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# Revisiting the Crime-Fraud Exception to the Attorney-Client Privilege: A Proposal to Remedy the Disparity in Protections for Civil and Criminal Privilege Holders

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# Revisiting the Crime-Fraud Exception to the Attorney-Client Privilege: a Proposal to Remedy the Disparity in Protections for Civil and Criminal Privilege Holders

Cary Bricker\*

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*“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.”*<sup>1</sup>

## I. INTRODUCTION

The attorney-client privilege, developed from and governed by common law<sup>2</sup> is considered “the most sacred of all legally recognized privileges, and its preservation is essential to the just and orderly operation of our legal system.”<sup>3</sup> The proper administration of justice requires scrupulous respect for, and protection of, this privilege to ensure that individuals feel free to make complete and full disclosure of facts to their lawyers, including admitting to past crimes and acts of indiscretion.<sup>4</sup> To insure its efficacy, the protection granted by the privilege must be consistent and predictable.<sup>5</sup>

Without such full disclosure counsel cannot render effective and comprehensive legal advice. Consequently, though the attorney-client privilege is not absolute, its abrogation should occur in extremely rare circumstances where a court finds that the privilege holder abused the

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<sup>1</sup> *Upjohn v. United States*, 449 U.S. 383, 393 (1981).

<sup>2</sup> FED. R. EVID. 501. Eight factors must be satisfied for the common law attorney-client privilege to attach to communication: the communication must be (1) legal advice sought from a (2) professional legal advisor (3) where the communication is related to the legal purpose, (4) and is made in confidence, (5) by the client, and (6) is permanently protected for the client (7) from disclosure by himself or the legal advisor, (8) unless that protection is waived. John H. Wigmore, *Evidence* §2292 at 554 (McHaughton Rev. 1961).

<sup>3</sup> *United States v. Bauer*, 132 F.3d 504, 510 (9th Cir. 1997)..

<sup>4</sup> *Id.* at 529

<sup>5</sup> *See Upjohn*, 449 U.S. at 393 (“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.”)

privilege by an established quantum of proof. One such abuse\_warranting vitiating of the attorney-client privilege occurs where a client is using his lawyer to commit a crime or fraud.<sup>6</sup>

The crime-fraud exception, like the attorney-client privilege, is a creature of common law and applies in both the civil and criminal context.<sup>7</sup> Where the exception arises as part of civil litigation, procedural protections are in place to ensure that the privilege-holder can meaningfully challenge the adversary's claim, in open court, before a court orders outright disclosure of attorney-client communications.<sup>8</sup> In contrast, where it arises in criminal litigation, usually in the context of a grand jury investigation, the privilege-holder has no concomitant right to be heard; indeed, rarely is he informed of the specific conduct allegedly constituting crime-fraud nor is he provided the opportunity to rebut the same on papers or in an evidentiary hearing.<sup>9</sup> Instead, a trial judge generally receives *ex parte* submissions by the government, often followed by *in camera* proceedings where the court will review the privileged communication at issue and determine whether the crime-fraud exception applies. If yes, the privilege holder's counsel must testify before the grand jury regarding privileged communications or risk being held in contempt.<sup>10</sup> Without any meaningful opportunity to argue in defense of preserving the attorney-client privilege, the lawyer's confidential relationship with his client is forever abrogated.<sup>11</sup>

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<sup>6</sup> See *infra* Section II.A.

<sup>7</sup> *Id.* The ABA Model Rules of Professional Conduct also permit disclosure of client confidences under several scenarios, one of which tracks the crime-fraud exception. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2) (2007) (stating in pertinent part that counsel is permitted to disclose a client's crime or fraud when it is "reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services.").

<sup>8</sup> See *infra* Section II.B.

<sup>9</sup> *Id.*

<sup>10</sup> See *infra* Section III.

<sup>11</sup> *Id.*

Examining the procedures surrounding application of the crime-fraud exception—civil and criminal—raises several pivotal legal questions. First, what quantum of proof is necessary to invoke the crime-fraud exception, and to what extent does that answer depend upon whether the privilege-holder is a civil litigant or the subject/target of a grand jury investigation? Second, what due process protections are in place to ensure that crime-fraud has actually occurred before a court orders outright disclosure of attorney-client communications, and to what extent do those protections differ, civil versus criminal? Finally, why do privilege-holders in criminal cases have significantly fewer procedural protections than civil litigants?

The first section of this paper explores the varying burdens of proof, judicial procedures and protections that have evolved in connection with the crime-fraud exception over the last 30 years, illustrating the differential treatment between civil and criminal privilege-holders.<sup>12</sup> The federal cases demonstrate a trend toward conferring more due process protections on civil privilege-holders with no comparable trend toward criminal privilege-holders. The second section discusses the ramifications to the privilege-holder when a court vitiates the attorney-client privilege through application of the attorney-client privilege.<sup>13</sup> The third section reviews different ways that federal courts have conferred *some* procedural protections on privilege holders in criminal cases while attempting to balance these protections against the purported need for grand jury secrecy.<sup>14</sup> The final section of this article proposes legislation imposing additional procedural requirements on the prosecution as the party seeking discovery of privileged attorney-client communication, and on the court adjudicating the crime-fraud issue, to confer meaningful

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<sup>12</sup> *See infra* Section II.

<sup>13</sup> *See infra* Section III.

<sup>14</sup> *See infra* Section IV.

procedural protections on the privilege-holder in criminal cases.<sup>15</sup> The proposed legislation addresses the procedures surrounding the presentation of “crime-fraud” evidence to the court, establishes when notice of the allegations must be provided to the privilege-holder, and delineates when the affected party may rebut the allegations.<sup>16</sup> This legislation will arm the privilege-holder with due process protections, while respecting the need for secrecy in criminal investigations.<sup>17</sup>

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<sup>15</sup> *See infra* Section V.

<sup>16</sup> *Id.*

<sup>17</sup> The proposed legislation in this article addresses protection of attorney-client communications, oral and written, and does not encompass attorney work-product.

## II. BACKGROUND

### A. *The Quantum of Proof Required to Pierce the Attorney-Client Privilege under the Crime-Fraud Exception*

The Supreme Court first addressed the crime-fraud exception in *Clark v. United States*.<sup>18</sup> There, a juror neglected to inform the court of her personal and professional connections with the defendants and committed perjury by assuring the court of her lack of bias in the matter.<sup>19</sup> The Court held that a juror may not invoke the typical protection from exposure of the “arguments and the ballots of a juror . . . where the relation giving birth to it has been fraudulently begun or fraudulently continued.”<sup>20</sup> The Court analogized to the crime-fraud exception to the attorney-client privilege, where “the privilege takes flight if the [attorney-client] 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.”<sup>21</sup> The Court, in dicta,<sup>22</sup> then addressed for the first time the evidentiary standard needed to vitiate the attorney-client privilege through the crime-fraud exception: the moving party must make a *prima facie* showing that the crime-fraud has some basis in fact.<sup>23</sup> The Court did not, however, address any distinction between the quantum of proof necessary to pierce the privilege in civil versus criminal cases.

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<sup>18</sup> 289 U.S. 1, 15 (1933).

<sup>19</sup> *Id.* at 8.

<sup>20</sup> *Id.* at 13-14. The Court in *Clark* focused on the privilege a juror was entitled to in deliberations. *Id.* at 8.

<sup>21</sup> *Id.* at 15.

<sup>22</sup> Although the Court only speaks of the attorney-client privilege in dicta, *Clark* is frequently cited for its discussion of the crime-fraud exception and the *prima facie* burden of proof.

<sup>23</sup> *Clark*, 289 U.S. at 15 (“It is obvious that it would be absurd to say that the privilege could be got rid of merely by making a charge of fraud.’ To drive the privilege away, there must be ‘something to give colour [sic] to the charge’; there must be ‘prima facie evidence that it has some foundation in fact.’”) (quoting *O’Rourke v. Darbishire*, A.C. 581, 604 (1920)).

In 1989, the Supreme Court in *United States v. Zolin* again confronted the crime-fraud exception.<sup>24</sup> This time, the Court focused on a narrower issue: whether a party seeking to pierce the attorney-client privilege by alleging crime-fraud must rely exclusively on evidence and sources independent of the disputed attorney-client communications, or could instead request that the trial court review, *in camera*, the *actual privileged communications* at issue.<sup>25</sup> The Court rejected the independent evidence approach and instead laid out a two-step process to determine when the crime-fraud exception should be applied.<sup>26</sup> First, the moving party must make a threshold showing, using non-privileged evidence “of ‘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.”<sup>27</sup> Though the *Zolin* court did not specify the level of proof necessary to trigger *in camera* inspection, all courts that have addressed this issue concur that it is very low.<sup>28</sup> Second, the trial judge may hold an *in camera* review of the privileged communication itself in the form of documents,

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<sup>24</sup> 491 U.S. 554, 556 (1989).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 556-557. In selecting this approach, the Court found that *in camera* review did not violate any express provisions of the Federal Rules of Evidence although the interaction between Rules 104(a) and 1101(c) seemingly indicated that privileged communication could not be considered. *Id.* at 566. The Court instead concluded that Rule 104(a) did not prohibit reliance on the result of *in camera* review of privileged communication. *Id.* at 568.

<sup>27</sup> *Id.* at 572 (quoting *Caldwell v. District Court*, 644 P.2d 26, 33 (Colo. 1982)).

<sup>28</sup> Though the level of proof for *in camera* inspection under *Zolin* and its progeny is low, most courts require as part of that proof, some evidence by the moving party that “the client was engaged in or planning a criminal or fraudulent scheme when it sought the advice of counsel to further the scheme,” and that the privileged communications are “sufficiently related to” and were made “in furtherance of [the] intended or present, continuing illegality.” In re Grand Jury Proceedings, 87 F.3d 377, 380-81 (9th Cir. 1996) (quoting *United States v. Laurins*, 857 F.2d 529, 540 (9th Cir. 1988) and *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985)) (internal quotation marks omitted).



attorney testimony, or both. Whether to conduct that extra level of review is left to the “sound discretion” of the district court.<sup>29</sup>

The Supreme Court declined to clarify what quantum of proof the moving party must establish to compel outright disclosure, generally the second step of the two-part Zolin test.<sup>30</sup> That decision was made notwithstanding the Court’s acknowledgement that the phrase *prima facie* to describe the quantum of proof in *Clark* caused confusion and still remained “subject to question.”<sup>31</sup> As with *Clark* the Court made no mention of whether that quantum of proof should differ depending upon whether the privilege holder was a civil litigant or the subject of a criminal investigation.

Post-*Zolin*, most trial courts adhere to some variation of the *prima facie* standard in determining whether to pierce the attorney-client privilege in criminal cases.<sup>32</sup> They have done

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<sup>29</sup> *Zolin*, 491 U.S. at 572. Courts frequently conduct *in camera* review in criminal cases rather than ordering outright disclosure of privileged communications based solely on the threshold showing consisting of nonprivileged material. This extra level of review is not required under *Zolin* and its progeny; all that is required to compel disclosure of privileged communication is a *prima facie* showing of crime-fraud, although there is much dispute about what that means. *Zolin*, 491 U.S. at 565, 572.

<sup>30</sup> *Zolin*, 491 U.S. at 563-64. The Court elected to limit its discussion to the type of evidence needed to warrant application of the crime-fraud exception, rather than the amount. *Id.*

<sup>31</sup> *Id.* at 565, fn. 7.

We note . . . that this Court’s use in *Clark v. United States* . . . of the phrase “*prima facie case*” to describe the showing needed to defeat the privilege has caused some confusion. In using the phrase in *Clark*, the Court was aware of scholarly controversy concerning the role of the judge in the decision of such preliminary questions of fact. The quantum of proof needed to establish admissibility was then, and remains, subject to question. In light of the narrow question presented here for review, this case is not the proper occasion to visit these questions. *Id.* (citations omitted).

<sup>32</sup> *See, e.g.,* *In re Grand Jury Subpoenas*, 144 F.3d 653, 660 (10th Cir. 1998) (stating that prima facie evidence to invoke the crime-fraud exception requires “that the allegation of attorney participation in the crime or fraud has some foundation in fact.”); *In re Grand Jury Proceedings*, 417 F.3d 18, 23 (1st Cir. 2005) (stating that under the prima facie standard “it is

so notwithstanding the *Zolin* Court’s observation that “the *prima facie* standard is commonly used by courts in civil litigation to *shift* the burden of proof from one party to the other. In the context of the fraud exception, however, the standard is used to dispel the privilege altogether *without* affording the client the opportunity to rebut the *prima facie* showing.”<sup>33</sup> Conversely, in the civil arena, though some courts have adhered to a *prima facie* standard, there has been a noticeable trend toward imposing a higher burden of proof on the party seeking discovery.<sup>34</sup> The Ninth Circuit, for example, requires that the moving party in grand jury cases need only show “reasonable cause to believe” that the privilege holder committed crime-fraud.<sup>35</sup> In civil cases, the same Circuit held that “the burden of proof that must be carried by a party seeking outright disclosure of attorney-client communications under the crime-fraud exception should be preponderance of the evidence.”<sup>36</sup>

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enough to overcome the privilege that there is a reasonable basis to believe that the lawyer’s services were used by the client to foster a crime or fraud.”); *In re Grand Jury Subpoena*, 419 F.3d 329, 336 (5th Cir. 2005) (stating that *prima facie* evidence is “such as will suffice until contradicted and overcome by other evidence”) (citation omitted); *In re Grand Jury Investigation*, 445 F.3d 266, 274 (3d Cir. 2006) (stating that *prima facie* evidence is “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.”) (citation omitted).

<sup>33</sup> *Zolin*, 491 U.S. 554, 565 n.7 (quoting Susan F. Jennison, Note, *The Crime or Fraud Exception to the Attorney-Client Privilege*, 51 BROOK. L. REV. 913, 918-919 (1985) (emphasis in original)).

<sup>34</sup> Circuits across the country differ in their articulation of the required burden of proof to pierce the privilege. *See, e.g.*, *In re Napster, Inc. Copyright Litigation*, 479 F.3d 1078, 1082 (9th Cir. 2006) (“when the district court is asked to order outright disclosure, the burden of proof on the party seeking to vitiate the privilege is preponderance of the evidence”).

<sup>35</sup> *In re Grand Jury Proceedings*, 867 F.2d 539, 541 (9th Cir. 1989) (stating that the appropriate quantum of proof in a criminal case to demonstrate the crime-fraud exception’s applicability is “reasonable cause to believe that . . . that the witness-attorney’s legal services were utilized . . . in furtherance of the ongoing unlawful scheme.”).

<sup>36</sup> *In re Napster*, 479 F.3d at 1094-95.

B. *Civil v. Criminal Litigants: Procedures when Adjudicating Crime-Fraud and the role of Due Process*

In the civil arena, one party will generally seek discovery of the other party's attorney-client communications as part of the adversarial process. Consequently, irrespective of whether the court adopts a *prima facie* standard of proof or a higher one, once the moving party makes the required evidentiary showing, the burden of proof shifts to the privilege holder.<sup>37</sup> Both parties will generally litigate the matter in open court as part of discovery.<sup>38</sup> The privilege holder will have full notice of the crime fraud allegation and a meaningful opportunity to challenge that claim through an evidentiary hearing.

Conversely, in criminal cases the crime-fraud exception is most commonly invoked in the context of a grand jury investigation as part of a criminal investigatory process.<sup>39</sup> As such, once the moving party makes a *prima facie* showing, the attorney-client privilege is dispelled without any burden shifting.<sup>40</sup>

In the typical case, the prosecutor presenting a case to an impaneled grand jury will issue a subpoena to compel a lawyer to testify before that body to his confidential communications with his client, usually a target or subject.<sup>41</sup> Often the evidence sought will "arise[] from documentary evidence and statements from cooperating witnesses . . . includ[ing]

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<sup>37</sup> Susan F. Jennison, Note, *The Crime or Fraud Exception to the Attorney-Client Privilege*, 51 BROOK. L. REV. 913, 918 (1985).

<sup>38</sup> See, e.g., *Haines v. Liggett*, 975 F.2d 81, 97 (3d Cir. 1992).

<sup>39</sup> In contrast to the adversarial process of a civil trial.

<sup>40</sup> See *In re Grand Jury*, 223 F.3d 213, 219 (3d Cir. 2000).

<sup>41</sup> Thomas M. DiBiagio, *Federal Criminal Law and the Crime-Fraud Exception: Disclosure of Privileged Conversations and Documents Should Not be Compelled without the Government's Factual Foundation being Tested by the Crucible of Meaningful Adversarial Testing*, 62 MD. L. REV. 1, 12 (2003).

testimony before the grand jury and documents produced in response to grand jury subpoenas.”<sup>42</sup>

Once the government issues the subpoena on the client-target’s attorney, the attorney or the privilege-holder as a client-intervenor will generally move to quash, asserting the attorney-client privilege.<sup>43</sup> Almost all federal courts then apply the two-step process established in *Zolin*,<sup>44</sup> requiring the prosecution to make a threshold showing of 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.”<sup>45</sup> In this phase, the prosecution will submit nonprivileged evidence *ex parte*—often including grand jury materials—to justify *in camera* review and ultimately the abrogation of the privilege by compelling the lawyer to testify in the grand jury.<sup>46</sup> At this preliminary stage, though prohibited from reviewing the privileged communication at issue, the court may consider evidence that is not independent of the allegedly privileged material.<sup>47</sup> Once the court finds that

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<sup>42</sup> DiBiagio, *supra* note 41, at 1.

<sup>43</sup> See *In re Grand Jury Subpoenas* (Nos. 97-1002, 97-1003), 123 F.3d 695, 696 (1st Cir. 1997) (where both client and law firm filed separate motions to quash on grounds of attorney-client privilege). The client owns the privilege, but the attorney may assert the privilege for the client as well.

<sup>44</sup> Additionally, many courts have articulated a two-pronged *prima facie* test. See, e.g., *In re Grand Jury Proceeding #5*, 401 F.3d 247, 251 (4th Cir. 2005) (“(1) the client was engaged in or planning a criminal or fraudulent scheme when he sought the advice of counsel to further the scheme, and (2) the documents [or communication] containing the privileged materials bear a close relationship to the client’s existing or future scheme to commit a crime or fraud.”) (citation omitted).

<sup>45</sup> *United States v. Zolin*, 491 U.S. 554, 572 (1989)

<sup>46</sup> Though “courts should not interfere with the grand jury process absent compelling reason,” *In re Weiss*, 596 F.2d 1185, 1186 (4th Cir. 1979), they will intervene when “recognized privilege[] provide legitimate grounds for refusing to comply with a grand jury subpoena,” *In re Sealed Case*, 676 F.2d 793, 806 (D.C. Cir. 1982), and the attorney-client privilege is one such common-law privilege. *In re Grand Jury Proceeding #5*, 401 F.3d at 250.

<sup>47</sup> *Zolin*, 491 U.S. at 574-75.

a factual good-faith basis exists, the most common practice is to conduct an *in camera* review of evidence presented by the prosecution, which often includes the communications at issue including written communication between a lawyer and his client. In some circumstances the court may compel the lawyer to appear *in camera* to testify to those communications with his client that allegedly constitute crime-fraud.<sup>48</sup> At both the threshold stage and when making its crime-fraud determination, the trial court may rely on evidence that may not be admissible at trial.<sup>49</sup>

Unlike the civil arena, the *ex parte in camera* review in the grand jury context generally means that the privilege-holder is denied the opportunity to see the government's *in camera* submission.<sup>50</sup> Nor is that privilege-holder informed of the specific conduct allegedly constituting crime fraud. Although the court has the discretion to provide opposing counsel the

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<sup>48</sup> The *Zolin* Court listed several criteria for the trial court to consider when deciding whether to grant an *in camera* review: the facts of the case, the circumstances surrounding the case, the volume of submitted materials, the importance of the allegedly privileged material, and the likelihood that all available evidence will show that the crime-fraud exception applies. *See id.* at 572.

<sup>49</sup> *See, e.g.,* *In re Grand Jury Subpoena*, 884 F.2d 124, 127 (4th Cir. 1989) (where hearsay potentially constituted part of the government's *ex parte* submission to the court for *in camera* review); *In re Grand Jury Proceedings*, 867 F.2d 539, 541 (9th Cir. 1989) (where the court reviewed grand jury materials in making a crime-fraud determination); *In re Grand Jury Proceedings*, 842 F.2d 1223, 1227 (11th Cir. 1987) (where a prosecutor's good faith statement summarizing evidence presented to grand jury sufficed); *In re Grand Jury Proceedings*, 723 F.2d 1461, 1467 (10th Cir. 1983) (where documentary evidence or prosecutor's good faith statements of grand jury testimony sufficed). *See also* Federal Rule of Evidence 104(a) (stating in pertinent part that "[p]reliminary 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). In making its determination it is not bound by the rules of evidence except those with respect to privileges.").

<sup>50</sup> *See In Re John Doe, Inc.*, 13 F. 3d 633, 636 (2d Cir. 1994) (observing that "the cautionary tone of *Zolin* with respect to the use of *in camera* proceedings concerns the disclosure of the communications for which the privilege is claimed... [but] does not address the propriety of *ex parte* submissions of non-privileged materials, [and concluding with a reference to a previous Second Circuit holding that] "where *in camera* is the only way to resolve an issue without compromising a legitimate need to preserve the secrecy of the grand jury, it is an appropriate procedure.").

opportunity to rebut claims, or to make the proceeding an adversarial one, it rarely does so.<sup>51</sup> In the vast majority of reported cases, courts rule on motions to compel disclosure of attorney-client communications without notice to the privilege holder, thereby precluding the client-target from presenting evidence to defeat the allegations.<sup>52</sup>

Thus whether the party seeking disclosure of these communications is a civil litigant or a prosecutor in a criminal action will dictate the extent to which the privilege holder has meaningful due process protections. In the context of civil litigation, all circuits that have addressed the issue hold that privilege holders must have notice of the alleged conduct constituting crime-fraud and must be afforded an opportunity to rebut the claims through an evidentiary hearing *before* the court rules on the issue. Several courts have gone so far as to hold that a denial of that evidentiary hearing is a denial of due process.<sup>53</sup> In the context of grand jury investigations, no court has ruled that the privilege holder has concomitant rights. While some courts have devised minimal procedural protections to privilege holders in grand

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<sup>51</sup> *See id.*

<sup>52</sup> Though most Circuits conclude that in the context of grand jury secrecy “in camera examination of the attorney [is] the most effective method of determining that the crime-fraud exception has been established,” *In re John Doe, Inc.*, 13 F.3d at 637, this is with the acknowledgement of the difficulty this poses for the privilege holder because of the impracticality of arguing against unknown evidence, effectively preventing development of an effective defense. *In re Antitrust Grand Jury*, 805 F.2d 155, 160 (6th Cir. 1986). There, counsel for the client-target argued that *in camera* review prevented them from “refut[ing] any false or misdirected information provided...[and from placing] any grand jury testimony in the ‘appropriate business context.’” *Id.* at 161.

<sup>53</sup> *Haines v. Liggett*, 975 F.2d 81, 97 (3d Cir. 1992); and *In re Napster, Inc. Copyright Litigation*, 479 F.3d 1078, 1093 (9th Cir. 2006).

jury cases,<sup>54</sup> none has ruled that denial of an adversarial hearing to rebut the claim of crime-fraud is a denial of due process in the criminal setting.<sup>55</sup>

This differential treatment, depending on whether the privilege holder is a civil litigant or the target/subject of a grand jury in a criminal case, is best illustrated by cases decided in the Third and Ninth Circuits. Both circuits analyzed the question of whether civil versus criminal privilege holders are denied due process when they are not afforded the opportunity to rebut claims of crime-fraud through the presentation of written and live evidence. Both circuits held that in civil cases, depriving the privilege holder of the opportunity to rebut crime-fraud allegations is a due process violation but failed to reach the same conclusion in the criminal context.

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<sup>54</sup> Outlined in Section IV, *infra*. See, e.g., *In re Taylor*, 567 F.2d 1183, 1187-88 (2d Cir. 1977).

<sup>55</sup> See *In re Grand Jury*, 223 F.3d 213, 219 (3d Cir. 2000) (“We today join the ranks of our sister circuits in holding that it is within the district courts’ discretion, and not violative of due process to rely on *ex parte* government affidavit to determine that the crime-fraud exception applies and thus compel a target-client’s subpoenaed attorney to testify before the grand jury.”); *In re Grand Jury Subpoenas*, 144 F.3d 653, 662 (10th Cir. 1998) (“The determination of whether the government shows a prima facie foundation in fact for the change which results in the subpoena lies in the sound discretion of the trial court.”) (quoting *In re September 1975 Grand Jury Term*, 532 F.2d 734, 735 (10th Cir. 1976)); *In re Grand Jury Subpoena*, 884 F.2d 124, 127 (4th Cir. 1989) (holding that “the district court’s in camera proceedings did not result in a violation of the [client-target’s] due process rights.”); *In re Grand Jury Proceedings (Gordon)*, 722 F.2d 303, 310 (6th Cir. 1983), cert. denied, 467 U.S. 1246 (1984) (stating that in camera submissions were a “reasonable accommodation of the need to maintain secrecy of the grand jury investigation and the need for prompt resolution of the privilege issue”); *In re September 1975 Grand Jury Term*, 532 F.2d 734 (10th Cir. 1976) (responding to client-target’s request for an adversary hearing rather than the *ex parte in camera* review with “we find no authority which holds that such determination must be made in an adversary hearing”); *but cf.* *American Tobacco Co. v. State*, 697 So.2d 1249 (Fla. Dist. Ct. App. 1997) (where the court in a crime-fraud case held that *ex parte* hearings did not afford the defendants adequate due process because “state prosecutors and their investigators had unfettered access to extensive confidential thoughts and unguarded statements of the lawyers in a wide array of files.”); *State v. Wong*, 40 P.3d 917, 922-23 (Haw. 2002) (holding that the state may not present attorney client privileged material to grand jury under crime-fraud exception without notice to the client and prior judicial approval). See *infra* Section IV, for more detailed analysis of due process considerations in the context of the crime-fraud exception.

In the Third Circuit case *Haines v. Liggett Group, Inc.*, the plaintiff sued the tobacco industry for wrongful death and sought documents from the defendant that plaintiff claimed were the product of crime-fraud.<sup>56</sup> After the trial court directed discovery, but before any privileged communications had been divulged, the defense was granted a writ of mandamus.<sup>57</sup> The Third Circuit held that in civil cases, due process is violated where the party invoking the attorney-client privilege is not given the chance to answer allegations of crime-fraud; the party has an “absolute right” to be heard by testimony and argument before the court conducts in camera review of the privileged oral and written communications at issue.<sup>58</sup>

Conversely, eight years later in *In re Grand Jury Subpoena*, the same court “join[ed] the ranks of [its] sister circuits in holding that it is within the district courts’ discretion, and not violative of due process, to rely on an *ex parte* government affidavit and thus compel a client-target’s subpoenaed attorney to testify before the grand jury.”<sup>59</sup> The court distinguished its holding in *Haines* from this case, where privileged communications between a target and his lawyer were sought in the form of a grand jury subpoena, and noted the importance of the grand jury’s investigative role and the need for secrecy in the context of an ongoing criminal

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<sup>56</sup> 975 F.2d 81, 84 (3d Cir. 1992).

<sup>57</sup> *Id.* at 89-90.

<sup>58</sup> *Id.* at 97. In granting the petition for mandamus, which vacated the lower court’s finding that the crime-fraud exception applied, the *Haines* Court stated “[t]he importance of the privilege, as we have discussed, 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.” *Id.*

<sup>59</sup> 223 F.3d 213, 219 (3d Cir. 2000).



investigation.<sup>60</sup> The court also noted that *Haines* involved adversarial proceedings whereas grand jury proceedings are investigative, explaining that “the rules of the game are different.”<sup>61</sup>

In March of 2008, the Ninth Circuit similarly held in *In Re: Napster*, that the party seeking outright disclosure where crime-fraud is alleged in the civil context has the right to introduce countervailing evidence.<sup>62</sup> Finding *Haines* to be “well-reasoned” the Court concluded that “in a civil case the party resisting an order to disclose materials allegedly protected by the attorney-client privilege must be given the opportunity to present evidence and argument in support of its claim of privilege.”<sup>63</sup> However, the same court did not provide privilege holders in criminal cases the same protections in *In re Grand Jury Proceedings*, and allowed the privilege to be pierced by a *prima facie* showing by the prosecution without considering contrary evidence by the defense. .<sup>64</sup>

Indeed, a review of federal civil cases demonstrates that both trial and appellate courts go to great lengths to ensure due process protection to privilege holders in civil cases but not in criminal cases.<sup>65</sup> In accord with the Third and Ninth Circuits, other circuits agree that civil

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<sup>60</sup> *Id.* at 218.

<sup>61</sup> *Id.*

<sup>62</sup> *In re Napster, Inc. Copyright Litigation*, 479 F.3d 1078, 1093 (9th Cir. 2006).

<sup>63</sup> *Id.*

<sup>64</sup> *In re Grand Jury Proceedings (John Doe)*. 867 F.2d 539 (9<sup>th</sup> Cir. 1989); *but see In re Green Grand Jury Proceedings*, 492 F.3d.976, fn 8 (8<sup>th</sup> Cir. 2007) (court stated: “(w)e need not decide today whether the district court may or should consider contrary evidence. Even if the district court could have (or should have) accorded the countervailing evidence some measure of consideration, we do not believe that consideration of the contrary evidence in this case would have properly affected the district court’s crime-fraud determination. . . . We leave open the possibility that, in some circumstances, weighing contrary evidence or rejecting the government’s evidence could be warranted. There may be cases, for example, where the government’s evidence appears so facially unreliable (or the countervailing evidence so compelling) that a more critical gaze, perhaps informed by contrary evidence, may be appropriate.”

<sup>65</sup> *See, e.g., In re General Motors Corp.* 153 F.3d 714 (8th Cir. 1998) In that case, the court held that because the case was civil rather than criminal, “the district court may not...

cases are part of the adversarial process while criminal are part of an investigative proceeding by an impaneled grand jury. While acknowledging the inherent conflict between providing the privilege holder in the criminal setting with the opportunity to rebut claims of crime-fraud and maintaining the integrity of grand jury proceedings, they consistently hold because grand jury secrecy is axiomatic<sup>66</sup> the latter trumps the former.<sup>67</sup> However, all concur that this secrecy can be penetrated, necessitating judicial intervention, when a “recognized privilege[] provide[s] legitimate grounds for refusing to comply with a grand jury subpoena.”<sup>68</sup> The attorney-client

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compel production without permitting the party asserting the privilege, to present evidence and argument.” *Id.* at 716. There the court remanded the case for the trial court to have an *ex parte in camera* hearing to determine whether the crime-fraud exception applied to certain documents and testimony. Further, the court made clear that the party seeking to pierce the privilege has no legal right to insist on being present at the *in camera* review.

<sup>66</sup> See, e.g., *In re General Motors Corp.*, 356 U.S.677 (1958). Policies that underlie the secrecy of grand jury proceedings include:

‘(1) [t]o prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.’

*Id.* at 682 n.6 (quoting *United States v. Rose*, 215 F.2d 617, 628-29 (3d Cir. 1954)).

<sup>67</sup> It is true that the grand jury, as an investigative body, rather than an adversarial one, may generally “compel the production of evidence or testimony of witnesses...unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials.” *United States v. Calandra*, 414 U.S. 338, 343 (1974).

<sup>68</sup> *In re Sealed Case*, 676 F.2d 793, 806 (D.C. Cir. 1982), (recognizing that each of the recognized privileges “is firmly anchored in a specific source—the Constitution, a statute, or the common law.”). See also *Calandra*, 414 U.S. at 346 (“Although courts may not interfere with the grand jury process absent a showing of a compelling reason, the grand jury as an investigative body is not impenetrable.”); and Federal Rule of Criminal Procedure 6(e)(3)(C) (providing for an exception to the general rule prohibiting disclosure of grand jury testimony, and stating in pertinent part that “(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—(i) when so directed by a court preliminary to or in connection with a judicial *proceeding*”) (emphasis added).

privilege falls in that category, unless proof exists that it has been abrogated through actual crime-fraud.

The importance of conferring additional due process rights on privilege-holders in the context of grand jury investigations becomes clear after reviewing recent federal grand jury history: such a review reveals that the theoretical independence of grand juries is at odds with reality. Although established as an independent body charged with determining whether there is probable cause to believe that “a crime has been committed and the protection of citizens against unfounded criminal prosecutions,”<sup>69</sup> in practice the grand jury is “an arm of the prosecution” used to gather incriminating evidence against a target/subject.<sup>70</sup> As such, the

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<sup>69</sup> *Calandra*, 414 U.S. at 343; *See also* *Wood v. Georgia*, 370 U.S. 375, 390 (1962) (“Historically, [the grand jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; 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.”).

<sup>70</sup> Note, *The Grand Jury as an Investigatory Body*, 74 HARV. L. REV. 590 (1961). In practice, however, the district attorney, because of his access to information, prestige as an important government official, and familiarity with grand jury procedure, tends to direct the grand jury’s operations. Normally the district attorney determines the subject matter of the investigation, and also has considerable control over its conduct.

*Id.* at 596. *See also* *United States v. Eisenberg*, 711 F.2d 959, 965 (11th Cir. 1983).

The grand jury serves as an investigative and accusatory body in collaboration with the U.S. Attorney. Until an indictment is returned and a case presented to the United States District Court, the responsibility for the functioning of the grand jury is largely in the hands of the U.S. Attorney. This does not mean that the court cannot redress abuses by the grand jury or a U.S. Attorney.

*Id.*; *United States v. Dionisio*, 410 U.S. 19, 23 (1973) (Douglas, J., dissenting) (“It is, indeed, common knowledge that the grand jury, having been conceived as a bulwark between the citizen and the Government, is now a tool of the Executive.”); Seymour Glanzer, Proceedings of the Thirty-Sixth Annual Judicial Conference of the District of Columbia Circuit, 67 F.R.D. 513, 538 (June 1975) (stating “the prosecutor and not the grand jury [] provides the only potential protection that exists between a possible accused and the bringing of criminal charges. The prosecutor is the central figure in the grand jury investigative process and he will generally make prosecutive determinations and not the grand jury.”);

Further, now that the practice of issuing grand jury subpoenas has become increasingly common, “the attorney client privilege has taken on particular significance in grand jury law.

prosecutor plays an increasingly prominent role in grand jury practice<sup>71</sup> necessitating greater protections for client-targets when their attorney-client privilege is being challenged under the crime-fraud exception.<sup>72</sup>

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The attorney client privilege therefore deserves independent attention as it applies to the efforts of grand juries to obtain evidence through subpoenas to the attorneys of criminal suspects.” Sarah S. Beale, et al., Annotation, *Attorney-client Privilege*, Grand Jury Law and Practice, §6:9 (2d Ed. 2007).

<sup>71</sup> United States v. Ross, 412 F.3d 771, 774 (7th Cir. 2005) (“Realistically, federal grand juries today provide little protection for criminal suspects whom a U.S. Attorney wishes to indict. Nevertheless, that is not a realism to which judges are permitted to yield.”).

<sup>72</sup> See *infra* Section V.

### III. RAMIFICATIONS OF COURT ORDERED DISCLOSURE

An analysis of the potentially far-reaching ramifications to the privilege-holder of a judicial ruling of crime-fraud provides a compelling rationale for ensuring that such a finding is based on strong evidence after the client-target had *some* opportunity to meet and challenge the allegations. The goal should be to allow courts to pierce the privilege and subject client-targets to all attendant ramifications only in situations where the privilege-holder *actually committed crime-fraud* rather than innocently communicating with counsel in a manner that the trial court erroneously construed as intentionally furthering illegal conduct.<sup>73</sup>

Under the current system, the most direct result of privilege-piercing is that a client-target will face indictment and mounting incriminating evidence, generated in part, by his own lawyer, with no forum for vindication *before* outright disclosure of privileged communications.<sup>74</sup> Further, once a court concludes that the crime-fraud exception applies, “all

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<sup>73</sup> See, e.g., *United States v. John Doe*, No. 04-4136 11/23/05, 429 F.3d 450, 454 (3d Cir. 2005).

The crime fraud exception... applies to any communications between an attorney and client that are intended ‘to further a continuing or future crime or tort.’ The privilege is not lost if the client innocently proposes an illegal course of conduct to explore with his counsel what he may or may not do. Only when a client knowingly seeks legal counsel to further a continuing or future crime does the crime-fraud exception apply.

*Id.* (quoting *In re Impounded*, 241 F.3d 308, 316 (3d Cir. 2001)).

<sup>74</sup> See, e.g., 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 Investigation*, 36 HASTINGS L. J. 821, 836 (1985). In that article, in the context of compelling counsel to testify to nonprivileged information related to her client before the grand jury, the author notes:

Essentially, the lawyer who is asked to produce information that might incriminate a client is being asked to engage in conduct that is inconsistent with the role of a totally committed advocate of the client’s interest. In this situation, the lawyer’s roles as citizen and officer of the court, on the one hand, and the client’s advocate, on the other hand, are in direct conflict. This conflict and the attendant strains placed on the adversary system inevitably result whenever a grand jury subpoenas an attorney to produce evidence about his client.

communications used in furtherance of crime fraud are deemed to be without privilege.”<sup>75</sup>

Obviously, the prosecution may compel testimony from counsel consisting of attorney-client confidences before the currently empanelled grand jury.<sup>76</sup> What is less obvious is that if that grand jury is disbanded before indicting a target, the prosecution can use the same testimony against the target before a second grand jury.<sup>77</sup> Some courts have held that this is so, even after a judge rules that the subpoena compelling testimony was improper or in error.<sup>78</sup>

If a client-target is indicted by an impaneled grand jury, based in part on crime-fraud evidence, and the subpoena served on counsel to testify to privileged communication is later found to be invalid or improperly issued, “there is nothing a court can do to withdraw all knowledge or information” from those who have heard it, including the prosecution.<sup>79</sup> Most courts that have addressed the issue have refused to issue an injunction against a “future use of [a]ttorney’s testimony” consisting of confidential communications with the client, again, even where the court finds that the subpoena compelling that testimony was issued in error.<sup>80</sup> This

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*Id.* See also *In re Grand Jury Subpoena Served Upon Doe, Esq.* 781 F.2d 238, 261 (2d. Cir. 1986) (“The result for the subpoenaed lawyer is equally inadequate. He has the so-called choice of either resisting disclosure with contempt possibilities—thereby risking his legal career—or resigning from the case.”).

<sup>75</sup> *Zolin*, 491 U.S. 565 n.7, See e.g. *In re Grand Jury Subpoena*, 419 F.3d 329, 349 n.12 (5<sup>th</sup> Cir. 2005) (stating that with respect to how far-reaching the exception can be, though trial courts generally confine what is discoverable pursuant to the crime-fraud exception to communications and documents used in furtherance of a contemplated or ongoing crime or fraud, this does not “preclude the potential disclosure of a client’s entire file, in the proper case, upon the proper showing of the client’s entire representation’s being in furtherance of the alleged crime or fraud.”)

<sup>76</sup> See, e.g., *In re Grand Jury Subpoena*, 781 F.2d at 260.

<sup>77</sup> *In Re: Grand Jury Investigation*, No. 06-1474, 445 F.3d 266, 272 (3d Cir. 2006). See also *In re Special September 1978 Grand Jury (II)*, 640 F. 2d 49, 62 (7th Cir.1980).

<sup>78</sup> See *In re Grand Jury Investigation*, 445 F.3d at 272.

<sup>79</sup> *Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992).

<sup>80</sup> *In re Grand Jury Investigation*, 445 F.3d at 272. See, e.g., *In re Grand Jury*

leaves room for the anomalous situation where a client-target's attorney-client privilege was abrogated in contravention of his rights, but he cannot foreclose the possibility that the prosecution will be permitted to use his oral communications with his lawyer in a future proceeding against him.<sup>81</sup> Nor is dismissing the grand jury that has heard the tainted evidence "an appropriate remedy," in circuits where the government is not precluded from using the same testimony before a second grand jury.<sup>82</sup>

The client-target finds himself in a Catch-22 when counsel moves to quash a crime-fraud subpoena without success, testifies to privileged communications before the grand jury, then seeks on his client's behalf to challenge the legality of the trial court's ruling ordering outright disclosure, either pre or post indictment. Several circuits have held that once the lawyer has completed testifying to privileged communications, the portion of the appeal

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Proceedings (John Roe), 142 F.3d 1416, 1428 (11th Cir. 1998) (rejecting the request for issuance of a future-use injunction because it would be unenforceable). Additionally, the D.C. Circuit stated that

[A] party cannot retrieve testimony once it is given; the party can only ask that the testimony be sealed against future use. In that event, such a challenge would be ripe only at the time when that future use is a real, not a speculative, possibility. Because appellant seeks only to seal his testimony against future use, we find that his appeal became moot upon his compliance with the district court's order enforcing the subpoena.

Office of Thrift Supervision, Dep't of Treasury v. Dobbs, 931 F.2d 956, 959 (D.C. Cir. 1991) (citations omitted). *But cf.* In re Grand Jury Investigation, 445 F.3d 266, 272-73 (3d Cir. 2006) (stating the court is "not convinced that we should rule out the possibility of a future-use injunction as a remedy," but in this case, "we need not decide whether we will extend our jurisprudence to the grand jury context... the potential availability of a future-use injunction means that the issue is not moot"). *See also* In re Berkley & Co., Inc., 629 F.2d 548, 555 (8th Cir. 1980) (holding that disclosure of documents was only valid as to the grand jury proceedings, and that claims of privilege could be re-asserted at trial).

<sup>81</sup> *See Scientology*, 506 U.S. at 12.

<sup>82</sup> *See, e.g., In re Grand Jury Investigation*, 445 F.3d at 272. *See also* In re Grand Jury Proceedings (John Roe), 142 F.3d 1416, 1427 (11th Cir. 1998) (dismissal of grand jury is not appropriate remedy because dismissal "would not erase the attorney's testimony from the mind of the United States Attorney and others having access to the testimony, or the fruits thereof, to another grand jury.").

challenging the trial court's refusal to quash a subpoena to testify is moot.<sup>83</sup> In other words, compliance with the subpoena often precludes an appeal at this stage in the proceedings. In these circuits, any indictment or subsequent conviction flowing, in part, from evidence collected pursuant to the crime-fraud exception, will not be vulnerable based on misapplication of the exception.<sup>84</sup>

In addition to undermining a client's trust for his lawyer, a ruling abrogating the privilege places the lawyer in a seriously compromised position.<sup>85</sup> That attorney, who is attempting to represent his client zealously, is put in a precarious situation when compelled to testify to his communications with his client.<sup>86</sup> If counsel moves to quash the subpoena,<sup>87</sup> as is

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<sup>83</sup> See, e.g., *In re Arbitration (Security Life, Ins.)*, 228 F.3d 865, 870 (8th Cir. 2000) (dismissing as moot that portion of the appeal concerning the enforcement of the subpoena for testimony). *But cf.* *In re Grand Jury Subpoena (Stover)*, 40 F.3d 1096, 1100 (10th Cir. 1994) (differentiating between live testimony and tangible evidence like documents, holding in that with respect to documents, the appeal is not moot because an order to return or destroy documents would offer some relief, and partial remedies can render an appeal not moot); *and* *United States v. Florida Azalea Specialist*, 19 F.3d 620, 622 (11th Cir. 1994) (stating the appeal was not moot under the circumstances because even if the court held "that the subpoena was improperly issued, Florida Azalea would be entitled to a partial remedy in the form of return or destruction of its documents.").

<sup>84</sup> See, e.g., *In re Grand Jury Proceedings (John Roe)*, 142 F.3d at 1428.

<sup>85</sup> David S. Rudolph & Thomas K. Maher, *The Attorney Subpoena: You are Hereby Commanded to Betray your Client*, 1-SPG CRIM. JUST. 15, 16 (1986).

The fragile relationship of trust, built upon the understanding that what is said to the attorney is confidential and that the attorney's sole function is to serve as a zealous advocate for the client within the bounds of the law, is seriously strained whenever the government even attempts to have the attorney act as a witness against his client.

*Id.* See also Peirce, *supra* note 75 at 857-58 (1985) (noting that the erosion of trust between attorney and client is "particularly destructive" if the relationship has lasted for a long time because most likely result is the termination of the relationship, or upon testimony against the client, disqualification).

<sup>86</sup> Thomas K. Foster, *Grand Jury Subpoenas of a Target's Attorney: The Need for a Preliminary Showing*, 20 GA. L. REV. 747, 773-74 (1986). See also Peirce, *supra* note 86.

Essentially, the lawyer who is asked to produce information that might incriminate a client is being asked to engage in conduct that is inconsistent with the role of a totally committed advocate of the client's interest. In this situation,



often the case, the attorney must expend valuable resources to wage an interlocutory appeal or file a *writ of mandamus*<sup>88</sup> that would otherwise be devoted to trial preparation.<sup>89</sup> In some

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the lawyer's roles as citizen and officer of the court, on the one hand, and the client's advocate, on the other hand, are in direct conflict. This conflict and the attendant strains placed on the adversary system inevitably result whenever a grand jury subpoenas an attorney to produce evidence about his client.  
*Id.* at 836.

<sup>87</sup> See, e.g., Max D. Stern & David A. Hoffman, *Privileged Informers: The Attorney Subpoena Problem and a Proposal for Reform*, 136 U. PA. L. REV. 1783, 1792-93 (1988).

<sup>88</sup> Writs of mandamus, which allow appellate courts to compel district courts to perform mandatory ministerial duties, are "drastic and extraordinary remed[ies]." *In re Grand Jury Proceedings*, 723 F.2d 1461, 1466 (10th Cir. 1983). According to the Supreme Court, mandamus may be used as a means of reviewing disclosure orders if 1) the party seeking issuance has no other adequate means to attain the relief sought, 2) there is a clear and undisputable right to it, and 3) the issuing court is satisfied that the writ is appropriate under the circumstances. *United States v. West*, 672 F.2d 796, 799 (10th Cir. 1982) (citing, *inter alia*, *Kerr v. United States District Ct. for N.D. of Cal.*, 426 U.S. 394 (1976); *Bankers Life & Casualty Company v. Holland*, 346 U.S. 379, (1953); and *Schlagenhauf v. Holder*, 379 U.S. 104 (1964)). Use of mandamus as a method of appealing a district court ruling varies by circuit. Cassandra B. Robertson, *Appellate Review of Discovery Orders in Federal Court: A Suggested Approach for Handling Privilege Claims*, 81 WASH. L. REV. 733,751. See also Stern, *supra* note 88 at 1794.

The subpoena creates intense pressure by virtue of the fact that the attorney herself may have been threatened with, or fear, investigation. Even if she has no reason to fear such investigation, she may wish to avoid confrontation or publicity. She also may lack the money, energy, time, knowledge or ability to wage the aggressive and complicated battle that subpoena litigation frequently involves. As an order denying a motion to quash a subpoena may not be immediately reviewable, she may hesitate to resist the subpoena and thereby risk contempt, which she may well have to do if the client's appellate rights are to be saved. At the same time, the subpoena constitutes an apparent legal command to produce evidence and thus offers a convenient, if insufficient, justification for capitulation. It presents an ideal opportunity for a prosecuting attorney to take advantage of a compromised lawyer in order to obtain client information.

*Id.*

<sup>89</sup> Stern, *supra* note 88 at 1792-93. See also Rudolph, *supra* note 86 at 16 ("[T]he litigation surrounding the enforcement of the subpoena may drain valuable time, energy and money from the preparation needed for the trial itself."); and *id.* at 18 ("Moreover, litigating a motion to quash consumes time and energy, and the fact that the motion may not be successful can deter counsel from becoming involved in cases in which a subpoena is likely.").

jurisdictions, in order to ensure immediate review the lawyer must refuse to comply<sup>90</sup> and incur criminal contempt charges.<sup>91</sup> Conversely, should the lawyer comply with the subpoena and testify to client confidences before the grand jury, and a court later finds that the subpoena was issued in error, counsel's professional reputation may be harmed, his credibility damaged in the eyes of current and future clients.<sup>92</sup>

Finally, once the trial court finds that the government has met its burden of proving crime-fraud, and orders the lawyer to testify before the grand jury, an appeal by either counsel or the client will rarely result in reversal. Courts of Appeal almost uniformly take the position that the correct standard of review is "clear error."<sup>93</sup> They justify this high standard based on their conclusion that "the application of the attorney-client privilege is a fact question to be determined in light of the purpose of the privilege and guided by judicial precedents."<sup>94</sup>

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<sup>90</sup> See, e.g., *In re Grand Jury Proceedings*, 723 F.2d at 1465 (holding that an appeal on a crime-fraud finding was premature because the client did not wait for her attorney to incur a contempt citation).

<sup>91</sup> *In re Grand Jury Subpoena Served Upon Doe, Esq.*, 781 F.2d 238, 261 (2d Cir. 1986) (stating that an attorney does not have much of an option when faced with a subpoena: compliance results in mandatory resignation, and resisting disclosure results in possible contempt charges, and the corresponding professional risk).

<sup>92</sup> Stacy Caplow, *The Reluctant Witness for the Prosecution: Grand Jury Subpoenas to Defense Counsel*, 51 BROOK. L. REV. 769, 785 (1985); William J. Genego, *The New Adversary*, 54 BROOK. L. REV. 781, 816 (1988).

<sup>93</sup> See, e.g., *In Re Grand Jury Subpoena*, 419 F.3d 329, 335 (5th Cir. 2005) (reviewing the district court's determination of crime-fraud for clear error) (citation omitted).

<sup>94</sup> *Id.* (citation omitted).

#### IV. RECOGNIZED DUE PROCESS PROTECTIONS

To date, no court has found *ex parte in camera* proceedings to violate the privilege holder's due process rights.<sup>95</sup> However, as set forth below, several circuits *have* articulated the need to balance grand jury secrecy with protection of the relationship between a client and his lawyer. In that vein, to varying degrees, courts of appeal have outlined procedural protections for privilege-holders against claims of crime-fraud, particularly in cases where the government's interest in preserving secrecy is minimal.

A review of case law provides guidance in structuring the proposed legislation promulgated in Section V of this article. In *In re Taylor* the Second Circuit held that on the facts of that case, *ex parte in camera* review of government submissions violated the client-target's due process rights.<sup>96</sup> Though not a crime-fraud case, crime-fraud decisions cite *Taylor* for its holding with respect to the propriety of *ex parte in camera* proceedings in connection with grand jury investigations. The *Taylor* court reasoned that

In camera proceedings are extraordinary events in the constitutional framework because they deprive the parties against whom they are directed of the root requirements of due process, i.e. notice setting forth the alleged misconduct with particularity and an opportunity for a hearing. They can only be justified and allowed by compelling state interests. Whenever the legal rights of individuals are to be adjudicated, the presumption is against the use of secret proceedings.<sup>97</sup>

Of particular relevance to this article's thesis, the *Taylor* court established a balancing test, pitting grand jury secrecy against a party's due process rights, where the determining factor is whether the government's need to maintain that secrecy in a given case, is actual or *de minimus*. In *Taylor*, the client-target sought a "limited and discrete disclosure of the factual

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<sup>95</sup> *See supra* Section II.B.

<sup>96</sup> 567 F.2d 1183 (2d Cir.1977).

<sup>97</sup> *Id.* at 1187-88.

basis for the assertion that he will be asked to incriminate his associates and that, therefore, he requires independent legal counsel.”<sup>98</sup> The court reasoned that the government’s need for secrecy was temporal and that disclosure of the *ex parte* submissions would not pose a danger to anyone involved in the case.<sup>99</sup>

The Second Circuit again recognized in *In re John Doe, Inc.*, that there are cases where *ex parte in camera* proceedings may “deprive[] 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.”<sup>100</sup> Building on the *Taylor* balancing test, the court stated in dicta, “where concerns for secrecy are weak, an *in camera* proceeding may not be justified”<sup>101</sup> where, for example, the party who sought access to

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<sup>98</sup> *Id.* at 1188. In *Taylor*, the government submitted an affidavit and exhibits *in camera* in support of a motion to disqualify a client-target’s attorney who was scheduled to appear before the grand jury. The motion alleged a conflict of interest as the government planned to call the client-target as a grand jury witness after granting him immunity to testify against other targets, where those targets were current clients of the attorney. The client-target requested a limited opportunity to review the *in camera* submissions so that he could respond in a manner that allowed him to retain his counsel, but the trial court found in favor of the government and precluded the client-target from retaining that counsel. The Second Circuit reversed, holding that the government’s withholding of the *in camera* materials, constituted “compulsory disqualification of [the attorney] as a tactical maneuver to compel [Taylor] to testify and to prevent what it anticipates will be efforts by the [other targets] summoned for the grand jury investigation to ‘stonewall’ the work of the grand jury.” *Id.* at 1187. The court further held that the denial of access to the *in camera* materials effectively denied the client-target of his right to counsel, thus violating his due process rights

<sup>99</sup> *Id.* at 1187. In another Second Circuit case, however, the court limited the holding in *Taylor* to situations when the government plans to reveal grand jury materials to a witness once the witness takes the stand before that body, where the need to maintain secrecy is consequently minimal. However the court did not suggest in this case that *in camera* submissions are to be routinely accepted, instead concluding that this method is preferred in cases where the clear alternatives are 1) sacrificing grand jury secrecy or 2) leaving the issue [of crime-fraud] unresolved at a “critical juncture.” *In re John Doe Corp.*, 675 F.2d 482, 490 (2d Cir. 1982). The following year, the court held that “although *in camera* submissions... are not to be routinely accepted, an exception to this general rule may be made where an ‘ongoing interest in grand jury secrecy’ is at stake.” *Marc Rich & Co. v. United States*, 707 F.2d 663, 670 (2d Cir. 1983) (citation omitted).

<sup>100</sup> 13 F.3d 633, 636 (2d Cir. 1994) (citations omitted).

<sup>101</sup> *Id.*

an *in camera* submission was going to learn the contents of the submission immediately after taking the stand when called as a grand jury. The court concluded that “there was no legitimate concern for secrecy justifying an *in camera* examination.”<sup>102</sup> *In camera* proceedings, then are extraordinary events, not to be taken lightly, appropriate when there is a legitimate need for secrecy.<sup>103</sup> Where the government’s need for secrecy was slight, and disclosure of the content of the *ex parte* affidavit would not pose a danger to anyone, a failure to reveal its contents violates due process.<sup>104</sup> The court also noted that where there is an allegation of crime-fraud in connection with a grand jury investigation, situations may present themselves where a “judge may perceive a special need for adversary examination and give full or limited access to the government’s submissions.”<sup>105</sup>

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<sup>102</sup> *Id.* See also *In re Special September 1978 Grand Jury (II)*, 640 F.2d 49 (7th Cir. 1980) (holding that in a case where the evidence to be revealed in seeking to pierce the privilege is the prosecution affidavit, which did not contain any testimony elicited from grand jury witnesses, the necessity of preserving secrecy was weak; disclosure to opposing counsel and the privilege holder would not discourage other grand jury witnesses from testifying).

<sup>103</sup> *In re John Doe*, 13 F.3d at 636 (referencing *In John Doe Corp.*, 657 F.2d 482, 490 (2d Cir. 1982), where it had concluded that “where an *in camera* submission is the only way to resolve an issue without compromising a legitimate need to preserve the secrecy of the grand jury, it is an appropriate procedure.”).

<sup>104</sup> *See id.*

<sup>105</sup> *Id.* Here the factual scenario underlying the appeal stemmed from a client-target raising a privilege claim upon learning that his former lawyer had been subpoenaed to testify before the grand jury to answer questions about certain attorney-client communications. *Id.* at 635. In response to the client-target taking the position that unless the government sought and obtained a final compulsion order from the trial court, in compliance with the procedures set for in *Zolin*, the privilege remained intact, the government moved for a compulsion order and submitted, in support, an *ex parte* FBI Affidavit. *Id.* The trial court reviewed the affidavit then questioned former counsel *in camera*. *Id.* Before issuing a compulsion order, the judge had a follow-up *ex parte* meeting with the prosecutor to determine the actual questions he would be asking counsel in front of the grand jury. *Id.* Among the issues on appeal were whether denying the client-target access to the FBI Affidavit or prohibiting him from being present when the trial judge questioned former counsel *in camera* about the actual privileged communications to determine whether the government met its burden to prove crime-fraud, were denials of due process. *Id.* The court held that neither act constituted a violation of the privilege-holder’s Fifth and Fourteenth Amendment rights. *Id.* at 635-36. The final question

In *In re John Doe*, the Second Circuit reiterated its concern that safeguards be in place to protect the rights of the client-target privilege holder where crime-fraud is alleged and concluded that “where concerns for secrecy are weak, an *in camera* proceeding may not be justified.”<sup>106</sup> The court concluded that should a judge perceive a special need for adversary examination, he or she has discretion to do so in full or limited form, though no such need presented itself in the case at issue.<sup>107</sup>

As previously outlined, the Third Circuit has repeatedly held that in the context of crime-fraud allegations stemming from a grand jury investigation, *ex parte in camera* submissions do not constitute a violation of due process.<sup>108</sup> It predicated this ruling on its “confiden[ce] that the district courts will vigorously test the factual and legal basis for any subpoena ... [A] court which questions the sufficiency of the affidavits has available various avenues of inquiry, among them discovery, *in camera* inspection, *additional affidavits and a hearing*.”<sup>109</sup> Thus this court echoed the Second Circuit’s observation that in certain crime-fraud cases, an adversarial hearing is warranted to determine whether the government has met its burden of proof to compel disclosure of privileged communication between a client-target and his counsel.<sup>110</sup> Without an adversarial proceeding to test the factual and legal basis for a subpoena, the Third Circuit acknowledged that the district court’s discretion plays a pivotal role in attempting to

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raised was whether denying the client-target’s current counsel the opportunity to question prior counsel about the content of the *in camera* interrogation was a denial of due process, and again the court said no. *Id.* at 636-37.

<sup>106</sup> *Id.* at 636.

<sup>107</sup> *Id.* Thus the court determined the degree of due process to be conferred on the privilege holder is contingent on the actual need for grand jury secrecy under the specific facts presented in given case.

<sup>108</sup> *See supra* Section II.B.

<sup>109</sup> *In re Grand Jury Subpoena*, 223 F.3d 213, 219 (3d Cir. 2000).

<sup>110</sup> *See id.*

preserve grand jury secrecy while ensuring that there is no abuse of grand jury powers or the attorney-client privilege.<sup>111</sup>

One year later, the Third Circuit again approved exclusive reliance in grand jury cases on *ex parte* materials, reviewed *in camera*, in establishing a *prima facie* showing of crime-fraud.<sup>112</sup> But the court noted that an exception may lie “where there are no secrecy or confidentiality imperatives” such that there “would seem to be no impediment to permitting the attorney to challenge the government’s *prima facie* evidence.”<sup>113</sup> The court allows discovery and the opportunity to challenge in the civil context, and where no security concern presents itself, the Third Circuit would permit the same in the grand jury context provided doing so does not devolve into a “minitrial.”<sup>114</sup>

In *In re Grand Jury #5*,<sup>115</sup> the Fourth Circuit adhered to its prior rulings that *ex parte in camera* hearings did not violate due process.<sup>116</sup> Nonetheless it stated that the client-target has a

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<sup>111</sup> *Id.*

<sup>112</sup> *In re Impounded*, 241 F.3d 308 (3d Cir. 2001).

<sup>113</sup> *Id.* at 318 n.9.

<sup>114</sup> *Id.*

<sup>115</sup> 401 F.3d 247 (4th Cir. 2005). The court held that the trial judge abused his discretion by finding that the crime-fraud exception applied in the context of both documents and testimony where he conducted an *in camera* hearing in which the government presented evidence *ex parte*, but never examined the allegedly privileged documents or testimony before ordering the attorney to testify in the grand jury. *Id.* at 251 n.2.

<sup>116</sup> *See, e.g., In re Grand Jury Proceedings*, 674 F.2d 309, 310 (4th Cir. 1982) (holding that the district court’s *ex parte in camera* hearings did not violate due process); *and In re Thursday Special Grand Jury Sept. Term*, 33 F.3d 342 (4th Cir. 1994). In *In re Thursday*, the court found no due process violation even though the district court “did not articulate the basis for the crime or fraud that allegedly vitiates the privileges the [client-targets] have asserted,” the privilege-holder was never apprised of which statutes or regulations he had violated justifying piercing the privilege, and the indictments ultimately returned against the client-target were for mail fraud, although mail fraud “does not appear to be the basis on which the district court applied the crime-fraud exception.” *Id.* at 346, 353 n.19. The Court held that these arguments, “[h]owever appealing,” were trumped by the government’s and grand jury’s interest in the secrecy of an ongoing investigation. *Id.* at 353.

right to rebut the government’s assertions through presentation of evidence to the trial judge.<sup>117</sup> However, the court left the privilege holder in a conundrum in a subsequent case by recognizing that the party asserting the privilege may seek to rebut the government’s assertion of crime-fraud by “demonstrat[ing it] has not proven its prima facie case,” but “cannot have access to the allegations in the government’s *in camera* submission to do so.”<sup>118</sup>

The Sixth Circuit adhered to its sister circuits’ conclusion that *in camera* inspection is not a “*per se* denial of due process” where a genuine conflict exists between the client-target’s interest in discovering the content of the government’s *ex parte* submission and the government’s interest in maintaining the secrecy of its grand jury investigation.<sup>119</sup> The court’s election of the term *per se* in *In re Antitrust Grand Jury*, coupled with the facts of the case, where for a long time the privilege holder had notice of the basis of the government’s request and knowledge about the grand jury investigation,<sup>120</sup> suggests that in a case where the government’s interest was more minimal, the court might allow disclosure to the defense of part or all of the *ex parte* submissions. Even with the strong facts presented in *Antitrust*, the Court of Appeals concluded that trial courts “must still closely scrutinize the [motion to pierce the privilege] and the *in camera* exhibits in support of that motion.”<sup>121</sup>

The Eighth Circuit, in *In re Berkley*, similarly affirmed the use of *in camera* review of privileged documents in a grand jury context, but nonetheless limited the issue of disclosure of

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<sup>117</sup> *Id.* at 352. The Fourth Circuit stated that the proof must be able to “subject the opposing party to the risk of non-persuasion if the evidence as to the disputed fact is left unrebutted.” *Id.* at 353.

<sup>118</sup> *In re Grand Jury Proceedings #5*, 401 F.3d 247, 251 n.2 (4th Cir. 2005).

<sup>119</sup> *In re Antitrust Grand Jury*, 805 F.2d 155, 161-62 (6th Cir. 1986).

<sup>120</sup> *Id.* at 164.

<sup>121</sup> *Id.* at 162.



“crime-fraud” documents to the grand jury proceeding.<sup>122</sup> The court made clear that claims of privilege with respect to the same documents that the court reviewed *in camera* and ultimately made available to the grand jury, could be re-asserted by the client-target at trial:

The ultimate question of the relevance and admissibility of the documents at trial may then be determined... 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.<sup>123</sup>

The range of due process protections provided by circuits is wide. Some courts conduct a balancing test to determine whether the need for grand jury secrecy trumps the right of the privilege-holder to see the government’s *ex parte* submission.<sup>124</sup> If the need for secrecy is slight, where, for example, the client-target’s lawyer will learn the content of the grand jury materials constituting the prosecution’s crime-fraud evidence the minute he or she takes the stand, the court may order disclosure of the affidavit. It may go further and order an evidentiary hearing providing the privilege-holder a forum to rebut the crime-fraud allegations.<sup>125</sup> In that vein, some courts acknowledge that in certain circumstances, the district court should consider countervailing evidence by the defense before determining whether the privilege has been pierced..<sup>126</sup> All circuits recognize that given the tension between preserving grand jury secrecy and the attorney-client privilege, courts play a pivotal role in evaluating the

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<sup>122</sup> *In re Berkley & Co., Inc.*, 629 F.2d 548, 555 (8th Cir. 1980).

<sup>123</sup> *Id.*

<sup>124</sup> *See, e.g.*, *In re Taylor*, 567 F.2d 1183, 1188-89 (2d Cir. 1977).

<sup>125</sup> *See, e.g.*, *In re Grand Jury Subpoena*, 223 F.3d 213, 219 (3d Cir. 2000)

<sup>126</sup> *In re Grand Jury Proceedings (John Doe)*, 867 F.2d at 539

evidence presented, and must be scrupulous in exercising their discretion where crime-fraud is alleged.<sup>127</sup>

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<sup>127</sup> *See, e.g.*, In re Grand Jury Subpoena, 223 F.3d at 219.

V. PROPOSED LEGISLATION

A) *Proposed Statute Regulating Subpoenaing of Attorneys to Testify to Client Confidentialities*

**(A) To subpoena a lawyer in a grand jury or other criminal proceeding to present confidential evidence or testimony about a past or present client, a prosecutor must, as a preliminary matter:**

**(1) reasonably believe that**

**(a) the attorney-client privilege does not protect the evidence because of the existence of crime fraud; and**

**(b) the requested evidence**

**(i) is defined with reasonable particularity;**

**(ii) is confined within a sufficiently narrow scope;**

**(iii) is essential to the successful completion of an ongoing criminal investigation or prosecution; and**

**(iv) cannot be obtained from a nonprivileged source;**

**(2) obtain prior judicial approval for *in camera* inspection of the confidential evidence/testimony at issue by making a preliminary showing of the need for an *ex parte* hearing (“secrecy”) in the form of an affidavit containing :**

**(a) facts demonstrating 1(a) and (b)(i-iv) above that are neither privileged nor grand jury testimony;**

**(b) facts demonstrating that the client-target knew or should have known that the intended conduct was unlawful; and**

**(c) a statement of if and when defense counsel, if subpoenaed to testify, will learn the content of grand jury testimony containing crime fraud evidence.**

**(B) If a judicial finding of the need for secrecy is made after the prosecutor’s preliminary showing, then the court may order an *ex parte* hearing. If the court deems that the prosecution has not established the need for secrecy, the client-target is entitled to, at minimum, notice of the allegations, and may be entitled to rebut the allegations in an adversarial hearing. If the court finds that the need for secrecy is minimal because the attorney-witness will learn of the grand jury testimony containing crime fraud evidence upon taking the stand, there must be an additional judicial determination of the efficacy of (1) notice to the client-target of the allegations and (2) an adversarial hearing.**

**(C) In the event that a prosecutor obtains judicial approval for a subpoena, and that subpoena is issued, that issuance is appealable as a final order.**

## B. Discussion of Proposed Statute Generally

Because there is no split in the circuits on the constitutionality of *ex parte in camera* hearings in crime-fraud cases, the Supreme Court is not likely to deviate from all lower courts<sup>128</sup> and hold that client-targets have a constitutional right to an adversary hearing in response to grand jury subpoenas served on counsel.<sup>129</sup> Instead, the remedies urged in this article consist of proposed legislation directed at prosecutors and trial judges designed to confer protection on privilege holders under the current system, assuming the continuation of *in camera* proceedings under the *Zolin* line of cases.

The goal of this proposed statute is to implement legislation imposing uniform regulations on prosecutors and judges,<sup>130</sup> thereby increasing the likelihood that trial courts find crime-fraud only where the client-target has, *in fact*, intentionally used counsel to further illegal conduct.<sup>131</sup> Put another way, uniform statutory procedures will allow compulsion orders

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<sup>128</sup> See *supra* note 55 and accompanying text.

<sup>129</sup> However, a number of academics and criminal practitioners do find the practice of *ex parte in camera* proceedings in connection with the issuance of grand jury subpoenas unconstitutional as violative of the privilege-holder's due process rights. See, e.g., DiBiagio, *supra* note 41 at ("the defendant's due process rights under the Fifth Amendment militate heavily in favor of subjecting the government's factual foundation for the crime-fraud exception to meaningful attack by the defendant"); Susan W. Crump, *The Attorney-Client Privilege and Other Ethical Issues in the Corporate Context where there is Widespread Fraud or Criminal Conduct*, 45 S. TEX. L. REV. 171, 181 (disfavoring the current practice because "[a]ttorneys and their clients must often respond to government crime-fraud exception allegations without knowing their factual basis, and the district court may make a fact intensive determination of the applicability of the privilege based upon a partial or wholly untested record.").

<sup>130</sup> See Geraldine Gauthier, Note, *Dangerous Liaisons: Attorney-client Privilege, the Crime-Fraud Exception, ABA Model Rule 1.6 and Post-September 11 Counter-Terrorist Measures*, 68 BROOK. L. REV. 351 (2002) (suggesting a uniform approach to crime-fraud).

<sup>131</sup> Uniform application of procedures will help to obviate the problem the Ninth Circuit articulated in 2006, that "[d]espite the fundamental importance and long history of the attorney-client privilege and the crime-fraud exception, the procedures for preserving the privilege against a crime-fraud challenge are surprisingly unclear." *In re Napster, Inc. Copyright Litigation*, 479 F.3d 1078, 1091 (9th Cir. 2006).

only after reliable findings of crime-fraud, and where feasible, only after the privilege-holders have been provided notice of the claims and some opportunity to meaningfully rebut them, without unduly compromising grand jury secrecy.

Such legislation is timely because the current scheme where “uncertainty caused by the [current] lack of uniform standards and procedures surrounding the application of the crime-fraud exception leaves [that] exception vulnerable to abuse.”<sup>132</sup> Moreover, client-targets have few meaningful remedies once the court deems the privilege pierced and the ramifications of disclosure can be far-reaching and draconian.<sup>133</sup> Thus, the proper administration of justice must ensure that the trial court finds crime-fraud only where it truly exists, rather than where there may be an innocent explanation for suspicious communications between counsel and client.<sup>134</sup>

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<sup>132</sup> Auburn K. Daily & S. Britta Thornquist, Note, *Has the Exception Outgrown the Privilege?: Exploring the Application of the Crime-Fraud Exception to the Attorney-Client Privilege*, 16 GEO. J. LEGAL ETHICS 583, 594.

Uncertainty as to the application of the crime fraud exception may cause a chilling of communication between the client and [] attorney, based on the client’s fear that privileged communications may later be exposed pursuant to a claim that the crime-fraud exception should apply... The solution to this problem seems to be increased uniformity in the evidentiary requirements for successful assertion of the crime fraud exception. As long as courts continue to adopt such widely differing formulations of the evidentiary requirement, the uncertainty will persist, and with it, the continuing threat to the attorney-client privilege.

*Id.* at 595.

<sup>133</sup> See *infra* Section III.

<sup>134</sup> See, e.g., Peirce, *supra* note 75, at 825.

[U]nder the special circumstances arising when an attorney is subpoenaed to appear before a grand jury that is investigating his client, the attorney-client relationship warrants stronger safeguards than are currently available.... the nature of the attorney-client relationship and the problems posed by the practice of subpoenaing the target client’s attorney require that the government justify the intrusion into that relationship.

*Id.*

### C. Discussion of Section (A)

The legislation proposed in this article incorporates holdings from appellate courts around the country into one federal statute. The first proposal requires the prosecution to engage in the deliberative process of a preliminary written showing of the need to pierce the attorney-client privilege where crime-fraud is suspected *before* issuing a subpoena on counsel to testify in the grand jury.<sup>135</sup> Under the current scheme, where there is no such pre-subpoena procedure, prosecutors feel no compunction to conduct a preliminary examination of the “quality” of their crime-fraud evidence, to justify why *ex parte* proceedings are necessary in the specific case, or to determine whether to provide the privilege holder with notice of the

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<sup>135</sup> Courts have previously exercised supervisory power to require preliminary showing before issuance of subpoena to lawyer to testify before grand jury. *See generally* *United States v. Klubock*, 832 F.2d 664 (1st Cir. 1987) (attempting to balance the resulting tension between the policies underlying the grand jury process and the protected attorney-client relationship, the court used its supervisory powers to adopt regulations requiring prior judicial approval before issuance of a subpoena both pre- and post-indictment on a target's counsel); *In re Grand Jury Proceedings (Schofield I)*, 486 F.2d 85 (3d Cir. 1973) (holding that in light of the Supreme Court ruling in *United States v. Calandra*, 414 U.S. at 343, that the grand jury may generally “compel the production of evidence or testimony of witnesses...unrestrained by the technical, procedural, and evidentiary rules governing the conduct of criminal trials,” and to prevent abuse of this process, required the government to justify a grand jury subpoena with “some preliminary showing by affidavit that each item [being subpoenaed] is at least relevant to an investigation being conducted by the grand jury and properly within its jurisdiction, and is not sought primarily for another purpose.”), *and* *In re Grand Jury Proceedings (Schofield II)*, 507 F.2d 963,965 (3d. Cir.), cert. denied, 421 U.S. 1015 (1975) (Seitz,C.J., concurring) (stating that the requirement to justify a grand jury subpoena is “almost indispensable if citizens are to be afforded minimum protection against the possible arbitrary exercise of power by a prosecutor through use of the grand jury machinery.”) *But cf.* *In re McNabb*, 658 F.2d 211 (3d Cir. 1981) (rejecting target's contention that he should not be compelled to appear until after Schofield I hearing); *In re Special Grand Jury (Leon Harvey)*, 676 F.2d 1005, 1009 (4th Cir. 1982) (decision vacated and withdrawn when grand jury indicted target and he became fugitive, 697 F.2d 12, en banc, and then subsequently vacated as moot) (“There is no significant reason why a preliminary showing requirement in these circumstances would hinder a United States Attorney's role in a grand jury investigation. Indeed, if the United States Attorneys are properly prepared, they will have no trouble showing that the information requested is both relevant and necessary to the investigation.”) *In re Walsh*, 623 F.2d 489 (7th Cir. 1980) (reversing decision by Chief Judge of Northern District of Illinois that required a preliminary showing of need before issuance of attorney subpoena);

allegations and the meaningful chance to rebut them.<sup>136</sup> Indeed, at present the prosecution has no incentive to provide the other side with crime-fraud evidence, even where doing so presents no real risk of compromising grand jury secrecy and would serve the interests of justice. The proposed legislation is designed to provide that incentive before issuing a subpoena on counsel,

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<sup>136</sup> Nor do Department of Justice Internal Guidelines deter prosecutors from serving subpoenas on lawyers compelling them to testify before grand juries.

Evidence suggests that the policy, [to get prior approval from the government before issuing a subpoena] in fact had little impact on federal prosecutor's efforts to subpoena defense lawyers. During the year after it was enacted, the Department of Justice approved 411 attorney subpoenas. During the six month period from March 1987 through October 1987, the Department rejected only ten requests for attorney subpoenas.

Kathy B. Weinman, *Driving a Wedge Between Lawyer and Client: Federal Grand Jury Subpoenas and IRS Summonses of Defense Attorneys*, 40-Jun. B. B. J. 6, 17-18 (1996). That policy required that a an Assistant Attorney General approve those subpoenas after verifying that:

- (1) In a criminal investigation or prosecution, there must be 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. The subpoena must not be used to obtain peripheral or speculative information;
  - (2) In a civil case, there must be reasonable grounds to believe that the information sought is reasonably necessary to the successful completion of the litigation.
  - (3) All reasonable attempts to obtain the information from alternative sources shall have proved to be unsuccessful;
  - (4) The reasonable need for the information must outweigh the potential adverse effects upon the attorney-client relationship. In particular, the need for the information must outweigh the risk that the attorney will be disqualified from representation of the client as a result of having to testify against the client;
  - (5) Subpoenas shall be narrowly drawn and directed at material information regarding a limited subject limited period of time; and
  - (6) The information sought shall not be protected by a valid claim of privilege.
- These guidelines on the issuance of grand jury or trial subpoenas to attorneys for information relating to the representation of clients are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, nor do they place any limitations on otherwise lawful investigative or litigative prerogatives of the Department of Justice.

Department of Justice, United States Attorney's Manual § 9-2.161(a)(E).

without forcing the prosecutor to reveal grand jury testimony to the client-target, thereby jeopardizing the secrecy of a grand jury investigation.<sup>137</sup>

Under this legislative scheme, before serving a grand jury subpoena on counsel, the prosecution must make a preliminary written showing of the need for secrecy at this stage or during a *Zolin ex parte in camera* hearing to obtain a compulsion order. Rather than asserting, in boilerplate fashion, that providing the client-target with notice of the crime-fraud allegations before issuance of the subpoena will compromise grand jury secrecy, the prosecution must provide non-privileged facts and arguments in support of this claimed need for secrecy.<sup>138</sup> The court must, in turn, make specific findings on the record as to whether secrecy is indeed warranted. If not, the defense should be given notice of the allegations and the opportunity to respond, either in writing or through an evidentiary hearing. If yes, then the court should allow the subpoena to issue, followed by the *Zolin* two step process of reviewing the prosecutor's affidavit *ex parte* and holding an *in camera* review of the privileged material.

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<sup>137</sup> The instant proposal suggests that federal law adopt the spirit of MASS. RULE OF PROF'L CONDUCT 3.8(f) which requires that a prosecutor obtain judicial approval prior to issuing a grand jury subpoena to an attorney for client related information and states in relevant part:

The prosecutor in a criminal case shall...(f) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless:

- 1) the prosecutor reasonably believes:
  - i) the information sought is not protected from disclosure by any applicable privilege;
  - the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
- 2) the prosecutor obtains prior judicial approval after an opportunity for a prior adversarial proceeding

*Id.* To make the statute have more direct application to factual scenarios where crime-fraud is alleged, section (1)(i) might be modified to read "the information sought is not protected under the attorney-client privilege because of the presence of crime-fraud."

<sup>138</sup> While this initial application can be *ex parte*, the judge should review it to decide whether, with redactions, it should be turned over to defense counsel. If the court determines that doing so will not compromise grand jury secrecy, the bench should order disclosure.



The preliminary application must also provide facts and argument in support of the prosecutor's contention that the client-target *knew or should have known* that the intended conduct was unlawful.<sup>139</sup> Again, facts at the prosecutor's disposal that are neither grand jury testimony nor privileged materials should be included to substantiate the prosecution's contention that the client-target *knowingly* engaged in crime-fraud, as a predicate for the issuance of a subpoena to compel privileged testimony or documents.

Finally, pursuant to the "sliding scale of need for secrecy" test outlined in *In re Taylor*<sup>140</sup> the prosecutor's preliminary application to the court must indicate whether the lawyer-witness will learn the content of the prior grand jury testimony substantiating the charge of crime-fraud, soon after he takes the stand. If the answer is yes, and thus the necessity of preserving grand jury secrecy is weak, then the court should determine the efficacy of conducting an adversarial hearing. At the very least, due process requires that the privilege holder be given notice of the crime-fraud charges.<sup>141</sup> If the answer is no, then the court can follow the two-step *Zolin* process.<sup>142</sup>

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<sup>139</sup> Daily, *supra* note 133, at 593-94 (noting that at least one court has required the party arguing to pierce the privilege show that the client knew or should have known that the intended conduct be unlawful, and recommending that as a requirement in future cases).

<sup>140</sup> *In re Taylor*, 567 F.2d 1183, 1187-88 (2d Cir. 1977).

<sup>141</sup> *See In re Special September 1978 Grand Jury (II)*, 640 F.2d 49 (7th Cir. 1980) (holding that because the only evidence to be revealed was the prosecution affidavit alleging crime-fraud, and the affidavit contained no grand jury testimony, the necessity of preserving secrecy was weak, and disclosure to opposing counsel and the privilege-holder would not discourage other grand jury witnesses from testifying).

<sup>142</sup> Through this legislation, the resulting judicial screening of the preliminary showing by the prosecution might obviate the need for a motion to quash the subpoena by the client-target. Thus the burden of proof and of presenting supportive evidence will be on the party with that evidence at its disposal, the government, rather than the client-target or attorney-witness (who is in the dark).

#### *D. Discussion of Section (B)*

The first requirement for the trial judge is to review the affidavit submitted by the prosecution in support of an *ex parte in camera* hearing to determine whether it has established the need for secrecy. If the court determines that the need for secrecy is minimal or *de minimus*, then it must decide how to proceed. One option is to conduct an evidentiary hearing where the privilege holder will be provided notice of the crime fraud allegations and will be provided the opportunity to rebut these claims in open court, mirroring the process in civil cases. At the same time the court should make a judicial finding as to whether disclosing the actual contents of the affidavit to the defense, with redactions, will compromise the integrity of the criminal investigation. If not, then the court should order immediate disclosure, before conducting any hearing or issuing a compulsion order.

#### *E. Suggested Judicial Guidelines for Adjudication of the Crime-Fraud Exception*

In addition to the mandatory legislation set forth above, trial courts should follow additional procedures to safeguard the due process rights of privilege-holders when adjudicating crime-fraud allegations. If, after review of the prosecution's preliminary application, the court rules that the government has met its initial burden and is permitted to subpoena counsel to testify in the grand jury, defense counsel will undoubtedly move to quash. If that happens the following rules procedures would safeguard due process: first, when the court receives the prosecution's *ex parte* affidavit, containing nonprivileged evidence and argument alleging crime-fraud and makes a judicial finding that an *ex parte in camera* hearing is warranted, it should nonetheless conduct an independent review of that document to determine whether, with redactions, it can be turned over to the privilege-holder without posing a serious threat of compromising the ongoing grand jury investigation. Though in many

federal cases defense counsel makes a written demand for production of the prosecutor's *ex parte* crime-fraud submission,<sup>143</sup> under this new guideline the court should review that prosecutor's affidavit irrespective of whether the defense has made such a demand. If the court subsequently orders disclosure, the client-target will have the opportunity to meaningfully address and rebut the claims, either through written submissions or an evidentiary hearing.<sup>144</sup>

Second, in those cases where defense counsel submits evidence negating the prosecution's claim of crime-fraud, under these new guidelines, the court should consider that evidence before making its determination as whether the prosecution has met its burden of proving crime-fraud. Presently, several, but not all circuits hold that the client-target has the right to have his submission considered by the trial court before the court rules whether the prosecution has met its burden of proof.<sup>145</sup> This guideline will make review of defense submissions a more uniform judicial practice.

Third, in cases where the prosecution survives the preliminary application phase of crime-fraud litigation outlined above, the court should not rule on whether the prosecution has met its burden of proving crime-fraud without reviewing the actual privileged communication at issue. Most courts that have addressed the issue of whether the prosecution can meet its burden of proving crime fraud through an affidavit alone, have determined that the best

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<sup>143</sup> See, e.g., *In re Grand Jury*, 223 F.3d 213 (3d Cir. 2000) (where the target of a grand jury requested access to the government's *ex parte* submission establishing the applicability of the crime-fraud exception).

<sup>144</sup> If the court has concerns in a particular case that a full evidentiary hearing will constitute a "mini-trial," it may restrict the defense to responding to the claim through submission of its own *ex parte* affidavit and documents countering the claim of crime-fraud.

<sup>145</sup> See, e.g., *In re Grand Jury Proceeding #5*, 401 F.3d 247, 253-55 (4th Cir. 2005) (holding that the district court's failure to review allegedly privileged documents *in camera* before determining whether the crime-fraud exception applied constituted an abuse of discretion).

practice to ensure due process is an *in camera* review of additional supporting evidence, including that privileged communication.<sup>146</sup>

Finally, in cases where the trial court holds an *ex parte in camera* review of privileged documents and testimony, finds that the prosecution has met its burden of proving crime-fraud, and orders counsel to testify before the grand jury, that judge should make a concerted effort to transfer the case to another judge for trial. That way, the presiding trial judge will not be in the position of having reviewed privileged communications between defense counsel and the defendant when making legal rulings at trial. Transferring the case will help the court maintain the appearance of propriety and will serve the interests of justice.<sup>147</sup>

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<sup>146</sup> See, e.g., *In re BankAmerica Corp. Sec. Litig.*, 270 F.3d 639, 645 (8th Cir. 2001) (noting that it could not find any case in which the Eighth Circuit had affirmed a production order for documents under the crime-fraud exception when the lower court had not first reviewed the allegedly privileged documents *in camera*); and *In re Antitrust Grand Jury*, 805 F.2d 155, 168 (6th Cir. 1986) (holding that the district court plainly erred when it ruled that the government established *prima facie* crime-fraud and ordered the production of documents, when it had never examined those documents *in camera*). According to the Supreme Court, *in camera* review of allegedly privileged documents is an inexpensive and effective way to balance competing interests of privilege and the need for documents. *Kerr v. United States District Ct. for N.D. of Cal.*, 426 U.S. 394, 405-06 (1976).

<sup>147</sup> See, e.g., *In re Marriage of Decker*, 606 N.E.2d 1094, 1107 (Ill. 1992) (noting that after an initial *prima facie* determination of crime-fraud has been made, “it would be prudent, where possible, to have another trial judge conduct the *in camera* inspection once the initial threshold has been met and the court has determined that an *in camera* inspection is proper.”)

## VI. CONCLUSION

The fair administration of justice requires the abrogation of the attorney-client privilege when a client-target uses counsel to facilitate crime or fraud. A client-target should not be rewarded or protected where he used his lawyer illegally. Yet the extremely draconian consequence of compelling a lawyer to testify to client confidences, thereby effectively abrogating the attorney-client relationship, should occur only where the facts warrant it. Through legislation that arms the privilege holder with additional due process protections, the hope is to address and resolve problems presented by a procedural world where *ex parte in camera* hearings are the rule and not the exception. The legislative imposition of procedural requirements on the government and the bench that are neither unduly burdensome, nor conflict with current federal case law, will provide the privilege holder a real chance of defending against specious crime-fraud allegations without thwarting the integrity and importance of grand jury secrecy. The proposed legislation imposes rules to be followed by prosecutors and judges in all crime-fraud cases, thereby realigning the grand jury process to once again protect as well as investigate.