

## 9 A.L.R.6th 363 (Originally published in 2005)

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Marjorie A. Shields, J.D.

### Crime-Fraud Exception to Attorney-Client Privilege in State Courts—Contemplated Crime

The crime-fraud exception removes from the attorney-client privilege those client communications that are in furtherance of contemplated or ongoing criminal or fraudulent conduct. In [Butler, Pappas, Weihmuller, Katz, Craig, LLP v. Coral Reef of Key Biscayne Developers, Inc.](#), 873 So. 2d 339, 9 A.L.R.6th 769 (Fla. Dist. Ct. App. 3d Dist. 2003), review summarily dismissed, 881 So. 2d 1111 (Fla. 2004), an action for breach of contract, the court held that an insurer had a reasonable basis to believe that the insured attempted to commit insurance fraud, and thus the insured did not meet the burden of showing that the insurer committed a crime or fraud by denying the insured's claim of loss, precluding application of the crime-fraud exception to communications between the insurer and its attorneys. The court found that the insured's supplemental claim was vastly disproportionate to the initial claim of loss, the individual who signed the claim had previously been convicted of insurance fraud, and the company that prepared the estimate on which the insured relied was under investigation for improper inflation of insurance estimates. This annotation collects and summarizes those state cases in which courts have considered the applicability of the crime-fraud exception to the attorney-client privilege where it is alleged that the communication in question involved a contemplated criminal act.

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- ▣ Park Cities Bank, In re, 409 S.W.3d 859 (Tex. App. Tyler 2013) — 3
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- Wright, In re, 2005 WL 913441 (Tex. App. Beaumont 2005) — 5, 7, 11, 23

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[Wis. Stat. Ann. § 905.03\(4\)\(a\)](#). See 4

 [Dyson v. Hempe, 140 Wis. 2d 792, 413 N.W.2d 379 \(Ct. App. 1987\)](#) — 19

 [Lane v. Sharp Packaging Systems, Inc., 2002 WI 28, 251 Wis. 2d 68, 640 N.W.2d 788 \(2002\)](#) — 4

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## I. PRELIMINARY MATTERS

### § 1. Scope

This annotation collects and discusses those state cases in which courts have considered the applicability of the crime-fraud exception to the attorney-client privilege<sup>1</sup> where it is alleged that the communication in question involved a contemplated criminal act.<sup>2</sup>

Some opinions discussed in this annotation may be restricted by court rule as to publication and citation in briefs; readers are cautioned to check each case for restrictions. A number of jurisdictions may have rules, regulations, constitutional provisions, or legislative enactments directly bearing upon this subject. These provisions are discussed herein only to the extent and in the form that they are reflected in the court opinions that fall within the scope of this annotation. The reader is consequently advised to consult the appropriate statutory or regulatory compilations to ascertain the current status of all statutes discussed herein.

### § 2. Background and summary

#### [Cumulative Supplement]

The relationship between an attorney and a client is highly fiduciary in its nature and of a very delicate, exacting, and confidential character, requiring a high degree of fidelity and good faith.<sup>3</sup>

The attorney-client privilege is a matter of common-law right and is the oldest of the privileges for confidential communications known. It protects disclosures that a client makes to his or her attorney, in confidence, for the purpose of securing legal advice or assistance.<sup>4</sup>

The crime-fraud exception removes the privilege from those attorney-client communications that are in furtherance of contemplated or ongoing criminal or fraudulent conduct.<sup>5</sup>

It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the seal of secrecy between lawyer and client does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime.<sup>6</sup> The crime-fraud exception to the attorney-client privilege is a limited one, and, because the attorney-client privilege has the effect of withholding relevant information from the fact finder, it applies only where necessary to achieve its purpose and after a determination by the trial court that there is probable cause to believe that a crime or fraud has been attempted or committed and that the communication was in furtherance thereof.<sup>7</sup> Disclosures of information to counsel are privileged as they relate to past offenses as distinguished from a crime that is planned for the future.<sup>8</sup>

It has been held that the crime-fraud exception to the attorney-client privilege is satisfied where the entire attorney-client relationship is embarked upon in furtherance of criminal activity, where the relationship is permeated by criminal activity, and where the client takes an active part in it, notwithstanding that it may have been the attorney who originally conscripted the client for an illegal purpose.<sup>9</sup> In the context of the crime-fraud exception to the lawyer-client privilege, "fraud" would include criminal fraud, as well as the commission and/or attempted commission of fraud on the court or on a third person, or common-law fraud.<sup>10</sup>

It has been recognized that good-faith consultations with attorneys by clients who are uncertain about the legal implications of a proposed course of action are entitled to the protection of the attorney-client privilege, even if that action should later be held improper. Also, the crime-fraud exception to the attorney-client privilege does not apply simply because privileged communications would provide an adversary with evidence of a crime or fraud; rather, mere relevance is insufficient, and there must be a showing that the communications at issue were made with an intent to further an unlawful act.<sup>11</sup>

An attorney-client relationship must exist at the time that a communication is made in order for the crime-fraud exception to apply. Thus, it has been held, where an attorney whom the defendant had attempted to involve in an extortion scheme did not occupy the relationship of attorney to the defendant and did not undertake to assist the defendant in any capacity in connection with the scheme, and where the attorney had refused to have anything to do with the defendant's plan and had advised the defendant that he would call the police, no violation of the attorney-client

relationship resulted from the fact that the attorney was thereafter subpoenaed and forced to reveal the defendant's name, or from the fact that the attorney later testified against the defendant.<sup>12</sup> It has also been held that an attorney was competent to testify to the fraudulent conduct of his clients, whom he had refused to represent, in procuring admission of a forged document to probate as the last will and testament of the deceased.<sup>13</sup>

An attorney need not be aware of the illegal use to which his advice is being put in order for the crime-fraud exception to the attorney-client privilege to apply; rather, the crime or fraud exception applies only when the client knows or reasonably should know that the attorney's advice is sought for a wrongful purpose.<sup>14</sup> In other words, the exception to the attorney-client privilege, applicable when the relation is abused by the client who seeks legal assistance to perpetrate a crime or fraud, is invoked only when a client seeks to obtain legal assistance to perpetrate or to enable or aid one to commit a crime of fraud, and an intention on the part of the client is required to abuse the attorney-client relationship, although the actual wrongdoing may be perpetrated by anyone.<sup>15</sup>

Courts in particular actions have determined, under the facts and circumstances presented, the applicability of the crime-fraud exception to the attorney-client privilege. Courts have determined the applicability of the crime-fraud exception in: an action for breach of fiduciary duty, holding the exception to be applicable (§ 4) or not (§ 5); an action for breach of contract, holding the exception to be applicable (§ 6) or not (§ 7); an action alleging trade secret misappropriation, holding the exception to be applicable (§ 8) or not (§ 9); an action for conversion, holding the exception to be applicable (§ 10) or not (§ 11); an action for divorce or a child custody proceeding, holding the exception to be applicable (§ 12) or not (§ 13); an action for insurance fraud or bad faith, finding the exception to be applicable (§ 14) or not (§ 15); an action for personal injury and/or negligence, holding the exception to be applicable (§ 16) or not (§ 17); an action for an antitrust violation (§ 18); an action for legal malpractice or an attorney disciplinary proceeding (§ 19); an action pertaining to employer/employee relations, finding the exception to be applicable (§ 20) or not (§ 21); an action alleging fraud, finding the exception to be applicable (§ 22) or not (§ 23); an action for defamation or invasion of privacy (§ 24); a shareholder's action, finding the exception to be applicable (§ 25) or not (§ 26); a civil rights action (§ 27); an action involving trusts or wills, finding the exception to be applicable (§ 28) or not (§ 29); debtor/creditor actions, finding the exception to be applicable (§ 30) or not (§ 31); an action pertaining to real property, holding the exception to be applicable (§ 32) or not (§ 33); various unspecified civil actions (§ 34); criminal prosecutions for sexual abuse (§ 35); murder, finding the exception to be applicable (§ 36) or not (§ 37); racketeering (§ 38); conspiracy (§ 39); forgery (§ 40); evidence tampering or intimidation of a witness, attorney, or judge, finding the exception to be applicable (§ 41) or not (§ 42); bribery (§ 43); extortion or blackmail (§ 44); perjury, finding the exception to be applicable (§ 45) or not (§ 46); misuse of official information (§ 47); narcotics (§ 48); arson (§ 49); larceny, theft, or embezzlement (§ 50);

possession of stolen property (§ 51); eavesdropping or wiretapping, finding the exception to be applicable (§ 52) or not (§ 53); and in various other unspecified criminal prosecutions (§ 54).

## CUMULATIVE SUPPLEMENT

### Cases:

Although the crime-fraud exception to attorney-client privilege used to apply only to criminal activity, the exception now applies to advice or assistance for the purpose of perpetrating a civil fraud as well. [In re Disciplinary Proceeding Against Jackson](#), 322 P.3d 795 (Wash. 2014).

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**[END OF SUPPLEMENT]**

### § 3. Practice pointers

[\[Cumulative Supplement\]](#)

With respect to the burden of proof for the crime-fraud exception to the attorney-client privilege, it has been recognized, generally, that the crime-fraud exception applies only if: (1) the party asserting it makes out a prima facie case of contemplated fraud; and (2) there is a relationship between the document for which the privilege is challenged and the prima facie proof offered.<sup>16</sup>

Documents at issue in a claim of crime-fraud exception to the attorney-client privilege cannot be used for the purpose of making out a prima facie case for the exception, unless the party asserting the privilege consents. Absent an agreement otherwise, a trial judge should not examine written communications between an attorney and client, unless the party seeking to establish the crime-fraud exception adduces competent evidence, apart from the disputed documents, that would lead a reasonable person to believe that such examination would reveal that communications were part of an effort to perpetrate some crime or fraud.<sup>17</sup>

It has been held that a prima facie showing of a crime or fraud need not rise to the level of dispositive proof for purposes of the crime-fraud exception to the attorney-client privilege, but it must at least have some substance, and although the government is not obliged to come forward with proof sufficient to establish the essential elements of a crime or fraud beyond a reasonable doubt, it is not enough for the government merely to allege that it has a sneaking suspicion the client was engaging in or intending to engage in a crime or fraud when it consulted the attorney. Generally, a test of probable cause required to establish the crime-fraud exception to the attorney-

client privilege is whether the totality of the facts and circumstances presented would warrant a reasonable and prudent person in the belief that the attorney-client communications in question were in furtherance of an ongoing or future crime or fraud. Only when communications are intended directly to advance a particular criminal or fraudulent endeavor will their privileged status be forfeited by operation of the crime-fraud exception to the attorney-client privilege; thus it is not enough to show temporal proximity between the communication and a crime, and communications concerning past or completed crimes are not affected by the crime-fraud exception.<sup>18</sup>

Case law has also established that, once there is a showing of a factual basis for application of the crime-fraud exception to the attorney-client privilege, the decision whether to engage in an in camera review of the evidence lies in the discretion of the court and, if and when there has been an in camera review, the court exercises its discretion again to determine whether the facts are such that the exception applies. These factual determinations, it has been held, are governed by the "clearly erroneous" standard.<sup>19</sup>

Before a trial court may perform in camera review at the request of a party opposing assertion of the attorney-client privilege on the basis of the crime-fraud exception, the party opposing assertion of the privilege must present evidence sufficient to support a reasonable belief that in camera review may yield evidence that establishes the exception's applicability. A party asserting the attorney-client privilege, who has properly opposed a motion for in camera review on the basis that the crime-fraud exception is applicable, may, in a proceeding brought after in camera review, seek a writ of mandamus on either or both of the following grounds: (1) that the trial court erred in holding that there was sufficient evidence to support a reasonable belief that in camera review might yield evidence establishing applicability of crime-fraud exception; or (2) that, after reviewing allegedly privileged materials in camera, the trial court erred in holding that there was sufficient evidence to conclude that the crime-fraud exception applies to some of or all the materials.<sup>20</sup>

It has been held, in response to a motion for return of property seized pursuant to a search warrant, that in camera review had to be conducted of documents seized from an attorney's office for which the attorney-client privilege was claimed to determine the applicability of the crime-fraud exception, even though a large quantity of documents were seized and the review might be burdensome and time-consuming.<sup>21</sup>

It has further been held that in order for an employer to force former employees and the employees' counsel to testify regarding communications between the employees and their counsel, the employer was required to specify what it expected the communications to reveal and demonstrate that there was a likelihood that the communications evidenced the intent to commit fraudulent acts in order for the trial court to be required to hold an in camera inspection of the communications, and if, after reviewing communications, the trial court found that there was a prima facie showing that

the crime-fraud exception to the attorney-client privilege applied, the privilege would be broken, and the communications could then be entered into evidence.<sup>22</sup>

Even if in camera inspection makes it appear that the crime-fraud exception to the attorney-client privilege applies, a full evidentiary hearing is necessary, unless waived by the proponent of the privilege, before confidential communications between an attorney and client can be disclosed to another party.<sup>23</sup>

Thus in a prosecution for grand theft arising out of the defendant's receipt of worker's compensation benefits, it was held that the evidence was insufficient to allow the state to discover communications between the defendant and her claims compensation attorney pursuant to the fraud exception to the attorney-client privilege, where the state presented no live testimony on the issues involved in its motion to compel the defendant's attorney to testify and no adversarial evidentiary hearing was held on the motion.<sup>24</sup> It has also been held that, where the trial court failed to conduct the necessary evidentiary hearing prior to applying the crime-fraud exception to an alleged discovery abuse issue, the portion of the trial court's ruling holding that the attorney-client privilege could not be invoked would be quashed.<sup>25</sup> A preliminary evidentiary hearing to determine whether the attorney-client privilege was overcome by the crime-fraud exception has been held to require notice to, and participation by, the defendants, and cannot be conducted by ex parte conferences discussing the substance of the case with prosecutors.<sup>26</sup>

In the context of criminal prosecutions, it has been held that the probable cause showing necessary to obtain a search warrant authorizing the seizure of an attorney's case files does not necessarily establish a prima facie case that the attorney's clients sought or obtained legal services to enable or aid the commission of a crime or fraud and that the attorney-client privilege is inapplicable. Thus it was ruled that the trial court properly ordered sealing of documents seized from attorneys pursuant to search warrants pending resolution of their claims of the attorney-client and work-product privilege, where a nondisclosure order permitting the People to have access to the documents before the privilege claims were resolved would violate the privilege and defeat the purpose of the hearing.<sup>27</sup>

While it has been recognized that the attorney-witness must, except in the most exceptional circumstances, honor a properly issued subpoena by appearing before the grand jury, it has been held that motions by attorneys to quash subpoenas, which required them to testify before the grand jury, on the ground that their testimony would violate the attorney-client privilege, could not be entertained prior to the attorneys' appearance before the grand jury, but, rather, the issue as to such privilege could be raised only when questions asked during the interrogation before the grand jury sought to elicit information assertedly within the privilege.<sup>28</sup>

## CUMULATIVE SUPPLEMENT

### Cases:

Party seeking discovery of otherwise privileged attorney-client communication bears burden of proving crime-fraud exception to attorney-client privilege. [Vernon's Ann.Texas Rules Civ.Proc., Rule 192.5\(c\)\(5\)](#); Rules of Evid., [Rule 503\(d\)\(1\)](#). [In re Park Cities Bank](#), 409 S.W.3d 859 (Tex. App. Tyler 2013), subsequent determination, 2013 WL 5276050 (Tex. App. Tyler 2013).

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**[END OF SUPPLEMENT]**

## II. APPLICATION IN CIVIL ACTIONS

### § 4. Breach of fiduciary duty—Crime-fraud exception held applicable

[\[Cumulative Supplement\]](#)

The state courts in the following cases held, under the facts and circumstances presented, that the crime-fraud exception to the attorney-client privilege was applicable in an action alleging breach of fiduciary duty.

The court in [Ginsburg v. Pachter](#), 893 So. 2d 586 (Fla. Dist. Ct. App. 4th Dist. 2004), held that letters from a law firm to a client concerning the execution of promissory notes were discoverable, pursuant to the crime-fraud exception to the attorney-client privilege, in a breach of fiduciary duty action against a law firm arising out of the execution of the promissory notes. The plaintiff had alleged, inter alia, that the defendant, who was represented by the same law firm (also named as defendants) as the plaintiff, conspired with others to strip the corporation formed by the plaintiff and the defendant of its assets and to eliminate the plaintiff's interest. The court found that the trial court, after reviewing the letters in question in light of the plaintiff's allegations of breach of fiduciary duty, properly found an exception to the privilege under [Fla. Stat. Ann. § 90.502\(4\)](#), which provides that there is no lawyer-client privilege when a communication is relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer, arising from the lawyer-client relationship. Ultimately relying on the crime-fraud exception to the attorney-client privilege, the trial court ordered production of the two letters. The court found that where the relationship of the law firm to the various individuals and corporate entities, including the plaintiff, was "less than crystal clear," it could not say the trial court deviated from the essential requirements of law when it determined that, while privileged, the letters were discoverable based

upon the crime-fraud exception, nor did it find irreparable harm would result from their disclosure to the plaintiff.

In [Niles v. Mallardi](#), 828 So. 2d 1076 (Fla. Dist. Ct. App. 4th Dist. 2002), where the decedent's children brought an action for intentional interference with an expectancy and breach of fiduciary duty against an attorney who had prepared their father's will and the will of the father's wife, and who had served as personal representative of the wife's estate, the court held that the biological children were entitled to depose an attorney who prepared the father's will and represented the wife as the personal representative of the father's estate following his death. The attorney-client privilege did not apply to the attorney's testimony, since, under the fraud exception, [Fla. Stat. Ann. § 90.502\(4\)](#), the children alleged that the wife diverted the assets which should have been inherited by the deceased's children for the benefit of her own children and that the attorney was liable for the loss.

In [First Union Nat. Bank v. Turney](#), 824 So. 2d 172 (Fla. Dist. Ct. App. 1st Dist. 2001), where a trust beneficiary brought an action against a trustee bank for breach of fiduciary duty, the court found that the crime-fraud exception to the attorney-client privilege applied to communications pertaining to the bank's attempt to obtain a general release from the beneficiary, where the bank did not fully disclose all material facts to the beneficiary, as bank personnel were aware that the other beneficiary had previously alleged breaches of fiduciary duty, but did not disclose such allegations. Also, the court found, the crime-fraud exception applied to attorney-client communications regarding the bank's deliberate nondisclosure of material facts pertaining to its breach of fiduciary duty, in furtherance of the bank's statute of limitations defense, where the bank's lawyers began, while the bank was still trustee, to take steps designed to set up a statute of limitations defense to defeat the beneficiary's claims.

In [Steevest, Inc. v. Scansteel Service Center, Inc.](#), 807 S.W.2d 476 (Ky. 1991), the Supreme Court of Kentucky held that the attorney-client privilege was not applicable, under the crime-fraud exception, to prevent discovery of the attorney of a corporate officer who formed a competing enterprise while still employed by the corporation, in light of the attorney's counseling of the corporate employee regarding future acts which were alleged to constitute a breach of fiduciary duties on the part of a corporate employee, where the evidence showed that the attorney advised the employee in efforts to form a corporation and presumably knew that his activities in formulating a new enterprise occurred during the period of employment and possibly constituted a breach of fiduciary duties.

Where a shareholder and officer in a professional medical corporation brought an action against a corporation's attorney alleging breach of the attorney-client relationship, breach of fiduciary, legal, and ethical duties, fraud, and legal malpractice, the court in [Fassihi v. Sommers, Schwartz, Silver, Schwartz & Tyler, P.C.](#), 107 Mich. App. 509, 309 N.W.2d 645 (1981), held that allegations

that the professional medical corporation's attorney, while under the guise of representing the corporation, conspired to withhold information from a 50% shareholder, which the shareholder had a right to have as a shareholder and member of the board of directors, and to wrongfully deprive the shareholder of the benefits of a business opportunity, all stemming from the shareholder's ouster from the corporation, were sufficient to defeat the attorney's invocation of the attorney-client relationship pursuant to the exception that the attorney-client privilege did not protect communications made for the purpose of perpetrating a fraud.

In  [Euclid Retirement Village, Ltd. Partnership v. Giffin, 2002-Ohio-2710, 2002 WL 1265570](#) (Ohio Ct. App. 8th Dist. Cuyahoga County 2002), the court held that the crime-fraud exception to the attorney-client privilege applied, in an action by limited partners against a general partner and its attorney for breach of fiduciary duty, to the attorney billing documents describing the nature of the work performed for the general partner, where the limited partners alleged that the general partner sought the attorney's counsel in furtherance of unlawful activities, such as self-dealing and the unlawful transfer of a partnership debt.

The crime-fraud exception to the attorney-client privilege applied, in a limited partners' action against a general partner and its attorney for breach of fiduciary duty, to attorney billing documents describing the nature of work performed for the general partner, the Supreme Court of Wisconsin, in  [Lane v. Sharp Packaging Systems, Inc., 251 Wis. 2d 68, 2002 WI 28, 640 N.W.2d 788 \(2002\)](#), held, where the limited partners alleged that the general partner sought the attorney's counsel in furtherance of unlawful activities, such as self-dealing and unlawful transfer of a partnership debt. In order to establish a prima facie case of fraud for purposes of a crime-fraud exception to the lawyer-client privilege ([Wis. Stat. Ann. § 905.03\(4\)\(a\)](#)), the court said, a plaintiff must only show reasonable cause to believe that the attorney's services were utilized in furtherance of an ongoing unlawful scheme; "reasonable cause" being more than suspicion but less than a preponderance of evidence. Thus, the court found, the circuit court did not erroneously exercise its discretion in finding that a former officer of the corporation established a prima facie case that the services of the attorney were obtained to enable the commission of a fraud, for purposes of the crime-fraud exception, where the officer served on the board of directors and had an option to purchase 25% of the corporation's stock, under the corporate by-laws the board was to approve any dividend distributions, without the officer's knowledge or meeting of the board, and with the attorney's advice the corporation obtained a loan to finance the corporate distribution to the existing shareholders, and in the month following the distribution the officer was informed of his termination. However, the court determined that the circuit court erroneously exercised its discretion in deciding not to conduct an in camera review of the documents in question following its finding that the plaintiff had made a prima facie case of fraud for purposes of the crime-fraud exception to the lawyer-client privilege, where the burden to establish a prima facie case was low, and only by reviewing the documents would the court be able to determine if, under such exception, the documents in the attorney's file could not be withheld from production. The court

therefore reversed and remanded, ordering, on remand, an in camera review of the communications in question.

## CUMULATIVE SUPPLEMENT

### Cases:

In determining whether the crime-fraud exception to the attorney-client privilege applies, fraud must be understood broadly as a generic term, embracing all multifarious means which human ingenuity can devise, and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth, and includes all surprise, trick, cunning dissembling, and any unfair way by which another is cheated. [Me. R. Evid. 502 \(d\)\(1\)](#). [Harris Management, Inc. v. Coulombe, 2016 ME 166, 151 A.3d 7 \(Me. 2016\)](#).

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**[END OF SUPPLEMENT]**

### [§ 5. Breach of fiduciary duty—Crime-fraud exception held inapplicable](#)

[\[Cumulative Supplement\]](#)

The state courts in the following cases held, under the facts and circumstances presented, that the crime-fraud exception to the attorney-client privilege was inapplicable in an action alleging breach of fiduciary duty.

In [First Union Nat. Bank v. Turney, 824 So. 2d 172 \(Fla. Dist. Ct. App. 1st Dist. 2001\)](#), where a trust beneficiary brought an action against a trustee bank for breach of fiduciary duty, the court found that an attorney did not represent the trustee bank and beneficiary with conflicting interests, as required to support the claim that the crime-fraud exception defeated the attorney-client privilege asserted by the bank in its communications with its attorney; rather, the attorney represented only the trustee, since the bank never told the beneficiary that the attorney represented her personally, and the beneficiary was expressly informed that the attorney represented the trust and she was free to retain her own counsel. The court stated that a client need not succeed in committing the intended crime or fraud in order to forfeit the attorney-client privilege; the dispositive question is whether attorney-client communications were part of the client's effort to commit a crime or perpetrate a fraud.

In [Huie v. DeShazo, 922 S.W.2d 920 \(Tex. 1996\)](#), where a trust beneficiary sought to compel discovery, from an attorney, of communications by the trustee to the attorney relating to trust administration in a suit by the beneficiary alleging that the trustee breached his fiduciary duty, the court held that the attorney-client privilege protected confidential communications between the trustee and attorney from discovery by the trust beneficiary, notwithstanding the trustee's fiduciary duty to fully disclose material facts regarding the administration of trust, since, inter alia, the crime-fraud exception to the attorney-client privilege, [Tex. R. Civ. Evid. 503\(d\)\(1\)](#), did not apply to compel disclosure of confidential communications concerning trust administration from the trustee to the attorney, given that the trustee's invocation of the attorney-client privilege did not violate the duty of full disclosure and thus the attorney could not be compelled to testify about the communications in question.

In an action by a plaintiff alleging various claims, including, inter alia, breach of fiduciary duty, against the real parties in interest arising out of the alleged underpayment of royalties by oil producers on federal property, the court in [In re Wright, 2005 WL 913441 \(Tex. App. Beaumont 2005\)](#), held that the trial court erred in ordering disclosure of several categories of documents under the crime-fraud exception to the attorney-client privilege rule, where the court failed to conduct a document-by-document assessment as to admissibility and failed to identify the basis for ruling on each document. In so holding, the court observed that the special master reported his general findings to the trial court, but did not identify specific documents covered by the crime-fraud exception.

### Comment

In a subsequent proceeding, the court in [In re Wright, 2005 WL 2087862 \(Tex. App. Beaumont 2005\)](#), considered the plaintiff's motion for a writ of mandamus to compel the trial court judge to vacate an order compelling the production of certain documents. After reviewing the documents at issue, the court found that the trial court erred in ordering the production of most of them, noting that the documents were not outcome determinative. In addition, referring to some of these documents, the court accepted the plaintiff's argument that he did not commit fraud when merely seeking the advice of counsel prior to negotiations between the parties, and that other documents were not evidence of fraud. As to another class of documents, which the court found were not income determinative, the court determined that the documents did not show a prima facie case of fraud based on the only theory suggested by the defendants, specifically, the fraudulent overstatement of time spent working on a qui tam lawsuit. As to the final class of documents, however, the court concluded that they were outcome determinative and should be produced, though only after being referred back to the trial court for redaction of those portions of the documents involving legal advice by the plaintiff's attorney.

## CUMULATIVE SUPPLEMENT

### Cases:

Crime-fraud exception to attorney-client privilege and work product doctrine was not applicable under Kentucky law in suit by employer asserting that employees breached contractual and fiduciary duties by seeking employment with competitor to warrant disclosure of privileged communications between defendants and their attorney, and between their attorney and attorneys representing competitor, absent any indication that communications were in furtherance of breach of any duty. [Fed.Rules Civ.Proc.Rule 26\(b\)\(3\)](#), 28 U.S.C.A.; [Ky.Rules of Evid., Rule 503\(d\)\(1\)](#).

 [Invesco Institutional \(N.A.\), Inc. v. Paas](#), 244 F.R.D. 374 (W.D. Ky. 2007).

Discovery master did not abuse his discretion by ruling that documents evidencing communications between corporation's directors and law firm advising directors on proposed acquisition were protected from discovery by the attorney-client privilege and that the documents were not subject to the crime-fraud exception, in breach of fiduciary duty, fraud, and conspiracy to commit fraud action that minority shareholders challenging acquisition of corporation brought against corporation, corporation's directors, buyer, and attorney. [Fisher v. Grove Farm Co., Inc.](#), 230 P.3d 382 (Haw. Ct. App. 2009), cert. rejected, 2010 WL 2091569 (Haw. 2010).

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**[END OF SUPPLEMENT]**

### **§ 6. Breach of contract—Crime-fraud exception held applicable**

[\[Cumulative Supplement\]](#)

The state courts in the following cases held, under the facts and circumstances presented, that the crime-fraud exception to the attorney-client privilege was applicable in an action alleging breach of contract.

In  [Dickey v. Johnson](#), 532 S.W.2d 487 (Mo. Ct. App. 1975), a suit brought by the sellers for specific performance of a claimed settlement agreement of disputes arising out of contracts for the sale of five banks in which the buyers counterclaimed, alleging conspiracy on the part of the sellers, the document, which was alleged to be a privileged communication between the sellers'

attorneys and sellers, but which had the import of an unlawful purpose to impose economic duress on the buyers until they compromised the contracts for the sale of the banks, was admissible under the crime-fraud exception to the attorney-client privilege.

See [Cortland Associates, LP v. Cortland Neighborhood Condominium Ass'n, 2005 WL 1405123 \(N.J. Super. Ct. Ch. Div. 2005\)](#), wherein the court held that the crime-fraud exception prevented the application of the attorney-client privilege to protect an attorney's certification under seal revealing information she obtained concerning the conduct of her client, one of several defendants in a contract action. The client never shared the specifics of the conduct with his attorney, but upon being informed of the client's conduct, the attorney informed the court and the plaintiff that an ethical issue had arisen, and further, indicated her intention to withdraw as counsel for the client. Following ex parte review of the attorney's certification, the court determined that the information contained therein must be shared with the plaintiff, citing the disadvantage to the plaintiff if the information was not disclosed, the late stage of the litigation when this issue arose, and the difficulty the plaintiff would have obtaining the information from other sources when the plaintiff did not even know what information was contained in the certification. In addition, the court relied on the crime-fraud exception, noting that the term "fraud" in this context should be given the broadest interpretation possible, including virtually all kinds of deception and deceit, even though they might not otherwise warrant criminal or civil sanctions. Also included in the definition of fraud, the court stated, was fraud upon the court, noting that the defendant/client in this case communicated his conduct to his attorney and hiding such conduct would clearly constitute a deception and deceit rising to the level of fraud.

In [Ocean Spray Cranberries, Inc. v. Holt Cargo Systems, Inc., 345 N.J. Super. 515, 785 A.2d 955 \(Law Div. 2000\)](#), the court held that a growers cooperative was entitled to obtain memos to a storage company's corporate counsel on the basis of the crime-fraud exception to the attorney-client privilege, as well as the work-product privilege, in an action over spoiled produce, where, although the storage company claimed in its interrogatory answers that it had no knowledge that the produce spoiled while in the warehouse, in camera review of the memos revealed that memos documented the creation of phony temperature readings, a "sea of red" created by thawing produce, and problems with the company's compressors for freezing, and the cooperative established a substantial need for the disclosure of memos and that it could not obtain substantial equivalent of memos by other means. The court further found that the growers cooperative made a prima facie showing it was entitled to obtain the documents in question on the basis of the crime-fraud exception, where, although the storage company claimed in its interrogatory answers it had no knowledge that the produce spoiled while stored at the warehouse, the company admitted problems with refrigeration-freezing equipment, 6 million pounds of produce rotted, company employees testified to a massive cleanup of juice caused by thawing produce, large quantities of produce were subsequently transferred, and when the cooperative's representatives visited the warehouse there was a stench from fermentation and fruit flies were frozen on the produce. The court explained that

the attorney-client privilege is limited to those situations in which lawful legal advice is the object of the relationship, and the crime-fraud exception to the attorney-client privilege applies whether or not the attorney is aware of the client's criminal or fraudulent intent. Where an "attorney-client privileged" memo contains evidence or suggestions of false information, the court continued, the crime-fraud exception applies and the memo is discoverable.

## CUMULATIVE SUPPLEMENT

### Cases:

Corporation seeking discovery under crime-fraud exception to attorney-client privilege, in action against president for breach of contract and breach of fiduciary duty, of its president's communications with law firm that dually represented president and corporation made prima facie showing of reasonable basis to suspect the perpetration or attempted perpetration of a crime or fraud and that the communications were in furtherance thereof, and thus, trial court could conduct an in camera inspection of relevant documents; evidence suggested that president served in that office while holding an interest in one of corporation's largest suppliers without disclosing that interest to corporation, that law firm assisted president in setting up his interest in the supplier and in concealing that interest from corporation, and that law firm assisted president in forming a competitor to corporation. [Mueller Industries, Inc. v. Berkman, 927 N.E.2d 794 \(Ill. App. Ct. 2d Dist. 2010\)](#).

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[END OF SUPPLEMENT]

### § 7. Breach of contract—Crime-fraud exception held inapplicable

[\[Cumulative Supplement\]](#)

The state courts in the following cases held, under the facts and circumstances presented, that the crime-fraud exception to the attorney-client privilege was inapplicable in an action alleging breach of contract.

In [Exxon Corp. v. Department of Conservation and Natural Resources, 859 So. 2d 1096 \(Ala. 2002\)](#), the Supreme Court of Alabama held that a letter from the in-house attorney of an oil company to the accounting manager of an oil project regarding the interpretation of the royalty provisions of the state oil-and-gas lease form was not admissible under the crime-fraud exception to the attorney-client privilege, [Ala. R. Evid. 502\(b\)](#), absent evidence that when the accounting

manager requested the letter the company was using the attorney's services to further an ongoing fraudulent scheme. The court stated that it is not enough for the government merely to allege that it has a suspicion that the attorney's client was engaging in or intending to engage in a crime or fraud when it consulted with the attorney in order for crime-fraud exception to the attorney-client privilege to apply and make the attorney's communications admissible at trial, since a threshold of proof that low could discourage many would-be clients from consulting an attorney about entirely legitimate legal dilemmas; rather, the trial court must find reasonable cause to believe that the attorney's services were utilized in furtherance of the ongoing unlawful scheme. The court found, in the instant case, that the trial court's error in admitting the letter was not harmless in regard to the State's breach of contract claim, though the company did not contest the amount of damages the State was seeking for breach of contract, as the company contested its liability for royalty payments to the State, the letter discussed the interpretation of the royalty provisions of the oil-and-gas lease, and admission of the information protected by the attorney-client privilege that spoke to the issue of a client's liability was highly prejudicial. The court also found that the trial court's error in admitting the letter was not harmless in regard to the State's fraud claim, where the State highlighted the letter in its opening statement to the jury, referred to the letter as "infamous" during the trial, used it during cross-examination of company employees, characterized the letter in its closing argument as stating that the company had little chance of winning the royalty dispute but all the company had to lose was giving the money back, and told the jury in its closing argument that if the jury did not award punitive damages they would be patting the attorney on the back and saying he was right. The court therefore reversed and remanded the trial court's judgment on the jury verdict awarding \$87.7 million in compensatory damages and \$3.42 billion in punitive damages to the State.

In [Butler, Pappas, Weihmuller, Katz, Craig, LLP v. Coral Reef of Key Biscayne Developers, Inc.](#), 873 So. 2d 339, 9 A.L.R.6th 769 (Fla. Dist. Ct. App. 3d Dist. 2003), review summarily dismissed, 881 So. 2d 1111 (Fla. 2004), an action for breach of contract, the court, recognizing that a party that seeks disclosure of privileged communications under the crime-fraud exception to the attorney-client privilege must allege that the communication was made as part of an effort to perpetrate a crime or fraud, and the party must also specify the nature of the crime or fraud, held that an insurer had a reasonable basis to believe that the insured attempted to commit insurance fraud, and thus the insured did not meet the burden of showing that the insurer committed a crime or fraud by denying the insured's claim of loss, precluding application of the crime-fraud exception, [Fla. Stat. Ann. § 90.502\(4\)\(a\)](#), to the attorney-client privilege for communications between the insurer and its attorneys. The court found that the evidence showed that the insured's supplemental claim was vastly disproportionate to the initial claim of loss, the individual who signed the claim had previously been convicted of insurance fraud, and the company that prepared the estimate on which the insured relied was under investigation for improper inflation of insurance estimates.

In [Holland v. Gordy Co.](#), 2003 WL 1985800 (Mich. Ct. App. 2003), appeal summarily denied, 469 Mich. 948, 671 N.W.2d 45 (2003), actions arising from song-writing contracts entered into by the plaintiffs with the defendants alleging that the defendants defrauded them of royalties generated from songs the plaintiffs wrote, the court held that the crime-fraud exception to the attorney-client privilege was inapplicable to a request for document production by the defendants to obtain from the plaintiffs documents accidentally given to the plaintiffs during discovery which contained instructions for the destruction of documents pertaining to the litigation between the parties. The court, recognizing that the attorney-client privilege ceases to operate where the advice from an attorney refers to future, not past, wrongdoing, found, in the instant case, that the trial court found no evidence of wrongdoing or fraudulent conduct by defendants, and, even if the destruction guidelines could be used as evidence of a crime or fraud, the evidence presented established that the destruction guidelines were prepared during its downsizing process when storage facilities containing paper records had to be eliminated, and that no documents relating to the plaintiffs or the instant case were destroyed. Further, there was no evidence presented that any documents were actually destroyed pursuant to the destruction guidelines. Accordingly, the court found that the plaintiffs failed to establish that the crime-fraud exception applied to otherwise privileged documents.

In [Levin v. C.O.M.B. Co.](#), 469 N.W.2d 512 (Minn. Ct. App. 1991), an employee's action against an employer for breach of contract, the court held that the employee failed to establish that a letter was written by the employer's outside counsel to further a fraud on the court for purposes of determining the applicability of the crime-fraud exception to the attorney-client privilege, even though the letter stated that documentation of the employee's poor work performance would provide an opportunity for "manufacturing" favorable evidence that could be used at the time of trial, where there was no evidence that outside counsel was present when the employer allegedly decided to falsify the employee's performance records or that counsel even knew of an alleged conspiracy to falsify records, and the term "manufacturing" was ambiguous and did not compel a finding of fraud. The court held, further, that the employee failed to establish a prima facie case that a conspiracy existed to falsify the employee's work records, where the only uncontradicted evidence of the employer's efforts to create false documents was the former employee's testimony that he told the employee's supervisor to review the employee's good work negatively, and such evidence could reasonably be evaluated in light of the former employee's belief that he had been wrongfully discharged and of his disclosure of a confidential company document to the employee's attorney. Even if the employee established that the letter written by the employer's outside counsel furthered the employer's alleged fraud in falsifying work records, the court found, the attorney's advice to "manufacture" favorable evidence against the employee was not admissible under the crime-fraud exception to the attorney-client privilege, where the evidence was insufficient to show a close relationship between the alleged fraud and the communication, where the employee presented no evidence that the alleged falsification was prompted by the attorney's communication, that such communication was understood as suggesting alleged fraud, or that any other relationship existed.

Although innocent communication from a lawyer may fall under the crime-fraud exception to the attorney-client privilege if the client is planning a fraud or a crime, the court emphasized, privileged statements between an attorney and a client do not fall within the crime-fraud exception to the attorney-client privilege unless the communications were made in furtherance of, and closely related to, a crime or fraud.

In [State ex rel. Peabody Coal Co. v. Clark](#), 863 S.W.2d 604 (Mo. 1993), the Supreme Court of Missouri found that a personal representative of an estate, who brought an action against a coal company seeking to recover sums allegedly due the estate under a royalty agreement, failed to establish a prima facie showing that the coal company had committed a crime or fraud so as to justify discovery of privileged information under the crime-fraud exception to the attorney-client privilege, where it merely made bare averments of fraud, but did not put forth evidence to prove the fraud.

In [National Utility Service, Inc. v. Sunshine Biscuits, Inc.](#), 301 N.J. Super. 610, 694 A.2d 319 (App. Div. 1997), the court held that the crime-fraud exception to the attorney-client privilege (N.J. Stat. Ann. § 2A:84A; N.J. R. Evid. 504(3)) did not apply to a prelitigation memorandum prepared by a corporation's in-house counsel to the corporation's controller merely because it embodied advice arguably inconsistent with the affirmative defense of no contract thereafter asserted by litigation counsel, and thus the memorandum was neither discoverable nor subject to use by an energy audit contractor in the contractor's action against the corporation to recover, under a contract, 50% of the corporation's energy cost savings allegedly resulting from the contractor's audits and recommendations, where the memorandum was prepared over three years before the litigation, laid out the approach to be taken with respect to resolving the contract dispute, and did not suggest the development of false information or facts. In deciding whether the "crime or fraud" exception to the attorney-client privilege applies, the court said, the relevant factor to consider is whether the client consulted with the attorney to aid the client in the commission of any crime, to enable the client to avoid any criminal investigation or proceeding pending at the time the advice was given, or to assist the client to avoid lawful process in any proceeding pending at the time the advice was given.

In an action by a plaintiff alleging various claims, including, inter alia, breach of contract, against the real parties in interest arising out of the alleged underpayment of royalties by oil producers on federal property, the court in [In re Wright](#), 2005 WL 913441 (Tex. App. Beaumont 2005), held that the trial court erred in ordering disclosure of several categories of documents under the crime-fraud exception to the attorney-client privilege rule, where the court failed to conduct a document-by-document assessment as to admissibility and failed to identify the basis for ruling on each document. In so holding, the court observed that the special master reported his general findings to the trial court, but did not identify specific documents covered by the crime-fraud exception.

**Comment**

In a subsequent proceeding, the court in [In re Wright, 2005 WL 2087862 \(Tex. App. Beaumont 2005\)](#), considered the plaintiff's motion for a writ of mandamus to compel the trial court judge to vacate an order compelling the production of certain documents. After reviewing the documents at issue, the court found that the trial court erred in ordering the production of most of them, noting that the documents were not outcome determinative. In addition, referring to some of these documents, the court accepted the plaintiff's argument that he did not commit fraud when merely seeking the advice of counsel prior to negotiations between the parties, and that other documents were not evidence of fraud. As to another class of documents, which the court found were not income determinative, the court determined that the documents did not show a prima facie case of fraud based on the only theory suggested by the defendants, specifically, the fraudulent overstatement of time spent working on a qui tam lawsuit. As to the final class of documents, however, the court concluded that they were outcome determinative and should be produced, though only after being referred back to the trial court for redaction of those portions of the documents involving legal advice by the plaintiff's attorney.

In [Warrantech Corp. v. Computer Adapters Services, Inc., 134 S.W.3d 516 \(Tex. App. Fort Worth 2004\)](#), rule 53.7(f) motion granted, (May 27, 2004), where a computer repair company brought an action for breach of contract, quantum meruit, and fraud against a computer warranty service, and the warranty service counterclaimed for breach of contract, fraud, conspiracy, and breach of fiduciary duty, the court held that the trial court did not abuse its discretion by finding that the letter the repair company wrote to its attorney, evidencing that the company was attempting to conceal its true identity from the warranty service, was not admissible under the crime-fraud exception to the attorney-client privilege, where there was no evidence that the repair company contemplated committing a fraud upon the court when the letter was written, as the letter was written more than two months before the suit was filed, and the letter did not evidence that the company was charging the warranty service for nonexistent repairs or that the company fraudulently induced the service into entering into a provider agreement, which were at the crux of the service's fraud claims.

**CUMULATIVE SUPPLEMENT****Cases:**

Parents of daughter killed in automobile action failed to establish crime/fraud exception to the attorney-client privilege when they attempted to obtain during discovery documents insurer claimed were protected by the privilege, in fraud, breach of contract and extra-contractual claims action brought by parents of daughter killed in automobile accident against insurer that issued policy insuring daughter and policy insuring owners of automobile alleging that insurer misrepresented daughter was driving automobile because owners' policy had larger limits, where parents produced nothing more than their allegations that insurer misrepresented the conclusion of its investigation. Rules of Evid., [Rule 503\(d\)\(1\)](#). [Coats v. Ruiz](#), 198 S.W.3d 863 (Tex. App. Dallas 2006).

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**[END OF SUPPLEMENT]**

### **[§ 8. Trade secret misappropriation—Crime-fraud exception held applicable](#)**

The courts in the following cases held, under the facts and circumstances presented, that the crime-fraud exception to the attorney-client privilege was applicable in an action alleging misappropriation of trade secrets.

Where the plaintiff, a telecommunications company that was negotiating to transfer some of its engineers and trade secrets to the defendant corporation, sued the defendant, alleging trade secret misappropriation, the court in [Jasmine Networks, Inc. v. Marvell Semiconductor, Inc.](#), 12 Cal. Rptr. 3d 123 (Cal. App. 6th Dist. 2004), as modified on denial of reh'g, (Apr. 29, 2004) and review granted and opinion superseded on other grounds, 16 Cal. Rptr. 3d 330, 94 P.3d 475 (Cal. 2004), held, inter alia, that the plaintiff demonstrated a prima facie case of a crime or fraud that was sufficient to support the crime-fraud exception to the attorney-client privilege, where, during the course of the parties' negotiations, the plaintiff obtained evidence that the defendant did not intend to abide by the terms of the contract and had stolen or was planning to steal the plaintiff's trade secrets and hire away the plaintiff's key employees. The evidence was contained in a transcript of a conversation among the defendant's lawyers and officers that was recorded on the plaintiff's voicemail system. The trial court had concluded that the plaintiff had not produced sufficient evidence that the attorney's services were retained and utilized to commit a crime or fraud or that a reasonable relationship existed between the voicemail and such crime or fraud. However, the court found, the plaintiff needed to only show a prima facie case of the defendant's crime or fraud, and a prima facie case that the voicemail reasonably related to that crime or fraud. Thus, the court found, the trial court erred by elevating the requirement of a prima facie case of crime or fraud to whether the plaintiff produced sufficient evidence to demonstrate that such crime or fraud occurred. The court observed, in the instant case, in the voicemail, the defendant's general counsel

and corporate officers openly discussed theft of the plaintiff's trade secret and the unlawful hiring of the engineering group, as well as the potential consequence of jail for the conduct. The court found that the contents of the conversation demonstrated the theft of the plaintiff's trade secret, the potential consequences, and the planned cover-up. Thus, the court determined, the evidence presented to the trial court, as well as the voicemail, satisfied the requirements of a prima facie case of a crime or fraud, and a reasonable relationship between the crime or fraud and the attorney-client communication. The court concluded that in an era where corporate fraud and boardroom misconduct is front-page news, as well as prosecutions of accountants and lawyers in connection with such conduct, our courts are required to ensure that the attorney-client privilege is not used to promote or further any such conduct.

## **§ 9. Trade secret misappropriation—Crime-fraud exception held inapplicable**

### **[Cumulative Supplement]**

The state courts in the following cases held, under the facts and circumstances presented, that the crime-fraud exception to the attorney-client privilege was inapplicable in an action alleging misappropriation of trade secrets.

In *Evans v. General Motors Corp.*, 2003 WL 461044 (Conn. Super. Ct. 2003), an action against the defendant for misappropriation of trade secrets in which the plaintiffs alleged that the defendant manufactured evidence to defeat their claims, the court denied the plaintiffs' motion to depose the defendant's attorneys, finding no basis to do so under the crime-fraud exception to the attorney-client privilege. The court found that although there was probable cause to support the proposition, at least in part, that the defendant had manufactured fraudulent evidence to defeat their claims, there was no allegation that counsel for the defendants had participated in any fraud.

In *Chrysler Corp. v. Sheidan*, 2001 WL 773099 (Mich. Ct. App. 2001), a suit claiming that the defendant wrongfully disclosed its trade secrets, the court rejected the defendant's claim that the crime-fraud exception barred application of the attorney-client privilege to certain e-mails, where the substance of the e-mail concerned the plaintiff's lead attorney's opinions in regard to the defendant's affidavit testimony and the defendant's qualifications as an expert, and there was no evidence suggesting the e-mail was distributed in furtherance of a criminal enterprise or fraud.

## **CUMULATIVE SUPPLEMENT**

### **Cases:**

Amusement park owners did not demonstrate prima facie case of crime or fraud, as required to support application of crime-fraud exception to attorney-client privilege in patent infringement action by patent assignee and licensees; assignee and licensees disputed invalidity of patent and any effort to conceal its invalidity in discovery or during litigation, and allegations of assignee and licensees' incomplete interrogatory answers and uncooperativeness with discovery requests fell short of demonstrating prima facie case of crime or fraud. [Magnetar Technologies Corp. v. Six Flags Theme Park Inc.](#), 886 F. Supp. 2d 466 (D. Del. 2012).

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**[END OF SUPPLEMENT]**

### **§ 10. Conversion of property or funds—Crime-fraud exception held applicable**

The following state court authority held, under the facts and circumstances presented, that the crime-fraud exception to the attorney-client privilege was applicable in an action for conversion of property or funds.

In [Surgical Design Corp. v. Correa](#), 799 N.Y.S.2d 584 (App. Div. 2d Dep't 2005), an action by a corporation against former employees to recover damages for conversion of corporate property and funds, the court held that three letters between the plaintiff and its counsel, reviewed in camera by the referee, were not protected by the attorney-client privilege because they related to client communications in furtherance of a fraudulent scheme, rather than the rendering of sound legal advice. Nevertheless, because the court also concluded that the collateral issue of the plaintiff's fraudulent scheme was not material and relevant to the remaining issues in the litigation, the court found that the referee erred in directing the plaintiff to produce these letters. The defendants, former employees of the plaintiff corporation, improperly retained letters from the plaintiff's Brazilian counsel to the plaintiff, copies of which had been sent to the defendants during the course of their employment, and attempted to use those letters against the plaintiff in the course of this litigation. All but three of the letters were found to be privileged following in camera review, the court commented, as they related to the rendering of sound legal advice.

### **§ 11. Conversion of property or funds—Crime-fraud exception held inapplicable**

The following state court authority held, under the facts and circumstances presented, that the crime-fraud exception to the attorney-client privilege was not applicable in an action for conversion of property or funds.

In an action by a plaintiff alleging various claims, including, inter alia, conversion, against the real parties in interest arising out of the alleged underpayment of royalties by oil producers on federal property, the court in [In re Wright, 2005 WL 913441 \(Tex. App. Beaumont 2005\)](#), held that the trial court erred in ordering disclosure of several categories of documents under the crime-fraud exception to the attorney-client privilege rule, where the court failed to conduct a document-by-document assessment as to admissibility and failed to identify the basis for ruling on each document. In so holding, the court observed that the special master reported his general findings to the trial court, but did not identify specific documents covered by the crime-fraud exception.

### Comment

In a subsequent proceeding, the court in [In re Wright, 2005 WL 2087862 \(Tex. App. Beaumont 2005\)](#), considered the plaintiff's motion for a writ of mandamus to compel the trial court judge to vacate an order compelling the production of certain documents. After reviewing the documents at issue, the court found that the trial court erred in ordering the production of most of them, noting that the documents were not outcome determinative. In addition, referring to some of these documents, the court accepted the plaintiff's argument that he did not commit fraud when merely seeking the advice of counsel prior to negotiations between the parties, and that other documents were not evidence of fraud. As to another class of documents, which the court found were not income determinative, the court determined that the documents did not show a prima facie case of fraud based on the only theory suggested by the defendants, specifically, the fraudulent overstatement of time spent working on a qui tam lawsuit. As to the final class of documents, however, the court concluded that they were outcome determinative and should be produced, though only after being referred back to the trial court for redaction of those portions of the documents involving legal advice by the plaintiff's attorney.

## § 12. Divorce/child custody proceedings—Crime-fraud exception held applicable

### [Cumulative Supplement]

The state courts in the following cases held, under the facts and circumstances presented, that the crime-fraud exception to the attorney-client privilege was applicable in an action for divorce or child custody proceedings.

An attorney's refusal to disclose the whereabouts of his wife and minor children, whose custody had been temporarily awarded to the husband in a dissolution of marriage action, served to assist

the wife in her ongoing violation of a court order and constituted a fraud on the court, and fell within the crime-fraud exception to the attorney-client privilege, [Conn. Rules Professional Conduct 1.6\(c\) \(2\)](#), the court in [Bersani v. Bersani](#), 41 Conn. Supp. 252, 565 A.2d 1368 (Super. Ct. 1989), held.

See [In re Fulton County Grand Jury Proceedings](#), 244 Ga. App. 380, 535 S.E.2d 340 (2000), in which the court held that the Confrontation Clause of the U.S. Constitution ([U.S.C.A. Const. Amend. VI](#)) did not afford an ex-husband the right to cross-examine an investigator on issues relating to whether he functioned in such capacity as to bring him within the protection of the attorney-client privilege, where, while the superior court indicated that it would allow such cross-examination if the investigator's testimony conflicted with the divorce lawyer's, the investigator's testimony did not conflict either with the testimony provided by the divorce lawyer or with the factual assertions contained in the investigator's own motion to quash, and the investigator's testimony authorized the court to find that the subject communications from the ex-husband were made after the investigator ceased acting as an agent or employee of the attorney, and that they fell within the crime-fraud exception to the attorney-client privilege, [Ga. Code Ann. § 24-9-24](#).

In [In re Marriage of Decker](#), 153 Ill. 2d 298, 180 Ill. Dec. 17, 606 N.E.2d 1094 (1992), where an attorney appealed the decision of the circuit court holding the attorney in contempt for refusing to obey an order to disclose any information about a client's intent to commit child abduction from the custodial parent, the Supreme Court of Illinois held that if the client met with the attorney and sought her services in furtherance of criminal activity and knew that the action was illegal, the communication would not be privileged; the attorney must disclose confidences or secrets when directed by a final court order after the court has properly determined that the information is not privileged.

The court in [In re Marriage of Granger](#), 197 Ill. App. 3d 363, 143 Ill. Dec. 651, 554 N.E.2d 586 (5th Dist. 1990), held that statements and communications between a wife and her attorney, which were recorded on tape at a postdissolution hearing when the attorney and client remained in the courtroom during recess to confer and the tape recording device was not turned off, were not protected by the attorney-client privilege and, therefore, under the crime-fraud exception to the attorney-client privilege, the trial court could consider the tape in granting the husband's motion for a new trial on all issues other than dissolution, where the clear import of those statements and communications was that the wife's attorney was urging the wife to commit perjury in order to save any chance she might have of obtaining custody of the child.

In [Fellerman v. Bradley](#), 99 N.J. 493, 493 A.2d 1239 (1985), the Supreme Court of New Jersey, recognizing that the "fraud" exception to the attorney-client privilege, N.J. Stat. Ann. § 2A:84A, expands beyond the notion of traditional tort or criminal law definitions and includes those which constitute "a fraud on the court," such as misleading, inconsistent, or deceitful actions which directly interfere with the judicial process, held that a husband's address, sought in connection with

the enforcement of an order in a domestic relations action, was not protected by the attorney-client privilege, since nondisclosure would have aided in a fraud, in light of the inference of duplicitous intent in the husband's seeking to prevent enforcement of a judgment incorporating an agreement reached with his consent and where enforcement of the privilege would result in a direct and clear impairment of the administration of justice.

An ex-wife's statement that "one of these days I am going to shoot the son of a bitch," made to an employee of the district attorney representing the ex-wife in a child support action against the ex-husband, related to the commission of a future crime and was not covered by the attorney-client privilege, the court in [Wilson v. State, 705 S.W.2d 719 \(Tex. App. Texarkana 1986\)](#), petition for discretionary review refused, (Oct. 8, 1986), held.

The Supreme Court of Appeals of West Virginia, in [Kessel v. Leavitt, 204 W. Va. 95, 511 S.E.2d 720 \(1998\)](#), held that disclosure of the client file of the attorney representing the biological mother of a newborn child in private adoption proceedings under the crime or fraud exception to the attorney-client privilege was warranted, in the adjudicated biological father's action for fraud in concealment of information regarding the adoption, based on evidence that the mother consulted an attorney in California in order to subvert the father's opposition to the adoption and to obtain adoptive placement in a judicially inaccessible forum, the mother and attorney failed to notify the circuit court of contemplated Canadian adoption proceedings upon learning of the pendency of the father's inverse paternity action, the attorney cautioned the mother's brother to prevent the father from learning anything more about the child's pre-adoptive placement, and the mother repeatedly renounced medical releases she had been ordered to execute in furtherance of the father's attempts to locate the child.

## CUMULATIVE SUPPLEMENT

### Cases:

Crime-fraud exception to attorney-client privilege applied to communications between client and attorney, relating to client's and attorney's allegedly fraudulent conduct in transferring property allegedly owned by client's wife. [Both v. Frantz, 629 S.E.2d 427 \(Ga. Ct. App. 2006\)](#).

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**[END OF SUPPLEMENT]**

### § 13. Divorce/child custody proceedings—Crime-fraud exception held inapplicable

The state courts in the following cases held, under the facts and circumstances presented, that the crime-fraud exception to the attorney-client privilege was inapplicable in an action for divorce or child custody proceedings.

In [Matter of Mendel, 897 P.2d 68 \(Alaska 1995\)](#), where the father of children whose mother had taken them into hiding brought an action alleging custodial interference, the Supreme Court of Alaska held that the attorney-client privilege, applicable to the questions asked of the mother's attorney during her deposition concerning whether the attorney had authorization from the mother to represent the mother, was not lost under the crime-fraud exception, [Ala. R. Evid. 503\(b\)](#), where the father failed to establish a prima facie case of crime or fraud in the attorney-client relationship that would abrogate the privilege. The court recognized that the attorney-client privilege only ceases to exist under the crime-fraud exception, [Ala. R. Evid. 503\(b\)](#), for ongoing and future wrongdoing, not past wrongdoing.

In [Dietter v. Dietter, 54 Conn. App. 481, 737 A.2d 926 \(1999\)](#), the court held that an attorney's letter, discussing the legal ramifications of certain proposals that were discussed at a meeting with a husband concerning the possibility of restructuring the corporation of which the husband was president, was protected from disclosure by the attorney-client privilege, in a dissolution proceeding in which the wife claimed that the husband fraudulently transferred assets from the marital estate, even if the letter contained circumstantial evidence of the husband's fraudulent intent to transfer assets from the marital estate, stating that to lose the attorney-client privilege, a communication must refer to the commission of a crime and not merely subject the client to a civil action for fraud.

A wife's communications to an attorney who represented her when an antenuptial agreement was signed, which allegedly revealed the wife's knowledge of misrepresentations made by the husband regarding the nature and extent of his assets, were protected by the attorney-client privilege and not discoverable in a subsequent action to invalidate the agreement based on the husband's fraud, because [Fla. Stat. Ann. § 90.502\(4\)\(a\)](#), the Florida statute providing that the attorney-client privilege does not apply when the services of a lawyer are sought or obtained to enable the client to commit fraud, did not apply, the court in [Cuillo v. Cuillo, 621 So. 2d 460 \(Fla. Dist. Ct. App. 4th Dist. 1993\)](#), held, commenting that the fact that privileged communications occur in the course of a transaction which is later litigated does not eliminate the privilege.

In [Matics v. Fodor, 1999 WL 33451700 \(Mich. Ct. App. 1999\)](#), a paternity action, where the defendant moved for rehearing or reconsideration of the trial court's custody order and for relief from that order, arguing that the plaintiff had engaged in fraud or misrepresentation in submitting the order to the court as a purported settlement agreement of the parties, and moved for the waiver

of the attorney-client privilege so that the plaintiff's attorneys could be examined regarding the alleged fraud, the court, affirming the trial court's denial of the motion, held that the defendant failed to show that the plaintiff or his attorneys engaged in a crime or fraud, or that the plaintiff communicated with his attorneys regarding a crime or fraud that was ongoing or that was to occur in the future, thus failing to establish that the crime-fraud exception applied.

In [Frease v. Glazer, 330 Or. 364, 4 P.3d 56 \(2000\)](#), the Supreme Court of Oregon held that the former wife of a client whom an attorney had represented in postdissolution custody proceedings, and who had sued the attorney for intentional infliction of emotional distress and misrepresentation after the client fled the country with the child, failed to present sufficient evidence to support a reasonable belief that in camera review might yield evidence that the crime-fraud exception, [Or. R. Evid. 503\(4\)\(a\)](#), to the attorney-client privilege would apply to the attorney's files regarding his representation of the client, where, other than the wife's "gut feeling," which was insufficient, nothing indicated that the client had retained the attorney's services to assist him in fleeing with the child.

#### **§ 14. Insurance fraud/bad faith action—Crime-fraud exception held applicable**

The state courts in the following cases held, under the facts and circumstances presented, that the crime-fraud exception to the attorney-client privilege was applicable in an action alleging insurance fraud or bad faith.

In [Grace v. Insurance Co. of North America, 944 P.2d 460 \(Alaska 1997\)](#), the Supreme Court of Alaska held that evidence of fraud in an insured's settlement with the underlying claimant was sufficient to warrant setting aside the insured's attorney-client privilege to allow a second-level excess liability insurer to investigate its contention that the settlement was unenforceable against it on the grounds of fraud, even though a fact issue remained as to whether the settlement actually was a product of fraud.

An insured, who sought discovery of an insurer's claim file, adequately presented a factual basis to support a good-faith belief by a reasonable person that in camera review of the materials might reveal evidence to establish that the crime-fraud exception to the attorney-client privilege applied to materials in the file, where the insurer's belated reservation of rights letter and its actions after the letter was sent were sufficient evidence of a bad-faith breach of duty to compel the conclusion that in camera review was justified, the Supreme Court of Alaska, in [Central Const. Co. v. Home Indem. Co., 794 P.2d 595 \(Alaska 1990\)](#), held, recognizing that services sought by a client from an attorney in aid of any crime or bad-faith breach of a duty are not protected by the attorney-client privilege.

The court in [State Farm Fire & Casualty Co. v. Superior Court](#), 54 Cal. App. 4th 625, 62 Cal. Rptr. 2d 834 (2d Dist. 1997), as modified, (May 1, 1997), held that the evidence was more than sufficient to support application of the crime-fraud exception, [Cal. Evid. Code § 956](#), to dispel the attorney-client privilege as to communications contained in declarations of a former employee of an insurer asserting that the insurer had made untruthful and incomplete discovery responses in litigation with the insureds concerning the insurer's alleged misrepresentations of earthquake coverage and noncompliance with statutory mailing requirements, which declarations the insureds offered in the same litigation to support their request for reconsideration of the grant of summary judgment and denial of the insureds' motion to file a third amended complaint, as a reasonable relationship existed between the communications and the fraud that the insurer was allegedly perpetrating upon the court in the litigation; thus the declarations were properly ordered unsealed.

The Supreme Court of Colorado held, in [A v. District Court of Second Judicial Dist.](#), 191 Colo. 10, 550 P.2d 315 (1976), that evidence of the contents of documents which consisted of correspondence between insurance companies which had allegedly employed a private investigating firm to illegally obtain information and the insurance company's counsel regarding claims in litigation, along with an indictment of the insurance companies, was sufficient to make out a prima facie case of the applicability of the criminal purpose exception to the attorney-client privilege, [Colo. Rev. Stat. Ann. § 13-90-107](#), to the documents.

The court in [Standard Fire Ins. Co. v. Smithhart](#), 183 Ky. 679, 211 S.W. 441, 5 A.L.R. 972 (1919), recognizing that communications by a client to his attorney respecting the proposed commission of a crime or perpetration of fraud are not privileged, but communications with respect to an alleged crime or fraud, made after the act or transaction is finished, are privileged, held, in an action on a fire insurance policy, that while communications by the plaintiff to her attorney, tending to prove that she had procured her house to be burned, were inadmissible over her objection, communications by the plaintiff to her attorney after the fire, tending to show that she was seeking to defraud the insurance company by pretending that the burning was accidental or without her participation, were not privileged because they were not made to the attorney in his professional capacity.

The court in [Morton v. Bank of the Bluegrass and Trust Co.](#), 18 S.W.3d 353 (Ky. Ct. App. 1999), held that the attorney-client privilege did not apply to the knowledge of insurance company attorneys as to any underwriting rule or plan by a company to perpetrate a fraud on the insureds under a group credit life insurance policy.

The court in [State v. Pavin](#), 202 N.J. Super. 255, 494 A.2d 834, 55 A.L.R.4th 323 (App. Div. 1985), held, where the defendant admitted attempting to perpetrate a fraud on an insurer when a statement was made to an insurance adjuster, the fraud exception in [N.J. Stat. Ann. § 2A:84A-20](#)

and N.J. R. Evid. 26(2) applied to dissipate any attorney-client privilege the statement might otherwise have enjoyed on an equitable theory.

Where an insured manufacturer of asbestos products sought a declaratory judgment that excess liability insurance policies covered injuries generating products liability suits, the attorney-client privilege did not protect a memorandum prepared by the asbestos products manufacturer for its in-house counsel because the memo revealed fraud on the Texas court by showing the falsity of the manufacturer's answers to interrogatories, the court in [Owens-Corning Fiberglas Corp. v. Am. Centennial Ins. Co.](#), 74 Ohio Misc. 2d 247, 660 N.E.2d 812 (C.P. 1995), held.

## § 15. Insurance fraud/bad faith action—Crime-fraud exception held inapplicable

### [Cumulative Supplement]

The state courts in the following cases held, under the facts and circumstances presented, that the crime-fraud exception to the attorney-client privilege was inapplicable in an action alleging insurance fraud or bad faith.

Where an insurer filed a notice of a motion for an in camera hearing to review sealed files in order to identify which documents seized from its office pursuant to a search warrant were covered by the attorney-client privilege or work-product doctrine, the court in [State Comp. Ins. Fund v. Superior Court](#), 91 Cal. App. 4th 1080, 111 Cal. Rptr. 2d 284, 66 Cal. Comp. Cas. (MB) 1061 (2d Dist. 2001), as modified on denial of reh'g, (Sept. 20, 2001), held that the probable cause showing to obtain a search warrant of an insurer did not satisfy the showing required to establish the crime-fraud exception to the attorney-client privilege, [Cal. Evid. Code § 956](#), in an investigation of fraud committed by the insurer's attorneys, where the affidavit upon which the search warrant was based was sealed, the insurer was not privy to its contents, and an affidavit sufficient to issue the search warrant only required probable cause, rather than the prima facie showing required to invoke the crime-fraud exception.

See [Hutchinson v. Farm Family Cas. Ins. Co.](#), 273 Conn. 33, 867 A.2d 1 (2005), wherein the court held that the plaintiffs-insureds failed to allege that the defendant insurance company gave information to or sought the advice of its attorneys for the purpose of concealing or facilitating its alleged bad-faith conduct in refusing to pay underinsured motorist benefits to the plaintiffs following a settlement with the driver of a pickup truck who killed the plaintiffs' daughter in a traffic accident. Rather, the court concluded, the plaintiffs only alleged that the insurer sought the good-faith legal advice of its attorneys and then failed to follow it, and thus the communications between the insurer and its attorneys did not come within the bad-faith exception to the attorney-client privilege.

Attorney-client communications arising out of a civil defendant's settlement and release with a codefendant were privileged, and thus not subject to discovery by the codefendant's insurer which had brought a subrogation action against the defendant, absent at least a prima facie showing that the defendant affirmatively sought the advice of counsel in the settlement transaction in order to procure a fraud upon the insurer, the court in [Florida Min. and Materials Corp. v. Continental Cas. Co.](#), 556 So. 2d 518 (Fla. Dist. Ct. App. 2d Dist. 1990), held.

The court in [Barry v. USAA](#), 98 Wash. App. 199, 989 P.2d 1172 (Div. 3 1999), held that an insured's allegations of significant delay by her automobile insurer in responding to and settling her claims for underinsured motorist (UIM) benefits did not support a good-faith belief that the insurer engaged in wrongful conduct sufficient to invoke the fraud exception to the attorney-client privilege to permit discovery of the insurer's communications with its claims attorney, where the insured did not make a UIM claim until about a year after the accident and the insurer made settlement offers within a year of the claim; accordingly, the trial court did not have to inspect the privileged documents in camera.

## CUMULATIVE SUPPLEMENT

### Cases:

District court acted within its discretion in determining that condominium association's board-meeting minutes were protected by attorney-client privilege, which had not been waived, and that the minutes did not suggest fraud as would exempt minutes from the privilege, in association's action against insurer seeking recovery for hurricane damage to condominium building. [Vantage View, Inc. v. QBE Ins. Corp.](#), 400 Fed. Appx. 420 (11th Cir. 2010).

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**[END OF SUPPLEMENT]**

### **§ 16. Personal injury/negligence—Crime-fraud exception held applicable**

[\[Cumulative Supplement\]](#)

The state courts in the following cases held, under the facts and circumstances presented, that the crime-fraud exception to the attorney-client privilege was applicable in an action for personal injury and/or negligence.

Where an attorney for the plaintiff, in an action for personal injuries alleged to have been received when the defendant's streetcar left the track, discovered upon examining his client before trial that she was not upon the car at the time, and that the action could not be successfully maintained without perjury, he could, in addition to withdrawing from the case, testify to the facts as related to him by his client; such communication not being privileged under the attorney-client privilege, the court in [Gebhardt v. United Rys. Co. of St. Louis](#), 220 S.W. 677, 9 A.L.R. 1076 (Mo. 1920), held.

The court in [Kugle v. DaimlerChrysler Corp.](#), 88 S.W.3d 355 (Tex. App. San Antonio 2002), review denied, (Apr. 3, 2003), held that testimony by two investigators and an attorney about an inspection of the car involved in an accident was not covered by the attorney-client privilege, [Tex. R. Evid. 503\(b\), \(d\)\(1\)](#), in the family members' personal injury action against the car dealer and manufacturer, where the report from the inspector who first viewed the car provided evidence of intent to defraud the car dealer and the manufacturer by the surviving family members.

In [Volcanic Gardens Management Co., Inc. v. Paxson](#), 847 S.W.2d 343 (Tex. App. El Paso 1993), the court found that the defendant in a personal injury action made a sufficient prima facie showing to require the court to make further inquiry as to the plaintiff's statements causing the attorney to conclude that he was being asked to participate in a fraudulent claim to attribute preexisting injuries to the defendant, where the attorney's statements and deposition of physicians could establish that the client was engaging in or planning to engage in fraud, so as to bring the statements within the crime-fraud exception to the attorney-client privilege.

The court in [Stephens v. Gillispie](#), 126 Wash. App. 375, 108 P.3d 1230 (Div. 3 2005), held that a mother, who sued her children's babysitter, the babysitter's husband, and the babysitter's son after the children were sexually molested by the babysitter's son, made an adequate showing to invoke the fraud exception to the attorney-client privilege with respect to the intent of the babysitter and her husband in executing a stipulation and order of dismissal as part of their settlement of the case with the mother, where the babysitter and her husband claimed that they had intended for their son to also be covered by the stipulation and dismissal, but their attorney testified that he did not represent the son, that the claims against the son had been reduced to judgment, and that such judgment remained unsatisfied.

## CUMULATIVE SUPPLEMENT

### Cases:

Executive made prima facie showing, in action for false imprisonment, for applying crime-fraud exception to Colorado's attorney-client privilege, with respect to legal advice received by defendant majority owner of business before executive was confronted at a ranch, by presenting

competent evidence that executive was falsely imprisoned at ranch in order to intimidate him and chill his speech regarding allegations that the business schemed to evade taxes on its profits. [Martensen v. Koch](#), 301 F.R.D. 562, 89 Fed. R. Serv. 3d 341 (D. Colo. 2014) (applying Colorado law).

Probable cause existed to support application of crime-fraud exception to preclude application of attorney-client privilege as to attorney's testimony regarding communications between attorney and workers' compensation claimant, in wrongful death action brought by claimant's mother and claimant's estate against medical defendants, in which mother alleged negligence regarding claimant's medications, and in which defendants asserted that stress from investigation of workers' compensation fraud might have contributed to claimant's heart attack and death; claimant signed written statement to fraud investigators admitting she worked for attorney while receiving benefits, and attorney was convicted for complicity to commit workers compensation fraud. [Lytle v. Mathew](#), 2017-Ohio-1447, 89 N.E.3d 199 (Ohio Ct. App. 8th Dist. Cuyahoga County 2017), appeal not allowed, 2018-Ohio-365, 2018 WL 638996 (Ohio 2018).

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**[END OF SUPPLEMENT]**

### **§ 17. Personal injury/negligence—Crime-fraud exception held inapplicable**

The state courts in the following cases held, under the facts and circumstances presented, that the crime-fraud exception to the attorney-client privilege was inapplicable in an action for personal injury and/or negligence.

In  [Hewes v. Langston](#), 853 So. 2d 1237 (Miss. 2003), the Supreme Court of Mississippi held, in a suit by an attorney against her former husband, his employer, law firm, and another attorney, alleging negligence, conspiracy to invade privacy, and negligent infliction of emotional distress, that various memoranda were not subject to disclosure under the crime-fraud exception to the attorney-client privilege, where, following in camera review, none of the documents supported the plaintiff's claim that the attorney conspired with his client to access the plaintiff's telephone records. The court found, further, that the trial court acted within its discretion in reviewing the documents in camera to determine whether the crime-fraud exception to the attorney-client privilege was applicable to the records.

In  [In re Brown](#), 1998 WL 207793 (Tex. App. Austin 1998), where 29 plaintiffs in three lawsuits alleging personal injuries suffered from exposure to asbestos were provided with a memo entitled "Preparing for Your Deposition/Attorney Work Product" by a legal assistant at the plaintiffs' law

firm, containing a question-and-answer section containing descriptions of asbestos-laden products and blanks for plaintiffs to describe their exposure to those products and including a section describing the deposition process and instructing the plaintiffs how to prepare, dress, and conduct themselves, and disclosure was sought by defense counsel and by asbestos defendants across the country, the court held that the memo was not subject to disclosure under the crime-fraud exception to the attorney-client privilege. The court found that the trial court did not abuse its discretion by rejecting the assertion of the crime-fraud exception where there was no evidence that the clients were aware that the memo was part of any crime or fraud and there was also no showing how the production of the memo in a separate lawsuit constituted a waiver of the privilege.

In [Psychiatric Institutes of America v. Edwards](#), 1997 WL 111999 (Tex. App. Beaumont 1997), a mandamus action in a lawsuit brought by over 600 plaintiffs against 97 defendants, alleging misconduct in the admission, treatment, and billing of the plaintiffs while hospitalized at one of 11 Texas facilities, the court found that the trial court abused its discretion in ordering production of a legal audit prepared by a law firm on behalf of the defendants, as there was no evidence that the defendants engaged the firm to perform the legal audit with illegal or fraudulent intent.

The court in [Thomas v. Jones](#), 105 W. Va. 46, 141 S.E. 434 (1928), held, in a passenger's action against the driver of an automobile for injuries sustained in an automobile accident, a showing that the plaintiff's communications to his attorney were to work a fraud on justice was insufficient to render them admissible.

## § 18. Antitrust violations

The following authority considered whether, under the facts and circumstances presented, the crime-fraud exception to the attorney-client privilege was applicable in an action alleging antitrust violations.

In [Blumenthal v. Kimber Mfg., Inc.](#), 265 Conn. 1, 826 A.2d 1088 (2003), the Supreme Court of Connecticut held that a corporate electronic message (e-mail), sought by the attorney general from a firearms manufacturer and its president in connection with an antitrust investigation, was not subject to disclosure to the state attorney general under the crime-fraud exception to the attorney-client privilege, since, for the exception to apply, the communication sought must have been made in furtherance of an unlawful act, but the e-mail revealed nothing that suggested an intent to break the law, critical statements in the e-mail were not words of advocacy but, rather, statements of fact or impression, and to the extent that the e-mail referred to any action, it was the actions of others, and not of the manufacturer or its president.

## § 19. Legal malpractice/disciplinary proceedings

### [Cumulative Supplement]

In the following state cases, the courts determined, under the facts and circumstances presented, whether the crime-fraud exception to the attorney-client privilege was applicable in a legal malpractice action or attorney disciplinary proceeding.

The statute, which provided that there was no attorney-client privilege if a lawyer's services were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud, [Cal. Evid. Code §§ 952, 956](#), was not applicable in a legal malpractice action in which it was alleged that an attorney and his malpractice insurers conspired together with fraud, malice, and oppression, where it was not contended that any communication was made in contemplation of a crime and no prima facie showing of fraud was made, the court in [Travelers Ins. Companies v. Superior Court](#), 143 Cal. App. 3d 436, 191 Cal. Rptr. 871 (1st Dist. 1983), held.

The Supreme Court of Florida, in [The Florida Bar v. Lange](#), 711 So. 2d 518 (Fla. 1998), an attorney disciplinary proceeding, held that an attorney's disclosure of confidential communications, made to him by a former client for purposes of demonstrating a possible conflict in representing a criminal defendant, was not subject to the crime-fraud exception to the rule prohibiting disclosure of confidential client information, [Florida Bar Rules 4-1.6](#), where the attorney did not disclose communications to discourage the former client from hiding evidence of crimes or to attempt to alert law enforcement agencies or the court of the existence of a possible crime.

Evidence, in disbarment proceedings, by an attorney who had been associated with the attorney sought to be disbarred as to transactions and conversations with such attorney and their client concerning a forged and untruthful affidavit and the use which it was proposed to make of it, divulged no privileged communications, the court in [In re Watson](#), 83 Neb. 211, 119 N.W. 451 (1909), held.

The Supreme Court of Washington, in [In re Disciplinary Proceeding Against Schafer](#), 149 Wash. 2d 148, 66 P.3d 1036 (2003), taking the view that the crime-fraud exception to the attorney-client privilege generally does not apply when an attorney seeks to disclose past wrongdoing, because the benefit of revealing a past harm that can no longer be prevented does not outweigh the injury to attorney-client relationships that would result by disclosure, held that the crime-fraud exception to the attorney-client privilege would not be extended, in an attorney disciplinary proceeding, so as to create an exception to the general prohibition, under the rules of professional conduct, of the disclosure of client secrets and confidences, where the attorney had voluntarily disclosed, without restriction, the client's allegations of past wrongdoing by the personal representative of an estate.

The court therefore ruled that the attorney would be suspended for revealing the client's and/or secrets relating to his representation of the client.

The court in [Dyson v. Hempe](#), 140 Wis. 2d 792, 413 N.W.2d 379 (Ct. App. 1987), held that the defendant attorneys failed to make a prima facie showing of fraud required, in a legal malpractice action, to make the testimony of another attorney available to fill a factual lacuna concerning whether the client sought the services of other attorneys in furtherance of insurance fraud, as the other attorney's conversations with the client were subject to the lawyer-client privilege, and the client had properly preserved the objection to the other attorney's testimony as to those conversations.

## CUMULATIVE SUPPLEMENT

### Cases:

Crime-fraud exception to the attorney-client privilege that existed between law firm and its former general counsel did not apply to defeat the privilege, which firm asserted protected from disclosure to Bar Counsel firm documents that Bar Counsel sought concerning former general counsel's investigation of firm's former partner for misconduct, as the firm was not planning or engaged in any fraudulent activity at the time it enlisted former general counsel's help in the investigation, and the firm did not intend to facilitate or conceal any fraudulent or criminal conduct in the communications with former general counsel. Rules of Evid., [Rule 502\(d\)\(1\)](#). [Board of Overseers of Bar v. Warren](#), 2011 ME 124, 34 A.3d 1103 (Me. 2011).

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**[END OF SUPPLEMENT]**

### **§ 20. Employer/employee action—Crime-fraud exception held applicable**

The following authority held, in an action involving employer/employee relations, that the crime-fraud exception to the attorney-client privilege was applicable under the facts and circumstances presented.

Where a corporation brought an action seeking to recover corporate property from former employees, the court in [Surgical Design Corp. v. Correa](#), 284 A.D.2d 528, 727 N.Y.S.2d 462 (2d Dep't 2001), held, although a letter between an attorney and the corporation advising the corporation that its importing practices violated Brazilian law qualified, under [N.Y. C.P.L.R.](#)

4503, for the attorney-client privilege, it related to a client communication in furtherance of a fraudulent scheme, and thus was not protected by that privilege.

## § 21. Employer/employee action—Crime-fraud exception held inapplicable

### [Cumulative Supplement]

The state courts in the following actions involving employer/employee relations determined, under the facts and circumstances presented, that the crime-fraud exception to the attorney-client privilege was inapplicable.

In *Camp v. Jeffer, Mangels, Butler & Marmaro*, 35 Cal. App. 4th 620, 41 Cal. Rptr. 2d 329, 10 I.E.R. Cas. (BNA) 1147, 10 I.E.R. Cas. (BNA) 1458 (2d Dist. 1995), as modified on denial of reh'g, (June 29, 1995), the court held that documents consisting of correspondence or memoranda between an attorney and a law firm's clients or other attorneys were protected by the attorney-client privilege, and absent a showing that the documents reflected illegal conduct on the part of the attorney, the crime-fraud exception did not apply and a former employee bringing an action against the former employer for wrongful termination was required to return those documents to the law firm.

A report which an environmental company hired by an employer's attorney sent to the attorney and employer concerning waste contamination at the employer's plant, did not fall within the crime-fraud exception to the attorney-client privilege for purposes of determining whether the report was protected from disclosure with respect to a wrongful discharge action brought by the employee, who was allegedly terminated after the employer learned of the employee's statements regarding its disposal practices, where there was no evidence that the employer sought legal advice with the intent to perpetrate a fraud on the government, which issued an order regarding the employer's waste practices, the Supreme Court of Connecticut, in *Olson v. Accessory Controls and Equipment Corp.*, 254 Conn. 145, 757 A.2d 14, 16 I.E.R. Cas. (BNA) 1050, 142 Lab. Cas. (CCH) ¶ 59132 (2000), held.

## CUMULATIVE SUPPLEMENT

### Cases:

Even if former employee, in employment discrimination suit against her corporate employer, had timely raised issue that crime-fraud exception to attorney-client privilege applied to communications made between corporate counsel and corporation's manager, she failed to allege how the communications might have been in furtherance of any fraud, as required to defeat

privilege. [Fed. Rules Evid. Rule 501, 28 U.S.C.A. Babych v. Psychiatric Solutions, Inc., 271 F.R.D. 603 \(N.D. Ill. 2010\)](#).

For purposes of employer's petition for writ of mandamus seeking protection of conversations between its employee and its outside counsel, trial court abused its discretion in concluding that employee established crime/fraud exception to attorney-client privilege with respect to such communications, where employee alleged that outside counsel committed crime of suborning perjury, but her affidavit in writ proceeding established how she felt about her conversation with counsel but failed to establish any acts by counsel that rose to level of suborning perjury. [V.T.C.A., Penal Code §§ 7.02\(a\)\(2\), 37.02\(a\)\(1\)](#). [In re USA Waste Management Resources, L.L.C., 387 S.W.3d 92 \(Tex. App. Houston 14th Dist. 2012\)](#).

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**[END OF SUPPLEMENT]**

## **§ 22. Fraud—Crime-fraud exception held applicable**

[\[Cumulative Supplement\]](#)

In the following state cases, the courts determined, under the facts and circumstances presented, that the crime-fraud exception to the attorney-client privilege was applicable in an action alleging fraud.

In [BP Alaska Exploration, Inc. v. Superior Court, 199 Cal. App. 3d 1240, 245 Cal. Rptr. 682 \(5th Dist. 1988\)](#), the court held that a letter to a proposed joint venturer by a mining exploration company, which inferred that the mining exploration company had entered into a mining joint venture with another party without the use of any confidential information provided by the first proposed joint venturer, which was belied by a later company memo, was a sufficient showing of fraud to make out a prima facie demonstration of the applicability of the crime-fraud exception to the attorney-client privilege, [Cal. Evid. Code § 956](#), regarding letters between the mining exploration company and its attorneys. The court held, further, that a letter from the mining exploration company to the proposed joint venturer, apologizing for the late return of the proposed venturer's confidential maps concerning potential oil and gas deposits and assuring the proposed venturer that the company had retained no copies of the maps, supported a prima facie showing of fraud to invoke the crime-fraud exception, where the mining exploration company had retained as many as 11 copies of the confidential maps. Finally, the court held, the presence of the mining exploration company's corporate counsel during the investigation of the proposed joint venture with the developer of a new mining process and the owner of the map of potential mining sites, and review of that investigation by the company's outside counsel, permitted the inference that the

corporate counsel's memo and outside counsel's opinion letter concerning the investigation were rationally related to the mining exploration company's alleged fraudulent scheme to dissuade the developer from pursuing its claims and to pursue the developer's claims itself; thus, a sufficient nexus existed between the letter and memo and the scheme to allow the developer to assert the crime-fraud exception to the attorney-client privilege during discovery. However, the court found, absent a showing that the mining exploration company's investigation of the proposed joint venture was itself fraudulent, the proposed joint venturer was not able to inquire about the investigation from the company's outside counsel, even though the company's later alleged fraudulent scheme was sufficient to allow application of the crime-fraud exception to some of the documents prepared by the attorney, since only the attorney's knowledge related to the alleged fraud was discoverable.

The court in [American Tobacco Co. v. State](#), 697 So. 2d 1249 (Fla. Dist. Ct. App. 4th Dist. 1997), an action against tobacco companies seeking to recover health care costs incurred by the state in treating diseases of Medicaid smokers, held that the evidence was sufficient to support the state's theory of fraud and that attorneys for the tobacco companies were used to perpetuate the fraud, so that the crime-fraud exception to the attorney-client privilege existed with respect to documents that the state sought to discover regarding allegations of its complaint that the companies had engaged in fraud in covering up the health risks of their product, where there was evidence that the companies hid the health risks of smoking from the public and that the companies utilized their attorneys in carrying out their misrepresentations.

An attorney who drafted a deed might testify without violating the statute as to confidential communications, where he was charged with participating in a fraud to secure the plaintiffs' property, the court in [Relf v. Cameron](#), 51 S.D. 554, 215 N.W. 881 (1927), held.

## CUMULATIVE SUPPLEMENT

### Cases:

Government sufficiently demonstrated that there was probable cause to believe that defendant attempted to engage in crime or fraud, and that communications and documents possessed by his law firm concerning lawsuit were in furtherance thereof, to warrant application of crime-fraud exception to attorney-client privilege to permit discovery of documents and communications in firm's possession in prosecution for conspiracy to collect unlawful debts, collection of unlawful debts, wire fraud, money laundering, and violation of Truth in Lending Act related to collection of usurious interest on payday loans, in light of evidence that lawsuit brought by defendant against co-defendant's business was sham litigation to bolster false appearance of tribal ownership and control of defendant's lending businesses, that parties on both sides of litigation were in communication with one another, and that documents and communications sought were made in furtherance of

defendants' allegedly usurious lending scheme. [United States v. Tucker](#), 254 F. Supp. 3d 620 (S.D. N.Y. 2017).

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**[END OF SUPPLEMENT]**

### § 23. **Fraud—Crime-fraud exception held inapplicable**

[\[Cumulative Supplement\]](#)

In the following state cases, the courts determined, under the facts and circumstances presented, that the crime-fraud exception to the attorney-client privilege was inapplicable in an action alleging fraud.

The court in [Kopowski v. Standard Life Ins. Co. of Indiana](#), 2005 WL 2045448 (Ky. 2005), held that the crime-fraud exception did not apply to defeat the attorney-client privilege, where the plaintiffs failed to prove by a preponderance of the evidence that the conversations between the defendant-corporation's executives and their in-house counsel were intended to, or did, further a crime or fraud in an action for fraud against a life insurance company whose agent solicited the company's customers for investments into an investment plan that allegedly were, in reality, investments in insurance products and/or bogus trusts. The plaintiffs sought to compel testimony from the defendant's in-house counsel and executives regarding the substance of three meetings between them in connection with the agent's sale of unregistered promissory notes. Noting that the trial court ruled that the facts put forth by the plaintiff's were sufficient to sustain the motion to compel because they explained the defendant's knowledge of the agent's conduct and directly related the meetings at issue to the plaintiff's fraud claim, the court concluded that whether or not the plaintiffs had successfully proven that the agent's fraudulent activities were in some way connected to the defendant was of little relevance without a finding that the conversations in question were made to further any such crime or fraud.

#### **Comment**

After finding that the plaintiffs failed to prove the crime-fraud exception, the court in [Kopowski v. Standard Life Ins. Co. of Indiana](#), 2005 WL 2045448 (Ky. 2005), noted that the plaintiffs still had, and always had, the right to depose any representative of the defendant concerning knowledge of any plan by the defendant of its agent to perpetrate a fraud on the plaintiffs, and further, that the lower

court would not be prohibited from conducting an in camera review of the conversations, or their gist, in order to determine whether the crime-fraud exception applied if the testimony had not yet been adjudicated as privileged. A lesser evidentiary showing, said the court, is needed to trigger in camera review than is required to overcome the privilege, as in camera review is a smaller intrusion upon the confidentiality of the attorney-client privilege than is public disclosure.

In an action by a plaintiff alleging various claims, including, inter alia, fraud against the real parties in interest arising out of the alleged underpayment of royalties by oil producers on federal property, the court in [In re Wright, 2005 WL 913441 \(Tex. App. Beaumont 2005\)](#), held that the trial court erred in ordering disclosure of several categories of documents under the crime-fraud exception to the attorney-client privilege rule, where the court failed to conduct a document-by-document assessment as to admissibility and failed to identify the basis for ruling on each document. In so holding, the court observed that the special master reported his general findings to the trial court, but did not identify specific documents covered by the crime-fraud exception.

### **Comment**

In a subsequent proceeding, the court in [In re Wright, 2005 WL 2087862 \(Tex. App. Beaumont 2005\)](#), considered the plaintiff's motion for a writ of mandamus to compel the trial court judge to vacate an order compelling the production of certain documents. After reviewing the documents at issue, the court found that the trial court erred in ordering the production of most of them, noting that the documents were not outcome determinative. In addition, referring to some of these documents, the court accepted the plaintiff's argument that he did not commit fraud when merely seeking the advice of counsel prior to negotiations between the parties, and that other documents were not evidence of fraud. As to another class of documents, which the court found were not income determinative, the court determined that the documents did not show a prima facie case of fraud based on the only theory suggested by the defendants, specifically, the fraudulent overstatement of time spent working on a qui tam lawsuit. As to the final class of documents, however, the court concluded that they were outcome determinative and should be produced, though only after being referred back to the trial court for redaction of those portions of the documents involving legal advice by the plaintiff's attorney.

In [In re NationsBank, N.A., 2000 WL 799807 \(Tex. App. Houston 1st Dist. 2000\)](#), an action for fraud, where the plaintiff entered into an agreement with the defendant for the defendant to act as investment manager for certain funds to be deposited by the plaintiff, and the defendant instead used such funds as collateral to make or secure loans to third parties, the court held, inter alia, that the trial court abused its discretion in ordering production of certain documents under the crime-fraud exception to the attorney-client privilege, [Tex. R. Evid. 503\(d\)\(1\)](#), where the plaintiff failed to establish a prima facie case of fraud with regard to the taking of the plaintiff's funds as collateral when the third party to whom the loan was made defaulted on its loan from the defendants. The court recognized that, in order for the crime-fraud exception to apply, the party asserting the exception first must establish a prima facie case of fraud that was ongoing or about to be committed when the document was prepared, a showing which was not made in the instant case.

In [In re Monsanto Co., 998 S.W.2d 917 \(Tex. App. Waco 1999\)](#), the court held that the crime-fraud exception to the attorney-client privilege, [Tex. R. Evid. 503\(d\)\(1\)](#), did not apply despite alleged fraud by a patent holder and manufacturer in connection with the marketing and sale of genetically engineered cotton seed, where the holder and manufacturer did not obtain legal services to commit or perpetuate a fraud, and no relationship was established between the documents and the fraud claim. The court recognized that the crime-fraud exception to the attorney-client privilege applies only if a prima facie showing is made of contemplated fraud, and if a relationship exists between the document sought and the prima facie proof offered. The court stated that a prima facie showing of contemplated fraud negating the attorney-client privilege is sufficient if it sets forth evidence that would establish the elements of a fraud that was ongoing or about to be committed when the document was prepared. The court emphasized that a cause of action for fraud by itself is insufficient to establish the crime-fraud exception to the attorney-client privilege, and the attorney-client privilege is lost under the crime-fraud exception only when the legal communications or services were obtained to commit or plan to commit a fraud.

## CUMULATIVE SUPPLEMENT

### Cases:

Former manager of limited liability company (LLC) failed to make out a prima facie case against LLC for abuse of process based on LLC's reporting of manager's alleged criminal activity, and thus, superior court did not abuse its discretion by refusing to permit discovery of LLC's privileged communications under exception to attorney-client privilege for use of attorney's services to commit fraud; manager did not cite any evidence in the record supporting its assertion that LLC wrongfully reported evidence of what it believed to be criminal activity. Rules of Evid., [Rule 503\(d\)\(1\)](#). [Alaska Interstate Const., LLC v. Pacific Diversified Investments, Inc., 279 P.3d 1156 \(Alaska 2012\)](#).

Under California law, purchasers of corporate assets failed to establish that seller attempted to conceal the material fact that his former wife was making a community property claim on his assets, as would trigger the crime-fraud exception to the attorney-client privilege, in purchasers' action asserting fraud, breach of asset purchase agreement, and related claims, where parties' asset purchase agreement and other contract specifically provided that representations by seller were limited by seller's disclosures set forth in another document, which explicitly referenced the pending litigation between seller and his former wife. [West's Ann.Cal.Evid.Code § 956. Action Performance Companies, Inc. v. Bohbot, 420 F. Supp. 2d 1115 \(C.D. Cal. 2006\) \(applying California law\).](#)

Donor of charitable trust fund for perpetual care of his deceased relatives' graves in cemetery was not entitled, under crime-fraud exception, to disclosure of documents subject to attorney-client privilege, in action against religious corporation, alleging breach of annual care contracts and perpetual care obligations, where "law of the case doctrine" barred donor's argument based on prior appellate holding that donor had failed to establish claim of fraud. [Leventhal v. Bayside Cemetery, 163 A.D.3d 433, 80 N.Y.S.3d 255 \(1st Dep't 2018\).](#)

In suit against energy company, and its landman, for allegedly fraudulently inducing former lessee to release its interest in a gas and oil lease, former lessee's mere allegation that company engaged its attorney for fraudulent purposes, was insufficient to satisfy prima facie case requirement that the documents it sought, which were otherwise protected by attorney-client privilege, showed contemplated fraud so as to support order compelling their discovery; lessee's argument, that company had developed a fraudulent scheme to obtain and use releases to convince other lessees to release their interests in lease, consisted of allegations of company's misrepresentation that lease was invalid and concealment of fact that lease was valid. Rules of Evid., [Rule 503\(d\)\(1\). In re Small, 346 S.W.3d 657 \(Tex. App. El Paso 2009\).](#)

Crime/fraud exception to attorney-client privilege did not apply to liability insurer's buyback agreement to repurchase policy from insured, even if the agreement was fraudulent transfer and even though it was negotiated in secret and contained confidentiality term; the agreement permitted insured to inform alleged victim of the buyback and lack of insurance, insured did so shortly before trial, and execution of the agreement was not concealed from alleged victim. Rules of Evid., [Rule 503\(d\)\(1\). In re General Agents Ins. Co. of America, Inc., 224 S.W.3d 806 \(Tex. App. Houston 14th Dist. 2007\).](#)

Property owner's general assertions in both its amended motion to compel in condemnation proceeding and its petition for a writ of mandamus did not specify the nexus between each of the "documents" it sought to compel and its claims of fraud, as was required to invoke the crime-

fraud exception to attorney-client privilege. Rules of Evid., [Rule 503\(d\)\(1\)](#). [In re JDN Real Estate-McKinney L.P.](#), 211 S.W.3d 907 (Tex. App. Dallas 2006).

The fact that the plaintiff's cause of action involves fraudulent conduct is insufficient to satisfy the prima facie case requirement for the crime/fraud exception to the attorney-client privilege; the fraud alleged to have occurred must have occurred at or during the time the document was prepared and in order to perpetrate the fraud. Rules of Evid., [Rule 503\(d\)\(1\)](#). [In re Seigel](#), 198 S.W.3d 21 (Tex. App. El Paso 2006).

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**[END OF SUPPLEMENT]**

#### **§ 24. Defamation/invasion of privacy**

The following authority considered whether, under the facts and circumstances presented, the crime-fraud exception to the attorney-client privilege was applicable in an action for defamation or invasion of privacy.

In [Harp v. King](#), 2000 WL 1011373 (Conn. Super. Ct. 2000), an action against four housing finance authority employees alleging, inter alia, defamation and false light violation of his right to privacy, the court held that certain communications between the defendants and their attorney were protected by the attorney-client privilege and were not subject to disclosure under the crime-fraud exception to that privilege. The court found that the plaintiff's allegations that the attorney's communications suggested that the plaintiff's business record could be misrepresented by the authority, thereby subjecting him to a different standard than other authority borrowers, were insufficient to support disclosure under the crime-fraud exception, as mere allegations or suspicions are insufficient to establish that the communications were for the purpose of committing fraud.

#### **§ 25. Shareholder's action—Crime-fraud exception held applicable**

The following authority held that, under the facts and circumstances presented, the crime-fraud exception to the attorney-client privilege was applicable in a shareholder's action.

In [Granada Corp. v. Honorable First Court of Appeals](#), 844 S.W.2d 223 (Tex. 1992), the Supreme Court of Texas held that the crime-fraud exception to the attorney-client privilege, [Tex. R. Civ. Evid. 503](#), applied to documents discovered by stockholders in an action against a corporation, where other documents suggested that the corporation fraudulently misled the stockholders to give

up their stock in exchange for royalty certificates, while seeking legal advice regarding proposals that would nullify the value of the certificates.

### § 26. **Shareholder's action—Crime-fraud exception held inapplicable**

The following authority held that, under the facts and circumstances presented, the crime-fraud exception to the attorney-client privilege was inapplicable in a shareholder's action.

The court in [National Football League Properties, Inc. v. Superior Court](#), 65 Cal. App. 4th 100, 75 Cal. Rptr. 2d 893 (6th Dist. 1998), recognizing that the attorney-client privilege, [Cal. Evid. Code § 956](#), is nullified if an attorney's services were sought to aid anyone in the commission of a crime or fraud, held that a professional football club failed to make a prima facie showing that the services of attorneys of a league merchandising corporation were sought by the corporation in order to commit a crime or fraud so as to trigger the statutory exception to nullify the corporation's attorney-client privilege for documents sought by the club for use in litigation as a shareholder against the merchandising corporation.

### § 27. **Civil rights action**

#### **[Cumulative Supplement]**

The following authority considered whether, under the facts and circumstances presented, the crime-fraud exception to the attorney-client privilege was applicable in a civil rights action.

In [Robichaud v. Kennedy](#), 711 So. 2d 186 (Fla. Dist. Ct. App. 2d Dist. 1998), the court found, in an action by an arrestee for civil rights deprivations and torts arising from a prosecution which eventually resulted in acquittal due to entrapment, that detectives were not entitled, under the crime-fraud exception to the attorney-client privilege, [Fla. Stat. Ann. § 90.502\(4\)](#), to confidential information exchanged between the arrestee and his assistant public defender on the ground that the arrestee's uncontradicted criminal trial testimony was a fabrication concocted by him as a consequence of conversations with his defense attorney in furtherance of a fraud on the criminal court and commission of the crime of perjury, in the absence of evidence supporting the allegations. To meet the crime-fraud statutory exception to the attorney-client privilege, the court said, proponents must allege and produce prima facie evidence that the client affirmatively sought the advice of counsel to procure fraud.

## **CUMULATIVE SUPPLEMENT**

**Cases:**

In child abuse acquittee's § 1983 action against state human services agency officials alleging that acquittee's listing on state's child abuse register had been in retaliation for his public complaints against agency employees, factual basis for crime-fraud exception to attorney-client privilege was not shown as to deposition questions posed to defendant official concerning discussion with agency counsel regarding decision not to expunge acquittee's name from register; official's stated reason for obtaining counsel's advice, that subject of expungement request was in litigation against agency employees, was reasonable. U.S.C.A. Const.Amend. 1, 14; 42 U.S.C.A. § 1983. *Kilpatrick v. King*, 499 F.3d 759 (8th Cir. 2007).

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**[END OF SUPPLEMENT]**

**§ 28. Trusts or wills—Crime-fraud exception held applicable**

The following state court authority held that, under the facts and circumstances presented, the crime-fraud exception to the attorney-client privilege was applicable in an action involving trusts or wills.

In *Strong v. Abner*, 268 Ky. 502, 105 S.W.2d 599 (1937), a will contest proceeding, an attorney's testimony as to a conversation with the propounder relating to the preparation of the will after the death of the alleged testator, offered to show forgery, was held to be admissible over the propounder's objection that it was privileged, since the conversation was made in contemplation of the future commission of a crime and perpetration of a fraud.

**§ 29. Trusts or wills—Crime-fraud exception held inapplicable**

The following state court authority held that, under the facts and circumstances presented, the crime-fraud exception to the attorney-client privilege was inapplicable in an action involving trusts or wills.

The court in *Wells Fargo Bank v. Superior Court*, 22 Cal. 4th 201, 91 Cal. Rptr. 2d 716, 990 P.2d 591 (2000), an action by a trustee to settle its accounts and to approve its resignation, held that beneficiaries' proof that a cotrustee initially used trust funds to retain personal counsel to deal with the beneficiaries' allegations of misconduct did not make a prima facie showing of fraud, for purposes of the statutory fraud exception to the attorney-client privilege, as the cotrustee was

entitled to charge such fees to the trust, and thus its actions did not destroy the privilege attaching to confidential communications with counsel.

In an action by two brothers alleging that a codicil to their father's will was the product of undue influence by their sister, the court in [In re Estate of Mechanic, 2005 WL 1384122 \(N.J. Super. Ct. Ch. Div. 2005\)](#), held that the crime-fraud exception did not apply so as to overcome the attorney-client privilege, the court concluding that the plaintiffs failed to set forth prima facie proofs of any fraud involving the law firm that prepared the codicil or the sister's utilization of such firm. The attorney who represented the father in the preparation and execution of the codicil was a personal friend of the sister and also served as her accountant.

### § 30. Debtor creditor/actions—Crime-fraud exception held applicable

In the following state cases, the courts determined, under the facts and circumstances presented, that the crime-fraud exception to the attorney-client privilege was applicable in debtor/creditor actions.

In [Mogg v. National Bank of Alaska, 846 P.2d 806 \(Alaska 1993\)](#), where a creditor bank instituted foreclosure proceedings against debtor corporations, the Supreme Court of Alaska held that a junior lienholder made a prima facie showing of fraud on the basis that the creditor bank agreed to a second deed of trust for the junior lienholder and a third deed of trust for itself knowing that the second deed of trust was worthless, and thus the junior lienholder made a prima facie case for abrogation of the bank's attorney-client privilege under the crime-fraud exception to that privilege, pursuant to [Alaska R. Evid. 503\(d\)\(1\)](#).

Application of the attorney-client privilege to an alleged conspiracy between judgment debtors and their attorney to commit a fraudulent conveyance was improper in view of the prima facie case established by the judgment creditor, the court in [Pearce v. Stone, 149 Ariz. 567, 720 P.2d 542 \(Ct. App. Div. 1 1986\)](#), held.

Where questions propounded to an attorney in a deposition sought information as to the receipt and disbursement of funds received from an absconding debtor who was the attorney's client and which funds were alleged to have been concealed in a fraud of the creditors, an attorney could not refuse to answer questions on the ground that he would be required to divulge information which was privileged, the Supreme Court of Florida, in [Kneale v. Williams, 158 Fla. 811, 30 So. 2d 284 \(1947\)](#), held.

In [Jefferson Ins. Co. of New York v. Dunn, 224 Ga. App. 732, 482 S.E.2d 383 \(1997\)](#), judgment rev'd on other grounds, [269 Ga. 213, 496 S.E.2d 696 \(1998\)](#) and judgment vacated on other

grounds, [232 Ga. App. 513, 498 S.E.2d 373 \(1998\)](#), where a judgment creditor of an insured brought a suit against an insured and its liability insurer, alleging that a settlement and release agreement entered into between the insured and insurer at the time when the insured was insolvent amounted to a fraudulent conveyance of the insured's sole remaining asset and that the release was obtained in bad faith, the attorney-client privilege did not protect communications between the liability insurer's counsel and its claims representative that allegedly involved perpetration of a fraud to keep the claimant from recovering on any judgment obtained against the insured by having the insured, which was insolvent, assign a bad-faith action to the insurer and settle the coverage claim for a small amount, as the communications were admissible on a prima facie showing that they were made in furtherance of illegal or fraudulent activity.

Testimony of an attorney who acted for a grantor and grantee in preparing a contract as to a conveyance in fraud of the grantor's creditors was held by the court in [Chicago Lumber Co. v. Cox, 94 Kan. 563, 147 P. 67 \(1915\)](#), not to be privileged.

Where the record disclosed much more than a mere accusation or charge of fraud and the proved facts were more consonant with a guilty purpose than an innocent one, the attorney-client privilege, if one ever existed within the framework of the particular circumstances of the case, was destroyed and an attorney was not entitled to refuse to answer questions concerning conversations with a client in a summary proceeding to release assets from a seizure and to set aside a default judgment, the court in [Eagle Indus. Associates, Inc. v. Universal Oil Corp., 277 So. 2d 720 \(La. Ct. App. 2d Cir. 1973\)](#), writ summarily denied, [281 So. 2d 740 \(La. 1973\)](#), held.

The court in [Horon Holding Corp. v. McKenzie, 341 N.J. Super. 117, 775 A.2d 111 \(App. Div. 2001\)](#), held that the attorney-client privilege did not apply to protect the testimony of judgment debtors' former attorney, who did not represent the judgment debtors in the underlying litigation, as to the whereabouts of the judgment debtors, insofar as the judgment debtors' flight from enforcement of the judgments, and the attorney's cooperation in withholding their whereabouts to that end, constituted a fraud upon the court, where the underlying litigation included an adverse judgment on a fraudulent conveyance claim.

### **§ 31. Debtor creditor/actions—Crime-fraud exception held inapplicable**

The following state court authority held that, under the facts and circumstances presented, the crime-fraud exception to the attorney-client privilege was inapplicable in a debtor/creditor action.

In [Wallace, Saunders, Austin, Brown & Enochs, Chartered v. Louisburg Grain Co., Inc., 250 Kan. 54, 824 P.2d 933 \(1992\)](#), where judgment creditors sought to set aside a judgment by a law firm against former clients for payment of legal services, the court, recognizing that to invoke the

fraud exception to the general rule of the attorney-client privilege, [Kan. Stat. Ann. § 60-426\(b\)\(1\)](#), there must be evidence sufficient to constitute a prima facie case of fraud, held that failure by the judgment creditors to establish the inadequacy of the consideration element of a prima facie case of fraud, as required to justify discovery of communications between the attorney and its clients on the theory that the suit for attorney fees was fraudulent, precluded it from invoking the fraud exception to the attorney-client privilege.

### § 32. **Actions pertaining to real property—Crime-fraud exception held applicable**

The following state court authority held that, under the facts and circumstances presented, the crime-fraud exception to the attorney-client privilege was applicable in an action pertaining to real property.

In [Matter of Franklin Washington Trust Co.](#), 1 Misc. 2d 697, 148 N.Y.S.2d 731 (Sup 1956), where, in an action in New Jersey, an order to take testimony in New York was obtained and the court issued subpoenas to the respondent attorneys, the respondents were not entitled to refuse to answer certain questions on the ground that they called for matters violating the attorney-client relationship where prima facie proof existed that the attorneys' services were allegedly sought to perpetrate alleged fraud in a real estate transaction.

### § 33. **Actions pertaining to real property—Crime-fraud exception held inapplicable**

In the following state cases, the courts determined, under the facts and circumstances presented, that the crime-fraud exception to the attorney-client privilege was inapplicable in an action pertaining to real property.

A legal memorandum prepared by an attorney outlining potential claims between a company and property owner that were involved in a dispute was protected in a property owner's subsequent trespass action against the company by the attorney-client and work-product privileges, where the attorney testified that the memorandum contained his opinions and legal theories with regard to the dispute, the attorney testified that the memorandum was prepared in anticipation of litigation, the memorandum was transferred to counsel who represented the company in a subsequent trespass action, such counsel testified that the memorandum was not intentionally produced and that he considered the document privileged, and no evidence supported the claim that the crime-fraud exception to the attorney-client privilege, [Tex. R. Evid. 503\(b\)\(1\)](#), applied, the court in [In re AEP Texas Central Co.](#), 128 S.W.3d 687 (Tex. App. San Antonio 2003), held. The court stated that mere allegations of fraud are insufficient to establish the crime-fraud exception to the attorney-client privilege; the fraud alleged to have occurred must have occurred at or during the time the document was prepared and in order to perpetrate the fraud, and the fact that the plaintiff's cause

of action involves fraudulent conduct is insufficient to establish the applicability of the crime-fraud exception.

The court in [Arkla, Inc. v. Harris](#), 846 S.W.2d 623 (Tex. App. Houston 14th Dist. 1993), held that the crime-fraud exception to the attorney-client privilege, [Tex. R. Civ. Evid. 503, 503\(a\)\(5\), \(b\), \(d\)\(1\)](#), did not apply with respect to title opinions and related documents in a trial alleging wrongful drainage of minerals, where there was no showing that the services of the attorneys who prepared the title opinions and related documents were sought or obtained with any fraudulent or illegal intent, and the party offered no proof supporting its allegation of document destruction constituting fraud sufficient to defeat the privilege. A party who asserts the crime-fraud exception to the attorney-client privilege, the court noted, must first establish a prima facie case showing a violation sufficiently serious to defeat the privilege, and, additionally, there must be a relationship between the document for which the privilege is challenged and the prima facie proof offered.

### § 34. Unspecified civil litigation

#### [Cumulative Supplement]

The following state court authority considered whether, under the facts and circumstances presented, the crime-fraud exception to the attorney-client privilege was applicable in civil litigation.

The court in [Tomkins Industries, Inc. v. Warren Technology, Inc.](#), 768 So. 2d 1125 (Fla. Dist. Ct. App. 3d Dist. 2000), held that the draft of a proposed letter from the defendant to the plaintiff that was forwarded to the defendant's corporate counsel for suggestions and advice, and which contained handwritten notations by counsel and corporate employees, was protected by the attorney-client privilege, despite the plaintiff's contention that fraud nullified the privilege, as the letter was forwarded to counsel for legal advice in anticipation of litigation, not business advice, and the plaintiff failed to produce evidence to support its theory of fraud, the court commenting that we have not arrived at a stage in our criminal jurisprudence where being obnoxious or obstreperous rises to the level of criminal or fraudulent behavior.

In [Baldoni v. Fallone](#), 2005 WL 1384316 (N.J. Super. Ct. Ch. Div. 2005), the court held that the crime-fraud exception did not apply in civil litigation involving corporate entities, officers, and shareholders, concluding that the plaintiff could not meet the burden of proof to establish a prima facie showing of fraud. At issue was a letter in which counsel informed the defendants of issues which may arise at a shareholder meeting. The court concluded that the plaintiff mischaracterized the events at issue and that the defendants never attempted to defraud the plaintiff or thwart the sale of corporate assets, noting that the attorney had nothing to do with the purchase sale price proposed by the defendant. Upon the defendant presenting the offer, the court remarked, the plaintiff voted

not to accept the offer and to list the corporate assets for sale. Therefore, the court determined, there is no conspiracy.

## CUMULATIVE SUPPLEMENT

### Cases:

The party seeking the application of the crime-fraud exception to the attorney-client privilege must present evidence sufficient to support a reasonable belief that in camera review might yield evidence that establishes the applicability of the exception. [Transamerica Life Ins. Co. v. Moore](#), 274 F.R.D. 602 (E.D. Ky. 2011).

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[END OF SUPPLEMENT]

## III. APPLICATION IN CRIMINAL ACTIONS

### § 35. Sexual abuse

The following state court authority considered whether, under the facts and circumstances presented, the crime-fraud exception to the attorney-client privilege was applicable in a criminal prosecution involving alleged sexual abuse.

In [In re Grand Jury Investigation](#), 437 Mass. 340, 772 N.E.2d 9, 167 Ed. Law Rep. 388 (2002), the court, recognizing that, under the crime-fraud exception, the attorney-client privilege does not extend to client communications if the communication seeks assistance in or furtherance of future criminal conduct, held that the crime-fraud exception, [Mass. Gen. Laws Ann. ch. 119, § 51A](#), applied to a private school's documents concerning alleged abuse of students under the age of 18 by other students, which was the subject of a grand jury investigation, where school officials and teachers had knowledge of reportable abuse, the school failed to report such abuse, and there was evidence that the school may have resorted to the cover of the attorney-client privilege to obscure its responsibility for not reporting the information, mischaracterizing its actions, and downplaying the nature of the abuse to the public. However, the court found, the crime-fraud exception to the attorney-client privilege did not apply to the school's documents concerning alleged abuse of students by other students, where the abuse was not disclosed by the students until after they turned 18 years old, where the school had no statutory duty to report abuse of those students.

## § 36. Murder—Crime-fraud exception held applicable

### [Cumulative Supplement]

In the following murder prosecutions, the court determined, under the facts and circumstances presented, that the crime-fraud exception to the attorney-client privilege was applicable.

See  [People v. DePallo, 96 N.Y.2d 437, 729 N.Y.S.2d 649, 754 N.E.2d 751 \(2001\)](#), in which the court, recognizing that a client's intent to commit a crime is not a protected confidence or secret for purposes of the attorney-client privilege, held that counsel for a murder defendant responded properly after learning of the defendant's intent to commit perjury during his bench trial, and thus did not provide ineffective assistance, where after unsuccessfully attempting to dissuade the defendant from perjuring himself, counsel initially noted at a sidebar conference that he had advised the defendant that he did not have to testify and that if he did he should do so truthfully, and then, after eliciting the defendant's testimony in narrative form, informed the court in chambers of his belief that the defendant had given perjured testimony.

The state had made a prima facie showing that because the attorney-client relationship was intended to further the criminal act of murder, communications between the defendant and his attorney had lost their confidential character, the court in [Keller v. State, 1982 OK CR 159, 651 P.2d 1339 \(Okla. Crim. App. 1982\)](#), held. The court found that sufficient evidence supported the trial judge's ruling that the attorney-client privilege did not exist in regard to statements made by the defendant to his attorney about killing the victim, who had sued the defendant over an employment contract dispute, even though the defendant contended that the attorney was not sure the defendant was serious in requesting his advice about "getting rid of" the victim.

A conversation between an inmate and an undercover police officer posing as an attorney willing to assist the inmate in the murder of two witnesses was not protected by the attorney-client privilege, where, assuming that the privilege applied due to the fact that the inmate was actively misled into believing that he was conversing with an actual attorney, the inmate sought the "attorney's" assistance for the sole purpose of committing a crime, the court in [Com. v. Boggs, 695 A.2d 839 \(Pa. Super. Ct. 1997\)](#), held.

A letter fabricated by a capital murder defendant, purporting to identify another person as the victim's killer, mailed by the defendant to his mother, and seized from the defendant's attorney's office, was not a privileged attorney-client communication, absent any evidence that the defendant intended the communication to be privileged, where the defendant steadfastly asserted that he had not authored the letter, the letter was sent to and handled by several third parties, and the purpose of the letter was to perpetrate a fraud so as to come within the exception, in [Tex. R. Evid. 503\(a\)](#)

(5), (b)(1), to the attorney-client privilege, the court in [Swearingen v. State](#), 101 S.W.3d 89 (Tex. Crim. App. 2003), held.

In a prosecution for the murder of the city marshal subsequent to a prosecution of the accused for a breach of peace growing out of the accused's attempt to collect a debt from the deceased debtor's family, the accused's threats against the debtor's family, occurring in consultation with the accused's attorney in regard to the collection of the debt, was held by the court in [Cernoch v. State](#), 128 Tex. Crim. 327, 81 S.W.2d 520 (1935), not to be inadmissible as a privileged communication.

In [Ott v. State](#), 87 Tex. Crim. 382, 222 S.W. 261 (1920), a prosecution of a wife for killing her husband, testimony of the attorney for the husband in his divorce suit that the husband asked him for advice as to what punishment would likely be meted out to him if he killed his wife, who was defending on the ground of self-defense, was held by the court not excludable as a privileged communication between attorney and client.

## CUMULATIVE SUPPLEMENT

### Cases:

Crime-fraud exception to the attorney-client privilege applied to statements made by defendant to his divorce attorney about killing victim, and thus, circuit court did not err in admitting the recordings of attorney's 911 call under this exception during prosecution for murder; defendant called his attorney and told him that he was about to commit a homicide, and attorney, who was acting in accordance with Mississippi's rules of ethics, chose to disclose this information to law enforcement. Rules of Evid., [Rule 502\(d\)\(1\)](#). [Shorter v. State](#), 33 So. 3d 512 (Miss. Ct. App. 2009).

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**[END OF SUPPLEMENT]**

### § 37. **Murder—Crime-fraud exception held inapplicable**

In the following murder prosecutions, the court determined, under the facts and circumstances presented, that the crime-fraud exception to the attorney-client privilege was inapplicable.

The court in [People v. Michaels](#), 28 Cal. 4th 486, 122 Cal. Rptr. 2d 285, 49 P.3d 1032 (2002), cert. denied, 538 U.S. 1058, 123 S. Ct. 2214, 155 L. Ed. 2d 1109 (2003), held that a note from a capital murder defendant to his attorney, written during the early stages of trial before the severance

of the trials of the defendant and his two co-defendants, warning the attorney that he or one of his co-defendants would harm the other co-defendant if "something can't be worked out[,]" did not come within the crime-fraud exception to the attorney-client privilege, [Cal. Evid. Code §§ 954, 956](#), where the defendant was not seeking to enlist the attorney's assistance in committing the crime, but rather in preventing one.

In [In re Public Defender Service](#), 831 A.2d 890 (D.C. 2003), the court held that the crime-fraud exception to the attorney-client privilege did not apply to communications between a murder defendant and his attorney regarding alleged witness tampering, where the alleged tampering occurred before any communications between the attorney and the defendant about the statements procured from the witness through intimidation, there was no suggestion that the attorney did anything that was conducive to the fulfillment of the tampering, and the attorney only undertook to investigate the bona fides of the witness's statement recanting his testimony against the defendant. The court concluded that it was not enough for the state to demonstrate probable cause to believe that the defendant knew the witness had been coerced into making false statements for the defendant's benefit, but rather, the state was required to show that the defendant's communication with his attorney furthered his improper purpose in obtaining the attorney's assistance in perpetrating a fraud.

In [State v. Thomas](#), 82 P.3d 531 (Kan. Ct. App. 2004), unpublished and review denied, (Apr. 1, 2004), the court held that the crime-fraud exception to the attorney-client privilege did not apply to permit a second-degree murder defendant's prior attorney to testify about a conversation between the attorney and a witness, whom the attorney was representing in an unrelated matter, where there was no prima facie evidence that the witness was seeking the attorney's advice to aid the witness in committing perjury or any other crime or fraud.

The court in [Newman v. State](#), 384 Md. 285, 863 A.2d 321 (2004), held that the crime-fraud exception to the attorney-client privilege did not apply to an attorney's testimony about his disclosure, under the professional rules of conduct, to the trial judge that the defendant in a prosecution for conspiracy attempted murder, and the defendant's friend, stated that they were planning to kill the defendant's former husband and the couple's children, and thus the conversation was not admissible. The attorney represented the defendant in connection with her divorce and custody proceedings. During the course of a meeting prior to a custody hearing, the defendant had discussed killing one or both of the children or killing her husband to save the children from the husband's alleged child abuse, and the defendant and her best friend had discussed, in front of the attorney, shooting the husband and then framing him by planting child pornography in his home. The court concluded that there was no evidence that the defendant sought advice or assistance from the attorney, who represented her in connection with her divorce, in furtherance of a crime, when she stated her intention to kill her former husband and children.

Despite the contention that a prosecution witness had consulted with his attorney for the purpose of enabling the witness or another to commit a crime or fraud, an attorney was properly allowed to invoke the attorney-client privilege at a pretrial hearing in a prosecution for first-degree murder, in that the only indication of the purpose to commit a crime or fraud was the defendant's allegation that the witness committed perjury some 13 years after the witness had consulted with the attorney, the court in [Cooper v. State, 1983 OK CR 154, 671 P.2d 1168 \(Okla. Crim. App. 1983\)](#), held.

The court in [Henderson v. State, 962 S.W.2d 544 \(Tex. Crim. App. 1997\)](#), a capital murder case, recognizing that the crime-fraud exception to the attorney-client privilege cannot be satisfied by the mere pendency of ongoing criminal activity or the mere threat of future activity, held that the defendant's creation of maps indicating the location of the victim's body and defense attorneys' refusal to divulge that location to law enforcement authorities did not trigger the exception to the attorney-client privilege for services sought or obtained in furtherance of crime or fraud, where the defendant did not seek the attorneys' services to further a crime under either kidnapping or abuse of corpse theories, and the refusal to disclose merely left authorities in the same position as if the defendant had not drawn the map.

In a first-degree murder trial, a state witness and his counsel did not have communications in furtherance of a future crime or fraud, and therefore the defendant was not entitled to in camera hearing on the applicability of the crime-fraud exception to the attorney-client privilege, where the defendant alleged that the witness who testified that the defendant committed the murders implicated the defendant only after police intimidation, that the witness subsequently denied five times any knowledge of the murders while in the presence of counsel, that the witness then reimplicated the defendant with police officers out of the presence of counsel, and that the witness' counsel withdrew upon learning of the altered statement, the court in [State v. Beard, 194 W. Va. 740, 461 S.E.2d 486 \(1995\)](#), held.

### § 38. Racketeering

The following state court authority considered whether, under the facts and circumstances presented, the crime-fraud exception to the attorney-client privilege applied in the context of a racketeering prosecution

In [State v. Charlesworth, 151 Or. App. 100, 951 P.2d 153 \(1997\)](#), the court held, in a prosecution for, inter alia, racketeering, conspiracy to commit racketeering, delivery of controlled substances, and conspiracy to deliver controlled substances, that information in a legal file that a secretary employed by the defendant's attorney had copied and given to the district attorney's office came within the crime-fraud exception to the attorney-client privilege, since the defendant had consulted the attorney in order to further a continuing criminal scheme. To establish a basis to conduct an in

camera review of the file to determine whether the crime-fraud exception applied, the court found, the state was not required to make a threshold showing using only evidence that was "independent" of the allegedly privileged attorney-client communications themselves.

### § 39. **Conspiracy**

In the following conspiracy prosecutions, the state courts determined the applicability of the crime-fraud exception to the attorney-client privilege.

Evidence tending to show that an attorney was an alleged active member of a conspiracy to violate a law prohibiting abortions and that he was allegedly counseling a fellow member in an attempt to further the illegal purpose of the conspiracy was not privileged as to the attorney, the court in [Abbott v. Superior Court in and for Alameda County](#), 78 Cal. App. 2d 19, 177 P.2d 317 (1st Dist. 1947), held.

The court in [People v. Wurbs](#), 38 Ill. App. 3d 360, 347 N.E.2d 879 (4th Dist. 1976), recognizing that there can be no duty of an attorney toward a client that authorizes collaboration in a crime or fraud, and that a defendant's status as an attorney does not give him the right to do acts that would be criminal if performed by a layman, held that the status of the defendant as an attorney did not shield him from the consequences of the statute governing the offense of conspiracy to commit theft when he sought to protect and further the interests of his client in obtaining money for the return of stolen guns.

Where a client's communications to his attorney are made with reference to an unlawful conspiracy, and the attorney's advice is obtained in aid and furtherance of the conspiracy, the communications of the client are not privileged, and the testimony of the attorney as to such communications may be received, the court in [Lockhart v. Washington Gold & Silver Min. Co.](#), 16 N.M. 223, 117 P. 833 (1911), held.

### § 40. **Forgery**

In the following forgery prosecutions, the state courts determined the applicability of the crime-fraud exception to the attorney-client privilege.

An attorney's testimony regarding two forged letters that a defendant provided to the attorney for the purpose of bolstering his self-defense argument in an aggravated battery prosecution was admissible under the crime-fraud exception to the attorney-client privilege in a prosecution of the defendant for forgery and obstructing justice, the court in [Lahr v. State](#), 731 N.E.2d 479 (Ind. Ct.

[App. 2000](#)), held, finding that the defendant enlisted the aid of his attorney in furtherance of a continuing crime or fraud.

In [State v. Kirkpatrick, 220 Iowa 974, 263 N.W. 52 \(1935\)](#), a prosecution for uttering counterfeit bonds, a conversation had by a party accused of uttering counterfeit bonds with an attorney in respect to negotiating such bonds was held not privileged where the accused knew at the time that the bonds were forgeries, and consequently was engaged in an attempt to commit a crime.

In [Ridener v. Com., 256 Ky. 112, 75 S.W.2d 737 \(1934\)](#), a prosecution for uttering a forged deed, the court held that the admission of testimony, over the accused's objection, of an attorney, that the accused solicited him to make erasures of the name of the grantee in the deed and to substitute another's name therefor, was not error.

In [State v. Childers, 196 La. 554, 199 So. 640 \(1940\)](#), a prosecution for knowingly forging and uttering an instrument purporting to be a last will with intent to defraud, the statements of the defendant to an attorney were not "privileged communications" where the record showed that the defendant had requested that the attorney prepare a purported will for the deceased after her death and had proposed that the defendant and attorney could share in the anticipated ill-gotten gains.

Where the defendant and an accomplice consulted an attorney for the purpose of changing the defendant's name to a duplicate name used by another woman in connection with such woman's property interests that were the subject of a pending partition suit between the woman and the accomplice at the time of consultation with the attorney and the defendant subsequently signed a variation of the new name to a deed conveying the woman's property interests to the accomplice, as well as signing the woman's name to a satisfaction of judgment in the partition suit, the attorney's testimony was properly admitted in a prosecution for forgery under the future crimes exception to the attorney-client privilege, the court in [State v. Ray, 36 Or. App. 367, 584 P.2d 362 \(1978\)](#), held.

#### **§ 41. Evidence tampering/intimidation of witness, attorney, or judge—Crime-fraud exception held applicable**

##### **[Cumulative Supplement]**

In the following prosecutions for evidence tampering or intimidation of a witness, attorney, or judge, the state courts determined that the crime-fraud exception to the attorney-client privilege was applicable.

In  [People v. Dang, 93 Cal. App. 4th 1293, 113 Cal. Rptr. 2d 763 \(2d Dist. 2001\)](#), review denied, (Mar. 13, 2002), a prosecution for dissuading witnesses by force or threat, the evidentiary rule exempting certain communications from the scope of the attorney-client privilege, the court held

that [Cal. Evid. Code § 956.5](#), applied to allow the defendant's former attorney to testify that the defendant told the attorney that the defendant would kill the witnesses if he was not successful in bribing them.

The court in [People v. Board, 656 P.2d 712 \(Colo. Ct. App. 1982\)](#), found that an order compelling an attorney for the defendant to testify was not violative of the attorney-client privilege where the prosecution presented prima facie evidence that the defendant's communication to the attorney concerned future wrongdoing in the form of a presentation of a false affidavit to a grand jury in a prosecution for evidence tampering.

The Supreme Court of Washington, in [State v. Hansen, 122 Wash. 2d 712, 862 P.2d 117 \(1993\)](#), held that the attorney-client privilege did not apply to a defendant's threat against a judge made during a telephone conversation with an attorney, since the privilege was not applicable to remarks concerning the furtherance of a crime, fraud, or to conversations contemplating a future crime, and thus the privilege could not in any way preclude the prosecution of the defendant for intimidating the judge.

The threat of injury made by a client toward family and property of an attorney was not privileged and was not within communications protected under the attorney-client privilege, the Supreme Court of Wyoming, in   [Hopkinson v. State, 664 P.2d 43 \(Wyo. 1983\)](#), held, where the client's communications were made in furtherance of criminal activity and related entirely to matters arising after he had terminated his relationship with the defendant and in the course of his duties as county prosecutor.

## CUMULATIVE SUPPLEMENT

### Cases:

Defendant's communications with his lawyer, in which he lied about false invoice purporting to reflect work done on alderman's home in an effort to thwart a grand jury investigation into defendant's dealings with alderman, fell within the crime-fraud exception to the attorney-client privilege; if defendant falsified a document which he gave to his attorney in hopes of more lenient treatment as part of a grand jury investigation, then he committed obstruction of justice. [18 U.S.C.A. § 1503. U.S. v. Boender, 719 F. Supp. 2d 951 \(N.D. Ill. 2010\)](#).

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**[END OF SUPPLEMENT]****§ 42. Evidence tampering/intimidation of witness, attorney, or judge—Crime-fraud exception held inapplicable**

The following state court authority held that, under the facts and circumstances presented, the crime-fraud exception to the attorney-client privilege was inapplicable in the context of a prosecution for evidence tampering or intimidation of a witness, attorney, or judge.

In [Matter of Sutton, 1996 WL 659002 \(Del. Super. Ct. 1996\)](#), the court held that the law firm which represented a defendant on first degree evidence tampering charges would not be compelled to produce documents concerning its representation of the defendant, where the State failed to make a prima facie showing that any confidential communications between the defendant and the law firm were in furtherance of a crime or fraud; rather, the State asserted merely that the defendant had engaged in fraudulent conduct in the Court of Chancery during the time he was represented by the law firm.

**§ 43. Bribery**

In the following prosecutions for bribery, the state courts determined the applicability of the crime-fraud exception to the attorney-client privilege.

A communication made by a client to his attorney in attempting to procure his services in securing a bribe which had been promised but withheld was not privileged, the court in [State v. Faulkner, 175 Mo. 546, 75 S.W. 116 \(1903\)](#), held.

Affirming the defendant commissioner's conviction of bribing a public official, the court in [State v. Bissantz, 3 Ohio App. 3d 108, 444 N.E.2d 92 \(12th Dist. Clermont County 1982\)](#), judgment rev'd on other grounds, [30 Ohio St. 3d 120, 507 N.E.2d 1117 \(1987\)](#), held, even if an attorney-client relationship existed between the prosecutor and county commissioner, the prosecutor could testify against the commissioner regarding a communication which he made to him in promoting a criminal activity.

**§ 44. Extortion or blackmail**

The following state court authority considered whether, under the facts and circumstances presented, the crime-fraud exception to the attorney-client privilege applied in the context of a prosecution for extortion or blackmail.

In [State v. Richards](#), 97 Wash. 587, 167 P. 47 (1917), a prosecution for blackmail, the court held that a lawyer would be allowed to testify that he advised the defendant that his intended act would be blackmail, since a conversation between the attorney and client as to a contemplated crime is not privileged.

#### § 45. Perjury—Crime-fraud exception held applicable

##### [Cumulative Supplement]

In the following prosecutions for perjury, the state courts determined that the crime-fraud exception to the attorney-client privilege was applicable.

In [State v. Johns](#), 209 La. 244, 24 So. 2d 462 (1945), the court, recognizing that communications had by the client with the attorney before the commission of a proposed crime and for the purpose of helping him in the commission thereof are not "privileged communications" which the client is forbidden to divulge without the attorney's consent, held that an indictment for perjury against an attorney for procuring a client to testify falsely in a divorce suit was not defective on the ground that it was founded upon a confidential communication between the attorney and his client, and that such consultation was a privileged communication, since the client might waive the privilege and, in any event, the privilege does not protect an attorney against prosecution for procuring his client to commit a crime.

The court in [State v. Phelps](#), 24 Or. App. 329, 545 P.2d 901 (1976), recognizing that the attorney-client privilege protects communications between a client and an attorney with regard to prior wrongdoing but communications made for an illegal purpose are not protected by the attorney-client privilege, held that the fact that the accused had told his counsel that the accused could produce witnesses who would give perjured testimony that he was not driving at the time of the alleged offense of driving under the influence of intoxicating liquor was within the future crime exception to the attorney-client privilege and thus was admissible in a prosecution for perjury and witness tampering, notwithstanding the contention that such exception should not apply where the contemplated crime has already been committed.

The court in [Sevachko v. Com.](#), 35 Va. App. 346, 544 S.E.2d 898 (2001), held that the attorney-client privilege did not attach to a defendant's statement to his attorney, who represented him in a prosecution for driving on a suspended license, that the defendant planned to falsely testify that he was not driving, and thus the statement was admissible, under the crime-fraud exception to the attorney-client privilege, in a perjury prosecution, as the statement was made in contemplation of committing perjury and fraud upon the court.

## CUMULATIVE SUPPLEMENT

### Cases:

Where a client blatantly disregards the law and is untruthful in submissions to the courts, the crime-fraud exception to the attorney-client privilege may apply. [Gillard v. AIG Ins. Co., 15 A.3d 44 \(Pa. 2011\)](#).

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[END OF SUPPLEMENT]

### § 46. Perjury—Crime-fraud exception held inapplicable

[\[Cumulative Supplement\]](#)

In the following prosecutions for perjury, the state courts determined that the crime-fraud exception to the attorney-client privilege was inapplicable.

The court in [State v. Fodor, 179 Ariz. 442, 880 P.2d 662 \(Ct. App. Div. 1 1994\)](#), recognizing that the crime-fraud exception to the attorney-client privilege, [Ariz. Rev. Stat. Ann. § 13-4062\(2\)](#), requires a prima facie showing by the state that the client retained the attorney for the express purpose of promoting intended or continuing criminal or fraudulent activity, found that the crime-fraud exception could not be invoked in a perjury prosecution to permit admitting a transcript of the defendant's wiretapped telephone conversation with her attorney in which the attorney asked the defendant if she had the letter that the prosecution sought in a grand jury proceeding, and the attorney then suggested that the defendant drop by his office the following day, even though the defendant later testified before the grand jury that she had never given the attorney the letter and that no one ever suggested that she give the letter to the attorney, which gave rise to perjury charges; where it was the attorney, not the defendant, who brought up the subject of the letter, and the state's agent admitted at trial that a prior monitored conversation demonstrated that it was already the defendant's intention to give the letter to the attorney.

In [State v. DeAngelis, 116 S.W.3d 396 \(Tex. App. El Paso 2003\)](#), the court held that the crime-fraud exception to the attorney-client privilege, [Tex. R. Evid. 503\(d\)\(1\)](#), did not apply to defeat the privilege between an assistant police chief and assistant city attorney, as it did not appear that the chief ever sought the attorney's assistance or looked to the attorney for advice on leaking certain police reports to the media, in a prosecution of the chief for aggravated perjury. The court stated that the plain language of the rule setting forth the crime-fraud exception to attorney-client

privilege indicates that a continuing or future crime is not enough; the attorney's services must be sought to aid in the commission of the crime.

## CUMULATIVE SUPPLEMENT

### Cases:

Crime-fraud exception to attorney-client privilege did not apply to require public defender to testify under state's subpoena regarding identity of defender's former client who had expressed an intention to commit perjury in murder prosecution, since no evidence aside from attorney's own summary of former client's statements existed to warrant a finding that client had sought or obtained legal service in order to enable or aid the commission or planning of a crime. Rules of Evid., K.S.A. 60-426(b)(1); Sup.Ct.Rules, Rule 226, Rules of Prof.Conduct, Rule 3.8(e). [State v. Gonzalez, 234 P.3d 1 \(Kan. 2010\)](#).

Even if defendant had, since his arrest, engaged in conversations with his attorney concerning refusals to submit to breath tests, such communication did not fall within the crime-fraud exception to the lawyer-client privilege, absent showing that such communication was designed to help defendant commit perjury in defending against charge of driving under the influence of intoxicants (DUI); State's cross-examination insinuation, that defendant's claim that he did not inform officer about his acid reflux out of fear of it being considered a refusal to test was concocted with assistance from counsel, was not sufficient to invoke the crime-fraud exception to the lawyer-client privilege. Rules of Evid., [Rule 503\(4\)\(a\)](#). [State v. Taylor, 247 Or. App. 339, 268 P.3d 795 \(2011\)](#).

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**[END OF SUPPLEMENT]**

### § 47. **Misuse of official information**

The following state court authority considered whether, under the facts and circumstances presented, the crime-fraud exception to the attorney-client privilege was applicable in the context of a prosecution for misuse of official information.

In [State v. Martinez, 116 S.W.3d 385 \(Tex. App. El Paso 2003\)](#), the court held that the state failed to establish a prima facie showing that a crime or fraud was ongoing or about to be committed by the deputy police chief when he sought counsel from the assistant city attorney, and thus the crime-fraud exception, [Tex. R. Evid. 503\(d\)\(1\)](#), did not apply to pierce the attorney-client privilege to require disclosure of the protected statements in a criminal investigation that focused on misuse

of official information, where the deputy chief had not been charged with releasing confidential information, and there was no evidence tending to prove that either the attorney or deputy chief was the source of the leak. The court stated that a continuing or future crime is not enough to require release of confidential information obtained during an attorney-client relationship pursuant to the crime-fraud exception to the attorney-client privilege; the attorney's services must be sought to aid in the commission of the crime.

#### § 48. Narcotics

In the following narcotics prosecutions, the state courts determined whether the crime-fraud exception to the attorney-client privilege was applicable.

A confidential communication by a criminal defendant to counsel regarding the defendant's apprehension that the prosecution's witness would appear and testify against him was not admissible at the continuation of the defendant's trial for furnishing a restricted dangerous drug after the defendant had absented himself from the second day of trial, even on the theory that such communication was an unprivileged communication of the intent to commit a crime or fraud, where the gravamen of the statement indicated the defendant's apprehension—consciousness of guilt—and the statement was only circumstantial evidence of flight at best, the court in [People v. Vargas](#), 53 Cal. App. 3d 516, 126 Cal. Rptr. 88 (1st Dist. 1975), held.

In [Matter of Nackson](#), 114 N.J. 527, 555 A.2d 1101 (1989), the Supreme Court of New Jersey held that the "crime or fraud" exception to the attorney-client privilege did not remove communication of the client's address from the scope of the attorney-client privilege in connection with the client's disclosure of his whereabouts to the attorney while consulting about a fugitive warrant for narcotics offenses, where the advice and communication arguably were given for the purpose of ending, rather than committing, a criminal violation. In determining whether the "crime or fraud" exception to attorney-client privilege applies, the relevant factor to consider is whether the client consulted with the attorney in order to aid the client in the commission of a crime, to enable the client to avoid any criminal investigation or proceeding pending at the time advice was given, or to assist the client to avoid lawful process in any proceeding pending at the time the advice was given.

#### § 49. Arson

The following state court authority considered whether, under the facts and circumstances presented, the crime-fraud exception to the attorney-client privilege was applicable in the context of a prosecution for arson.

In [Purcell v. District Attorney for Suffolk Dist.](#), 424 Mass. 109, 676 N.E.2d 436 (1997), where an attorney brought an action challenging denial in a criminal case of his motion to quash the anticipated subpoena requiring him to testify regarding incriminating communications he had with a client, the court held that the evidence did not support application of the crime-fraud exception to the attorney-client privilege to threats made by the client, while he was consulting the attorney regarding his eviction proceeding, that he would burn the apartment building, absent evidence that the client had informed the attorney of his intention to commit arson for the purpose of receiving legal advice or assistance in furtherance of the crime, though the attorney had disclosed, under authority of the disciplinary rule, the client's threats to authorities in order to protect residents of the building. Unless the crime-fraud exception applies, the court said, the attorney-client privilege should apply to the client's communications concerning possible future, as well as past, criminal conduct, because an informed lawyer may be able to dissuade the client from improper future conduct and, if not, under ethical rules may elect in the public interest to make a limited disclosure of the client's threatened conduct.

## § 50. Larceny, theft, or embezzlement

### [Cumulative Supplement]

The following state court authority considered whether, under the facts and circumstances presented, the crime-fraud exception to the attorney-client privilege was applicable in the context of a prosecution for larceny, theft, or embezzlement.

In a grand jury investigation involving allegations of improper diversion of public funds by county officials into charitable certificates of deposit (CDs) which paid a lower rate of return than other CDs available at the bank, a bank president's memorialization in handwritten notes of discussions with his attorney pertaining to the grand jury investigation was subject to the attorney-client privilege; furthermore, the crime-fraud exception to the attorney-client privilege was inapplicable, as the Commonwealth did not produce sufficient evidence that the bank president's grand jury testimony regarding an undated document stating that a higher rate of interest was in fact being paid was fabricated and intended as a cover-up, the Supreme Court of Pennsylvania, in [In re Grand Jury Investigation](#), 437 Mass. 340, 772 N.E.2d 9, 167 Ed. Law Rep. 388 (2002), held.

## CUMULATIVE SUPPLEMENT

### Cases:

In prosecution for financial institution fraud and other crimes, state presented sufficient evidence to show that attorney-client privilege did not prevent defendant's former attorney from testifying

about former attorney's communications with defendant and acts that former attorney took in following defendant's instructions; evidence showed that defendant used his instructions to former attorney to further defendant's attempts to commit crimes or engage in fraudulent activity concerning sales of condominiums to straw purchasers and subsequent resales from straw purchasers to corporations controlled by defendant. S.H.A. 720 ILCS 5/5-2(c); 5/16H-25, 5/16H-30. [People v. Radojic, 2012 IL App \(1st\) 102698, 969 N.E.2d 501 \(Ill. App. Ct. 1st Dist. 2012\)](#).

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**[END OF SUPPLEMENT]**

### § 50.5. Fraud

[\[Cumulative Supplement\]](#)

The following authority determined, under the facts and circumstances presented, that the crime-fraud exception to the attorney-client privilege was applicable in a fraud prosecution.

## CUMULATIVE SUPPLEMENT

### Cases:

Crime-fraud exception to attorney-client privilege applied such that defendant's former attorney could testify about former attorney's communications with defendant and acts that former attorney took in following defendant's instructions with respect to real estate transactions identified in indictment, in prosecution for financial institution fraud and other crimes related to a mortgage fraud scheme allegedly orchestrated by defendant; evidence indicated that defendant used his instructions to former attorney to further defendant's attempts to engage in fraudulent activity concerning sales of condominiums to straw purchasers and subsequent resales from straw purchasers to corporations controlled by defendant; abrogating, [Mueller Industries, Inc. v. Berkman, 399 Ill.App.3d 456, 340 Ill.Dec. 55, 927 N.E.2d 794](#). [People v. Radojic, 2013 IL 114197, 998 N.E.2d 1212 \(Ill. 2013\)](#).

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**[END OF SUPPLEMENT]**

## § 51. Possession of stolen property

In the following prosecutions for possession of stolen property, the state courts determined whether the crime-fraud exception to the attorney-client privilege was applicable.

The defendant attorney was foreclosed from validly asserting the lawyer-client privilege in resisting the trial court's ruling requiring him to disclose the name of his client, by virtue of the crime exception to the privilege, [Cal. Evid. Code § 956](#), where the client had sought the services of the defendant attorney to aid in a criminal plan to have stolen property returned to him upon his payment of \$2,500 and execution of a nonprosecution agreement, the court in [People v. Pic'l](#), 114 Cal. App. 3d 824, 171 Cal. Rptr. 106 (2d Dist. 1981) (disapproved of on other grounds by, [People v. Kimble](#), 44 Cal. 3d 480, 244 Cal. Rptr. 148, 749 P.2d 803 (1988)), held.

In [State v. Menard](#), 844 So. 2d 1117 (La. Ct. App. 3d Cir. 2003), the court held that the evidence of the defendant's active participation with counsel to move evidence that may have linked the defendant to criminal activity was sufficient to support a finding that the defendant and counsel conspired to conceal criminal activity, and thus the attorney-client privilege was vitiated and communications made in furtherance of a conspiracy could be used at a trial for illegal possession of stolen goods, where counsel made conflicting statements as to whether he or someone else removed goods from a storage facility for delivery to law enforcement authorities and misled detectives as to who possessed stolen goods, and a witness testified that counsel was concerned about being the subject of a criminal investigation. The state was not required to identify specific communications between the defendant and defense counsel that showed that they were moving evidence of criminal activity to satisfy its burden of proving that the attorney-client privilege was vitiated, the court said; the state was only required to prove by a preponderance of the evidence that the communication occurred between the defendant and counsel in furtherance of a crime or fraud. The court found, however, that the trial court's ruling that communications between the defendant and counsel that would "otherwise be protected" by the attorney-client privilege were subject to discovery and could be used at trial, subject to other applicable rules of evidence, was overly broad, since the court made a determination that the attorney-client privilege was vitiated due to a conspiracy between the defendant and counsel to conceal criminal activity, in which communications were made in furtherance of a crime or fraud, and thus only those communications were to be admitted.

## § 52. Eavesdropping or wiretapping—Crime-fraud exception held applicable

[Cumulative Supplement]

In the following prosecutions for eavesdropping or wiretapping, the state courts determined that the crime-fraud exception to the attorney-client privilege was applicable.

In [Roberts v. Jardine, 366 So. 2d 124 \(Fla. Dist. Ct. App. 2d Dist. 1979\)](#), the court, recognizing that any consultations between a client and attorney concerning the planning of a crime are not subject to the attorney-client privilege and may be the subject of discovery, held that, in an action to recover with respect to a claim that the defendant made a tape recording of her telephone conversation with the plaintiff without the plaintiff's knowledge, since interception and disclosure of wire or oral communications is illegal, any communications between a client and her attorney in planning the taping of a phone conversation by the client would be discoverable.

In [State ex rel. Nix v. Cleveland, 83 Ohio St. 3d 379, 1998-Ohio-290, 700 N.E.2d 12 \(1998\)](#), the Supreme Court of Ohio, recognizing that the mere fact that communications may be related to a crime is insufficient to overcome the attorney-client privilege, held, in wiretapping litigation in which a writ of mandamus to compel release under the Public Records Act of investigatory and other records pertaining to alleged illegal wiretapping was sought, that affidavits replete with allegations based on belief and speculation that communications between city law department attorneys and city employees named in the wiretapping litigation were in furtherance of illegal wiretapping were insufficient to overcome the attorney-client privilege protecting such communication based on the crime-fraud exception, finding that affidavits must be based on personal knowledge and not hearsay.

## CUMULATIVE SUPPLEMENT

### Cases:

Wife's lawyers were not immune from liability under federal and Virginia wiretapping statutes with respect to husband's claims, alleging that wife's lawyers and wife's family members had recorded husband's conversations with his attorneys and purported romantic partner in violation of wiretapping statutes and had used contents of those recordings in his underlying divorce proceedings; there was no litigation privilege exception to wiretapping statutes, and wife's disclosure of information, she obtained in violation of wiretapping statutes, to her lawyers was not protected by attorney-client privilege because of the crime-fraud exception. [18 U.S.C.A. § 2511\(1\)](#); [Va. Code Ann. § 19.2-62\(A\)](#). [Marsh v. Curran, 362 F. Supp. 3d 320 \(E.D. Va. 2019\)](#) (applying Virginia law).

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**[END OF SUPPLEMENT]****§ 53. Eavesdropping or wiretapping—Crime-fraud exception held inapplicable**

The following authority held that, under the facts and circumstances presented, the crime-fraud exception to the attorney-client privilege was inapplicable in a prosecution for eavesdropping or wiretapping.

There was no general public awareness of the unlawfulness of electronic eavesdropping that would justify a holding that an employer must have known that it was a crime to listen in on a telephone conversation made by an employee during working hours on the employer's telephone, so that inquiries made by the employer to its attorney concerning the lawfulness of such activity did not fall within the future crime or tort exception to the attorney-client privilege, [Or. Rev. Stat. § 44.040\(1\)](#), the Supreme Court of Oregon, in [State ex rel. North Pac. Lumber Co. v. Unis](#), 282 Or. 457, 579 P.2d 1291 (1978), held. The court found, furthermore, where the contract between the employer and the telephone company involving special telephone equipment did not directly state that the use of the equipment for eavesdropping on an employee's personal calls would be contrary to the law, although it did make it clear that such use would be a violation of its contract, the fact that employer was aware of the contract provision did not justify a holding that the employer must certainly have known that use of the equipment for eavesdropping would violate the law so as to bring the employer's inquiries to its attorney concerning the lawfulness of such activity within the future crimes or tort exception.

**§ 54. Unspecified criminal offense****[Cumulative Supplement]**

In the following criminal prosecutions, the state courts determined whether the crime-fraud exception to the attorney-client privilege was applicable.

See [State v. Casby](#), 348 N.W.2d 736 (Minn. 1984), in which the Supreme Court of Minnesota held that the defendant attorney's alleged participation in her client's deceit of the court by the attorney's failure to disclose the client's true identity was not excused or protected by either the attorney-client privilege, the code of professional ethics, or the client's Fifth and Sixth Amendment constitutional rights.

The court in [Matter of Grand Jury Subpoena Duces Tecum](#), 165 N.J. Super. 211, 397 A.2d 1132 (Law Div. 1978), judgment aff'd per curiam, 171 N.J. Super. 475, 410 A.2d 63 (App. Div. 1979), recognizing that the attorney-client privilege does not protect communications concerning misconduct, criminal activity, or fraudulent acts in which the client is presently engaging, held

that the public defender had a duty to reveal evidence in his possession which may establish that a fraud was perpetrated upon his office by a defendant who fraudulently procured legal services by knowingly and intentionally misrepresenting his assets.

### Observation

Affirming, the court in [Matter of Grand Jury Subpoena Duces Tecum](#), 171 N.J. Super. 475, 410 A.2d 63 (App. Div. 1979), held, in the event that the public defender should claim that one or more of the documents referred to in a grand jury subpoena duces tecum were protected from disclosure by the attorney-client privilege, he was at liberty to apply to the trial court for an order directing that the documents be submitted for in camera inspection by the court and a determination of whether they constituted privileged material.

In [Nowlin v. People of State of New York](#), 1 A.D.3d 172, 767 N.Y.S.2d 77 (App. Div. 1st Dep't 2003), where the government served defense counsel with a subpoena to require his appearance as a witness in connection with a criminal action against his client, and requiring the production of documents that the government believed that the client had provided to counsel that were falsely back-dated in order to exonerate the client of the offense for which she was indicted, the court held that the crime-fraud exception to the attorney-client privilege applied to the documents, given a showing of probable cause to believe that the documents were in furtherance of a fraud or a crime.

The court in [Matter of Doe](#), 101 Misc. 2d 388, 420 N.Y.S.2d 996 (Sup 1979), held that, where the defendant, as a part of a plea bargain, consented to undergo psychiatric care, the defendant, after treatment, was to return to court for sentencing, the defendant violated the agreement by leaving the hospital without permission and with intent to frustrate the court mandate, and the attorney who had represented the defendant in plea bargaining and who was subsequently contacted by her after she left the hospital, became aware of the defendant's whereabouts, the whereabouts of the defendant was not a privileged communication within the attorney-client privilege and the attorney was required to answer a question by the grand jury as to her whereabouts.

## CUMULATIVE SUPPLEMENT

## Cases:

Documents prepared after a tax return was filed were not protected from discovery, pursuant to the crime-fraud exception to the attorney-client privilege, despite claim that any tax violations were completed when the contested tax return was filed; the alleged fraud was in seeking to avoid taxation of a settlement not just during one tax year, but also in each subsequent year, and the fraud alleged was ongoing so long as the taxpayer avoided paying taxes on the income. [U.S. v. Trenk, 385 Fed. Appx. 254, 2010-2 U.S. Tax Cas. \(CCH\) P 50506, 106 A.F.T.R.2d 2010-5073 \(3d Cir. 2010\)](#).

District court abused its discretion in stripping all communications between cigarette manufacturer and its attorney of privilege, on grounds of crime-fraud exception, without reviewing each communication individually in camera and determining whether there was probable cause that each such communication was made in furtherance of crime or fraud; despite evidence that manufacturer's sole business was production and distribution of cigarette products illegally sprayed with synthetic cannabinoids, it did not necessarily follow that all attorney-client communications were in furtherance of continuing or future crime or fraud. [In re 2015-2016 Jefferson County Grand Jury, 2018 CO 9, 410 P.3d 53 \(Colo. 2018\)](#).

Client's threat to kill his ex-fiancée, made during communications between client and attorney while discussing a plea offer, did not qualify under the crime-fraud exception to the attorney-client privilege, and was thus inadmissible in criminal threats prosecution; client's meeting with attorney, a public defender, was for the specific purpose of discussing the state's plea offer on separate charges relating to client's conduct towards his ex-fiancée, not for the purpose of furthering a crime, and communication was made during the course of attorney's representation of client. [Kan. Stat. Ann. § 60-426. State v. Boatwright, 401 P.3d 657 \(Kan. Ct. App. 2017\)](#).

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**[END OF SUPPLEMENT]**

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**RESEARCH REFERENCES**

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- West's Key Number Digest, [Grand Jury](#) 36.3(2)
- West's Key Number Digest, [Pretrial Procedure](#) 34
- West's Key Number Digest, [Witnesses](#) 198(1), 201(1), 201(2), 222, 223

### Westlaw Databases

- [Attorney Client Privilege in the United States, Second Edition \(ACPRIV-FED\)](#)
- [Depositions Procedure, Strategy, and Technique \(DEPOPST\)](#)
- [Legal Ethics and Professional Responsibility—Law Reviews, Texts, and Bar Journals \(ETH-TP\)](#)
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### A.L.R. Library

- A.L.R. Index, Attorney-Client Privilege
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- [Construction and Application of Self-Protection or Self-Defense Exception to Attorney-Client Privilege, 71 A.L.R.6th 249](#)
- [Applicability of Attorney-Client Privilege to Communications Made in Presence of or Solely to or by Family Members or Companion, Confidant, or Friend of Attorneys or Client or Attesting Witnesses for Client's Will, 67 A.L.R.6th 341](#)
- [Applicability of Attorney-Client Privilege to Communications Made in Presence of or Solely to or by Nonattorney Consultants, Professionals, and Similar Contractors, 66 A.L.R.6th 83](#)
- [Applicability of Attorney-Client Privilege to Communications Made in Presence of or Solely to or by Other Attorneys, Coparties, and Their Staff, 64 A.L.R.6th 655](#)

- Construction and Application of Fiduciary Duty Exception to Attorney-Client Privilege, 47 A.L.R.6th 255
- Application of Attorney-Client Privilege to Electronic Documents, 26 A.L.R.6th 287
- Subject Matter and Waiver of Privilege Covering Communications to Clergy Member or Spiritual Adviser, 93 A.L.R.5th 327
- Testimonial privilege for confidential communications between relatives other than husband and wife—state cases, 62 A.L.R.5th 629
- Reportorial privilege as to nonconfidential news information, 60 A.L.R.5th 75
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- Work product privilege as applying to material prepared for terminated litigation or for claim which did not result in litigation, 27 A.L.R.4th 568
- Attorney's conduct in delaying or obstructing discovery as basis for contempt proceeding, 8 A.L.R.4th 1181
- Rights and duties of attorney in a criminal prosecution where client informs him of intention to present perjured testimony, 64 A.L.R.3d 385
- Attorney-client privilege as affected by its assertion as to communications, or transmission of evidence, relating to crime already committed, 16 A.L.R.3d 1029
- Applicability of attorney-client privilege to communications with respect to contemplated tortious acts, 2 A.L.R.3d 861
-  Persons other than client or attorney affected by, or included within, attorney-client privilege, 96 A.L.R.2d 125
- Crime-Fraud Exception to Work Product Privilege in Federal Courts, 178 A.L.R. Fed. 87
- Views of United States Supreme Court as to attorney-client privilege, 159 A.L.R. Fed. 243
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-  Protection from discovery of attorney's opinion work product under Rule 26(b)(3), Federal Rules of Civil Procedure, 84 A.L.R. Fed. 779

- Constitutional right to counsel as ground for quashing or modifying federal grand jury subpoena directed to attorney, 83 A.L.R. Fed. 504
- Attorney's work product privilege, under Rule 26(b)(3) of the Federal Rules of Civil Procedure, as applicable to documents prepared in anticipation of terminated litigation, 41 A.L.R. Fed. 123
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- Motions for Production and Inspection, 4 Am. Jur. Trials 223
- Discovery—Oral Depositions, 4 Am. Jur. Trials 119
- Discovery—Written Interrogatories, 4 Am. Jur. Trials 1

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- Kedem, Case Comment, [Can Attorneys and Clients Conspire? Farese v. Scherer](#), 342 F.3d 1223 (11th Cir. 2003), 114 Yale L.J. 1819 (2005)
- Ruzenski, Notes: [Balancing Fundamental Civil Liberties and the Need for Increased Homeland Security: The Attorney-Client Privilege After September 11th](#), 19 St. John's J. Legal Comment. 467 (2005)
- Troxel, [Office of Foreign Assets Control Regulations: Making Attorneys Choose Between Compliance and the Attorney-Client Relationship](#), 24 Rev. Litig. 637 (2005)
- Young, [Pierce the Privilege or Give 'Em Shelter? The Applicability of Privilege in Tax Shelter Cases](#), 5 Nev. L.J. 767 (2005)

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## Footnotes

- 1 Cases dealing with the crime-fraud exception to the work-product privilege are excluded from the scope of this annotation. For a federal annotation on this topic, see the annotation, [Crime-Fraud Exception to Work Product Privilege in Federal Courts](#), 178 A.L.R. Fed. 87.
- 2 Included within the scope of this annotation are all cases discussing the applicability of the crime-fraud exception to any alleged unlawful act, unless specifically denominated as a tort or "civil fraud." For an annotation dealing with the applicability of the crime-fraud exception to cases involving contemplated civil fraud, see the annotation, [Attorney-client privilege as extending to communications relating to contemplated civil fraud](#), 31 A.L.R.4th 458.
- 3 [Am. Jur. 2d, Attorneys at Law § 137.](#)
- 4 [Am. Jur. 2d, Witnesses § 325.](#)
- 5 See, e.g., [Murphy & Demory, Ltd. v. Murphy](#), 1994 WL 1031072 (Va. Cir. Ct. 1994).
- 6 [Evans v. General Motors Corp.](#), 2003 WL 461044 (Conn. Super. Ct. 2003).
- 7 [Blumenthal v. Kimber Mfg., Inc.](#), 265 Conn. 1, 826 A.2d 1088 (2003).
- 8  [Lewis v. State](#), 265 Ark. 132, 577 S.W.2d 415 (1979).

- 9 People v. Superior Court (Bauman & Rose), 37 Cal. App. 4th 1757, 44 Cal. Rptr. 2d 734 (2d Dist. 1995).
- 10  State of West Virginia ex rel. Allstate Ins. Co. v. Madden, 215 W. Va. 705, 601 S.E.2d 25 (2004).
- 11 Blumenthal v. Kimber Mfg., Inc., 265 Conn. 1, 826 A.2d 1088 (2003).
- 12  State v. Carter, 578 P.2d 1275 (Utah 1978).
- 13 In re Koellen's Estate, 167 Kan. 676, 208 P.2d 595 (1949).
- 14  Caldwell v. District Court In and For City and County of Denver, 644 P.2d 26, 31 A.L.R.4th 446 (Colo. 1982).
- 15  Glade v. Superior Court, 76 Cal. App. 3d 738, 143 Cal. Rptr. 119 (3d Dist. 1978).
- 16  Warrantech Corp. v. Computer Adapters Services, Inc., 134 S.W.3d 516 (Tex. App. Fort Worth 2004), rule 53.7(f) motion granted, (May 27, 2004).
- 17 See, e.g., First Union Nat. Bank v. Turney, 824 So. 2d 172 (Fla. Dist. Ct. App. 1st Dist. 2001);  State of West Virginia ex rel. Allstate Ins. Co. v. Madden, 215 W. Va. 705, 601 S.E.2d 25 (2004);  People v. Paasche, 207 Mich. App. 698, 525 N.W.2d 914 (1994).
- 18 In re Public Defender Service, 831 A.2d 890 (D.C. 2003).
- 19 Evans v. General Motors Corp., 2003 WL 461044 (Conn. Super. Ct. 2003).
- 20  Frease v. Glazer, 330 Or. 364, 4 P.3d 56 (2000).
- 21 Geilim v. Superior Court, 234 Cal. App. 3d 166, 285 Cal. Rptr. 602 (2d Dist. 1991).
- 22 Radiac Abrasives, Inc. v. Diamond Technology, Inc., 177 Ill. App. 3d 628, 126 Ill. Dec. 743, 532 N.E.2d 428 (2d Dist. 1988).
- 23 First Union Nat. Bank v. Turney, 824 So. 2d 172 (Fla. Dist. Ct. App. 1st Dist. 2001).
- 24 Horning-Keating v. State, 777 So. 2d 438 (Fla. Dist. Ct. App. 5th Dist. 2001).
- 25 IDS Long Distance, Inc. v. Heiffer, 837 So. 2d 1130 (Fla. Dist. Ct. App. 4th Dist. 2003).
- 26  State v. Marks, 758 So. 2d 1131 (Fla. Dist. Ct. App. 4th Dist. 2000).
- 27  People v. Superior Court (Laff), 25 Cal. 4th 703, 107 Cal. Rptr. 2d 323, 23 P.3d 563 (2001).
- 28 Losavio v. District Court In and For Tenth Judicial Dist., 188 Colo. 127, 533 P.2d 32 (1975).