cir. 1957) (holding corporation liable where general foreman caused defective goods to be shipped to the government); St. Johnsbury Trucking Co. v. United States, 220 F.2d 393 (1st Cir. 1955) (attaching liability for clerk's failure to properly label shipping papers for goods classified by ICC as dangerous); Inland Freight Lines v. United States, 191 F.2d 313 (10th Cir. 1951) (holding trucking company liable when truck drivers prepared false logs and trip reports); United States v. Armour & Co., 168 F.2d 342 (3d Cir. 1948) (attaching corporate liability for salesman requiring tie-in sales in violation of price controls); United States v. George F. Fish, Inc., 154 F.2d 798 (2d Cir. 1946) (holding corporation liable where salesman was engaged in tying agreements in violation of Emergency Price Control Act); The President Coolidge, 101 F.2d 638 (9th Cir. 1939) (holding company liable when deck hand illegally dumped refuse overboard); John Gund Brewing Co. v. United States, 204 F. 17 (8th Cir. 1913) (attaching corporate liability when

In these circumstances, the analysis of the crime-fraud exception to the attorney-client privilege currently employed by the courts, which focuses on the intent of the client in seeking legal counsel, does not fit precisely. Indeed, even though the law of vicarious corporate liability is to the effect that the intent of the miscreant employee generally will be imputed to the corporation,[47] it strains reason to suggest that when a low-level employee

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salesman violated liquor laws by processing fictitious orders); *see generally* H. Lowell Brown, *Vicarious Criminal Liability of Corporations for the Acts of Their Employees and Agents*, 41 LOY. L. REV. 279 (1995).

[47] Notwithstanding long-standing judicial precedent that corporations could be held liable for knowing and willful violations of the criminal law, *see* United States v. Union Supply Co., 215 U.S. 50, 54-55 (1909) (finding corporation capable of willful failure to maintain required books and records); Joplin Mercantile Co. v. United States, 213 F. 926, 935-36 (8th Cir. 1914) (holding that a corporation could be charged with conspiracy); United States v. New York Herald Co., 159 F. 296, 297 (S.D.N.Y. 1907) (finding that a corporation could be liable for knowing deposit of obscene material in the U.S. Mail); United States v. John Kelso Co., 86 F. 304, 306 (N.D. Cal. 1898) (finding corporation capable of intentionally violating law limiting hours of labor), there has been scholarly debate over whether a corporation can formulate criminal intent, *see* Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1097 (1991) ("Traditionally, the criminal law has been reserved for intentional violations of the law. Yet, our prosecutions of corporations have been marked by floundering efforts to identify the intent of intangible, fictional entities.") (footnotes omitted); Note, *Criminal Liability of Corporations for Acts of Their Agents*, 60 HARV. L. REV. 283, 284 (1946) ("Instead of regarding the problem as one of vicarious liability, however, the courts have stumbled over the theoretical difficulties of ascribing criminal intent to a corporation.") (footnote omitted). Indeed, as Professor Gerhard O.W. Mueller has observed:

> Many weeds have grown on the acre of jurisprudence which has been allotted to the criminal law. Among these weeds is a hybrid of vicarious liability, absolute liability, an inkling of *mens rea*–though a rather degenerated *mens rea*–, a few genes from tort law and a few from the law of business associations. This weed is called *corporate criminal liability*. . . . Nobody bred it, nobody cultivated it, nobody planted it. It just grew.

Gerhard O.W. Mueller, *Mens Rea and the Corporation: A Study of the Model Penal Code Position on Corporate Criminal Liability*, 19 U. PITT. L. REV. 21, 21 (1957).

Nevertheless, courts have consistently held that the knowledge and intent of corporate employees, acting within the scope of their employment, will be attributed to the corporation, thereby providing the basis for ascribing to the corporate the requisite criminal intent. *See Bank of New England*, 821 F.2d at 856

consults counsel and then commits a crime or fraud, the corporation (i.e., the attorney's client) intended to commit a crime or fraud at the time the employee consulted with counsel or that counsel's advice was sought by the corporation in furtherance of that crime or fraud.[48]

As a result, because the attorney's intent and knowledge of the individual's purposes in seeking counsel are largely irrelevant to the applicability of the crime-fraud exception,[49] the attorney cannot assure either the corporate client or the individual employee that the confidentiality of their communications will be respected in a future proceeding.[50]

(attributing collective knowledge of bank's employees concerning individual depositor's cash transactions to the corporation); *see also* Brown, *supra* note 46, at 296-306.

[48] Of course, the confidentiality of the communication with respect to the employee may not be protected. *See* Massing, *supra* note 8, at 1197.

[49] *See* Clark v. United States, 289 U.S. 1, 15 (1933); United States v. Chen, 99 F.3d 1495, 1504 (9th Cir. 1996); *In re* Grand Jury Proceedings, 87 F.3d 377, 381-82 (9th Cir. 1996); United States v. Neal, 27 F.3d 1035, 1048 (5th Cir. 1994); United States v. Laurins, 857 F.2d 529, 540 (9th Cir. 1988); *In re* Grand Jury (G.J. No. 87-03-A), 845 F.2d 896, 898 (11th Cir. 1988); United States v. Soudan, 812 F.2d 920, 927 (5th Cir. 1986); United States v. Ballard, 779 F.2d 287, 292 (5th Cir. 1986); *In re* Sealed Case, 754 F.2d 395, 402 (D.C. Cir. 1985); *In re* Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983, 731 F.2d 1032, 1038 (2d Cir. 1984); *In re* Grand Jury Proceedings, 689 F.2d 1351, 1352 n.2 (11th Cir. 1982); *In re* Grand Jury Proceedings, 680 F.2d 1026, 1028 (5th Cir. 1982); *In re* Grand Jury Proceedings, 604 F.2d 798, 802 (3d Cir. 1979); United States v. Hodge & Zweig, 548 F.2d 1347, 1354 (9th Cir. 1977); United States v. Calvert, 523 F.2d 895, 909 (8th Cir. 1975); United States v. Aldridge, 484 F.2d 655, 658 (7th Cir. 1973); United States v. Friedman, 445 F.2d 1076, 1086 (9th Cir. 1971). *But see In re* Grand Jury Subpoena Duces Tecum, 773 F.2d 204, 207 (8th Cir. 1985) (finding that mere failure to include documents with subpoenaed material was not enough to remove privilege without some showing of intent on part of attorneys).

[50] Different considerations apply with respect to attorney work product, however. In general, the crime-fraud exception applies to the doctrine protecting attorney work product from discovery by third parties. As one court explained:

> [T]he two privileges are separate and distinct, but there is also an overlap. Information furnished by the client to the lawyer may merge into his work product; moreover, the overriding purpose of the two privileges is the same–to encourage proper functioning of the adversary system. From this viewpoint, there is no actual inconsistency in applying the crime-fraud exception to the work product as well as to the attorney-client privilege. The rationale supporting the exception in both areas is virtually identical. The work product privilege is perverted if it is used to further illegal activities

> as is the attorney-client privilege, and there are no overpowering considerations in either situation that would justify the shielding of evidence that aids continuing or future criminal activity.

In re Grand Jury Proceedings, 604 F.2d at 802 (footnotes omitted); *accord In re* Burlington N., Inc., 822 F.2d 518, 524 (5th Cir. 1987); *In re* Antitrust Grand Jury, 805 F.2d 155, 164 (6th Cir. 1986); *In re Sealed Case*, 754 F.2d at 399 n.4; *In re* Grand Jury Proceedings, 723 F.2d 1461, 1467 (10th Cir. 1983); *In re* International Sys. & Controls Corp. Sec. Litig., 693 F.2d 1235, 1242 (5th Cir. 1982); *In re* Sealed Case, 676 F.2d 793, 812 (D.C. Cir. 1982); *In re* John Doe Corp., 675 F.2d 482, 492 (2d Cir. 1982). Accordingly, authority addressing the crime-fraud exception in regard to attorney-client communications and attorney work product will be cited herein interchangeably.

However, unlike the attorney-client privilege, which inures solely to the benefit of the client, the work product doctrine benefits both attorneys and clients by protecting not only communications but also attorney thought processes and analysis in anticipation of litigation. *See* Upjohn Co. v. United States, 449 U.S. 383, 401 (1981); United States v. Nobles, 422 U.S. 225, 238 (1975); Hickman v. Taylor, 329 U.S. 495, 501 (1947); *In re* Grand Jury Proceedings, 33 F.3d 342, 348 (4th Cir. 1994); *In re* Grand Jury Proceedings, 727 F.2d 941, 945 (10th Cir. 1984); *In re International Sys. & Controls Corp. Sec. Litig.*, 693 F.2d at 1242. As such, the protection of the work-product doctrine is broader than those of the attorney-client privilege. *See Nobles*, 422 U.S. at 238 n.11; *In re Antitrust Grand Jury*, 805 F.2d at 163; *In re Sealed Case*, 676 F.2d at 808; Moody v. Internal Revenue Serv., 654 F.2d 795, 798 (D.C. Cir. 1981); *In re* Murphy, 560 F.2d 326, 337 (8th Cir. 1977). Also, in contrast to the attorney-client privilege, the work product doctrine may be asserted by either the client or the attorney whose work product is sought, and a waiver by the client will not deprive the attorney of the benefits of the doctrine. *See In re* Grand Jury Proceedings, 43 F.3d 966, 972 (5th Cir. 1994); *In re* Special Sept. 1978 Grand Jury (II), 640 F.2d 49, 63 (7th Cir. 1980).

Courts distinguish between "fact" work product and "opinion" work product. In essence, "fact" work product is written or oral information conveyed to the attorney. "Opinion" work product covers any material reflecting the attorney's mental impressions, opinions, analyses, conclusions, legal theories or judgments. *See In re Grand Jury Proceedings*, 33 F.3d at 348; *In re Antitrust Grand Jury*, 805 F.2d at 163. Fact work product is subject to disclosure on a showing of "substantial need," whereas disclosure of opinion work product is reserved for "compelling circumstances." *See In re Grand Jury Proceedings*, 33 F.3d at 348; *In re John Doe Corp.*, 675 F. 2d at 492-93; *In re* Doe, 662 F.2d 1073, 1078 (4th Cir. 1981); *In re Special Sept. 1978 Grand Jury*, 640 F.2d at 62; Goldsmith & King, *Policing Corporate Crime: The Dilemma of Internal Compliance Programs*, *supra* note 40, at 29-30. A showing that an attorney's services were used by the client in furtherance of a crime or fraud is sufficient to defeat the protection for fact work product. *See In re Grand Jury Proceedings*, 604 F.2d at 803. It is only where the

Thus, in virtually every substantive exchange between a corporate attorney and an individual employee, there is the prospect that the attorney-client privilege will be pierced at a later time and that counsel may become a witness against the corporate client.

B. The Crime-Fraud Exception to the Attorney-Client Privilege

The protections afforded by the attorney-client privilege do not extend to communications with a lawyer which are intended to be in furtherance of a presently occurring or planned illegality.[51] At common law, as

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attorney was a knowing participant in the client's unlawful scheme, however, that "opinion" work product will be subject to disclosure. *See In re Grand Jury Proceedings*, 33 F.3d at 349; *In re Antitrust Grand Jury*, 805 F.2d at 164; Earl J. Silbert, *The Crime-Fraud Exception to the Attorney-Client Privilege and Work-Product Doctrine, The Lawyer's Obligations of Disclosure, and the Lawyer's Response to Accusation of Wrongful Conduct*, 23 AM. CRIM. L. REV. 351, 357 (1985) ("[T]he consensus among federal courts is that client fraud vitiates any work product privilege the client may claim, but an innocent attorney can assert the privilege for his opinion work product. If both the attorney and the client are involved in fraud, neither can assert the privilege."). Thus, unlike the crime-fraud exception to the attorney-client privilege, the attorney's culpability is highly relevant to the extent of the work product doctrine where there is a showing of client crime or fraud.

[51] This was explained in *In re Grand Jury Proceedings* as follows:

> While there is a societal interest in enabling clients to obtain complete and accurate legal advice, which we serve by sheltering confidential communications between client and attorney from public consumption, there is no such interest when the client consults the attorney to further the commission of a crime or fraud. Thus, the crime-fraud exception insures that the confidentiality enveloping the attorney-client relationship does not encompass communications "made for the purpose of getting advice for the commission of a fraud or crime[ ]."

In re Grand Jury Proceedings, 87 F.3d at 381 (citations omitted); *accord* MCCORMICK ON EVIDENCE § 95, at 229 (Edward W. Cleary ed., 3d ed. 1984) ("Since the policy of the privilege is that of promoting the administration of justice, it would be a perversion of the privilege to extend it to the client who seeks advice to aid him in carrying out an illegal or fraudulent scheme."); Fried, *supra* note 13, at 443-44 ("The privilege ends when the client seeks to involve the attorney in wrongdoing. It also ends when the client takes advantage of legal counsel to plan a crime or fraud, perhaps by tailoring evidence or testimony to the requirements of law that the client has learned from his or her attorney."); Gergacz, *supra* note 10, at 1676 ("Since the privilege is based on public policy and justice considerations, abuse of those considerations will cause the privilege to fail. This occurs when the

exemplified by cases such as *Annesley v. Earl of Anglesea*[52] and *The Queen v. Cox and Railton*,[53] communications in furtherance of a present or future

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client's communication with an attorney is to further a plan to commit a crime or perpetrate a fraud. In such a situation, the client loses the privilege.") (footnotes omitted).

[52] Annesley v. Earl of Anglesea, 17 How. St. Trials 1139 (1743). The action was one of ejectment in which James Annesley claimed special title to the largest estate in England then being occupied by the Earl of Anglesea. The basis of his claim was that he was the son and rightful heir of Arthur Baron Altham, the deceased brother of the then-Earl, who had died in Ireland sixteen years earlier. *See* Fried, *supra* note 13, at 447.

Annesley alleged that his father, Baron Altham, had abandoned him to the streets of Dublin when he was seven years old at the insistence of his father's mistress. With the connivance of his uncle, the Earl, Annesley was kidnapped and indentured in the West Indies for thirteen years. He was able to secure his return to England by shipping with the Royal Navy as a common seaman. *See id.*

Shortly after his return to England, Annesley was involved in a hunting accident in which a gamekeeper was killed. Seizing upon the opportunity to again remove Annesley from the scene (and from contention for his inheritance), the Earl commissioned John Giffard, his attorney of long-standing, to prosecute Annesley for murder. In due course, Annesley was tried for the murder of the gamekeeper, but the jury returned a verdict of " 'death by chance–medley,' " accidental death, and Annesley was acquitted. *Id.* at 448 (quoting Trial of Annesley & Redding, 17 How. St. Trials 1094 (1742)).

At the time of the ejectment action, the key witness for Annesley was Giffard, the Earl's attorney. Giffard was permitted to testify to conversations he had had with his client, the Earl, preceding the murder prosecution in which the Earl had acknowledged that Annesley was the son of his brother, the Baron, and that he would pay £10,000 to have Annesley hanged. It took the court less than two hours to find for Annesley. Although the facts of the case and the arguments of Annesley's counsel suggest that Giffard's testimony was allowed in spite of the attorney-client privilege, the court indicated that it considered the Earl's comments about wanting to see Annesley hanged as being a conversation with a friend rather than with a professional. *See id.*; *see also* 8 WIGMORE, *supra* note 3, § 2298, at 574-77; Hazard, *supra* note 1, at 1073-80.

[53] *The Queen v. Cox & Railton*, 14 Q.B.D. 153 (Q.B. 1884). The *Annesley* decision appears to have been largely ignored and the crime-fraud exception undeveloped until this decision. *See* Fried, *supra* note 13, at 450-56; Hazard, *supra* note 1, at 1080-86. *Cox* was a case of criminal fraud against creditors. *See* Fried, *supra* note 13, at 456-57. Railton had consented to the entry of a judgment against him for liability which carried with it an assessment of substantial costs. Cox and Railton were partners in a newspaper business which they hoped to shield from Railton's judgment creditors. *See Cox & Railton*, 14 Q.B.D. at 153.

crime or fraud were not considered to be within the bounds of the privilege because the purpose of the communication, in the first instance, was not to obtain legal advice in good faith.[54]

Cox and Railton consulted with an attorney who advised them that only a sale of Railton's interest to a bona fide purchaser would put the partnership assets beyond the reach of the judgment and that a sale between Railton and Cox would not be bona fide because of the partnership. *See* Hazard, *supra* note 1, at 1087. Cox and Railton then prepared a memorandum dissolving the partnership which they back-dated prior to the assessment of costs. *See Cox & Railton*, 14 Q.B.D. at 153.

At the trial, the attorney was permitted to testify concerning his conversation with Cox and Railton and his advice that a sale of the assets to Cox would not be bona fide. In this regard, the attorney testified that Railton had asked whether anyone knew of the partnership other than the attorney. The attorney had answered that no one other than his clerks knew. *See id.* at 156. Admission of the testimony was upheld, the court noting:

> In order that the [privilege] may apply there must be both professional confidence and professional employment, but if the client has a criminal object in view in his communications with his solicitor one of these elements must necessarily be absent. The client must either conspire with his solicitor or deceive him. If his criminal object is avowed, the client does not consult his adviser professionally, because it cannot be the solicitor's business to further any criminal object. If the client does not avow his object he reposes no confidence, for the state of facts, which is the foundation of the supposed confidence, does not exist.

Id. at 168.

[54] David J. Fried observed:

> The court here made a bold play upon the word "confidence." Vice Chancellor Cranworth, among others, previously had said that there is no privilege except for "what passes between [client and solicitor] in professional confidence." This statement is entirely consistent with the *Annesley* approach: there can be no *professional* confidence when the attorney is either invited to participate in a fraud, which is no part of the attorney's professional role, or when the attorney is told some fact not needed to perform a professional function.
>
> The *Cox* court, however, for the first time conceived that the client has a role to play. No professional confidence existed because the clients failed to take the attorney into their confidence. Because the privilege is intended to make perfect frankness possible, there is no privilege unless the client is perfectly frank. The court equated the technical requirement of "confidentiality," which both before and since the *Cox* decision has meant that no one but the client and his or her attorney is privy to the communication, with the meaning of the word in ordinary speech. The crime-fraud exception in its modern form, with its focus on the client's

Today, communications which would otherwise be considered privileged (i.e., communications with an attorney, acting as such, for the purpose of obtaining legal counsel) are excepted from the privilege if the communication furthers an ongoing or future crime.[55] Indeed, it is to prevent abuse of the secrecy accorded bona fide attorney-client communications that the modern crime-fraud exception has been fashioned.[56]

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intention, was born of the rhetorical figure.

Fried, *supra* note 13, at 458 (footnotes omitted).

[55] The Supreme Court explained in *United States v. Zolin*, 491 U.S. 554 (1989):

> The attorney-client privilege must necessarily protect the confidences of wrongdoers, but the reason for the protection–the centrality of open client and attorney communication to the proper functioning of our adversary system of justice–"ceas[es] to operate at a certain point, namely, where the desired advice refers *not to prior wrongdoing*, but to *future wrongdoing*."

Id. at 562-63 (quoting 8 WIGMORE, *supra* note 3, § 2298, at 573); *accord In re Sealed Case*, 754 F.2d at 399 ("Communications otherwise protected by the attorney-client privilege are not protected if the communications are made in furtherance of a crime, fraud, or other misconduct."); *In re* Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983, 731 F.2d 1032, 1038 (2d Cir. 1984) ("It is well established that communications that otherwise would be protected by the attorney-client privilege or the attorney work product privilege are not protected if they relate to client communications in furtherance of contemplated or ongoing criminal or fraudulent conduct.").

[56] *See Zolin*, 491 U.S. at 563 ("It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the 'seal of secrecy' between lawyer and client does not extend to communications 'made for the purpose of getting advice for the commission of a fraud' or crime.") (citations omitted); Clark v. United States, 289 U.S. 1, 15 (1933) ("There is a privilege protecting communications between attorney and client. The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told."); *In re* Sealed Case, 107 F.3d 46, 49 (D.C. Cir. 1997) ("The relationship between client and counsel may, however, be abused. And so the attorney-client privilege is subject to what is known as the crime-fraud exception."); *In re Grand Jury Proceedings*, 87 F.3d at 381 ("[T]he crime fraud exception insures that the confidentiality enveloping the attorney-client relationship does not encompass communications made for the purpose of getting advice for the commission of a fraud or crime.") (citations omitted); *In re* Richard Roe, Inc., 68 F.3d 38, 40 (2d Cir. 1995).

> Although there is a societal interest in enabling clients to get sound legal advice, there is no such interest when the communications or advice are intended to further the commission of a crime or fraud. The crime-fraud exception thus insures that the secrecy protecting the attorney-client

The crime or fraud that the communication is intended to further must be either presently occurring or planned for the future.[57] Communications

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relationship does not extend to communications or work product " 'made for the purpose of getting advice for the commission of a fraud' or crime." *Id.* (quoting *Zolin*, 491 U.S. at 563); *see also In re* Feldberg, 862 F.2d 622, 627 (7th Cir. 1988) ("When the privilege shelters important knowledge, accuracy declines. Litigants may use secrecy to cover up machinations, to get around the law instead of complying with it. Secrecy is useful to the extent it facilitates the candor necessary to obtain legal advice. The privilege extends no further."); *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d at 1038 ("[C]onfidentiality of communications . . . facilitates the rendering of sound legal advice, advice in furtherance of a fraudulent or unlawful goal cannot be considered 'sound.' Rather advice in furtherance of such goals is socially perverse, and the client's communications seeking such advise are not worthy of protection."); United States v. Dyer, 722 F.2d 174, 177 (5th Cir. 1983) ("Where a client seeks to use an attorney to further a continuing or future crime or fraud the broader public interest in the administration of justice is being frustrated, not promoted."); *In re* Berkley & Co., 629 F.2d 548, 555 (8th Cir. 1980) ("When the attorney-client relationship has been . . . abused we perceive no justification for sustaining the privilege in any context."); MCCORMICK ON EVIDENCE, *supra* note 51, § 95, at 229 ("Since the policy of the privilege is that of promoting the administration of justice, it would be a perversion of the privilege to extend it to the client who seeks advice to aid him in carrying out an illegal or fraudulent scheme.").

[57] *See Zolin*, 491 U.S. at 562 ("[T]he reason for that protection . . . 'ceas[es] to operate . . . where the desired advice refers . . . to *future wrongdoing*.' " (quoting 8 WIGMORE, *supra* note 3, § 2298, at 573)); United States v. Chen, 99 F.3d 1495, 1500 (9th Cir. 1996) ("[The attorney-client privilege] cannot be used to shield ongoing or intended future criminal conduct."); *In re Grand Jury Proceedings*, 87 F.3d at 381 ("The protection afforded by the attorney-client privilege does not extend to any communication 'in furtherance of intended, or present, continuing illegality.' "); *In re* Grand Jury No. 94-1, C.A. No. 95-50302, 1996 U.S. App. LEXIS 2148, at *3 (9th Cir. Jan. 31, 1996) ("The District Court found . . . that the attorney 'was contacted with the specific purpose of assisting in further crime.' This is precisely what the government was required to demonstrate."); United States v. Neal, 27 F.3d 1035, 1048 (5th Cir. 1994) ("[T]he privilege does not apply where legal representation was secured in furtherance of intended, or present, continuing illegality."); *In re* John Doe, Inc., 13 F.3d 633, 636 (2d Cir. 1994) ("The crime-fraud exception strips the privilege from attorney-client communications that 'relate to client communications in furtherance of contemplated or ongoing criminal or fraudulent conduct.' "); *In re* Antitrust Grand Jury, 805 F.2d 155, 162 (6th Cir. 1986) ("All reasons for the attorney-client privilege are completely eviscerated when a client consults an attorney not for advice on past misconduct,

concerning past, completed crimes or frauds are not subject to the exception.[58] Nevertheless, reliance on past crimes as a basis for asserting

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but for legal assistance in carrying out a contemplated or ongoing crime or fraud."); United States v. Sutton, 732 F.2d 1483, 1494 (10th Cir. 1984) ("The attorney-client privilege does not protect disclosure of plans for future illegal activity."); *In re* Grand Jury Proceedings, 604 F.2d 798, 802 (3d Cir. 1979) ("The ultimate aim is to promote the proper administration of justice. That end, however, would be frustrated if the client used the lawyer's services to further a continuing or future crime or tort."); United States v. Hodge & Zweig, 548 F.2d 1347, 1354 (9th Cir. 1977) ("Because the attorney-client privilege is not to be used as a cloak for illegal or fraudulent behavior, it is well established that the privilege does not apply where legal representation was secured in furtherance of intended, or present, continuing illegality."); United States v. Friedman, 445 F.2d 1076, 1086 (9th Cir. 1971) ("[T]he attorney-client privilege does not extend to communications between attorney and client where the purpose of that communication is to further the crime charged in the indictment or future intended illegality."); United States v. Hoffa, 349 F.2d 20, 37 (6th Cir. 1965) ("The attorney-client relationship would offer no shield to either client or attorney if the client had been engaged in a plan to commit a crime in the future."); *In re* Sawyer, 229 F.2d 805, 808-09 (7th Cir. 1956) ("[A] client's communication to his attorney in pursuit of a criminal or fraudulent act yet to be performed is not privileged in any judicial proceeding."); United States v. Bob, 106 F.2d 37, 40 (2d Cir. 1939) ("It has always been settled that communications from a client to an attorney about a crime or fraud to be committed are not privileged.").

[58] Thus, Professor Hazard has observed, "[I]t is common ground that the privilege ought to apply at least to communications by an accused criminal to his counsel, in contemplation of defense of a pending or imminently threatened prosecution, concerning a completed crime." Hazard, *supra* note 1, at 1062 (footnotes omitted); *see Zolin*, 491 U.S. at 562 (stating that the purpose of the attorney-client privilege is "that clients be free 'to make full disclosure to their attorneys' of past wrongdoings."); *In re* Grand Jury Subpoena 92-1(SJ), 31 F.3d 826, 831 (9th Cir. 1994) ("Attorney-client communications concerning past or completed crimes do not come within the crime-fraud exception to the attorney-client privilege."); *In re* Federal Grand Jury Proceedings 89-10 (MIA), 938 F.2d 1578, 1581 (11th Cir. 1991) ("[T]he crime-fraud exception does not operate to remove communications concerning past or completed crimes or frauds from the attorney-client privilege."); United States v. Inigo, 925 F.2d 641, 656-57 (3d Cir. 1991) ("Only disclosure of confidential information concerning past wrongdoing is protected."); *In re* Sealed Case, 754 F.2d 395, 402 (D.C. Cir. 1985) ("Communications with Doe and Roe regarding past crimes . . . remain privileged."); *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d at 1041 ("Advice sought in furtherance of a future or ongoing fraud is unprivileged; communications with respect to advice as to past or completed frauds

the privilege may prove unavailing since the failure to disclose even a past crime may be a predicate for liability resulting from the cover-up of prior wrongdoing.[59] This is an area in which corporate counsel, particularly, must

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are within the privilege."); *In re* International Sys. & Controls Corp. Sec. Litig., 693 F.2d 1235, 1242 (5th Cir. 1982) ("The privilege exists to encourage full disclosure of pertinent information by clients to their attorneys. Its protection extends to past criminal violations.") (citation omitted); *In re* Special Sept. 1978 Grand Jury, 640 F.2d 49, 59 (7th Cir. 1980) ("It is settled that the attorney-client privilege is waived when the client uses the attorney client relationship to engage in on-going fraud rather than to defend against past misconduct."); *In re Berkley & Co., Inc.*, 629 F.2d at 553 ("Attorney-client communications lose their privileged character when the lawyer is consulted not with respect to past wrongdoings but rather to further a continuing or contemplated criminal or fraudulent scheme."); *Hodge & Zweig*, 548 F.2d at 1355 ("[S]o important is full disclosure that the law recognizes the privilege even if the advice is sought by one who has already committed a bad act."). This includes, as well, documents prepared by counsel after the illegality ended, *see* Hercules, Inc. v. Exxon Corp., 434 F. Supp. 136, 155 (D. Del. 1977) ("If the documents were prepared subsequent to completion of the alleged fraud, they could not be 'in furtherance' of the fraud."), and applies to documents subject to the work product doctrine, *see In re Sealed Case*, 107 F.3d at 51 ("[T]he crime-fraud exception for work product immunity cannot apply if the attorney prepared the material after his client's wrongdoing ended.").

[59] Professor Gergacz has observed that "not revealing the past wrongdoing itself may constitute a criminal or fraudulent act. Once the act has been communicated to the attorney, an ongoing or newly created crime or fraud of the corporation not reporting that activity may remove the communication from the privilege." Gergacz, *supra* note 10, at 1679; *see also* J. Michael Callan & Harris David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System*, 29 RUTGERS L. REV. 332, 348 (1976) ("Virtually every crime committed in the past carries with it some vestigial element of continuing criminality."). For example, the Securities and Exchange Commission suggested in its order accepting the settlement in the Salomon Brothers case that the General Counsel's failure to disclose the unauthorized trading in treasury notes could, in future cases, subject someone similarly situated to liability for failure to supervise under 15 U.S.C. § 780(b)(4)(e) (1994). *See In re* Gutfreund, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 85,067 (S.E.C. Dec. 3, 1992); *see also* James R. Doty, *Regulatory Expectations Regarding the Conduct of Attorneys in the Enforcement of the Federal Securities Law: Recent Development* [sic] *and Lessons For the Future*, 48 BUS. LAW. 1543, 1556-58 (1993). The SEC had previously sought to attribute liability to attorneys who failed to disclose material inaccuracies in their clients' financial statements in *SEC v. National Student Marketing Corp.*, 457 F. Supp. 682 (D.D.C. 1978). *See also* SEC v. National Student Marketing Corp., [1971-1972 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,360 (D.D.C. Feb. 3, 1972) (reprinting Complaint of SEC). The Office of Thrift Supervision also aggressively sought to assert liability of attorneys

be sensitive.[60]

Operation of the crime-fraud exception has the effect of transforming the attorney into a witness against the client. This possibility directly threatens the ability to frame a defense, especially if the attorney was counsel to the defendant prior to or at the time of the alleged offense.[61] For

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who, in the view of the OTS, withheld material information concerning the financial condition and business practices of their clients. *See, e.g., In re* Fishbein, OTS AP-92-19 (1992) (LEXIS, Bankng Library, OTSDD File).

[60] Corporate counsel may provide advice, wholly innocently, which later results in the commission of a crime or perpetration of a fraud. Counsel is bound by applicable standards of legal ethics to maintain the confidentiality of client confidences. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4, DR 4-101(B)(1) (1983); MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.6, 1.13 (1998). However, as the *Salomon Brothers*, *National Student Marketing*, and *Fishbein* cases suggest, the government will view the failure to disclose misconduct as evidence of counsel's complicity in the misconduct. Prosecutors have made it clear that lawyers are not viewed any differently than other potential defendants in a criminal investigation. *See White Collar Crime Meeting Addresses Issues of Privilege*, *supra* note 12, at 1023; *see generally* H. Lowell Brown, *The Dilemma of Corporate Counsel Faced with Client Misconduct: Disclosure of Client Confidences or Constructive Discharge*, 44 BUFF. L. REV. 777, 824-63 (1996); Richard W. Painter & Jennifer E. Duggan, *Lawyer Disclosure of Corporate Fraud: Establishing a Firm Foundation*, 50 SMU L. REV. 225 (1996).

[61] Seeking to compel an attorney to testify against a client, particularly where the attorney represents the client in a criminal matter, implicates a criminal defendant's Fifth and Sixth Amendment rights. The uncertainty and distrust between client and attorney that would result from the attorney's revelation of client communications, as well as the intimidation which the attorney would experience particularly because appearance before a grand jury might result in charges being brought against the attorney (i.e., perjury), may chill advocacy and cause of a conflict of interests between the attorney and client. *See* United States v. Edgar, 82 F.3d 499, 507-08 (1st Cir. 1996); Whitehouse v. United States Dist. Ct. for the Dist. of R.I., 53 F.3d 1349, 1354 (1st Cir. 1995); United States v. Dyer, 722 F.2d 174, 177-78 (5th Cir. 1983). As one court observed in this regard:

> There may be an implicit threat to the attorney called to testify about a client to the grand jury that the attorney will become a target himself should the prosecutor think he knowingly participated in the fraud. This is particularly so where the prosecution asserts that the privilege must give way to the crime-fraud exception. The lawyer may be tempted to reveal privileged conversations in order to avoid becoming a target himself. Ideally, counsel receiving a subpoena will give notice to a client and consistently assert the privilege on behalf of a client. Ideally, a prosecutor faced with an assertion of privilege by an attorney witness will seek a judicial determination of whether the privilege is valid. But we do not live in an ideal world.

Edgar, 82 F.3d at 508 (footnotes omitted). The court in *Whitehouse* noted that service

corporate counsel, the possibility that counsel might later become a witness against the corporation, or against the employee who consulted with counsel on the corporation's behalf, should be expected to chill the willingness of many employees to seek out counsel in the first instance.

The confrontation of the need for (and desirability of) confidentiality between attorneys and their clients[62] with the judiciary's right, particularly that of the grand jury, "to every man's evidence"[63] creates tension in our

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of a grand jury subpoena on a lawyer may: 1) chill the relationship between lawyer and client; 2) create an immediate conflict of interest for the attorney/witness; 3) divert the attorney's time and resources away from his client; 4) discourage attorneys from providing representation in controversial criminal cases; and 5) force attorneys to withdraw as counsel because of ethical rules prohibiting an attorney from testifying against his client.

Whitehouse, 53 F.3d at 1354. These adverse affects on the attorney-client relationship have been noted by commentators as well. *See* Stacy Caplow, *Commentary–The Reluctant Witness for the Prosecution: Grand Jury Subpoenas to Defense Counsel*, 51 BROOK. L. REV. 769, 784-86 (1985); Ronald Goldstock & Steven Chananie, *"Criminal" Lawyers: The Use of Electronic Surveillance and Search Warrants in the Investigation and Prosecution of Attorneys Suspected of Criminal Wrongdoing*, 136 U. PENN. L. REV. 1855, 1865 (1988); Peirce & Colamarino, *supra* note 5, at 833-35; Stern & Hoffman, *supra* note 12, at 1789-93.

In response, the United States Department of Justice has adopted procedures governing the issuance of subpoenas directed to attorneys. The procedures require, *inter alia*, the prior approval of the Assistant Attorney General in charge of the criminal division, who must be satisfied that there are "reasonable grounds to believe that a crime has been or is being committed and that the information sought is reasonably needed for the successful completion of the investigation or prosecution." 2 UNITED STATES ATTORNEY'S MANUAL § 9-13.410(c) (1997). In addition, "[t]he need for the information must outweigh the potential adverse effects upon the attorney-client relationship." *Id.*

The American Bar Association ("ABA") has also promulgated two resolutions addressing subpoenas directed to attorneys. These resolutions, adopted by the ABA House of Delegates in February 1986 and February 1988, urge state and federal authorities to adopt rules requiring prior judicial approval of attorney-oriented subpoenas based on a finding, *inter alia*, that the information sought is not protected by the attorney-client privilege or the work-product doctrine. These resolutions are appended to Stern & Hoffman, *supra* note 12, at 1852-54. Massachusetts, Pennsylvania, Rhode Island, Tennessee, and Virginia have adopted variations of the ABA's proposed rules. *See Whitehouse*, 53 F.3d at 1353 n. 4.

[62] *See supra* notes 4-5 and accompanying text.

[63] The Supreme Court has noted:

"For more than three centuries it has now been recognized as a fundamental maxim that the public . . . has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary

jurisprudence.[64] As a consequence, once the party asserting the privilege has established entitlement to the privilege's protections,[65] the party seeking to pierce those protections then has the burden of establishing that the crime-fraud exception applies.[66]

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assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule."

United States v. Bryan, 339 U.S. 323, 331 (1950) (quoting 8 WIGMORE, *supra* note 3, § 2192, at 64); *accord* Jaffee v. Redmond, 518 U.S. 1, 9 (1996); United States v. Nixon, 418 U.S. 683, 709 (1974); Branzburg v. Hayes, 408 U.S. 665, 688 (1972); *see In re* John Doe Corp., 675 F.2d 482, 489 (2d Cir. 1982) ("The privilege itself is an exception to the critically important duty of citizens to disclose relevant evidence in legal proceedings.").

[64] For this reason, it has been said that "[t]he attorney-client privilege is cast in perpetual tension." *Dyer*, 722 F.2d at 177; *accord In re* Antitrust Grand Jury, 805 F.2d 155, 164 (6th Cir. 1986) ("Often . . . [the attorney-client and work product] privileges come into conflict with other societal interests when they are invoked during a grand jury investigation."); *In re* Grand Jury Subpoenas Duces Tecum, 773 F.2d 204, 206 (8th Cir. 1985) ("When a claim of privilege is asserted in the context of resisting compliance with a grand jury subpoena, strong competing principles are at odds."); *In re* Grand Jury Investigation No. 83-2-35, 723 F.2d 447, 451 (6th Cir. 1983) ("Since the attorney-client privilege may serve as a mechanism to frustrate the investigative or fact-finding process, it creates an inherent tension with society's need for full and complete disclosure of all relevant evidence during implementation of the judicial process."); *In re* Grand Jury Proceedings, 517 F.2d 666, 671-72 (5th Cir. 1975) ("[T]he purpose of the privilege–to suppress truth–runs counter to the dominant aims of the law.").

[65] The party seeking the benefits of the attorney-client privilege bears the burden of establishing entitlement to the privilege. *See* Motley v. Marathon Oil Co., 71 F.3d 1547, 1550 (10th Cir. 1995); *In re* Grand Jury Investigation, 974 F.2d 1068, 1070 (9th Cir. 1992); *In re* Grand Jury Investigation, 842 F.2d 1223, 1225 (11th Cir. 1987); United States v. Harrelson, 754 F.2d 1153, 1167 (5th Cir. 1985); *In re Grand Jury Investigation No. 83-2-35*, 723 F.2d at 450-51; *In re* Grand Jury Proceedings in the Matter of Freeman, 708 F.2d 1571, 1575 (11th Cir. 1983); United States v. Kelly, 569 F.2d 928, 938 (5th Cir. 1978); United States v. Stern, 511 F.2d 1364, 1367 (2d Cir. 1975); United States v. Tratner, 511 F.2d 248, 252 (7th Cir. 1975); United States v. Gurtner, 474 F.2d 297, 298 (9th Cir. 1973).

[66] *See In re* Sealed Case, 107 F.3d 46, 49 (D.C. Cir. 1997); United States v. Chen, 99 F.3d 1495, 1503 (9th Cir. 1996); *In re* Grand Jury Proceedings, 87 F.3d 377, 381 (9th Cir. 1996); *In re* Richard Roe, Inc., 68 F.3d 38, 40 (2d Cir. 1995); *In re* Grand Jury Subpoena, 884 F.2d 124, 127 (4th Cir. 1989); United States v.

This requires a two-part showing. First, it must be shown that the underlying crime or fraud was committed. Second, it must be shown that the otherwise privileged communication was in furtherance of the client's crime or fraud.[67]

1. *Proof of the Underlying Crime or Fraud*

As an initial matter, the proponent of the crime-fraud exception generally must demonstrate that a crime or fraud was committed which was "sufficiently serious to defeat the privilege."[68] The proponent is not required to prove the crime or fraud definitively. Instead, all that is required is a prima facie showing.[69] There must be evidence which, if believed, is sufficient to establish the elements of a crime or fraud.[70] At one time, it was thought that the crime or fraud underlying the exception had to be the same

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Laurins, 857 F.2d 529, 540 (9th Cir. 1988); *In re* Sealed Case, 754 F.2d 395, 399 (D.C. Cir. 1985); *In re* Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983, 731 F.2d 1032, 1039 (2d Cir. 1984); United States v. Horvath, 731 F.2d 557, 562 (8th Cir. 1984); *In re* Vargas, 723 F.2d 1461, 1467 (10th Cir. 1983); *Dyer*, 722 F.2d at 178; *In re* Grand Jury Proceedings, 680 F.2d 1026, 1029 (5th Cir. 1982); Pfizer, Inc. v. Lord, 456 F.2d 545, 549 (8th Cir. 1972).

[67] *See In re Sealed Case*, 107 F.3d at 49; *In re Richard Roe, Inc.*, 68 F.3d at 40; Cox v. Administrator United States Steel & Carnegie, 17 F.3d 1386, 1416 (11th Cir.), *modified on other grounds*, 30 F.3d 1347 (11th Cir. 1994); *In re* Federal Grand Jury Proceedings 89-10 (MIA), 938 F.2d 1578, 1581 (11th Cir. 1991); *In re* Grand Jury (G.J. No. 87-03-A), 845 F.2d 896, 897 (11th Cir. 1988); *In re Grand Jury Investigation*, 842 F.2d at 1226-27; *In re Antitrust Grand Jury*, 805 F.2d at 164; *In re Sealed Case*, 754 F.2d at 399; *In re* Sealed Case, 676 F.2d 793, 814-15 (D.C. Cir. 1982).

[68] *In re Sealed Case*, 754 F.2d at 399.

[69] *See* Clark v. United States, 289 U.S. 1, 15 (1933); Haines v. Liggett Group, Inc. 975 F.2d 81, 95 (3d Cir. 1992); *In re Sealed Case*, 754 F.2d at 399; *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d at 1039; *In re* International Sys. & Controls Corp. Sec. Litig., 693 F.2d 1235, 1242 (5th Cir. 1982); *In re Sealed Case*, 676 F.2d at 814; United States v. Bob, 106 F.2d 37, 40 (2d Cir. 1939). The prima facie case is discussed *infra* Part II.A.

[70] *See In re Grand Jury Investigation*, 842 F.2d at 1226; *In re Sealed Case*, 754 F.2d at 399; *In re Sealed Case*, 676 F.2d at 815; *see also Haines*, 975 F.2d at 95-96 ("[T]he party seeking discovery must present evidence which, if believed by the fact-finder, would be sufficient to support a finding that the elements of the crime-fraud exception were met.").

as the crime or fraud under investigation,[71] but such a rule has not been accepted.[72] Nor must the fraud involved be criminal in order to invoke the exception.[73] Indeed, the crime or fraud need not have been successfully completed to warrant the exception so long as there was a criminal or fraudulent objective at the time of the attorney-client communication.[74]

Nevertheless, in order to establish the predicate crime or fraud, more must be shown than mere allegations of misconduct or simply the fact that a party to the communication is a target of a grand jury investigation.[75] The failure to make the requisite showing of the underlying crime or fraud is fatal to the assertion of the crime-fraud exception.[76]

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[71] It was suggested by the Supreme Court in *Alexander v. United States*, 138 U.S. 353 (1891), that "the rule announced in [*Regina v. Cox*] should be limited to cases where the party is tried for the crime in furtherance of which the communication was made." *Id.* at 359-60; *accord* Kaufman v. United States, 212 F. 613, 618 (2d Cir. 1914).

[72] *See, e.g., In re* Berkley & Co., Inc. 629 F.2d 548, 555 (8th Cir. 1980) ("Our research has disclosed no decision subsequent to *Alexander* directly supporting its rule."); *see also* James A. Gardner, *The Crime-Fraud Exception to the Attorney-Client Privilege*, 47 A.B.A. J. 708, 709-10 (1961); John J. Dutton, Note, *Evidence: Attorney-Client Privilege: Communications in Furtherance of a Crime*, 45 CAL. L. REV. 75 (1957).

[73] *See In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d at 1039.

[74] *See id.*

[75] Mere allegations of wrongdoing, *see In re* International Sys. & Controls Corp. Sec. Litig., 693 F.2d 1235, 1242 (5th Cir. 1982); United States v. Bob, 106 F.2d 37, 40 (2d Cir. 1939), or "a strong suspicion" of misconduct, *see In re* Antitrust Grand Jury, 805 F.2d 155, 165 (6th Cir. 1986); *In re* Grand Jury Proceedings in the Matter of Fine, 641 F.2d 199, 204 (5th Cir. 1981), are not sufficient to establish the predicate for the crime-fraud exception. In like fashion, an indictment is not sufficient evidence of a crime or fraud to overcome the privilege. *See In re* Vargas, 723 F.2d 1461, 1467 (10th Cir. 1983); United States v. Dyer, 722 F.2d 174, 178 (5th Cir. 1983); *see also* Callan & David, *supra* note 59, at 346 ("As to what constitutes a prima facie case, a mere allegation that the client has engaged in criminal or fraudulent conduct is insufficient by itself to defeat the client's claim of privilege."); Gardner, *supra* note 72, at 710 ("[S]ome early cases indicated that a mere charge of fraud was sufficient to bring the rule into operation. But it is now clear that more than this is required.") (footnote omitted).

[76] *See, e.g.*, Industrial Clearinghouse, Inc. v. Browning Mfg. Div., 953 F.2d 1004, 1008 (5th Cir. 1992); Charles Woods Television Corp. v. Capital Cities/ABC Inc., 869 F.2d 1155, 1161-62 (8th Cir. 1989); Pritchard-Keang Nam Corp. v. Jaworski, 751 F.2d 277, 283 n.6 (8th Cir. 1984); *In re* Grand Jury Proceedings, 600 F.2d 215, 219 (9th Cir. 1979); Duplan Corp. v. Deering Milliken, Inc., 540 F.2d 1215, 1220-21 (4th Cir. 1976); Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 90 F.R.D.

Further, when the crime-fraud exception is asserted against a corporation, the proponent must establish that the crime or fraud was committed by the corporation and not simply by a corporate employee on a frolic.[77] Aside from the vexing questions of corporate vicarious liability this raises,[78] there is the question whether the communication with counsel, either on the behalf of a corporation or an individual, was in furtherance of a crime or fraud. It is this issue that is addressed in the second prong of the analysis.

2. *The Attorney-Client Communication Was in Furtherance of the Client's Crime or Fraud*

It would seem that a communication between an attorney and client "in furtherance" of a crime or fraud is a communication which in some way

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21, 30-31 (N.D. Ill. 1980).

[77] *See In re* Sealed Case, 107 F.3d 46, 50 (D.C. Cir. 1997) ("[F]rom the material before the district court, there was no way of knowing or even guessing whether the vice president was on a frolic of his own, against the advice of Company counsel, when he [committed the crime].").

[78] As noted, a corporation must act and communicate with its attorneys through its employees. Although under *Upjohn Co. v. United States*, 425 U.S. 383 (1981), the attorney-client privilege extends to communications with counsel by employees at all levels of the corporation, ordinarily only officers and directors are authorized to waive the attorney-client privilege so long as they are acting consistently "with their fiduciary duty to act in the best interests of the corporation and not of themselves as individuals." Commodity Futures Trading Comm. v. Weintraub, 471 U.S. 343, 348-49 (1985). Likewise, as also noted, the actions of even low-level employees may subject the corporation to liability so long as there was some intention to benefit the corporation. *See supra* notes 45-46 and accompanying text. Thus, as the court in *In re Sealed Case* suggests, in determining the applicability of the crime-fraud exception in the corporate context, it is essential that the focus of the inquiry be on the intent of the employee to further the criminal objectives of the corporation (not the individual employee), rather than rely on a wooden application of quasi-agency principles of corporate vicarious liability. *See In re Sealed Case*, 107 F.2d at 50-51. The court noted:

> The government suggested at oral argument that even if [the corporate officer was on a frolic of his own], the Company could still be held criminally liable. There are circumstances under which corporations are responsible for the crimes of their agents. But neither in this court nor in the district court did the government offer anything in terms of evidence or law to support the idea that the Company bore criminal responsibility for the acts of this officer. The government therefore did not sustain its burden.

Id.

advances the commission of an illegal act. One court recently held, however, that an otherwise privileged communication can be "in furtherance" of prohibited activity "even if the attorney does nothing after the communication to assist the client's commission of a crime, and even though the communication turns out not to help (and perhaps even to hinder) the client's completion of a crime."[79] The court based this conclusion primarily on the grounds that the attorney's knowledge of the criminal plan is wholly irrelevant to whether the crime-fraud exception applies. Rather, it is the client's intent in consulting with counsel that is determinative.[80]

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[79] *In re* Grand Jury Proceedings, 87 F.3d 377, 382 (9th Cir. 1996). In this case, a corporation, its president, and two employees were targets of a grand jury investigation into possible tax evasion and violation of the immigration laws arising from the company's employment of a woman whom it knew did not have the required visa and working permits. *See id.* at 379. Subpoenas were served on two former corporate counsel seeking their testimony regarding communications with their client concerning the employment status and form of compensation of the woman in connection with the attorneys' preparation and filing of documents with the Immigration and Naturalization Service. *See id.* at 379-80. The court summarized the evidence submitted to the district court with regard to the crime-fraud exception as follows:

> The evidence shows that the corporate targets consulted counsel about Mrs. T's employment status shortly after another employee told [the corporation's president] of the likely illegality of the existing situation. Corporation did not stop its alleged criminal conduct with regard to Mrs. T, but continued to employ her illegally. When Corporation, through Roe, corresponded with the INS in September and October of 1991 about its petition to legalize Mrs. T's employment, it did not disclose that Mrs. T already had been working in Corporation's U.S. Office illegally for more than a year.

Id. at 382. On the basis of this evidence, the district court held that the government had met its burden of showing that the communications with the corporation's counsel was in furtherance of the corporation's illegal activity. *See id.* at 379-80.

[80] The court stated in this regard that "for the crime-fraud exception to apply, 'the attorney need not himself be aware of the illegality involved; it is enough that the communication furthered, or was intended by the client to further, that illegality.' " *In re Grand Jury Proceedings*, 87 F.3d at 381 (quoting United States v. Friedman, 445 F.2d 1076, 1086 (9th Cir. 1981)). The corporation argued that the government had failed to sustain its burden because

> the government didn't show that there was any communication which was in itself in furtherance of any crime (that is, there is no showing that either lawyer made any false representation to the INS in connection with the submission of Mrs. T's application); [attorneys] Roe and Doe were not

While the clear weight of modern authority is to the effect that the client's state of mind when consulting with counsel is the significant factor in applying the crime-fraud exception, saying that an attorney's role in the client's fraudulent or criminal transaction is irrelevant simply goes too far.

a. Intent of the Communication

The attorney-client privilege is said to "belong" to the client because the privilege operates for the benefit of the client and not the attorney.[81] For

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aware of Mrs. T's employment arrangement and did not take an affirmative step that in fact facilitated commission of the crimes; and as neither knew about her status, the government failed to show that any communication was in furtherance of a tax or immigration offense.

Id. at 380-81. The court rejected the corporation's argument and upheld the district court's reliance on the client's intent. As the court stated, "[b]ecause all of Corporation's points have to do with the *attorney's* knowledge, state of mind or actions, we disagree that the district court erred since it focused, quite properly, on the *client*." *Id.* at 381.

[81] *See, e.g., In re Sealed Case*, 107 F.3d at 49 ("The privilege is the client's, and it is the client's fraudulent or criminal intent that matters."); *In re* Grand Jury Proceedings, 102 F.3d 748, 752 (4th Cir. 1996) ("[T]he attorney's knowledge of the client's fraud does not control whether the crime-fraud exception vitiates the attorney-client privilege."); *In re Grand Jury Proceedings*, 87 F.3d at 381-82 ("Inasmuch as today's attorney-client privilege exists for the benefit of the client, not the attorney, it is the client's knowledge and intentions that are of paramount concern to the application of the crime-fraud exception.") (footnote omitted); *In re* Grand Jury Proceedings Thursday Special Grand Jury Sept. Term, 1991, 33 F.3d 342, 348 (4th Cir. 1994) ("The client is the holder of the privilege."); Cox v. Administrator United States Steel & Carnegie, 17 F.3d 1386, 1417 (11th Cir.) ("The attorney-client privilege 'belongs solely to the client . . . .' ") (quoting *In re* Von Bulow, 828 F.2d 94, 100-01 (2d Cir. 1987)), *modified*, 30 F.3d 1347 (11th Cir. 1994); *In re* Grand Jury Proceedings, 604 F.2d 798, 801 (3d Cir. 1979) ("It is clear that the attorney-client privilege is one that is owned by the client . . . ."); Garner v. Wolfinbarger, 430 F.2d 1093, 1096 n.7 (5th Cir. 1970) ("The objection [on grounds of the attorney-client privilege] is the client's to invoke, not the attorney's."). Of course, although the privilege is for the benefit of the client, the privilege can be invoked, and often is, by an attorney on behalf of the client. *See, e.g., In re* Impounded Case (Law Firm), 879 F.2d 1211, 1213 (3d Cir. 1989); *In re* Grand Jury Proceedings, 727 F.2d 1352, 1355 (4th Cir. 1984); *In re* Grand Jury Proceedings in the Matter of Freeman, 708 F.2d 1571 (11th Cir. 1983); *In re* Grand Jury Proceedings, 663 F.2d 1057, 1061 (5th Cir.), *vacated*, 680 F.2d 1026 (5th Cir. 1982); *In re* Grand Jury Proceedings, 517 F.2d 666, 668 (5th Cir. 1975); Hett v.

that reason, it is generally the client's fraudulent or criminal intent in communicating with an attorney that triggers the application of the crime-fraud exception.[82] There have been instances, however, where the criminal intent of the attorney rather than the client served as the predicate for the exception.[83]

United States, 353 F.2d 761, 764 (9th Cir. 1965).

[82] *See, e.g.*, Jennison, *supra* note 38, at 937 ("The crime or fraud exception focuses on intent. If the client's intent in seeking legal advice is legitimate the claim of privilege should stand."). At least one commentator has suggested the contrary, however. *See* Gergacz, *supra* note 10, at 1677 (suggesting that, at least for the prima facie showing, the client's intent in seeking counsel is not considered).

[83] As was stated in *In re Impounded Case (Law Firm)*:

> It is not apparent to us what interest is truly served by permitting an attorney to prevent this type of investigation of his own alleged criminal conduct by asserting an innocent client's privilege with respect to documents tending to show criminal activity by the lawyer. On the contrary, the values implicated, particularly the search for the truth, weigh heavily in favor of denying the privilege in these circumstances.

In re Impounded Case (Law Firm), 879 F.2d at 1213-14; *accord In re* Sealed Case, 676 F.2d 793, 815 (D.C. Cir. 1982) ("The prima facie violation may also be the attorney's, since attorney misconduct negates the premise that the adversary system furthers the cause of justice."); Moody v. Internal Revenue Serv., 654 F.2d 795, 800 (D.C. Cir. 1981) ("An attorney should not be able to exploit the privilege for ends outside of and antithetical to the adversary system any more than a client who attempts to use the privilege to advance criminal or fraudulent ends."); *see, e.g.*, United States v. Aucoin, 964 F.2d 1492, 1499 (5th Cir. 1992) (discussing counsel's assistance to client in continuing to conduct illegal gambling operation); United States v. Townsley, 843 F.2d 1070, 1086 (8th Cir. 1988) (finding that attorney participated with defendant in obstruction of grand jury's investigation); United States v. Harrelson, 754 F.2d 1153, 1167 (5th Cir. 1985) (determining that defendant and attorney were coconspirators); United States v. Horvath, 731 F.2d 557, 562 (8th Cir. 1984) (finding that attorney assisted clients in shielding transactions and hiding the source of funds); United States v. Gordon-Nikkar, 518 F.2d 972, 974 (5th Cir. 1975) (noting attorney's suggestion that witness leave the country and that other witnesses give false testimony); United Sates v. Shewfelt, 455 F.2d 836, 838 (9th Cir. 1972) (noting that attorney filed quiet title actions knowing that clients had no interest in the real property); *Hett*, 353 F.2d at 764 (discussing attorneys aid to client in fleeing from prosecution); United States v. Weinberg, 226 F.2d 161, 170 (3d Cir. 1955) (noting that attorney was an unindicted coconspirator with client in conspiracy to defraud the United States). A similar rule applies with regard to attorney work product. *See In re* Antitrust Grand Jury, 805 F.2d 155, 168 (6th Cir. 1986) ("Should the district court review the

Thus, it is now almost uniformly recognized that the proponent of the exception does not need to show that the attorney was a party to, or even aware of, the client's illicit scheme. Instead, the attorney may be wholly innocent of any wrongdoing, and still the client communications will be subject to the exception so long as the client had formed the intent to commit a crime or a fraud at the time the client sought the attorney's counsel.[84]

This is not the end of the inquiry, however. Indeed, difficult issues remain as to when the requisite intent must have been formed such that the client's communication are outside the bounds of the privilege. The courts have not been uniform in their resolution of these issues.

i. Prior to Consultation with Counsel

The clearest case for application of the crime-fraud exception is when the client intends to commit (or is committing) a crime or fraud and seeks the assistance of counsel, wittingly or not, to carry out the unlawful plan. Indeed, these were the circumstances that gave rise to the exception in the first instance and continue to be the most common circumstances under which the crime-fraud exception is recognized.[85]

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documents and find that the law firms were knowing and willing conspirators in the alleged crime, then all opinion work product made in furtherance of the alleged crime should also be produced."); *In re* Doe, 662 F.2d 1073, 1078 (4th Cir. 1981) ("No court construing this rule, however, has held that an attorney committing a crime could, by invoking the work product doctrine, insulate himself from criminal prosecution for abusing the system he is sworn to protect.").

[84] *See* Clark v. United States, 289 U.S. 1, 15 (1932) ("The attorney may be innocent, and still the guilty client must let the truth come out."); *see also In re Grand Jury Proceedings*, 102 F.3d at 752; United States v. Chen, 99 F.3d 1495, 1504 (9th Cir. 1996); *In re Grand Jury Proceedings*, 87 F.3d at 381-82; United States v. Neal, 27 F.3d 1035, 1048 (5th Cir. 1994); United States v. Laurins, 857 F.2d 529, 540 (9th Cir. 1988); *In re* Grand Jury (G.J. No. 87-03-A), 845 F.2d 896, 898 (11th Cir. 1988); United States v. Soudan, 812 F.2d 920, 927 (5th Cir. 1986); United States v. Ballard, 779 F.2d 287, 292 (5th Cir. 1986); *In re* Sealed Case, 754 F.2d 395, 402 (D.C. Cir. 1985); *In re* Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983, 731 F.2d 1032, 1038 (2d Cir. 1984); *Horvath*, 731 F.2d at 762; *In re* Grand Jury Proceedings, 689 F.2d 1351, 1352 (11th Cir. 1982); *In re Sealed Case*, 676 F.2d at 812; United States v. Hodge & Zweig, 548 F.2d 1347, 1354 (9th Cir. 1977); United States v. Aldridge, 484 F.2d 655, 658 (7th Cir. 1973); United States v. Friedman, 445 F.2d 1076, 1086 (9th Cir. 1971).

[85] Thus it has been observed:

> The attorney-client privilege has always been subject to the qualification

ii. After Consultation with Counsel

But what of the client who consults with counsel, in good faith, for the purpose of obtaining legal advice but later forms the intent to commit a crime or fraud after obtaining counsel's advice? Should the crime-fraud exception operate post hoc to lift the veil of privilege from the earlier communication? In one case, Judge J. Shelly Wright appeared to suggest that the crime-fraud exception would apply where it was shown that "the client actually committed or attempted a crime or fraud subsequent to receiving the benefit of counsel's work product."[86] Judge Wright's view has not gained acceptance, however.[87] Instead, it is the client's intent at the time of the communication that is considered determinative of whether the crime-fraud exception will apply.[88] It is also clear that the mere showing

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> that protection is denied to communications wherein a lawyer's assistance is sought in activity that the client knows to constitute a crime or tort. The knowledge requirement minimizes the effect of the exception on proper communications; absent this requirement legitimate consultations would be inhibited by the risk that their subject matter might turn out to be illegal and therefore unprivileged.

Note, *The Future Crime or Tort Exception to Communications Privileges*, 77 HARV. L. REV. 730, 730-31 (1964).

[86] *In re Sealed Case*, 676 F.2d at 815. Judge Wright's opinion in this regard was his own, however, since neither Judge Tamm, who concurred in the result only, nor Judge Wald joined in that part of Judge Wright's opinion. Moreover, Judge Wright's comments regarding the timing of the client's conduct can be read fairly as addressing the first prong of the two-part inquiry, that is, the "showing of a violation sufficiently serious to defeat the . . . privilege." *Id.* at 814. Proponents of the exception have relied on Judge Wright's opinion as authority for the argument that the subsequent use of an attorney's advice or work product to perpetrate a fraud is a sufficient predicate for invoking the crime-fraud exception even when it has not been shown that the client had intended to commit the crime or fraud at the time of the communication with counsel. *See* Pritchard-Keang Nam Corp. v. Jaworski, 751 F.2d 277, 283 n.5 (8th Cir. 1984) (criticizing Judge Wright's opinion).

[87] One commentator has suggested that such post hoc reasoning is analogous to asserting that "the cock's crowing made the sun rise." Fried, *supra* note 13, at 482.

[88] Indeed, the two decisions cited by Judge Wright are to this effect. In *In re Grand Jury Proceedings*, 604 F.2d 798 (3d Cir. 1979), the issue was whether the law firm which provided the sought-after documents had been retained before or after the crime was committed. The court explained:

> If the crime had been completed before retention of the Cleary firm, then the privilege should be in effect. If, however, the crime was a continuing

that a client committed a crime or fraud after having consulted with an attorney is not sufficient to invoke the crime-fraud exception unless it is also shown that the client intended to commit the crime or fraud at the time of the consultation with counsel.[89] In this connection, it is recognized that a client may commit a crime or fraud in spite of the advice of counsel and accordingly, so long as it is not shown that the advice was sought in furtherance of the unlawful plan, the privilege remains intact.[90] Indeed, to

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one, or one that occurred after the firm was consulted, then the prima facie showing made by the government would suffice to allow inspection by the grand jury.

Id. at 803. In the second case, *In re Murphy*, 560 F.2d 326 (8th Cir. 1977), the government apparently showed that the law firm's clients were in the process of committing fraud on the Patent Office at the time legal advice was sought. The court noted that the government was required to show that "the client was engaged in or planning a criminal or fraudulent scheme when he sought the advice of counsel to further the scheme . . . ." *Id.* at 338. The court concluded that the government had not made the requisite showing. *See id.*

[89] For example, in the recent decision of *In re Sealed Case*, 107 F.3d 46 (D.C. Cir. 1997), the D.C. Circuit appears to have rejected Judge Wright's view.

> The critical consideration is that the government's presentation had to be aimed at the intent and action of the client. It was not enough for the government to show that the vice president committed a crime after he wrote his memorandum and attended the late August meeting with Company counsel.... Unless the government made some showing that the Company intended to further and did commit a crime, the government could not invoke the crime-fraud exception to the privilege.

Id. at 50; *accord In re* Grand Jury Subpoenas Duces Tecum, 798 F.2d 32, 34 (2d Cir. 1986) ("The crime/fraud exception... cannot be successfully invoked merely upon a showing that the client communicated with counsel while . . . engaged in criminal activity [but] only when there is probable cause to believe that the communications . . . were intended in some way to facilitate or to conceal the criminal activity."); *In re Sealed Case*, 754 F.2d at 402 ("Although we agree that 'mere coincidence in time,' without more, cannot support the invocation of the exception, the evidence presented to the district court clearly demonstrates more than just simple coincidence."); *Pritchard-Keang Nam Corp.*, 751 F.2d at 283 n.5 ("That the fraud merely follows the attorney-client communication does not alone support discovery.").

[90] The court in *Haines v. Liggett Group, Inc.*, 975 F.2d 81 (3d Cir. 1992), observed:

> Where the client commits a fraud or crime for reasons completely independent of legitimate advice communicated by the lawyer, the seal [of secrecy] is not broken, for the advice is, as the logicians explain, *non causa*

do otherwise would allow an adverse inference to be drawn from legitimately seeking legal advice.[91]

> *pro causa*. The communication condemned and unprotected by the attorney-client privilege is advice that is illicit because it gives direction for the commission of future fraud or crime. The advice must relate to future illicit conduct by the client; it is the *causa pro causa*, the advice that leads to the deed.

Id. at 90. In like fashion, the court in *In re Burlington Northern, Inc.*, 822 F.2d 518 (5th Cir. 1987), held that it was error for the district court to have failed to inquire whether the specific litigation activities were illegitimate, notwithstanding evidence that the defendants had utilized lawsuits to accomplish their anti-competitive goals. The court explained:

> The attorney/client privilege and work product immunity protect communications and papers generated when a client engages his attorney for legitimate purposes. To the extent the railroads sought out their attorneys to bring lawful suits and consulted with them in connection with such suits, they were within the scope of this protection. That the railroads might also have consulted and received the help of their attorneys in connection with other activities that are not lawful does not change this conclusion. The focus must be narrowed to the specific purpose of the particular communication or document. To the extent the document deals with a protected activity, it is immune from discovery.

Id. at 525; *accord In re* Grand Jury in the Matter of Fine, 641 F.2d 199, 204 (5th Cir. 1981) ("The professional relationship between Fine and his client either was formed to further a criminal enterprise or it was legitimate and independent. Mr. Fine has testified that it was legitimate and independent, and the government has failed to make a contrary prima facie showing.").

The court's suggestion in *In re Grand Jury Proceedings* that an attorney-client communication could be in furtherance of a crime or fraud "even though the communication turns out not to help (and perhaps even to hinder) the client's completion of a crime" ignores this critical inquiry of whether the specific advice sought was legitimate or not. *In re* Grand Jury Proceedings, 87 F.3d 377, 382 (9th Cir. 1996). Absent a showing that the communication with counsel was in furtherance of an unlawful end, the better view is that the attorney-client privilege remains intact.

[91] As the court in *In re Sealed Case* observed:

> Companies operating in today's complex legal and regulatory environments routinely seek legal advice about how to handle all sorts of matters, ranging from their political activities to their employment practices to transactions that may have antitrust consequences. There is nothing necessarily suspicious about the officers of this corporation getting such advice. True enough, within weeks of the meeting about campaign finance law, the vice president violated that law. But the government had to demonstrate that the

b. Relationship Between the Communication and the Underlying Crime or Fraud

In addition to showing that the client intended to further the crime or fraud by consulting with the attorney, there must be a relationship between the communication or the attorney's advice and the underlying crime or fraud. The required relatedness is not synonymous with "relevance," and the courts have not hesitated to reject crime-fraud arguments by either the government or private litigants grounded solely on the contention that the

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> Company sought the legal advice with the intent to further its illegal conduct. Showing temporal proximity is not enough.

In re Sealed Case, 107 F.3d at 50. The court in *United States v. White*, 887 F.2d 267 (D.C. Cir. 1989), agreed, saying:

> Far from showing that [the attorney's] advice was intended to further a crime or fraud, the evidence suggests . . . that [the attorney's] advice was intended to prevent unlawful conduct. [The client's] failure to heed his lawyer's counsel does not alter this critical facet of the case.
>
> The district court's ruling . . . would deny [the client] the privilege where even its stern critics acknowledge that the justifications for the shield are the strongest–where a client seeks counsel's advice to determine the legality of conduct *before* the client takes any action.

Id. at 271-72 (footnote omitted); *accord In re* International Sys. & Controls Corp. Sec. Litig., 693 F.2d 1235 (5th Cir. 1982).

> [I]t may well be that the purpose in commencing the special review was entirely pure. In the modern corporate world with multiple subsidiaries and hundreds of employees, shady practices may occur without the directors' and officers' knowledge. An attempt by management to investigate past and present questionable practices should not be discouraged by guaranteed disclosure.

Id. at 1243 (footnote omitted). One commentator, however, has suggested that "the subsequent appropriation to an illegal end of legal services originally obtained for a proper purpose" would "lie within the future crime or tort exception." Note, *supra* note 85, at 731. Fairly read, the commentator appears to be referring to situations in which the client contemplates future unlawful action at the time of the consultation with counsel.

> Although there might be some loss of frankness in the original communication due to the client's fear that his later application of the attorney's work to an illegal purpose will result in a loss of privilege, the loss is likely to be marginal. And this inhibition, rooted in the contemplation of future activities known to be unlawful, seems unworthy of legal protection.

Id.

attorney-client communication or work product would be relevant to establishing the underlying crime or fraud.[92] There is, however, a substantial divergence of views concerning the degree of relatedness which must be shown to demonstrate that the attorney-client communication was in furtherance of a crime or fraud.

Some courts, recognizing that the proponent of the crime-fraud exception usually lacks specific information concerning the communication to which the privilege has been asserted,[93] require only a minimal showing

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[92] As was explained in *In re Richard Roe, Inc.*, 68 F.3d 38 (2d Cir. 1995):

> The "relevant evidence" test departs from the correct "in furtherance" test in two respects. First, the crime-fraud exception does not apply simply because privileged communications would provide an adversary with evidence of a crime or fraud. If it did, the privilege would be virtually worthless because a client could not freely give, or an attorney request, evidence that might support a finding of culpability. Instead, the exception applies only when the court determines that the client communication or attorney work product in question was *itself* in furtherance of the crime or fraud. . . . Second, the crime-fraud exception applies only where there is probable cause to believe that the particular communication with counsel or attorney work product was intended in some way to facilitate or conceal the criminal activity. . . . Because a simple finding of relevance does not demonstrate a criminal or fraudulent purpose, it does not trigger the exception.

Id. at 40-41 (citations omitted); *accord Pritchard-Keang Nam Corp.*, 751 F.2d at 283 ("That the report may help *prove* that a fraud occurred does not mean that it was *used* in perpetrating the fraud.").

[93] *See, e.g., In re* Grand Jury Investigation, 842 F.2d 1223, 1227 (11th Cir. 1987) ("[T]he determination whether the requested material is sufficiently related to the investigation must take into account that the government does not know precisely what the material will reveal or how useful it will be."); *In re* Sealed Case, 676 F.2d 793, 814 n.83 (D.C. Cir. 1982) ("Even in its present posture, the government is hampered by having no idea what type of information is contained in seven of the eight items that the District Court ordered Company to produce."). Nevertheless, as the court in *Cox v. Administrator United States Steel & Carnegie*, 17 F.3d 1386, *modified*, 30 F.3d 1347 (11th Cir. 1994), cautioned:

> Although that determination [of communications that should not be privileged because they were used to further a crime or fraud] "must take into account that the [party seeking discovery] does not know precisely what the material will reveal or how useful it will be," "there is no reason to permit opponents of the privilege to engage in groundless fishing expeditions."

Id. at 1416 (quoting *In re Grand Jury Investigation*, 842 F.2d at 1227; United States v. Zolin, 491 U.S. 554, 571 (1989)).

of relatedness.[94] One court emphasized that this standard is not to be "interpreted restrictively."[95] Other courts have imposed a somewhat higher standard that the communication or work product be "reasonably related" to the crime or fraud.[96] Still other courts have required a showing of a close relationship between the privileged material and the client's crime or fraud.[97] Regardless of the standard applied, it has been said that the purpose of the requirement of relatedness is "easy differentiation between material for which the law should not furnish the protections of a privilege and material for which a privilege should be respected."[98]

While relatedness may be a useful requirement in winnowing out baseless assertions of the crime-fraud exception, it is not the complete answer. That is, a showing of relatedness, even under the most stringent standard, is not sufficient to establish that the communication was in

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[94] Thus, for example, some courts require only a "potential relationship . . . between the documents and the charges under investigation," *In re* September 1975 Grand Jury Term, 532 F.2d 734, 738 (10th Cir. 1976), or "some relationship between the communication at issue and the *prima facie* violation," *In re* Antitrust Grand Jury, 805 F.2d 155, 164 (6th Cir. 1986), or "that the communication is related to the criminal or fraudulent activity," *In re* Grand Jury (G.J. No. 87-03-A), 845 F.2d 896, 898 (11th Cir. 1988). *See also In re Grand Jury Investigation*, 842 F.2d at 1227; *In re* Grand Jury Proceedings, 604 F.2d 798, 803 n.6 (3d Cir. 1979).

[95] *In re Grand Jury Investigation*, 842 F.2d at 1227 ("[T]he requirement that legal advice must be related to the client's criminal or fraudulent conduct should not be interpreted restrictively.").

[96] *See In re International Sys. & Controls Corp. Sec. Litig.*, 693 F.2d at 1243 ("[T]he work product must reasonably relate to the fraudulent activity."); *In re Sealed Case*, 676 F.2d at 814-15 ("[T]he court must find some valid relationship between the work product under subpoena and the *prima facie* violation. . . . A finding that the work product reasonably relates to the subject matter of the possible violation should suffice.").

[97] *See, e.g.*, *Cox*, 17 F.3d at 1417; Charles Wood Television Corp. v. Capital Cities/ABC, Inc., 869 F.2d 1155, 1161-62 (8th Cir. 1989); *Pritchard-Keang Nam Corp.*, 751 F.2d at 283; *In re* Murphy, 560 F.2d 326, 338 (8th Cir. 1977).

[98] *In re Sealed Case*, 676 F.2d at 815 n.91. It has also been observed that questions of relatedness should be resolved in favor of upholding the privilege:

> Concern for professional relationships dictates that all doubtful questions be resolved in favor of privilege, even when the statement lacks close relationship to either the proper or improper end. Hence, the exception . . . should admit only communications which are in furtherance of the illegal purpose. In situations involving merely a statement of intention to commit a crime, that statement alone should be admissible.

Note, *supra* note 85, at 733.

furtherance of a crime or fraud.[99] Instead, there must be evidence that the attorney-client relationship was *used* in furtherance of the crime or fraud.[100]

c. An Affirmative Act That Either Promotes or Conceals the Crime or Fraud

In order to meaningfully discern between an attorney-client communication that is either merely related to or contemporaneous with a client's crime or fraud (and therefore is subject to the attorney-client privilege) and a communication that is in furtherance of a crime or fraud (and therefore is subject to the exception), there must be a showing that the consultation with the attorney resulted in some act, either by the client or by the attorney, that was in aid of the crime or fraud.[101] That is, there must be some evidence that the attorney-client relationship was actually abused by the client in furtherance of the unlawful scheme.

Such a showing can be made through direct evidence that there were attorney-client communications that were incident to the client's unlawful conduct. For example, where the attorney and the client engage in the illegality together,[102] or where the client discloses the unlawful plan to the

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[99] As Justice Ginsburg (then a judge on the D.C. Circuit) explained in *United States v. White*, 887 F.2d 267 (D.C. Cir. 1989):

> The crime-fraud exception has a precise focus: It applies only when the communications between the client and his lawyer further a crime, fraud or other misconduct. It does not suffice that the communications may be related to a crime. To subject the attorney-client communications to disclosure, they must actually have been made with an intent to further an unlawful act.

Id. at 271.

[100] It has been observed that "[t]he primary difficulty with [relatedness] tests is that they operate to deprive the client of the protections of the privilege in circumstances where the consultation was in all respects legitimate and proper." Callan & David, *supra* note 59, at 347. Direct evidence that the attorney-client relationship was abused cures this deficiency.

[101] *See In re* Richard Roe, Inc., 68 F.3d 38, 40 (2d Cir. 1995) ("[T]he crime-fraud exception applies only where there is probable cause to believe that the particular communication with counsel or attorney work product was intended in some way to facilitate or to conceal the criminal activity."); *In re* Grand Jury Investigation, 842 F.2d 1223, 1226 (11th Cir. 1987) ("[T]here must be a showing that the attorney's assistance was obtained in furtherance of the criminal or fraudulent activity or was closely related to it.").

[102] *See, e.g., In re* Grand Jury Proceedings, Thursday Special Grand Jury Sept. Term, 1991, 33 F.3d 342, 346 (4th Cir. 1994) (finding that attorneys were involved

attorney,[103] the communications between the client and the attorney would not be privileged.

A showing that the attorney-client relationship was abused would also be made where there was an affirmative act on the part of the attorney which promoted the client's crime or fraud. Thus, where the attorney performed legal services such as forming corporations,[104] obtaining

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in setting sham minority contracting firms to comply with minority set-aside program); United States v. Aucoin, 964 F.2d 1492, 1495 (5th Cir. 1992) (assisting client in obtaining seized records necessary to conduct gambling operations); United States v. Townsley, 843 F.2d 1070, 1086 (8th Cir.), *on rehearing*, 856 F.2d 1189 (8th Cir. 1988) (finding that both defendant and attorney conspired to obstruct the grand jury's investigation by suborning perjury); United States v. Harrelson, 754 F.2d 1153, 1167 (5th Cir. 1985) (refusing to apply privilege where attorney and client conspired to murder a federal judge); *In re* Doe, 662 F.2d 1073, 1073 (4th Cir. 1981) (disallowing privilege where attorney conspired to obstruct justice and suborn perjury); United States v. Gordon-Nikkar, 518 F.2d 972, 974 (5th Cir. 1975) (invoking crime-fraud exception where attorney recommended that one witness leave the country and other witnesses give perjured testimony); United States v. Shewfelt, 455 F.2d 836, 838 (9th Cir. 1972) (disallowing privilege where attorney filed quiet title actions in aid of client's fraud knowing that client had no interest in the property); Hett v. United States, 353 F.2d 761, 764 (9th Cir. 1966) (invoking exception where attorney aided client in flight from prosecution); United States v. De Vasto, 52 F.2d 26, 30 (2d Cir. 1931) (invoking exception where attorney took title to illicit brewery and sold half interest for client's benefit).

[103] *See, e.g.*, United States v. Sutton, 732 F.2d 1483, 1494 (10th Cir. 1984) (disallowing privilege where client told attorney about plan to destroy records so that the government would not get them); *In re* Doe, 551 F.2d 899, 900 (2d Cir. 1977) (disallowing privilege where client told attorney about plan to bribe a juror); United States v. Calvert, 523 F.2d 895, 909 (8th Cir. 1975) (invoking crime-fraud exception where defendant discussed plan to defraud insurance company); *In re* Sawyer's Petition, 229 F.2d 805, 807-08 (7th Cir. 1956) (invoking exception where client told attorney that he would perjure himself in exchange for dismissal of criminal charges); United States v. Bob, 106 F.2d 37, 39-40 (2d Cir. 1939) (invoking exception where client discussed control of mining venture used in fraudulent scheme); Fuston v. United States, 22 F.2d 66, 67 (9th Cir. 1927) (refusing to apply privilege where client signed documents in attorney's presence using false name).

[104] *See, e.g.*, United States v. Billingsley, 440 F.2d 823, 824 (7th Cir. 1971) (invoking crime-fraud exception where attorney's incorporation of trusts and mailing of corporate documents to client were acts in furtherance of conspiracy to defraud); United States v. Weinberg, 226 F.2d 161, 170 (3d Cir. 1955) (disallowing assertion of privilege where attorney assisted in incorporating trade schools and negotiating financing in furtherance of a scheme to defraud the Veteran's

licenses,[105] assisting in the purchase or sale of assets,[106] or providing other services on behalf of a client[107] that assisted the client in accomplishing the

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Administration).

[105] *See, e.g., In re* Grand Jury Subpoena 92-1(SJ), 31 F.3d 826, 828 (9th Cir. 1994) (invoking crime-fraud exception where corporate counsel obtained export license that allowed company illicitly to ship global positioning systems to Iran through the United Arab Emirates); Duttle v. Bandler & Kass, 127 F.R.D. 46, 54 (S.D.N.Y. 1989) (invoking exception where communications with counsel concerning the acquisition of licenses to continue trading securities were in furtherance of fraud).

[106] *See, e.g., In re Grand Jury Investigation*, 842 F.2d at 1227 (disallowing assertion of privilege where assistance in generating and disposing of unreported income was in furtherance of client's evasion of taxes); *In re* Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983, 731 F.2d 1032, 1038-39 (2d Cir. 1984) (invoking exception to privilege where legal assistance in sale of subsidiary was in furtherance of fraud against the United States); *In re* Grand Jury Proceedings, 727 F.2d 1352, 1353-54 (4th Cir. 1984) (invoking exception where attorney assisted in fraudulent private placement of limited partnership interests); Pollock v. United States, 202 F.2d 281, 285 (5th Cir. 1953) (disallowing claim of privilege where attorney received large cash deposits from client and used proceeds to purchase real estate in furtherance of client's evasion of income tax).

[107] *See, e.g.*, United States v. Chen, 99 F.3d 1495, 1503-04 (9th Cir. 1996) (denying privilege where attorneys' false disclosure to the customs service concerning the cost of imported goods was in furtherance of client's tax fraud); United States v. Edgar, 82 F.3d 499, 502 (1st Cir. 1996) (invoking crime-fraud exception where attorney filed fraudulent insurance claim for lost wages supported by false tax returns provided by client); United States v. Inigo, 925 F.2d 641, 657 (3d Cir. 1991) (invoking exception where attorney conducted negotiations which constituted attempted extortion); *In re* Grand Jury Proceedings, 867 F.2d 539, 541 (9th Cir. 1989) (holding privilege inapplicable where attorney's services were utilized in furtherance of client's conspiracy); United States v. Friedman, 445 F.2d 1076, 1079 (9th Cir. 1971) (applying crime-fraud exception where attorney obtained illicit copies of grand jury transcripts at client's direction); Union Camp Corp. v. Lewis, 385 F.2d 143, 144-45 (4th Cir. 1967) (disallowing privilege where attorney's advice served client's violation of anti-trust laws); Avramides v. First Nat'l Bank of Md., No. 87 Civ. 5732, 1997 U.S. Dist. LEXIS 1647 (S.D.N.Y. Feb. 19, 1997) (invoking exception where attorney filed collusive law suit); Greenwood v. State, No. 84 Civ. 9143, 1992 U.S. Dist. LEXIS 11954 (S.D.N.Y. Aug. 10, 1992) (applying exception where attorney for state employer brought disciplinary action against a state psychiatrist in bad faith); Federal Deposit Ins. Corp. v. Cafritz, 1991 U.S. Dist. LEXIS 11152 (D.D.C. Aug. 12, 1991) (disallowing privilege where attorneys prepared marital trust used to defraud creditors); *Duttle*, 127 F.R.D. at 54 (disallowing privilege where communications with counsel

unlawful objective, the communications associated with the performance of those services would not be privileged.

In like fashion, attorney-client communications that result in the attorney's assistance in concealing the client's crime or fraud would not be privileged. Thus, abuse of the attorney-client relation would be shown where the provision of legal services prevented detection of a conspiracy,[108] where misleading reports were made to the government to hide misconduct,[109] where the attorney conducted transactions on behalf of the client to conceal assets or sources of funds,[110] where transactions were mischaracterized to conceal their true nature,[111] where information was withheld from investigators by the attorney,[112] or where

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concerning operation of sales force since sales personnel were instrumentalities of fraud).

[108] For example, agreements to pay legal fees of conspirators are considered in furtherance of concealment of the conspiracy. *See, e.g.*, *In re* Grand Jury Proceedings, 689 F.2d 1351, 1352 (11th Cir. 1982); *In re* Grand Jury Proceedings, 680 F.2d 1026, 1029 (5th Cir. 1982); United States v. Hodge & Zweig, 548 F.2d 1347, 1354 (9th Cir. 1977); *In re* Grand Jury Investigation, 640 F. Supp. 1047, 1049-50 (S.D.W. Va. 1986).

[109] *See, e.g.*, *In re* Sealed Case, 676 F.2d 793, 813-16 (D.C. Cir. 1982) (disallowing privilege where report to the SEC regarding "questionable payments" did not fully disclose that company officers had lied to the IRS); *In re* John Doe Corp., 675 F.2d 482, 490-91 (2d Cir. 1982) (denying claim of privilege where report of internal investigation was used to conceal corrupt payment to public official); *In re* Special Sept. 1978 Grand Jury (II), 640 F.2d 49, 60 (7th Cir. 1980) (denying privilege where report did not disclose a state political fund maintained by trade association in furtherance of an ongoing fraud).

[110] *See, e.g.*, United States v. Ballard, 779 F.2d 287, 292-93 (5th Cir. 1986) (invoking crime-fraud exception where bankruptcy petition did not disclose fraudulent transfer of property); United States v. Horvath, 731 F.2d 557, 562 (8th Cir. 1984) (disallowing privilege where attorney conducted transactions to shield clients' business transactions and to hide the source of funds); United States v. Loften, 518 F. Supp. 839, 848 (S.D.N.Y. 1981) (denying privilege where attorney assisted in investment of racketeering income), *aff'd*, 819 F.2d 1130 (2d Cir. 1987).

[111] *See, e.g.*, *In re* Grand Jury Proceedings, 102 F.3d 748, 752 (4th Cir. 1996) (denying privilege where bank's attorneys furthered bank's fraud by mischaracterizing the recipients of loans and thereby concealing their true beneficiary); United States v. Dyer, 722 F.2d 174, 176-77 (5th Cir. 1983) (invoking crime-fraud exception where attorney's mischaracterization of the reason money was paid back to an individual was part of client's attempt to cover up extortion).

[112] *See, e.g.*, *In re* Grand Jury Proceedings, 87 F.3d 377, 382 (9th Cir. 1996) (invoking crime-fraud exception where correspondence of corporation's attorneys

the services of attorneys were otherwise used to conceal criminal or fraudulent activity.[113]

C. *Summary*

The attorney-client privilege serves important societal interests. By assuring the confidentiality of communications with counsel for the purpose of obtaining legal advice, the privilege serves to encourage clients, both individuals and corporations, to seek the advice of lawyers and thereby comply with the obligations of law. The assurance of confidentiality also encourages candor between clients and attorneys which should result in accurate legal counsel.

There are circumstances under which the confidentiality of attorney-client communications can be abused. Rather than seeking advice for the purpose of conforming conduct to the requirements of law, clients may seek the advice of lawyers to help them violate the law. In some instances,

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with the Immigration and Naturalization Service regarding the legalization of an alien's status did not disclose that the alien was already working for the corporation); United States v. Davis, 1 F.3d 606, 608-09 (7th Cir. 1993) (invoking crime-fraud exception where client withheld document from attorney who produced records pursuant to a grand jury subpoena); United States v. Laurins, 857 F.2d 529, 540 (9th Cir. 1988) (invoking exception where attorney falsely represented that client did not have records responsible to a grand jury subpoena because client had sequestered the records without informing the attorney); *In re* Sealed Case, 754 F.2d 395, 400 (D.C. Cir. 1985) (invoking exception where attorneys were instrumentalities through which corporation carried out pervasive scheme to alter or destroy subpoenaed evidence).

[113] *See, e.g.*, *In re* Grand Jury Proceedings, 857 F.2d 710, 712 (10th Cir. 1988) (upholding use of exception where company committed crimes and used law firm to cover up and perpetuate those crimes through a series of additional crimes and frauds); United States v. Soudan, 812 F.2d 920, 927 (5th Cir. 1986) (applying exception where attorney's assurance to witness that grand jury testimony would be kept secret furthered defendant's scheme to cover up perjury before the grand jury); *In re* Berkley & Co., 629 F.2d 548, 553 (8th Cir. 1980) (upholding use of exception where attorney was involved in preparation of documents used by defendants to avoid detection of various illegal and fraudulent schemes); Sound Video Unlimited, Inc. v. Video Shack, Inc., 661 F. Supp. 1482, 1489 (N.D. Ill. 1987) (applying crime-fraud exception to communications about concealing illegal wiretapping and wiretap transcripts); *In re* A.H. Robins Co., 107 F.R.D. 2, 11 (D. Kan. 1985) (finding exception applicable where counsel assisted company in misrepresenting the safety and efficacy of the Dalkon Shield).

the attorney-client relationship itself has been used to conceal the client's criminal or fraudulent intentions and actions.

In these circumstances, an exception to the rule of attorney-client confidentiality has been recognized. This "crime-fraud exception" is narrow and comes into play only when the attorney-client relation is abused such that the benefits of client candor with a legal advisor are outweighed.

In recognition of the social importance of attorney-client confidentiality, the applicability of the crime-fraud exception requires a two-step analysis. First, there must be evidence that a crime or fraud serious enough to defeat the privilege was committed, or at least attempted, by the client. To invoke the exception, it is not necessary for the crime or fraud to have succeeded, but there must be sufficient evidence that the crime or fraud was substantial and not hypothetical.

Once there has been a substantial showing that a crime or fraud was committed, there must then be evidence that the client's otherwise privileged communication with the attorney was actually in furtherance of the client's crime or fraud. The client must have been engaged in planning or carrying out the crime or fraud at the time of the communication with counsel, and the client must have intended that the communication assist in the perpetration of the crime or fraud. Additionally, the attorney must have taken some demonstrable action, wittingly or not, in aid of the client's crime or fraud.

The procedures under which these determinations are made have been the subject of controversy and scholarly debate. There is uncertainty as to the requisite quantum of evidence necessary to make the required showings. Also, there is tension between, on the one hand, the concern for judicial economy (i.e., the avoidance of mini-trials) coupled with the need to preserve grand jury secrecy, and, on the other hand, the opportunity of the privilege holder to be heard before confidential communications are disclosed. As a result of this tension, courts have striven to find a middle course of *in camera* inspection of *ex parte* submissions. These have proven not to be wholly satisfactory and continue to raise issues of when such procedures are appropriate and what evidence should be considered.

II. DETERMINING WHETHER THE CRIME-FRAUD EXCEPTION APPLIES

It is settled law that the crime-fraud exception requires a prima facie showing that the consultation with counsel was in furtherance of a crime or fraud committed or attempted by the client. In contrast, however, questions of what constitutes this prima facie showing and how it is to be

made are not so well settled and continue to occupy the attention of courts and practitioners.

Out of well-founded concerns for judicial economy and the avoidance of "mini-trials" of collateral issues, coupled with the need to maintain the traditional guarantees of grand jury secrecy, district courts have exercised their considerable discretion in fashioning procedures under which evidence supporting the crime-fraud exception is considered *in camera.* This is often done without giving the privilege holder any opportunity to be informed of the allegations of abuse of the attorney-client relationship or to offer evidence showing that the relationship in fact was not abused.

In view of the significant social values that are served by the attorney-client privilege, these largely *ex parte* procedures are not wholly satisfactory and will remain so until some accommodation is found for allowing the interests of the privilege holder to be vindicated.

A. The Prima Facie Showing

1. *The Quantum of Proof Necessary to Sustain the Prima Facie Showing*

In the seminal case of *Clark v. United States*,[114] Justice Cardozo, writing for the Court, stated that while there were "early cases apparently to the effect that a mere charge of illegality, not supported by any evidence" would be sufficient to invoke the crime-fraud exception, "this conception of the privilege is without support in later rulings."[115] Instead, "[t]o drive the privilege away, there must be 'something to give colour to the charge;' there must be '*prima facie* evidence that has some foundation

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[114] Clark v. United States, 289 U.S. 1 (1932). The case involved a judgment of criminal contempt against a juror who had failed to disclose during voir dire that she had personal and professional ties to the defendant's company. She also discussed information obtained outside of trial and became the lone holdout for acquittal during deliberations which she refused to join. A mistrial was declared when the jury was unable to reach a verdict. The government then sought a rule to show cause why the juror should not be held in contempt for making false statements during voir dire and for obstructing the trial. After holding a hearing, the juror was held in criminal contempt. *See id.* at 7-9. On appeal and before the Supreme Court, the juror challenged the admission of evidence concerning the jury's deliberations, which she claimed were privileged. *See id.* at 12-13. The Court analyzed the claim of jury privilege by analogy to the attorney-client privilege and the crime-fraud exception. *See id.* at 15-16.

[115] *Id.* at 15.

in fact.' . . . When that evidence is supplied, the seal of secrecy is broken."[116]

Justice Cardozo's formulation of the prima facie showing as evidence giving "colour to the charge" of crime or fraud has been widely adopted.[117] There has been little guidance or continuity, however, in the standards applied by the courts in evaluating the substance of the prima facie showing.[118]

Nonetheless, there is agreement that the prima facie showing is less than proof beyond a reasonable doubt.[119] Some courts have adopted the

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[116] *Id.* (citations omitted).

[117] *Id.*; *see, e.g.*, *In re* Special Sept. 1978 Grand Jury (II), 640 F.2d 49, 60 (7th Cir. 1980); *In re* September 1975 Grand Jury Term, 532 F.2d 734, 737 (10th Cir. 1976); *see also* Charles Woods Television Corp. v. Capital Cities/ABC, Inc., 869 F.2d 1155, 1159 (8th Cir. 1989) (noting that under Missouri law, party asserting exception must show "something more substantial than suspicion, surmise, and speculation"); *In re Grand Jury Proceedings*, 857 F.2d at 712 (noting that government must show more than that attorney was target of grand jury investigation); United States v. Dyer, 722 F.2d 174, 178 (5th Cir. 1983) (stating that government must offer competent evidence of the crime or fraud and cannot simply rely on the indictment to establish a prima facie showing); *In re* Grand Jury Proceedings in Matter of Fine, 641 F.2d 199, 204 (5th Cir. 1981) (stating that government must establish more than "a strong suspicion").

[118] *See* Silbert, *supra* note 50, at 361-62. According to *Silbert*:

> The Supreme Court has said that the mere charge of fraud will not suffice to destroy the attorney-client privilege; rather, the party seeking to overcome the privilege must establish a prima facie case of a continuing or contemplated crime or fraud. The courts have done little to explain how detailed the showing must be.

Id. (footnote omitted). Indeed, the *Clark* decision itself provides little guidance, as Professor Fried has noted:

> In *Clark* not only had a prima facie case been established, but the juror's perjury had been so abundantly proven by independent evidence that the admission of evidence concerning discussions in the jury room would, if erroneous, have been harmless. The opinion thus provides little guidance as to the minimum quantum of evidence necessary to overcome the privilege.

Fried, *supra* note 13, at 463 (footnote omitted).

[119] *See* United States v. Davis, 1 F.3d 606, 609 (7th Cir. 1993); *In re* Feldberg, 862 F.2d 622, 625 (7th Cir. 1988); *In re* Sealed Case, 754 F.2d 395, 399 (D.C. Cir. 1985); *In re* Sealed Case, 676 F.2d 793, 814 (D.C. Cir. 1982); United States v. Friedman, 445 F.2d 1076, 1086 (9th Cir. 1971). As Professor Gergacz commented:

> A court in its review of the crime-fraud exception contention is not to establish

definition in *Black's Law Dictionary*,[120] to the effect that a prima facie showing is sufficient proof that "will support [a] finding if evidence to the contrary is disregarded."[121] Courts have also characterized the prima facie showing as "evidence which, if believed by the fact finder, would be sufficient to support a finding that the elements of the crime-fraud exception were met."[122] Other courts view the prima facie showing as being the equivalent of probable cause.[123]

Several courts have articulated less stringent standards. One court has said that the prima facie showing must raise "more than a strong suspicion . . . but it need not be as strong as that needed to effect an arrest or secure an indictment," i.e., probable cause.[124] Another court relied on only "substantial evidence."[125] The prima facie showing has also been described as sufficient for "reasonable cause to believe" that an attorney's services were employed in furtherance of a crime or fraud.[126] Yet other courts

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a criminal conviction. Nor is the court to anticipate a possible criminal indictment or charge being filed concerning the improper activity. Instead, the prima facie showing should establish an abuse of the attorney-client relationship sufficient to outweigh the important justice considerations behind the privilege.

Gergacz, *supra* note 10, at 1677.

[120] The "prima facie case" is defined as "[s]uch as will prevail until contradicted and overcome by other evidence. A case which has proceeded upon sufficient proof to that stage where it will support finding if evidence to contrary is disregarded." BLACK'S LAW DICTIONARY 1189-90 (6th ed. 1990) (citations omitted).

[121] *Id.*; *see, e.g.*, *In re* International Sys. & Controls Corp. Sec. Litig., 693 F.2d 1235, 1242 (5th Cir. 1982); *In re Grand Jury Proceedings in Matter of Fine*, 641 F.2d at 203; Pfizer, Inc. v. Lord, 456 F.2d 545, 549 (8th Cir. 1972); *see also* Duplan Corp. v. Deering Milliken, Inc., 540 F.2d 1215, 1220 (4th Cir. 1976) ("[W]hile a *prima facie* showing need not be such as to actually prove the disputed fact, it must be such as to subject the opposing party to the risk of non-persuasion if the evidence as to the disputed fact is left unrebutted.") (footnote omitted).

[122] Haines v. Liggett Group, Inc., 975 F.2d 81, 95-96 (3d Cir. 1992); *see also* United States v. Laurins, 857 F.2d 529, 541 (9th Cir. 1988); *In re* Grand Jury Investigation, 842 F.2d 1223, 1226 (11th Cir. 1987); *In re Sealed Case*, 754 F.2d at 399; *In re Sealed Case*, 676 F.2d at 815.

[123] *See, e.g.*, *In re* John Doe, Inc., 13 F.3d 633, 637 (2d Cir. 1994); *In re* Grand Jury Subpoenas Duces Tecum, 798 F.2d 32, 34 (2d Cir. 1986).

[124] *In re* Antitrust Grand Jury, 805 F.2d 155, 165 (6th Cir. 1986) (citations omitted).

[125] United States v. Shewfelt, 455 F.2d 836, 840 (9th Cir. 1972).

[126] United States v. Chen, 99 F.3d 1495, 1503 (9th Cir. 1996); *see also In re* Grand Jury Proceedings, 87 F.3d 377, 381 (9th Cir. 1996); *In re* Grand Jury

consider the prima facie showing to be evidence sufficient to warrant further inquiry or which would require an explanation of the circumstances from the privilege holder.[127]

These are more than simple semantic differences. Rather, the different formulations reflect a fundamental conflict among the courts concerning the evidentiary threshold that must be met before the attorney-client privilege will be invaded.[128] This basic conflict would seem ripe for resolution by the Supreme Court, but the Court has thus far declined to provide authoritative guidance on this essential issue.[129]

2. *The Evidence That Can Be Considered in Regard to the Prima Facie Showing*

a. Independent Evidence

One issue that the Supreme Court addressed in *Zolin v. United States*[130] was whether the prima facie showing could be predicated on the privileged

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Proceedings, 867 F.2d 539, 541 (9th Cir. 1989); Appeal of Hughes, 633 F.2d 282, 291 (3d Cir. 1980). The Ninth Circuit has described the "reasonable cause" standard as being "more than suspicion but less than a preponderance of evidence." *Chen*, 99 F.3d at 1503. The Second Circuit has suggested that "reasonable basis to suspect" is tantamount to a prima facie showing, *see In re* Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983, 731 F.2d 1032, 1039 (2d Cir. 1984), or to probable cause, *see* Avramides v. First Nat'l Bank of Md., No. 87 Civ. 5732, 1997 U.S. Dist. LEXIS 1647 (S.D.N.Y. 1997).

[127] *See* United States v. Davis, 1 F.3d 606, 609 (7th Cir. 1993); *In re* Feldberg, 862 F.2d 622, 625 (7th Cir. 1988).

[128] Indeed, the trend has been seen as a lowering of the evidentiary standard to be met. *See* Karen J. Rolandelli, Note, *Confidentiality and the Crime Fraud Exception*, 3 GEO. J. LEGAL ETHICS 139, 143-44 (1989) ("[C]ourts have broadened the crime-fraud exception by steadily lowering the procedural threshold for its application. In the last ten years, some courts have even abandoned the prima facie test and have replaced it with a lower standard of proof. . . .") (footnote omitted); *see also* Massing, *supra* note 8, at 1218 ("The courts may be likely to require a relatively low standard of proof. . . . [I]f the client has behaved legally, no harm will come from disclosure. If, on the other hand, the client has abused the attorney-client relationship, then there is no basis for the privilege.").

[129] Indeed, in its opinion in *Zolin v. United States*, 491 U.S. 554 (1989), the Court recognized the confusion and controversy resulting from the phrase "prima facie case" as used in *Clark v. United States*, 289 U.S. 1, 14 (1932). *See Zolin*, 491 U.S. at 563 n.7. Nevertheless, the Court specifically declined to decide "the quantum of proof necessary ultimately to establish the applicability of the crime-fraud exception." *Id.*

[130] *Zolin*, 491 U.S. at 554.

communication itself rather than on evidence extrinsic to the attorney-client communication.[131] The rule that the prima facie showing must be based on "independent" evidence originated in the Ninth Circuit's decision in *United States v. Shewfelt*.[132] Precedent for the rule was uncertain,[133] and

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[131] Justice Blackmun framed the issue as follows:

> The specific question presented is whether the applicability of the crime-fraud exception must be established by "independent evidence" (*i.e.*, without reference to the content of the contested communications themselves), or, alternatively, whether the applicability of that exception can be resolved by an *in camera* inspection of the allegedly privilege material.

Zolin, 491 U.S. at 556.

[132] United States v. Shewfelt, 455 F.2d 836 (9th Cir. 1972). The court in *Shewfelt* held that "before the privileged status of these communications can be lifted, the government must first establish a prima facie case of fraud independently of the said communications." *Id.* at 840. The Ninth Circuit adhered to its rule in *Shewfelt* in *In re Grand Jury Proceedings*, 867 F.2d 539, 541 (9th Cir. 1989), and *United States v. Zolin*, 842 F.2d 1135, 1136 (9th Cir. 1988) (en banc), *aff'd in part and vacated in part*, 491 U.S. 554 (1989).

[133] The Ninth Circuit's decision appears to have been predicated on the requirement of a prima facie showing in *Clark*, 289 U.S. at 15, and relied on two previous decisions of the Second and Fourth Circuits, neither of which addressed the necessity of evidence extrinsic to the privileged communication.

In the first, *United States v. Bob*, 106 F.2d 37 (2d Cir. 1939), a former attorney for the defendant testified at trial concerning the defendant's control of several mining companies whose stock was alleged to have been sold fraudulently. The court upheld the conclusion that the communications between the attorney and the defendant were within the crime-fraud exception. *See id.* at 40. The court noted that the government was required to establish a prima facie case and stated that "here such a case has already been established against Bob through Israel, named as co-conspirator, who testified before [the attorney] took the stand as to details of the stock-selling campaign." *Id.* The court also noted that the attorney's testimony was not the only evidence of the defendant's involvement. "The commission of the crime was not proved by [the attorney's] testimony alone, although there is no doubt of its extensive and damaging character." *Id.* Thus, while it appears that there was independent evidence of the defendant's participation in the fraudulent scheme, there does not appear to be a requirement for such evidence as a predicate for the prima facie case.

In the second decision, *Union Camp Corp. v. Lewis*, 385 F.2d 143 (4th Cir. 1967), it appears that in evaluating the government's prima facie showing, the district court examined the documents to which privilege had been asserted. As the court of appeals noted, "[t]he court heard argument of counsel, examined the controversial papers, considered other evidence available to the grand jury, and

it has generally not been followed.[134] The independent evidence restriction has also been criticized as being too great an impediment to the search for truth.[135]

Against this background, the Supreme Court held in *United States v. Zolin* that "[a] *per se* rule that the communications in question may never be considered creates . . . too great an impediment to the proper functioning of the adversary process."[136] Accordingly, it is now settled that a court may

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denied the motion to quash." *Id.* at 144. Rather than support a requirement for independent evidence, the *Union Camp* decision appears to uphold consideration of the privileged document as part of the prima facie showing.

[134] The Eighth Circuit declined to follow the *Shewfelt* rule, finding the requirement of independent evidence to be unsupported. *See In re* Berkley & Co., 629 F.2d 548, 553 n.9 (8th Cir. 1980). Other courts of appeal have also upheld and engaged in *in camera* inspections of privileged documents. *See In re* Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983, 731 F.2d 1032, 1037-39 (2d Cir. 1984); *In re* John Doe Corp., 675 F.2d 482, 491 (2d Cir. 1982); *In re* Sept. 1975 Grand Jury Term, 532 F.3d 734, 738 (10th Cir. 1976).

[135] For example, one commentator observed:

> [T]he best–frequently the only–evidence to prove that a communication was made in connection with a future wrong lies in its own content. Thus if the apparently privileged statements are admitted in deciding upon the exception, the consequence is the incurable harm of unjustified disclosure in those instances where allegations of criminal purpose turn out to be unsupported. On the other hand, if the privilege must be honored unless the exception is overwhelmingly established by other evidence, the exception could operate in but few cases.

Note, *supra* note 85, at 736. However, one commentary suggested that such a showing could be made by

> facts tending to show that the particular crime or fraud charged could not normally have been committed in the absence of legal assistance; the number and duration of meetings between attorney and client at or about the time of the alleged crime or fraud; nonprivileged documents which relate to the alleged crime or fraud; the nature and duration of the attorney-client relationship generally; and admissions by the client to third parties.

Callan & David, *supra* note 59, at 349.

[136] *Zolin*, 491 U.S. at 569. The *Zolin* case arose from the Internal Revenue Service ("IRS") investigation of L. Ron Hubbard, founder of the Church of Scientology. In the course of the investigation, the IRS sought production of two tapes which had been filed with the district court in connection with other litigation involving Mr. Hubbard's wife and which the district court found were privileged. In support of its motion to enforce the summons, the IRS presented two declarations by one of its agents. One of the affidavits contained excerpts of a transcript of the tapes, which the IRS agent claimed he had obtained from a third-

consider the content of the privileged conversation in determining whether the crime-fraud exception applies to an otherwise privileged communication.

The abandonment of the independent evidence restriction has been criticized as yet a further lowering of the evidentiary standards for invocation of the crime-fraud exception and thus weakening the safeguards envisioned by Justice Cardozo in *Clark v. United States*.[137] It has also been suggested that with the loosening of the standards there is a risk that the exception will swallow the privilege.[138]

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party source. The district court found that the IRS had not made a prima facie showing sufficient to defeat the privilege. On appeal to the Ninth Circuit, the district court's determination that the IRS had not made a prima facie showing was affirmed on the basis of the court's review of the "independent" evidence. *See id.* at 558-61.

[137] Clark v. United States, 289 U.S. 1 (1932); *see* Ann M. St. Peter-Griffith, Note, *Abusing the Privilege: The Crime Fraud Exception to Rule 501 of the Federal Rules of Evidence*, 48 U. MIAMI L. REV. 259, 270 (1993) ("By abolishing the 'independent evidence' rule, the Supreme Court diminished some of the safeguards Justice Cardozo imposed in *Clark* to establish workable parameters for the rule"). Even before *Zolin* was decided, Professor Fried remarked that "[i]n recent years, the courts have lowered the evidentiary standard that the opponent of the privilege must meet to overcome the privilege and generally have rejected any requirement that there be evidence of fraud independent of the confidential communication itself." Fried, *supra* note 13, at 461-62 (footnote omitted).

[138] Silbert remarks:

> As one court aptly stated, there is a danger that "in giving practical application to the [crime-fraud exception] rule 'the secret must be told in order to see whether it ought to be kept.'" As another court has more recently written, "where disclosure is sought for the purpose of determining whether such misbehavior has occurred, [it] involves an entirely different problem–an exception which threatens to swallow the rule."

Silbert, *supra* note 50, at 365-66 (quoting Hamil & Co. v. England, 50 Mo. App. 338, 348 (1892); Moody v. Internal Revenue Serv., 654 F.2d 795, 800 n.17 (D.C. Cir. 1981)). According to Fried:

> In the great majority of instances, the commission of a crime or fraud is the ultimate issue in the case, and the attorney-client communication is relevant precisely as evidence of such commission. A mere allegation of fraud should not be enough to overcome the privilege, however. It is desirable to avoid the circularity of relying upon the confidential communication itself to prove the client's fraudulent intent, which in turn serves as the necessary justification for the disclosure. This difficulty . . . is central to the modern history of the crime-fraud exception.

Fried, *supra* note 13, at 461. These observations were all made before the Supreme

b. Competent Evidence

A second evidentiary issue is whether the required prima facie showing must be based on competent, admissible evidence. Such a requirement was suggested by the Fifth Circuit in *United States v. Dyer*,[139] which held that "when the government can by competent evidence establish a prima facie case that an attorney was being used in the commission of a crime there is no privilege."[140]

Nonetheless, privilege holders have not been successful in asserting such a requirement.[141] District courts are not restricted by the rules of evidence in determining preliminary questions of applicability of privileges.[142] Courts also regularly rely on affidavits summarizing grand jury testimony or other evidence[143] and on a "good faith statement"

Court rejected the independent evidence rule in *Zolin*.

[139] United States v. Dyer, 722 F.2d 174 (5th Cir. 1983).

[140] *Id.* at 178.

[141] *See In re* Grand Jury Subpoena, 884 F.2d 124, 127 (4th Cir. 1989).

[142] Under Federal Rule of Evidence 104(a):

> Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b) [addressing relevancy conditioned on fulfillment of a condition of fact]. In making its determination it is not bound by the rules of evidence except those with respect to privileges.

FED. R. EVID. 104(a). Federal Rule of Evidence 1101(d), governing applicability of the rules of evidence, similarly states, "The rules (other than with respect to privileges) do not apply in the following situations: (1) *Preliminary Questions of Fact.* The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104." FED. R. EVID. 1101(d). Thus, the Fourth Circuit in *In re Grand Jury Subpoena* stated, "This court and others, when reviewing whether the crime-fraud exception applies, have permitted district courts to rely on evidence not ordinarily admissible at trial." *In re Grand Jury Subpoena*, 884 F.2d at 127.

[143] *See* United States v. Chen, 99 F.3d 1495, 1503 (9th Cir. 1996); *In re* Richard Roe, Inc., 68 F.3d 38, 39 (2d Cir. 1995); *In re* Grand Jury Proceedings Thursday Special Grand Jury Sept. Term 1991, 33 F.3d 342, 345 (4th Cir. 1994); *In re* Grand Jury Subpoena 92-1(SJ), 31 F.3d 826, 828 (9th Cir. 1994); *In re* Grand Jury Proceedings, 867 F.2d 539, 541 (9th Cir. 1989); *In re* Grand Jury (G.J. No. 87-03-A), 845 F.2d 896, 898 (11th Cir. 1988); *In re* Grand Jury Investigation, 842 F.2d 1223, 1228 (11th Cir. 1987); *In re* Grand Jury Subpoena Duces Tecum, 798 F.2d 32, 33 (2d Cir. 1986); *In re* Sealed Case, 754 F.2d 395, 400 (D.C. Cir. 1985); *In re* Grand Jury Proceedings–Gordon, 722 F.2d 303, 309 (6th Cir. 1983); *In re* Grand

of government counsel.[144] Indeed, this was the procedure employed in *Zolin*.[145]

Unquestionably, the district courts have broad discretion in deciding whether the attorney-client privilege will be overborne by the crime-fraud exception.[146] They are not prohibited by the rules of evidence from considering evidence that would be inadmissible at trial when determining questions of privilege. Nevertheless, although courts enjoy wide latitude in the type of information given consideration, the courts should be more wary in relying solely on the representations of government agents, which are not subject to testing or rebuttal, because the proceedings are usually conducted *ex parte* and *in camera* with little or no meaningful notice to the privilege holder of the allegations of abuse.

B. The Nature of the Proceedings

Judicial determinations of the applicability of the crime-fraud exception are routinely made by district courts *in camera*. When privileged documents or testimony are sought by the grand jury, the court's *in camera* review is initiated by the government's *ex parte* application.

These practices result from the long-standing preference for *in camera* review as the means for determining questions of privilege and from the long-established policy of grand jury secrecy. Although the procedures endorsed by the Supreme Court in *Zolin* attempt to balance these policies with a concern for judicial economy and the interests of privilege holders, the confidentiality of attorney-client communications is regularly pierced with little or no meaningful opportunity for the privilege holder to be heard. How one reacts to this emerging fact of judicial life depends almost entirely on how one weighs these competing interests.

Jury Proceeding, 674 F.2d 309, 310 (4th Cir. 1982).

[144] *In re Grand Jury Investigation*, 842 F.2d at 1226; *see also In re* Vargas, 723 F.2d 1461, 1467 (10th Cir. 1983).

[145] *See* United States v. Zolin, 491 U.S. 554, 558 (1989).

[146] *See In re* Grand Jury Investigation, 974 F.2d 1068, 1072 (9th Cir. 1992); *In re Grand Jury Subpoena*, 884 F.2d at 127; *In re* Grand Jury Proceedings, 857 F.2d 710, 712 (10th Cir. 1988); *In re* Grand Jury Subpoena Duces Tecum, 773 F.2d 204, 206 (8th Cir. 1985); *In re Sealed Case*, 754 F.2d at 399-400; *In re Vargas*, 723 F.2d at 1467; *In re* Berkley & Co., 629 F.2d 548, 553 (8th Cir. 1980); *In re* September 1975 Grand Jury Term, 532 F.2d 734, 737 (10th Cir. 1976).

1. In Camera *Proceedings*

The Supreme Court has long made clear its approval of *in camera* review as the preferred means of determining questions of privilege.[147] In this connection, the Supreme Court has agreed with the observation that "'*in camera* inspection . . . is a smaller intrusion upon the confidentiality of the attorney-client relationship than is public disclosure.'"[148] Proponents of the privilege have also availed themselves of *in camera* review in support of their assertion of the privilege.[149]

When assertions of the crime-fraud exception are made by the government in conjunction with a grand jury investigation, as is increasingly the case, other powerful social interests in grand jury secrecy also weigh heavily in favor of *in camera* proceedings. Indeed, the confidentiality of matters occurring before the grand jury is deeply rooted in our jurisprudence.[150] The grand jury, whose existence is recognized in the

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[147] *See* Kerr v. United States Dist. Ct. for the N. Dist. of Cal., 426 U.S. 394, 405-06 (1976) ("[T]his Court has long held the view that *in camera* review is a highly appropriate and useful means of dealing with claims of governmental privilege."); United States v. Nixon, 418 U.S. 683, 706 (1974) ("[W]e find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for *in camera* inspection with all the protection a district court will be obliged to provide.").

[148] *Zolin*, 491 U.S. at 572 (quoting Fried, *supra* note 13, at 467).

[149] *See In re* Horn, 976 F.2d 1314, 1318 (9th Cir. 1992) ("'The proper procedure for asserting the attorney-client privilege as to particular documents, or portions thereof, [is] for [the individual] to submit them *in camera* for the court's inspection, providing an explanation of how the information fits within the privilege.'") (quoting *In re* Grand Jury Witness (Salas), 695 F.2d 359, 362 (9th Cir. 1982)); Clarke v. American Commerce Nat'l Bank, 974 F.2d 127, 129 (9th Cir. 1992) ("A district court may conduct an in camera inspection of alleged confidential communications to determine whether the attorney-client privilege applies.").

[150] The Supreme Court has observed:

> The institution of the grand jury is deeply rooted in Anglo-American history. In England, the grand jury served for centuries both as a body of accusers sworn to discover and present for trial persons suspected of criminal wrongdoing and as a protector of citizens against arbitrary and oppressive governmental action. In this country the Founders thought the grand jury so essential to basic liberties that they provided in the Fifth Amendment that federal prosecution can only be instituted by "a presentment or indictment of a Grand Jury." The grand jury's historic

Constitution,[151] is empowered with extraordinary authority to conduct broad ranging investigations of possible violations of law.[152] To protect both the integrity of the grand jury's investigation and the rights of those who are the subjects of investigation,[153] proceedings before the grand jury

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functions survive to this day. Its responsibilities continue to include both the determination whether there is probable cause to believe a crime has been committed and the protection against unfounded criminal prosecutions.

United States v. Calandra, 414 U.S. 338, 342-43 (1974) (footnotes and citations omitted); *see also* Branzburg v. Hayes, 408 U.S. 665, 687 (1972); Costello v. United States, 350 U.S. 359, 362 (1956).

[151] The Fifth Amendment provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. CONST. amend. V. The Court has viewed this authority as "show[ing] the high place [the grand jury] held as an instrument of justice." *Costello*, 350 U.S. at 362.

[152] The grand jury has been described as follows:

It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquires is not to be limited narrowly by questions or propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime.

Blair v. United States, 250 U.S. 273, 282 (1919). Thus, the Court said in *United States v. R. Enterprises, Inc.*, 498 U.S. 292 (1991):

The grand jury occupies a unique role in our criminal justice system. It is an investigatory body charged with the responsibility of determining whether or not a crime has been committed. Unlike this Court, whose jurisdiction is predicated on a specific case or controversy, the grand jury "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." The function of the grand jury is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred. As a necessary consequence of its investigatory function, the grand jury paints with a broad brush. "A grand jury investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.'"

Id. at 297 (citations omitted).

[153] The Supreme Court has noted in this regard:

Historically, [the grand jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive prosecution; it serves the invaluable function in our society of standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.

are held in secret,[154] and that secrecy is codified in the Federal Rules of Criminal Procedure.[155] Thus, the need for *in camera* review of a prima facie showing based on matters occurring before a grand jury is compelling.[156]

Wood v. Georgia, 370 U.S. 375, 390 (1962).

[154] The "'long-established policy that maintains the secrecy of grand jury proceedings in the federal courts'" has been recognized by the Supreme Court. United States v. Sells Eng'g, Inc., 463 U.S. 418, 424 (1983) (quoting United States v. Proctor & Gamble Co., 356 U.S. 677, 681 (1958)). "The grand jury as a public institution serving the community might suffer if those testifying today knew that the secrecy of their testimony would be lifted tomorrow." *Proctor & Gamble*, 356 U.S. at 682. The Court explained in *Douglas Oil Co. of Cal. v. Petrol Stops Northwest*, 441 U.S. 211 (1979):

> [I]f preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.

Id. at 219.

[155] Federal Rule of Criminal Procedure 6(e)(2) states the general rule of grand jury secrecy:

> A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made [as an agent of the attorney for the government pursuant to Rule 6(e)(3)(A)] shall not disclose matters occurring before the grand jury.

FED. R. CRIM. P. Rule 6(e)(2). Additionally, Rule 6(d) restricts those who may be present during grand jury proceedings. *See id.* Rule 6(d). With respect to this provision, the Supreme Court has noted that Rule 6(d)

> is designed to guard the secrecy of the grand jury proceedings, prevent intimidation of jurors, and guarantee that the grand jury is given the opportunity to make an independent examination of the evidence and render its probable cause and charging determinations free of undue prosecutorial influence.

United States v. Mechanik, 475 U.S. 66, 74 (1986) (O'Connor, J., concurring).

[156] *See In re* John Doe Corp., 675 F.2d 482, 490 (2d Cir. 1982) ("Here, the materials contained in the *in camera* submission are not on the verge of disclosure to Doe Corp. and may, in fact, never be disclosed. An ongoing interest in grand jury secrecy is at stake."). Thus, as the Second Circuit stated in *In re John Doe Corp.*, upholding the use of *in camera* proceedings:

For these reasons, *in camera* review is now the accepted procedure for evaluation of the crime-fraud exception.[157] However, the Supreme Court has recognized that even *in camera* review may result in disclosure of that which the privilege was meant to protect.[158] The Court also recognized the

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> We recognize that appellants cannot make factual arguments about materials they have not seen and to that degree they are hampered in presenting their case. The alternatives, however, are sacrificing the secrecy of the grand jury or leaving the issue unresolved at this critical juncture. We believe those alternatives less desirable than the *in camera* submission utilized by Judge Sifton. . . . Leaving the issue unresolved, on the other hand, would permit wholly untested claims of privilege to obstruct investigations of federal crimes. There is a public interest in respecting confidentiality of communications by clients to their attorneys, in maintaining the secrecy of grand jury proceedings and in investigating and prosecuting federal crimes. Where these interests conflict or the validity of privilege claims based on these interests are challenged, the limitations on adversary argument caused by *in camera* submissions are clearly outweighed by the benefits of obtaining a judicial resolution of a preliminary evidentiary issue while preserving confidentiality.

Id.; *accord In re* Grand Jury Proceedings in the Matter of Freeman, 708 F.2d 1571, 1576 (11th Cir. 1983) ("It is settled . . . that cautious use of *in camera* proceedings is appropriate to resolve disputed issues of privilege. The need to preserve the secrecy of an ongoing grand jury investigation is of paramount importance.") (citations omitted).

[157] *See, e.g.*, *In re* Grand Jury Proceedings, 87 F.3d 377, 379 (9th Cir. 1996); *In re* Grand Jury Subpoena, 884 F.2d 124, 127 (4th Cir. 1989); *In re* Impounded Case (Law Firm), 879 F.2d 1211, 1214 (3d Cir. 1989); *In re* Antitrust Grand Jury, 805 F.2d 155, 168-69 (6th Cir. 1986); *In re* Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983, 731 F.2d 1032, 1036 (2d Cir. 1984); *In re* Vargas, 723 F.2d 1461, 1467 (10th Cir. 1983); *In re Grand Jury Proceedings in Matter of Freeman*, 708 F.2d at 1576; *In re* Marc Rich & Co., A.G., 707 F.2d 663, 670 (2d Cir. 1983); *In re* Grand Jury Proceedings, 674 F.2d 309, 310 (4th Cir. 1982); *In re* Sealed Case, 676 F.2d 793, 814 (D.C. Cir. 1981); *In re* Special Sept. 1978 Grand Jury (III), 640 F.2d 49, 57 (7th Cir. 1980); *In re* Berkley & Co., 629 F.2d 548, 553 (8th Cir. 1980); *In re* Grand Jury Proceedings, 604 F.2d 798, 800 (3d Cir. 1979); *In re* Murphy, 560 F.2d 326, 331 (8th Cir. 1977); *In re* September 1975 Grand Jury Term, 532 F.2d 734, 738 (10th Cir. 1976); Union Camp Corp. v. Lewis, 385 F.2d 143, 144 (4th Cir. 1967).

[158] *See* United States v. Zolin, 491 U.S. 554, 570 (1989). The Court explained:

> A blanket rule allowing *in camera* review as a tool for determining the applicability of the crime-fraud exception . . . would place the policy of

risk that "opponents of the privilege" could use the *in camera* procedure "to engage in groundless fishing expeditions, with the district courts as their unwitting (and perhaps unwilling) agents."[159]

In response, the Supreme Court agreed with the view of several of the courts of appeal that the proponent of the crime-fraud exception should be required to make a preliminary showing that *in camera* review is justified.[160] Because the objective of this preliminary showing is quite different from that required to overcome the privilege,[161] the Supreme Court has said that the preliminary showing needed to trigger *in camera* review "need not be a stringent one."[162]

The required showing is " 'a factual basis adequate to support a good faith belief by a reasonable person' that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies."[163] In essence, this operates as a prima facie showing of the prima facie showing.

The "good faith belief" standard, which in the Court's view "strikes the correct balance,"[164] has been implemented by the courts of appeals.[165] However, simply because the requisite preliminary showing is made does not require that an *in camera* review be undertaken. The district court

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> protecting open and legitimate disclosure between attorneys and clients at undue risk. There is also reason to be concerned about the possible due process implications of routine use of *in camera* proceedings.

Id. at 571.

[159] *Id.*

[160] *See id.* The Court specifically noted the decision of the Second Circuit in *In re John Doe Corp.*, 675 F.2d at 490, and of the District of Columbia Circuit in *In re Sealed Case*, 676 F.2d at 815, in this regard. *See Zolin*, 491 U.S. at 570.

[161] *See* Haines v. Liggett Group, Inc., 975 F.2d 81, 96 (3d Cir. 1992) ("[A]t a very minimum, we must recognize that the objectives of the two proceedings are completely different. One merely seeks *in camera* examination of documents by the court; this is a comparatively non-dispositive procedural way station. The other seeks to break the seal of a highly protected privilege.").

[162] *Zolin*, 491 U.S. at 572.

[163] *Id.* (citation omitted).

[164] *Id.*

[165] *See* United States v. Chen, 99 F.3d 1495, 1502 (9th Cir. 1996); *In re* Grand Jury Subpoena 92-1(SJ), 31 F.3d 826, 830 (9th Cir. 1994); *Haines*, 975 F.2d at 96; *In re* Grand Jury Investigation, 974 F.2d 1068, 1072 (9th Cir. 1992); United States v. De La Jara, 973 F.2d 746, 748 (9th Cir. 1992).

retains discretion to decide whether to conduct an *in camera* review,[166] but as a practical matter, *in camera* review ordinarily follows a satisfactory preliminary showing.[167]

In conducting its *in camera* review, the district court's inquiry must be a focused one. For example, only documents generated during the alleged criminal scheme should be subject to the court's review.[168] Further, the district court should examine each document to which the crime-fraud exception is claimed to apply.[169] The court should also articulate the basis on which it was determined that disclosure is warranted by the crime-fraud exception.[170]

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[166] As the Supreme Court explained in *Zolin*:

> Once [the preliminary] showing is made, the decision whether to engage in *in camera* review rests in the sound discretion of the district court. The court should make that decision in light of the facts and circumstances of the particular case, including, among other things, the volume of materials the district court has been asked to review, the relative importance to the case of the alleged privileged information, and the likelihood that the evidence produced through *in camera* review, together with other available evidence then before the court, will establish that the crime-fraud exception does apply. The district court is also free to defer its *in camera* review if it concludes that additional evidence in support of the crime-fraud exception may be available that is *not* allegedly privileged, and that production of the additional evidence will not unduly disrupt or delay the proceedings.

Zolin, 491 U.S. at 572.

[167] Of course, the district court is also free to conclude that the prima facie showing to defeat the privilege has been made based on the preliminary showing. *See, e.g.*, *In re* Grand Jury Proceedings Thursday Special Grand Jury Sept. Term, 33 F.3d 342, 350 (4th Cir. 1994).

[168] *See In re Grand Jury Subpoena 92-1(SJ)*, 31 F.3d at 831 ("[T]he district court erred by failing to limit the scope of its *in camera* review to documents generated during the course of the Corporation's alleged criminal scheme.").

[169] *See In re* Richard Roe, Inc., 68 F.3d 38, 41 (2d Cir. 1995) ("We therefore remand this matter to the district court for an examination of each document under the proper standard."); *In re* Antitrust Grand Jury, 805 F.2d 155, 168 (6th Cir. 1986) ("[T]he only way the district court can determine if any of the documents are subject to a subpoena under the crime-fraud exception is by reviewing them."); *see, e.g.*, *In re* John Doe Corp., 675 F.2d 482, 486-87 (2d Cir. 1982); *In re* National Mortgage Equity Corp. Mortgage Pool Certificate Litig., 116 F.R.D. 297, 300 (C.D. Cal. 1987).

[170] *See, e.g.*, *In re Richard Roe, Inc.*, 68 F.3d at 41.

If production is ordered, the court shall specify the factual basis for the

2. *The Opportunity to Rebut the* Ex Parte *Showing*

Out of concern for preserving the secrecy of grand jury proceedings and concern for the avoidance of preliminary "mini-trials" of issues of privilege,[171] *in camera* review of the prima facie showing has been upheld against due process challenge. The *ex parte* character of the proceedings raises other significant due process issues, however.

It has been recognized that consideration of the *in camera* submission "'deprives one party to a proceeding of a full opportunity to be heard on an issue' and its use is justified only by a compelling interest."[172] The absence of notice of the basis of the crime-fraud claim further aggravates the inability of the privilege holder to meaningfully respond and to preserve the

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> crime or fraud that the documents or communications are deemed to have furthered, which of the parties asserting claims of privilege possessed a criminal or fraudulent purpose with respect to those documents or communications, and, if appropriate, whether the crime-fraud exception applies to an innocent joint privilege-holder.

Id.

[171] As Judge Wright observed in *In re Sealed Case*:

> In making this determination [whether the possibility that a privileged relationship has been abused is sufficient to alter the balance of costs and benefits that supports the privilege] courts will not be able to receive a complete adversary presentation of the issues, since one of the parties will not be privy to the information at issue. Any system that requires courts to make highly refined judgments–perhaps concerning volumes of documents–will most likely collapse under its own weight. And it would run afoul of the basic prescription[:] "Any holding that would saddle a grand jury with mini trials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in fair and expeditious administration of the criminal laws."

In re Sealed Case, 676 F.2d 793, 814 (D.C. Cir. 1982) (quoting Unites States v. Dionisio, 410 U.S. 1, 17 (1973)) (footnote omitted); *accord In re* Vargas, 723 F.2d 1461, 1467 (10th Cir. 1983) ("[The] determination can be made ex-parte and a 'preliminary mini-trial' is not necessary."); *In re* September 1975 Grand Jury Term, 532 F.2d 734, 737 (10th Cir. 1976) ("Proceedings related to the enforcement of a grand jury subpoena may not be converted into a preliminary trial on the merits.").

[172] *In re* John Doe, Inc., 13 F.3d 633, 636 (2d Cir. 1994) (quoting *In re John Doe Corp.*, 675 F.2d at 490).

privilege.[173] The court is also deprived of the robust factual development and legal argument necessary for an informed judicial decision.

The legitimate need to preserve grand jury secrecy has been found to be a sufficiently compelling interest to outweigh and cut off the ability of the privilege holder to be heard.[174] Thus, courts have overwhelmingly rejected due process claims where disclosure of the government's preliminary or prima facie showings risked compromising the secrecy of ongoing grand jury proceedings.[175]

Although such *ex parte, in camera* proceedings appear to be the norm, courts have exercised their discretion to allow the party opposing disclosure to offer contrary evidence or at least to argue that the privilege should be maintained.[176] Furthermore, where the need for grand jury secrecy has

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[173] One commentator notes:

> *In camera* inspection of ostensibly privileged documents is common on motions to quash grand jury subpoenas. In that context, the case for disclosure is not necessarily based solely on the attorney-client communications. Rather, the government may also submit affidavits and transcripts of grand jury testimony *ex parte*, and government attorneys will argue for the applicability of the exception in chambers. As a result, the attorney and the client cannot meaningfully dispute the court's finding that the government has established a prima facie case of fraud.

Fried, *supra* note 13, at 467.

[174] *See, e.g., In re Antitrust Grand Jury*, 805 F.2d at 161-62 ("To determine whether *in camera* inspection was proper . . . the government's interest must be balanced against the interests of the appellants. We believe that the balance in these types of cases should always be weighted presumptively toward the government when the targets of a grand jury investigation are requesting disclosure of grand jury testimony for use in that proceeding.") (citations omitted). The court noted, however, that this was not a case "where the parties have no notice or idea of the basis for the government's request." *Id.*

[175] *See, e.g., In re* Grand Jury No. 94-1, C.A. No. 95-50302, 1996 U.S. App. LEXIS 2148 (9th Cir. Jan. 31, 1996); *In re* Grand Jury Proceedings Thursday Special Grand Jury Sept. Term, 33 F.3d 342, 353 (4th Cir. 1994); *In re John Doe, Inc.*, 13 F.3d at 635; *In re* Grand Jury Subpoena, 884 F.2d 124, 126-27 (4th Cir. 1989); *In re Antitrust Grand Jury*, 805 F.2d at 162; *In re Vargas*, 723 F.2d at 1467; *In re* Grand Jury Proceedings–Gordon, 722 F.2d 303, 310 (6th Cir. 1983); *In re John Doe Corp.*, 675 F.2d at 490; *In re* Grand Jury Proceedings, 674 F.2d 309, 310 (4th Cir. 1982); *In re* Special Sept. 1978 Grand Jury (II), 640 F.2d 49, 56 (7th Cir. 1980); *In re September 1975 Grand Jury Term*, 532 F.2d at 737.

[176] *See In re Grand Jury Proceedings*, 33 F.3d at 353 ("The district court's decision to review the government's and the appellants' submissions *in camera* was an appropriate exercise of discretion . . . ."); *In re* Grand Jury Subpoena 92-1 (SJ),

abated or is not implicated, courts have properly allowed the privilege holder to be heard.[177]

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31 F.3d 826, 830 (9th Cir. 1994) ("[T]he record does not reflect whether the district court realized it had the discretion to consider the evidence offered by the Corporation in deciding whether to exercise its discretion to order *in camera* review."); *In re John Doe, Inc.*, 13 F.3d at 637 ("The district court proceeded to an *in camera* review of the allegedly privileged communication only after oral argument and after the threshold showing required by *Zolin* was made."); *In re* Feldberg, 862 F.2d 622, 626 (7th Cir. 1988) ("Here, as in the law of discrimination, a *prima facie* case must be defined with regard to its function: to require the adverse party, the one with superior access to the evidence and in the best position to explain things, to come forward with that explanation."); *In re* Grand Jury Proceedings in Matter of Fine, 641 F.2d 199, 203 (5th Cir. 1981) (allowing attorney to testify at evidentiary hearing in response to government's allegation that his services had been used in furtherance of his client's marijuana smuggling). Thus, as the court stated in *Appeal of Hughes*, 633 F.2d 282 (3d Cir. 1981):

> Before the Government can justify interrogation of attorneys, or their agents, with respect to matters which are prima facie work product, on the ground that the work product involved misconduct, it must demonstrate a reasonable basis for such a belief and the opposing attorney must be afforded an opportunity to respond to the government's allegations.

Id. at 291.

[177] As was stated in *Haines v. Liggett Group, Inc.*, 975 F.2d 81 (3d Cir. 1992):

> If the party seeking to apply the exception has made its initial showing, then a more formal procedure is required than that entitling plaintiff to *in camera* review. The importance of the privilege... as well as fundamental concepts of due process require that the party defending the privilege be given the opportunity to be heard, by evidence and argument, at the hearing seeking an exception to the privilege. We are concerned that the privilege be given adequate protection, and this can be assured only when the district court undertakes a thorough consideration of the issue, with the assistance of counsel on both sides of the dispute.
>
> We therefore must agree with petitioners' contention that where a fact finder undertakes to weigh evidence in a proceeding seeking an exception to the privilege, the party invoking the privilege has the absolute right to be heard by testimony and argument.

Id. at 96-97 (citations omitted); *accord In re* Taylor, 567 F.2d 1183, 1188-89 (2d Cir. 1977) (finding that government's interest in secrecy was minimal because the government was going to disclose grand jury materials to the witness during grand jury testimony); *see In re* A.H. Robins Co., 107 F.R.D. 2, 7-8 (D. Kan. 1985) (giving privilege holder opportunity to make written submission in opposition to crime-fraud exception). Commentary is in accord with this view. *See* Note, *supra* note 85, at 740. This Note states:

To be sure, there are situations in which the integrity of the grand jury's process warrant *in camera* proceedings in which the privilege holder is foreclosed from responding to the government's proffered justification of the crime-fraud exception. This procedure should be reserved for only the exceptional case under the most compelling circumstances where the confidentiality of the grand jury's proceedings are directly at stake. Instead, even in instances where the grand jury's investigation is ongoing, a controlled means of providing meaningful notice and opportunity to be heard should be afforded the privilege holder before client confidences are invaded.

III. CONCLUDING OBSERVATIONS

The confidentiality of attorney-client communications is the oldest and perhaps most venerated evidentiary privilege in our jurisprudence. Client confidentiality is deemed to be so central to the attorney-client relationship that the principles of ethics governing the legal profession enjoin attorneys to maintain confidentiality both as a matter of fiduciary obligation and as a means of ensuring the proper functioning of the legal system.[178] Despite

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> Once this burden [of persuading the court to examine the privileged communication] has been met and the second step reached, it would seem that the ultimate burden of persuasion ought to return to the person claiming privilege, since in theory the future crime or tort exception is simply an expression of the general requirements that define and justify a given privilege.

Id. Jennison states:

> The adverse effect of denying a client's claim of privilege without affording him or her an opportunity to be heard may be justified in the context of a grand jury proceeding because of the time constraints of such a proceeding. In addition, because of the confidential nature of the proceedings, the damage suffered by the client when his or her communications are disclosed may be minimal. However, neither of these considerations is present at trial, and there is, therefore, no basis for allowing a mere *prima facie* showing to dispel the client's privilege within the trial context.

Jennison, *supra* note 38, at 919.

[178] The Model Code of Professional Responsibility provides:

> Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that

the sanctity accorded the attorney-client privilege, increased reliance on the crime-fraud exception to the privilege as a means of invalidating the attorney-client privilege and compelling an attorney to be a witness against a client challenges the fundamental trust that is the essence of the attorney-client relationship.

Few would deny that the attorney-client relationship can be abused, and few would argue that the privilege should serve as "a cloak of secrecy" to shield that abuse. Indeed, when the attorney becomes an ally of the client's crime or fraud (knowingly or not), there is no principled basis for maintaining the privilege.

> volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-1 (1983). The Preamble to the Model Rules of Professional Conduct similarly provides: "A lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private." *Preamble* to MODEL RULES OF PROFESSIONAL CONDUCT (1998). Thus, the comment to Model Rule 1.6 states:

> The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.
>
> Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.
>
> A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

Id. Rule 1.6 cmt.

Nevertheless, while there may be general agreement with these broad themes, their implementation has proven troublesome. Thus, courts have fashioned procedures that allow the privilege to be pierced on grounds of which the privilege holder is not told, based on pleadings which the privilege holder is not shown, and in proceedings in which the privilege holder does not participate.

By focusing almost exclusively on the intent of the client in determining whether the attorney-client communication was in furtherance of a crime or fraud, courts have often failed to inquire whether there is substantive evidence that the attorney-client relationship was in fact abused or whether the attorney's services in fact furthered the client's unlawful scheme. Indeed, the Ninth Circuit has gone so far as to suggest that even advice from counsel that hinders a client's illegal plan may nonetheless be in furtherance of a crime or fraud.[179] If that were the case, virtually all of a lawyer's client counseling could be subject to the crime-fraud exception simply because the client later chose to ignore the advice.[180] Additionally, because the applicability of the crime-fraud exception is determined post hoc and often on the basis of the client's subsequent conduct, there is significant uncertainty in virtually every attorney-client communication whether confidentiality will be preserved.

Further, out of a well-founded respect for the secrecy of grand jury proceedings, courts have allowed the prima facie showing in support of the crime-fraud exception to be made *ex parte* without disclosure of the grounds to the privilege holder. Indeed, the privilege holder generally does not participate in these proceedings which, if a minimal preliminary showing is made, are conducted *in camera*.

However great society's interest may be in the integrity of the grand jury, society's very substantial interest in fostering attorney-client communication should not be thrown over so easily. Instead, in those instances in which grand jury secrecy is not implicated (i.e., in civil litigation) or when the importance of grand jury secrecy has abated (i.e., after the grand jury's investigation has concluded in the return of an indictment or a declination of prosecution), there is simply no justification for *ex parte* proceedings.

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[179] *See In re* Grand Jury Proceedings, 87 F.3d 377 (9th Cir. 1996).

[180] As Elihu Root once observed, "[a]bout half the practice of a decent lawyer [rests upon] telling would-be clients that they are damned fools and should stop." Geoffrey C. Hazard, Jr., *Doing the Right Thing*, 70 WASH. U. L.Q. 691, 699 (1992) (quoting 1 PHILLIP JESSE [sic], ELIHU ROOT 133 (1938)).

In cases where the interest in grand jury secrecy has vitality, other considerations apply. The disclosure of privileged information to a court *in camera* does not operate as a waiver of the attorney-client privilege.[181] In like fashion, a judicial determination of the applicability of the crime-fraud exception on the basis of an *ex parte* showing is not a final determination that privileged communications are subject to the crime-fraud exception.[182] Instead, the privilege holder may challenge the disclosure and use of otherwise privileged communications either by seeking dismissal of the indictment[183] or in a motion to suppress admission of the privileged

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[181] *See* United States v. Zolin, 491 U.S. 554, 568 (1989) ("We begin our analysis by recognizing that disclosure of allegedly privileged materials to the district court for purposes of determining the merits of a claim of privilege does not have the legal effect of terminating the privilege.").

[182] *See* United States v. Dyer, 722 F.2d 174, 179 (5th Cir. 1983).

> [W]e find no rational basis for concluding that the privilege is defeated for purposes of grand jury testimony but nonetheless is resurrected at trial. . . . Of course, if the evidence at trial persuades the trial court that the earlier established crime or fraud exception is in fact not established the privilege could be recognized.

Id. (citations omitted); *see also In re* Special Sept. 1978 Grand Jury (II), 640 F.2d 49, 57 (7th Cir. 1980) ("Crucial to our decision is the fact that the finding of prima facie fraud based on the *in camera* submissions waives the attorney-client privilege and work product doctrine only as to this Grand Jury subpoena and not in regard to any other proceeding."); *In re* Berkley & Co., 629 F.2d 548 (8th Cir. 1980).

> The potential defendants have had no opportunity to challenge [the government's showing] or to present contrary evidence which may show events in a different light. In these circumstances, the district court's preliminary determination that the documents are not privileged before the grand jury is not binding on the parties at any subsequent trial.

Id. at 555; *see also* Duplan Corp. v. Deering Milliken, Inc., 540 F.2d 1215, 1222 (4th Cir. 1976) ("It may well be that during the trial of this case the throwsters will be able to present sufficient evidence to make such a showing. Nothing in our opinion here forecloses that possibility.").

[183] For example, indictments have been challenged on the grounds that the grand jury considered admissions made following grants of immunity or in confessions that were suppressed as being involuntary. *See In re* Grand Jury Subpoenas Dated Dec. 7 & 8, 40 F.3d 1096, 1103 (10th Cir. 1994); United States v. Pino, 708 F.2d 523, 530 (10th Cir. 1983); United States v. Beery, 678 F.2d 856, 863 (10th Cir. 1982). As the Eighth Circuit explained in *In re Berkley & Co.*:

> The determination that the documents are not privileged pertains only to the grand jury proceedings. If indictments are returned and the matter proceeds to trial, Berkley and any individual defendants are free to reassert their

communications as well as any evidence derived from the communication.[184]

Courts also have broad authority to restrict the admissibility of attorney-client communications subject to the exception[185] and to fashion

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claims of privilege to prevent use of the documents at trial. The ultimate question of the relevance and admissibility of the documents at trial may then be determined, but only after all parties have had an opportunity to be heard. The district court's determination that there was prima facie evidence of criminal or fraudulent activity was based solely on the documents before it. The potential defendants have had no opportunity to challenge this evidence or to present contrary evidence which may show events in a different light. In these circumstances, the district court's preliminary determination that the documents are not privileged before the grand jury is not binding on the parties at any subsequent trial.

In re Berkley & Co., 629 F.2d at 555.

[184] *See* Federal Trade Comm'n v. Gibson Prods. of San Antonio, Inc., 569 F.2d 900, 903 (5th Cir. 1978) (stating that even though respondent has complied with an administrative subpoena, "[i]f this case were decided in Gibson's favor, relief would be available by an order requiring the FTC to return the subpoenaed documents and to forbid use of the material in the adjudicatory hearing."); *cf.* G.M. Leasing Corp. v. United States, 429 U.S. 338, 359 (1977) ("The books and records were returned, and the photocopies concededly have been destroyed; . . . The suppression issue, as to the books and records, obviously is premature and may be considered if and when proceedings arise in which the Government seeks to use the documents or information obtained from them.").

[185] Thus, for example, the court in *United States v. Dyer* commented:

> The district court has abundant resources to prevent abuse [of the crime-fraud exception]. It can refuse to allow use of the evidence until its relevance has first been established and given the concerns which we have identified [regarding protection of the Sixth Amendment right to counsel] a district court can insist that this relevance be more than marginal. . . . [T]he district judge has the power to so control the trial and the sequence of the evidence as to insure that evidence of a client's communication with his lawyer be used only after more than marginal relevance at trial is first demonstrated and only after it is convinced that the government effort to obtain and use the evidence was in good faith and was not an abuse of the grand jury or an effort to strike at opposing counsel.

Dyer, 722 F.2d at 178-79 (citations omitted); *accord In re* September 1975 Grand Jury Term, 532 F.2d 734, 738 (10th Cir. 1976) ("Our examination of the disputed documents convinces us that a potential relationship exists between the documents and the charges under investigation. No more is required when the concern is with a grand jury investigation.").

a remedy for improper access to privileged information.[186] For example, the court may direct the return of privileged documents and foreclose the introduction of testimony concerning privileged communications.[187] Nonetheless, simply restoring the privilege holder to the status quo ante may not be a sufficient remedy since effectively, once the privilege has been pierced, the damage is done.[188]

However, if the privilege holder is able to demonstrate that the government's *ex parte* prima facie showing was faulty and therefore that the crime-fraud exception should not apply, the burden would then fall on the government to demonstrate that the evidence underlying the indictment was derived from an independent source untainted by the privileged communications.[189] If the government is not able to make this showing or

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[186] *See* Church of Scientology of Cal., Inc. v. United States, 506 U.S. 9, 13 (1992).

[187] Thus, for example, in *Church of Scientology*, which arose following the Supreme Court's decision in *United States v. Zolin*, 491 U.S. 554 (1989), the Court held that an appeal from an order enforcing an IRS summons was not moot despite the fact that the privileged communications had been disclosed to the IRS during the pendency of the appeal because a remedy could nevertheless be fashioned.

> Even though it is now too late to prevent, or to provide a fully satisfactory remedy for, the invasion of privacy that occurred when the IRS obtained the information on the tapes, a court does have power to effectuate a partial remedy by ordering the Government to destroy or return any and all copies it may have in its possession.

Church of Scientology, 506 U.S. at 13.

[188] As Earl J. Silbert has observed:

> Whether or not the supposed privileged material can be used in a criminal trial or other subsequent judicial proceedings, the material has been disclosed in a nonadversarial proceeding and confidentiality has been breached. Even if disclosure is found unjustified, the harm may be irreparable, particularly in light of possible derivative use of the alleged crime-fraud information by the government.

Silbert, *supra* note 50, at 364; *see also* Jennison, *supra* note 38, at 938. Jennison states:

> If clients have evidence that may establish that their intent in seeking legal advice was not fraudulent, they must be allowed to submit such evidence *before* disclosure to the fact-finder. A post-disclosure determination that the clients' intent was not fraudulent is meaningless. The claim of privilege is destroyed as soon as the material is disclosed to the trier of fact.

Id.

[189] *See* Kastigar v. United States, 406 U.S. 441, 460 (1972); Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52, 79 n.18 (1964); United States v. Schwimmer, 924 F.2d 443, 446 (2d Cir. 1991); United States v. Williams, 817 F.2d 1136, 1138 (5th Cir. 1987). As the Court explained in *Kastigar*:

if the privileged information is central to the proof of an element of the government's case, the indictment should be dismissed lest any subsequent conviction be reversed on appeal.[190]

Accordingly, the government should be put to a choice when disclosure of a privileged communication is sought at the investigatory stage. On the one hand, the government can seek disclosure through an adversarial, evidentiary proceeding in which the privilege holder is allowed to participate in a meaningful way (i.e., with notice of the grounds of the crime-fraud claim and an opportunity to rebut the prima facie showing). If the privilege is defeated on the basis of such a hearing, the privilege holder would be foreclosed from re-litigating the matter post-indictment.

If, on the other hand, the government elects to proceed by way of an *ex parte* proceeding, in which the privilege holder has neither substantive notice of the government's claim nor a meaningful opportunity to be heard, the privilege holder would not be precluded from litigating the issue of the crime-fraud exception post-indictment. If the privilege were upheld based on the privilege holder's showing to rebut the claim of the crime-fraud exception, the government would then be required to demonstrate that there was an independent, untainted source of its evidence or else suffer suppression of the tainted evidence and, possibly, dismissal of the indictment.

This choice of proceeding should be left to the government, at least in the first instance.[191] The government is best positioned to evaluate both the importance of the privileged information to the completion of the grand jury's investigation and the relative importance of maintaining the secrecy of the grand jury's proceedings. In either event, whether during the

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> This burden of proof . . . is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.

Kastigar, 406 U.S. at 460.

[190] For example, in *United States v. White*, 887 F.2d 267 (D.C. Cir. 1989), the court reversed a conviction based in part on evidence of a privileged conversation between the defendant and his attorney which the court found was not within the crime-fraud exception. As Judge (now Justice) Ginsburg stated, "[b]ecause the afternoon conversation [between White and his attorney] was central to the government's proof that White had criminal intent, its improper admission cannot be deemed harmless." *Id.* at 272.

[191] The district court has authority, in any event, to hold an adversarial, evidentiary hearing at any stage. *See supra* notes 176-77 and accompanying text.

pendency of the grand jury's investigation or at a later time when the interest in grand jury secrecy has abated, it is only by allowing the privilege holder to be heard that the significant social and personal interests, in due process and attorney-client confidentiality, can be vindicated.