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Deborah F. Buckman, J.D.

Crime–Fraud Exception to Work Product Privilege in Federal Courts

The work product privilege, codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure, provides that when a court orders discovery of "documents and tangible things … prepared in anticipation of litigation," the court is required to "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney … concerning the litigation." However, where the relationship between client and counsel has been abused, as where such consultations are conducted for the purpose of furthering an unlawful act, the crime–fraud exception applies to vitiate any protection from discovery that work product would otherwise enjoy. The application of the crime–fraud exception to the work product privilege has been discussed in many federal courts in many different contexts. For example, in In re Grand Jury Subpoena, 220 F.3d 406, 54 Fed. R. Evid. Serv. 1496, 178 A.L.R. Fed. 625>"> (5th Cir. 2000), the Fifth Circuit Court of Appeals upheld application of the crime–fraud exception in an investigation of possible criminal violations of the Clean Air Act. Unlike the attorney–client privilege, work product protection belongs to both the client and the attorney, either one of whom may assert it. This annotation collects and discusses federal court decisions which have considered the applicability of the crime–fraud exception to the work product privilege.

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FEDERAL RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS

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(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party … . For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence …

(3) Trial Preparation: Materials … a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative … only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation … .

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I. PRELIMINARY MATTERS

§ 1[a] Introduction—Scope

This annotation [1] collects and analyzes those federal court decisions which have considered the applicability of the crime–fraud exception to the work product privilege, in situations where it appeared that a client or an attorney had been involved in fraudulent conduct during the pendency of litigation or during attorney–client consultations which occurred in anticipation of litigation. This annotation does not include a discussion of cases considering the applicability of

a fraud exception to the attorney–client privilege, except insofar as such discussion may arise in connection with the work product privilege.

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.

§ 1[b] Introduction—Related annotations

Related Annotations are located under the Research References heading of this Annotation.

§ 2[a] Background, summary, and comment—Generally

The work product privilege was originally formulated by the Supreme Court's 1947 decision in Hickman v. Taylor, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947), in which the Court noted that "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." It is now codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure. This rule provides that when a court orders discovery of "documents and tangible things … prepared in anticipation of litigation or for trial by or for another party," the court is required to "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." An attorney's mental processes in preparing for litigation will thus not be subject to disclosure under the discovery rules. Though the Federal Rules express the principle in terms of discoverability of relevant material in civil cases, the work product privilege also applies to criminal trials and grand jury proceedings. [2]

Although the law places great importance on the maintenance of attorney–client confidentiality to promote the rendering of legal services, the relationship between client and counsel may be abused. Therefore, the privilege generally accorded to consultations for litigation is subject to what is known as the crime–fraud exception. The purpose of the exception is to ensure that the otherwise protected secrecy of attorney–client discussions does not extend to communications which are made for the purpose of continuing or contemplating criminal or fraudulent activity. [3] The term "crime–fraud" is a bit of a misnomer, as several courts have recognized situations involving wrongdoing which was not specifically criminal or fraudulent in which the exception might also apply. For example, some courts have applied the exception to a lawyer's unprofessional behavior. [4] Such criminal, fraudulent, or otherwise improper misconduct, obviously, would be fundamentally inconsistent with the basic premises of the adversary system.

Two conditions must be met for application of the crime–fraud exception. First, the client must have made or received the otherwise privileged communication with the intent to further an unlawful or fraudulent act. Different circuits may word the test somewhat differently, but they all agree that the work product documents in question must have themselves been in furtherance of a crime or fraud. Therefore, one district court was corrected for its inaccurate application of a requirement that the documents in question "have the real potential of being relevant evidence of activity in furtherance of a crime." Their relevance is not central to the determination because it does not demonstrate a criminal or fraudulent purpose; rather, the focus is on whether they were produced in furtherance of a crime or fraud. [5] Second, the client must have carried out the crime or fraud. In other words, the exception does not apply even though, at one time, the client had bad intentions. Otherwise "it would penalize a client for doing what the privilege is designed to encourage—consulting a lawyer for the purpose of achieving law compliance." [6]

The courts are very critical in analyzing the evidence of alleged fraud or crime and whether work product documents were created in furtherance thereof. There will be no discovery of otherwise protected documents under the crime–fraud exception where the party seeking discovery fails to prove that the documents in question were created in furtherance of any wrongful activity, even where wrongful activity is itself proven. [7]

Before a court will allow public disclosure of work product materials which may have been tainted by crime or fraud, it will perform an in camera inspection. This is clearly "a smaller intrusion upon the confidentiality of the attorney–client relationship than is public disclosure," and therefore "a lesser evidentiary showing is needed to trigger in camera review than is required ultimately to overcome the privilege." [8] Addressing the valid concern that routine in camera review of generally privileged documents might encourage opponents of the privilege to engage in groundless "fishing expeditions," the Supreme Court established a general standard. Before engaging in in camera review to determine the applicability of the crime–fraud exception, the Court ruled, a judge should require a showing of "a factual basis adequate to support a good faith belief by a reasonable person" that in camera review of the materials may reveal evidence to establish the claim that the crime–fraud exception applies. [9] Exactly how much proof is thus required, is a question left to each court's discretion. [10] Then, if that threshold showing is made, the discretionary decision whether to conduct in camera review should be made "in light of the facts and circumstances of the particular case," including the volume of materials in question, their relative importance to the case, and the likelihood that the crime–fraud exception will be found to apply. [11]

Decisions such as whether work product documents may be subpoenaed do not require preliminary "mini–trials" such as hearings at which initial prima facie evidence of crime or fraud may be rebutted. A district court has the discretion to determine ex parte whether a prima facie foundation for subpoenas of work product documents under the crime–fraud exception has been

established. [12] In addition, a district court does not have to review in camera the proposed questions that would be posed to a grand jury by a party seeking discovery. Such additional burdens on the district courts would allow the determination of the crime–fraud exception question to turn into a series of "mini–trials that would waste resources and delay the grand jury proceedings." [13]

The application of the crime–fraud exception to the work product privilege has been discussed in many federal courts in many different contexts. Some courts deal with general matters such as definitions of scope (§ 3) and the type of evidence, which may be used to establish the required prima facie case (§ 4). The vast majority of cases address whether the exception may be applied in specific circumstances. Federal courts have held that the exception is applicable to pierce work product protection in cases involving securities law (§ 5), family law (§ 10), patent law (§ 11), contract law (§ 12), tort actions in general (§ 13), more specifically products liability (§ 14), fraud (§ 15), election laws (§ 16), and unspecified actions (§ 17). Courts have also found the exception applicable to grand jury proceedings in general (§ 6) and such proceedings as they relate to environmental law (§ 8) and antitrust law (§ 7). Other courts have held that the exception would not apply, under the particular circumstances presented, in cases involving bankruptcy (§ 18), election laws (§ 19), state whistleblower act actions (§ 20), antitrust (§ 21), attorney malpractice (§ 22), patent law (§ 23), securities law (§ 24), grand jury proceedings (§ 25), labor and employment (§ 26), actions in contract (§ 28), and cases involving allegations of improper sales practices (§ 27).

In contrast to the attorney–client privilege, which is held by the client and may be asserted by the attorney only on the client's behalf, work product protection belongs to both the client and the attorney, either one of whom may assert it. Generally, the exception will apply even in situations where an attorney was unaware that his advice was sought in furtherance of an improper purpose (§ 29[a]). However, some courts have held that under the facts and circumstances, the crime–fraud exception may not apply and an innocent attorney may be able to assert work product protection (§ 29[b]).

In courts which make this distinction, the first type of work product is generally called "ordinary" or "fact" work product, and consists of written or oral information transmitted by a client to an attorney and recorded verbatim or in summary form. [14] It may include such items as raw information and photographs. Ordinary work product is generally discoverable when there is a demonstrated substantial need and an inability to otherwise obtain the relevant material without undue hardship. The second type is "opinion work product," which includes an attorney's conclusions, mental impressions, opinions, and legal theories concerning the litigation. [15] This second type is more carefully and zealously guarded from exposure. Fact work product, then, will readily be ordered to be produced if it is found to be within the crime–fraud exception, [16] even if the attorney asserting the protection was unaware and innocent of any wrongdoing.

There is some authority to the effect that an attorney's fraudulent or criminal intent will defeat a claim of privilege even if the client is innocent (§ 30). [17]

§ 2[b] Background, summary, and comment—Practice pointers

Foreign law may not be incorporated into a crime–fraud analysis, where it does not have an analogue in American law, a New York court held in Madanes v. Madanes, 199 F.R.D. 135 (S.D. N.Y. 2001). In this case, the law of Argentina would have imposed criminal liability on an attorney who divulged client confidences or accepted an engagement that created a conflict of interest. Since there is no equivalent American statute, such behavior could not constitute the crime essential for invocation of the crime–fraud exception. Nonetheless, the court held that such conduct may have constituted an intentional tort, and thus ordered an in camera review of opinion work product documents.

Constitutional challenges alleging due process violations have not been successful as defenses against application of the crime–fraud exception to work product. In the face of a constitutional challenge to in camera review of work product documents, to determine whether they should be discovered under the crime–fraud exception, the Fourth Circuit Court of Appeals, in In re Grand Jury Proceedings, Thursday Special Grand Jury Sept. Term, 1991, 33 F.3d 342, 30 Fed. R. Serv. 3d 115 (4th Cir. 1994), noted that "in camera proceedings in the context of grand jury proceedings and on–going investigations requiring secrecy are not violative of due process." The government in that case established a prima facie case that the attorney had been used by the client to further a criminal scheme and that the testimony sought was highly relevant to the ongoing investigation before the grand jury. The client unsuccessfully argued that such a procedure denied him due process because it did not give him an opportunity to challenge the validity of the evidence.

Similarly, the Ninth Circuit Court of Appeals, in In re Grand Jury Proceedings, 867 F.2d 539, 27 Fed. R. Evid. Serv. 705 (9th Cir. 1989), held that in camera inspection of materials allegedly falling under the crime–fraud exception did not constitute a denial of due process. The court further held that application of the exception did not violate due process where the government presented a prima facie case of an ongoing conspiracy by the grand jury investigation target and others to commit a crime, and established reasonable cause to believe that the attorney's legal services had been utilized by the target and others in furtherance of the ongoing unlawful scheme. The court ordered the attorney to respond to a subpoena and disclose fact work product, but not opinion work product, stemming from that legal representation.

The crime–fraud exception will not be applied when the only evidence presented by the party seeking discovery of work product documents is that in–house counsel had been directed to conduct an internal investigation. This was the situation in In re Grand Jury Subpoenas 89–

3 and 89–4, 734 F. Supp. 1207 (E.D. Va. 1990), order aff'd in part, vacated in part on other grounds, 902 F.2d 244, 30 Fed. R. Evid. Serv. 273, 28 A.L.R.5th 775 (4th Cir. 1990), in which the court held that evidence of in–house counsel having been directed to conduct an internal investigation and interviews around the time that management might have learned of the alleged theft of computer code was inadequate to compel operation of the crime–fraud exception to the work–product privilege. The court held that these facts did not in any way establish a prima facie case that the attorney was retained for the purpose of facilitating or concealing a criminal or fraudulent scheme, but rather could just have easily shown an innocent and prudent decision by management, faced with allegations of corporate illegality, to have its lawyers conduct an internal investigation. The court noted that a contrary holding would in effect condemn and discourage essentially every internal corporate investigation, which certainly is not the intention of the crime–fraud exception.

An allegation that the defendant's former officer may have received a large severance package, presumably leading to the assumption of some wrongdoing, was also considered inadequate evidence for application of the exception. In In re Gulf Oil/Cities Service Tender Offer Litigation, 1990 WL 108352 (S.D. N.Y. 1990), the court held that an unusually large severance package was insufficient evidence of alleged wrongdoing on the part of a former officer to warrant piercing the work product privilege based on the crime–fraud exception. The class plaintiffs moved to compel the defendant's former employee and officer to return for a continued deposition, arguing that any work–product protection should be set aside based on allegations that a meeting had been held for the purpose of concocting a false story about the former officer. They asserted that some malign purpose was evidenced by the fact that he received what they claimed was a very generous severance package when he left the defendant's employ. They further cited particular testimony which they felt was incredible as implying intentional falsification. The court, however, found no meaningful evidence of these allegations or of any crime or fraud in which the officer or the attorneys were involved, and termed the plaintiffs' attempt to apply the crime–fraud exception a "defamatory attack on the witness and counsel."

Another court held that conflicting testimonies will certainly not constitute sufficient evidence of wrongdoing so as to invoke the crime–fraud exception. In Cardiac Pacemakers, Inc. v. St. Jude Medical, Inc., 2001 WL 699889 (S.D. Ind. 2001), the court held that the crime–fraud exception was inapplicable to pierce the work product privilege in a case in which the only evidence in favor of the exception was that four witnesses presented conflicting reports about meetings they had attended several years earlier. The case involved a claim by a university to a share of the royalties from a patent held by the plaintiff corporation, and the defendants claimed that the plaintiffs had submitted false evidence in support of a motion for summary judgment. The court, however, held that the evidence showed only the rather commonplace situation of four different participants at particular meetings giving incomplete, conflicting, and self–serving accounts of those meetings, which would certainly not invoke the crime–fraud exception.

II. GENERAL

§ 3. Defining scope of exception

[Cumulative Supplement]

The following authority defined the proper time period to be considered in determining whether to apply the crime–fraud exception in a grand jury investigation of allegedly criminal activity.

In In re Grand Jury Subpoenas, 144 F.3d 653 (10th Cir. 1998), the Tenth Circuit Court of Appeals held that where the district court delineated a reasonable time period and narrowed the focus of questions to the relationship between a hospital and its attorneys in a federal grand jury investigation of alleged criminal activity, the court properly defined the scope of the crime–fraud exception. The court rejected the argument of the hospital's president, that the court had defined an arbitrary and overly long time period so that the subpoena could include communications which would not fall within the exception.

CUMULATIVE SUPPLEMENT

Cases:

In order to pierce attorney client/work product doctrine privileges by invoking crime fraud exception in civil tax fraud case, the government need not actually prove that the taxpayer committed fraud; rather, the government must demonstrate that there is a reasonable basis to believe that the lawyer's services were used by the client to foster a crime or fraud. U.S. v. Windsor Capital Corp., 524 F. Supp. 2d 74 (D. Mass. 2007).

To assert crime–fraud exception to attorney–client privilege, party seeking discovery must demonstrate reasonable cause to believe that a crime or fraud has been committed or was intended and that the attorney–client communication was intended to facilitate or conceal the misconduct. Lugosch v. Congel, 218 F.R.D. 41 (N.D. N.Y. 2003).

There is a "crime-fraud" exception to the work-product doctrine, as there is to the attorney-client privilege, which applies when there is (1) a determination that the client communication or attorney work product in question was itself in furtherance of the crime or fraud and (2) probable cause to believe that the particular communication with counsel or attorney work product was intended in some way to facilitate or to conceal the criminal activity. Meyer v. Kalanick, 212 F. Supp. 3d 437, 2016-2 Trade Cas. (CCH) ¶ 79704 (S.D. N.Y. 2016).

Neither the attorney-client privilege nor the attorney work-product doctrine protect communications made in furtherance of a crime or fraud. Amusement Industry, Inc. v. Stern, 293 F.R.D. 420 (S.D. N.Y. 2013).

A showing that the crime-fraud exception to the work product privilege exists may be made using any relevant evidence, lawfully obtained, that has not been adjudicated to be privileged. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A. Complex Systems, Inc. v. ABN AMRO Bank N.V., 279 F.R.D. 140 (S.D. N.Y. 2011).

Probable cause standard is not satisfied by a showing that the material in question might provide evidence of a crime or fraud, as required for crime-fraud exception to remove the privilege from attorney-client communications and work product; rather, the evidence provided must give a prudent person a reasonable basis to suspect the perpetration or attempted perpetration of a crime or fraud, and that the communications were in furtherance thereof. Chevron Corp. v. Salazar, 275 F.R.D. 437 (S.D. N.Y. 2011).

Crime-fraud exception to attorney-client privilege or work-product doctrine does not apply simply because privileged communications would provide adversary with evidence of crime or fraud; rather, exception applies only where there is probable cause to believe that particular communication or work product was intended in some way to facilitate or to conceal criminal activity. Kyoei Fire & Marine Ins. Co., Ltd. v. M/V Maritime Antalya, 248 F.R.D. 126, 2007 A.M.C. 2839 (S.D. N.Y. 2007).

Party wishing to invoke crime–fraud exception to attorney–client privilege must demonstrate that there is factual basis for showing of probable cause to believe that fraud or crime has been committed and that communications in question were in furtherance of fraud or crime. Specialty Minerals, Inc. v. Pluess-Staufer AG, 220 F.R.D. 41 (S.D. N.Y. 2004).

A party seeking to apply the crime-fraud exception to the work product doctrine must demonstrate that there is a reasonable basis to suspect (1) that the lawyer or client was committing or intending to commit a crime or fraud, and (2) that the attorney work product was used in furtherance of that alleged crime or fraud. In re Grand Jury Matter #3, 847 F.3d 157 (3d Cir. 2017).

Where there is a reasonable basis to suspect that the privilege holder was committing or intending to commit a crime or fraud and that the attorney work product was used in furtherance of the alleged crime or fraud, this is enough to break the privilege. In re Grand Jury Subpoena, 745 F.3d 681 (3d Cir. 2014).

Communications between an attorney and a client, otherwise privileged, are not protected by the attorney-client privilege or work product doctrine if they are made in furtherance of a crime or fraud. Magnetar Technologies Corp. v. Six Flags Theme Park Inc., 886 F. Supp. 2d 466 (D. Del. 2012).

Claims of attorney-client privilege or attorney work-product protection can sometimes be defeated by the crime-fraud exception. Fed. R. Civ. P. 26(b)(3); Fed. R. Crim. P. 16(a)(2), (b)(2). In re Search Warrant Issued June 13, 2019, 942 F.3d 159 (4th Cir. 2019), as amended, (Oct. 31, 2019).

Party seeking to compel the production of attorney's opinion work product under the crime-fraud exception must demonstrate attorney knowledge of or participation in the client's crime or fraud, but no such showing is necessary to discover fact-work-product privileged materials related to a client's crime or fraud. In re Grand Jury Subpoena, 870 F.3d 312 (4th Cir. 2017).

The crime–fraud exception to the attorney–client privilege provides that a client's communications with an attorney will not be privileged if made for the purpose of committing or furthering a crime or fraud. U.S. v. Cohn, 303 F. Supp. 2d 672 (D. Md. 2003).

While the attorney-client privilege may be vitiated under the crime-fraud exception without showing that the attorney knew of the fraud or crime, those seeking to overcome the opinion work product privilege must make a prima facie showing that the attorney in question was aware of or a knowing participant in the criminal conduct. U.S. v. Moazzeni, 906 F. Supp. 2d 505 (E.D. Va. 2012).

"Crime/fraud" exception to attorney–client and work product privileges provides that otherwise privileged communications or work product made for, or in furtherance of, purpose of committing crime or fraud will not be privileged or protected. Rambus, Inc. v. Infineon Technologies AG, 222 F.R.D. 280 (E.D. Va. 2004).

The party intending crime or fraud cannot invoke the work product privilege, but if the other party did not intend crime or fraud, that party can invoke it. In re Grand Jury Subpoenas, 561 F.3d 408 (5th Cir. 2009).

The reach of the crime-fraud exception to the attorney-client and work product privileges does not extend to all communications made in the course of the attorney-client relationship. In re Grand Jury Subpoena, 419 F.3d 329 (5th Cir. 2005).

To invoke the crime or fraud exception to the attorney–client privilege, a party must establish a prima facie case that a crime has been committed. Myers v. City of Highland Village, Texas, 212 F.R.D. 324 (E.D. Tex. 2003).

To establish the crime-fraud exception to attorney-client privilege, government must present prima facie evidence that gives color to the charge by showing some foundation in fact; such evidence then allows the district court to require the defendant to come forward with an explanation for the evidence offered against the privilege, and district court then exercises its discretion in accepting or rejecting the proffered explanation. U.S. v. Boender, 649 F.3d 650 (7th Cir. 2011).

The work product privilege is forfeited if the attorney is assisting his client to commit a crime or a fraud, but the party seeking to invoke the crime-fraud exception must at least demonstrate that there is probable cause to believe that a crime or fraud has been attempted or committed and that the communications were in furtherance thereof. Mattenson v. Baxter Healthcare Corp., 438 F.3d 763, 97 Fair Empl. Prac. Cas. (BNA) 839 (7th Cir. 2006).

Client who has used his attorney's assistance to perpetrate crime or fraud cannot assert work product privilege as to any documents generated in furtherance of his misconduct. In re Grand Jury Proceedings, G.S., F.S., 609 F.3d 909 (8th Cir. 2010).

A client who has used his attorney's assistance to perpetrate a crime or fraud cannot assert the work product privilege as to any documents generated in furtherance of his misconduct. In re Green Grand Jury Proceedings, 492 F.3d 976 (8th Cir. 2007).

If an attorney-client relationship is immaculate at its conception, but then devolves into attorney assistance in illegal activity, then under the crime/fraud exception to attorney client or work product privilege, all of the communications between the client and the attorney are potentially privileged except those that are germane to some criminal or fraudulent goal. Chevron Corporation v. Snaider, 78 F. Supp. 3d 1327, 90 Fed. R. Serv. 3d 955 (D. Colo. 2015).

Attorney-client privilege and attorney work-product protection are vitiated by the crime-fraud exception when the communications between a client and attorney are made for the purpose of furthering a crime. Fed. R. Civ. P. 26(b)(3)(A). Martensen v. Koch, 301 F.R.D. 562, 89 Fed. R. Serv. 3d 341 (D. Colo. 2014).

A crime-fraud exception to the work-product doctrine applies upon a showing that a client consulted with an attorney in furtherance of a crime or fraud. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A. S.E.C. v. Goldstone, 301 F.R.D. 593 (D.N.M. 2014).

To fall within the crime–fraud exception to the attorney–client privilege, the communication must further a crime, fraud or other misconduct. In re Public Defender Service, 831 A.2d 890 (D.C. 2003).

Without evidence of a crime or fraud, the crime–fraud exception to attorney–client privilege is inapplicable. In re Grand Jury Investigation, 437 Mass. 340, 772 N.E.2d 9 (2002).

Mere allegations of fraud are insufficient to establish crime/fraud exception to 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 AEP Texas Central Co., 128 S.W.3d 687 (Tex. App. San Antonio 2003).

Plain language of the rule setting forth 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. Rules of Evid., Rule 503(d)(1). State v. DeAngelis, 116 S.W.3d 396 (Tex. App. El Paso 2003).

In order for the crime–fraud exception to apply to the attorney–client privilege, the proponent of the exception must first establish a prima facie showing that a crime or fraud was ongoing or about to be committed. Rules of Evid., Rule 503(d)(1). State v. Martinez, 116 S.W.3d 385 (Tex. App. El Paso 2003).

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[END OF SUPPLEMENT]

§ 4. Application of exception based on evidence from documents sought for discovery

[Cumulative Supplement]

It has been held that the prima facie case of wrongdoing required to apply the crime–fraud exception may not be made using the very work product documents which are sought for discovery.

In Aguinaga v. John Morrell & Co., 112 F.R.D. 671, 124 L.R.R.M. (BNA) 2898, 112 Lab. Cas. (CCH) ¶ 11310 (D. Kan. 1986), the court held that work product documents which are themselves to be used as evidence of crime or fraud may not be discovered by application of the crime–fraud exception. In this suit by union members who had not been rehired when their employer's plant reopened, the court noted that the documents in question were prepared in the course of the defendant company's conduct in allegedly committing unfair labor practices.

CUMULATIVE SUPPLEMENT

Cases:

Plaintiff did not commit fraud under Georgia law by withholding certain documents under the work product doctrine, so as to invoke crime-fraud exception to the doctrine, as its reasonable, albeit mistaken, assertion that the work-product doctrine protected the documents from discovery did not constitute omission of a material fact. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A. Underwriters Ins. Co. v. Atlanta Gas Light Co., 248 F.R.D. 663 (N.D. Ga. 2008).

[Top of Section]

[END OF SUPPLEMENT]

III. CRIME–FRAUD EXCEPTION HELD TO APPLY

§ 5. Securities law

The courts in the following cases held that the crime–fraud exception applied to force discovery of work product documents in cases involving alleged securities law violations.

In In re Rospatch Securities Litigation, 1991 WL 574963 (W.D. Mich. 1991), the court held that the crime–fraud exception applied to compel discovery of work product materials in consolidated actions alleging violations of the federal securities laws. The plaintiffs sought damages and equitable relief based on allegations that the defendants knowingly released materially inaccurate public documents which overstated the value of their corporation, thereby inflating the value of its stock. The attorney, who was both counsel to the corporation and a member of its board of directors, allegedly participated in the filing of false Securities and Exchange Commission (SEC) public documents and in the continuing course of conduct alleged in these actions. Though noting that the facts produced at trial might establish only mismanagement, the court nonetheless ordered production of the documents, concluding that a prudent person would have a reasonable basis to suspect perpetration of a fraud, as well as, the knowledge of the attorney of that fraud in this case.

In In re Bonham, 1998 WL 460279 (Bankr. D. Alaska 1998), the bankruptcy court held that the crime–fraud exception applied to compel discovery of work product documents where the defendant's investment operations were found to constitute securities fraud. The court distinguished between opinion work product and fact work product, noting that the former may remain privileged even where the client was guilty if the attorney was innocent, but the latter is

much more easily disclosed. The relevant materials in this case were found to be what the court called fact work product.

In Gutter v. E.I. Dupont De Nemours, 124 F. Supp. 2d 1291 (S.D. Fla. 2000), the court held that the crime–fraud exception was applicable, in a federal securities class action, to work product materials where the defendant had intentionally committed discovery fraud on the court in prior litigations. It had, for example, falsely claimed work product protection for certain documents. The court rejected the defendant's argument that intent was a required element of the exception, noting that the much lower threshold of establishing a prima facie case was all that was required to invoke the exception. Applying Eleventh Circuit precedent, the court further rejected the defendant's argument that the exception only applies when it is determined that an otherwise privileged document was itself in furtherance of a crime or fraud. Rather, the required proof, which the defendant failed to rebut, is that an attorney's assistance was obtained in furtherance of or closely related to criminal or fraudulent activity. The court therefore ordered in camera review of the documents to determine whether they were so related to criminal or fraudulent conduct.

In SEC v. National Student Marketing Corp., Fed. Sec. L. Rep. (CCH) ¶ 94610, 1974 WL 415 (D.D.C. 1974), the court held that work product documents prepared by attorneys during their representation of a corporation in an investigation by the SEC should be produced for discovery where the attorneys themselves were charged as defendants for their failure to disclose relevant and damaging financial data and improper participation by their client in a merger closing, their involvement in the issuance of a questioned opinion concerning the sale of certain of the client's stock acquired in that merger, and their illegal reporting of the sales of two of the client's subsidiaries. This case, the court noted, was unique in that the production requests were made on the attorneys as defendants and not in their role as attorneys for a former client. The fact that the client entered into a judgment of permanent injunction waiving and avoiding the necessity of presenting any defense, and agreed to make all material related to this litigation available for discovery, thereby divesting itself of any interest it might have in immunizing attorney work product from discovery, gave further support to the court's order for production of the documents. The court further noted that although the adversary system of justice requires that certain activities of attorneys be sheltered from discovery, in this case it would be difficult for the attorneys to now posit their reliance on theories of work product in terms of serving or protecting the rights of a former client and codefendant, who no longer had any interest in the action.

§ 6. Grand jury proceedings—generally

[Cumulative Supplement]

The courts in the following cases held that the crime–fraud exception applied to force discovery of work product documents in cases involving grand jury investigations.

In In re John Doe Corp., 675 F.2d 482, Fed. Sec. L. Rep. (CCH) ¶ 98648, 10 Fed. R. Evid. Serv. 1390 (2d Cir. 1982), the Second Circuit Court of Appeals held that a memorandum concerning the deletion from a business ethics report of a particular payment to a lawyer was not entitled to work product protection from discovery, as the payment may have been a means of bribing or attempting to bribe administration officials. The lower court had issued a civil contempt judgment for failure to produce the memorandum for grand jury inspection, and the court here found that there was probable cause to believe that preparation and use of the business ethics report was part of a scheme of ongoing criminality, and therefore invocation of the work product privilege would be inappropriate. The court further indicated that given the finding of probable cause that the deletion in this report concealed the criminal scheme from a securities underwriter, as well as, auditors, this case entailed none of the dangers associated with the disclosure of normal and legitimate work product. Instead, the court held that to the contrary, where so–called work product is in aid of a criminal scheme, fear of disclosure may serve a useful deterrent purpose and be the kind of rare occasion in which an attorney's mental processes are not immune.

Where an attorney and the law partnership of which he was a member sought review of an order of the district court denying their motions relating to a grand jury subpoena of records containing attorney work product in a grand jury investigation of the attorney, the court in In re Doe, 662 F.2d 1073, 9 Fed. R. Evid. Serv. 578, 64 A.L.R. Fed. 457 (4th Cir. 1981), held that allegations that an attorney had advised a client to lie on the witness stand during trial and to bribe witnesses, and had otherwise engaged in attempts to procure false testimony, demonstrated extraordinary circumstances requiring disclosure of the subpoenaed record under the fraud exception to the work product privilege. The court observed that the work product privilege would never be invoked to insulate an attorney from criminal prosecution for abusing the legal system he has sworn to protect, and that the purpose of the work product doctrine is not to endow lawyers as individuals with an untouchable status.

In In re Grand Jury Proceedings, 674 F.2d 309, 82–1 U.S. Tax Cas. (CCH) ¶ 9296, 10 Fed. R. Evid. Serv. 189, 50 A.F.T.R.2d 82–5574 (4th Cir. 1982), the Fourth Circuit Court of Appeals held that the work product privilege could not be invoked to prevent an attorney from testifying before a grand jury as to crimes committed by a client, due to the fact that the government had made out a prima facie case that the crime–fraud exception to the work product privilege was applicable. Affirming the district court's order requiring the attorney to testify, the court found that a document prepared by an Internal Revenue Service special agent, which summarized the testimony before the grand jury, contained evidence of what the court termed serious crimes committed by the attorney's client and other persons, thereby bringing it within the fraud exception. The court further found that although it was unclear from the document whether the attorney knew of the criminal activity, it was clear that the attorney was hired to further the criminal activity.

In In re Grand Jury Subpoenas, 144 F.3d 653 (10th Cir. 1998), the Tenth Circuit Court of Appeals held that the crime–fraud exception operated to make available for grand jury review documents which implicated a hospital's president in the hospital's possible criminal activities. He alleged that he was entitled to a separate work product privilege for documents generated by the hospital's attorneys, which he claimed represented an individual relationship between himself and the attorneys. The court affirmed the district court's conclusions that the government had adequately established a prima facie case that the hospital and its president had committed a crime and had used the attorneys' legal services to effectuate and conceal the criminal conduct.

In In re Sealed Case, 676 F.2d 793, Fed. Sec. L. Rep. (CCH) ¶ 98647, 82–1 U.S. Tax Cas. (CCH) ¶ 9335, 10 Fed. R. Evid. Serv. 490, 50 A.F.T.R.2d 82–5637 (D.C. Cir. 1982), the District of Columbia Court of Appeals held that work product documents which reflected work which may have been performed in furtherance of a crime or fraud were not protected from discovery. This case was an appeal from a district court order holding a corporation's agent in contempt of court for refusing to produce before the grand jury eight items from the files of the defendant company's former general counsel. Ordering production of the documents, the court found that a comparison of a witness' affidavit and those of company officers indicated that the company officers may have conspired to defraud the government by submitting false information to the Internal Revenue Service in 1976 and to the Securities and Exchange Commission in 1978. The court concluded that although in some circumstances an attorney may be innocently involved in his client's crime or fraud, a guilty client may not use the innocence or ignorance of its attorney to claim the court's protection against a grand jury subpoena, and unless the blameless attorney is before the court with an independent claim of privilege, the client's use of an attorney's efforts in furtherance of crime or fraud negates the privilege.

CUMULATIVE SUPPLEMENT

Cases:

To extent that manufacturer of product subject to Food and Drug Administration (FDA) regulation, its attorney and law firm argued that product being shipped was failing at rate higher than label specifications suggest, and that they knew field failures were likely to occur at such a rate, crime–fraud exception made any claim to work product immunity for attorney's notes of discussions with FDA invalid, when notes were sought as part of grand jury investigation. Federal Food, Drug, and Cosmetic Act, § 301, 21 U.S.C.A. § 331; Fed. Rules Civ. Proc. Rule 26(b)(3), 28 U.S.C.A. In re Grand Jury Subpoena, 220 F.R.D. 130 (D. Mass. 2004).

District court did not abuse its discretion in determining that there was reasonable basis to conclude that attorney's advice had been used by targets of grand jury investigation to fashion conduct in

furtherance of their crime, and thus crime-fraud exception applied to attorney-client privilege with regard to unmemorialized verbal communications so that attorney could be compelled to testify before grand jury, where attorney provided information about types of conduct that violated the law, in addition to advice that he should not make payment, and then target stated that he was going to make payment anyway. In re Grand Jury Subpoena, 745 F.3d 681 (3d Cir. 2014).

Question that government sought to ask criminal defense team pursuant to grand jury subpoena, which broadly asked what witnesses told defense team, sought attorney opinion work product, and thus government could not rely on crime-fraud exception to work-product privilege to compel defense team to answer question in connection with investigation of apparently fraudulent document defendant submitted at trial, absent defense team's awareness of alleged crime or fraud; to answer question, defense team would have to disclose their recollections of witness statements and reveal what they deemed sufficiently important to remember from those discussions, which would constitute the fruit of attorney's mental processes. In re Grand Jury Subpoena, 870 F.3d 312 (4th Cir. 2017).

The reach of the crime-fraud exception to the attorney-client and work product privileges is limited to those communications and documents in furtherance of the contemplated or ongoing criminal or fraudulent conduct. In re Grand Jury Subpoena, 419 F.3d 329 (5th Cir. 2005).

Ordinarily, attorney-client communications and attorney work product are not discoverable, even in grand jury investigation. In re Grand Jury Proceedings, G.S., F.S., 609 F.3d 909 (8th Cir. 2010).

Crime–fraud exception to attorney–client privilege applied to private school's documents concerning alleged abuse of students under age of 18 by other students, which was the subject of a grand jury investigation; school officials and teachers had knowledge of reportable abuse, school failed to report such abuse, and there was evidence that school may have resorted to cover of attorney–client privilege to obscure its responsibility for not reporting information, mischaracterizing its actions, and downplaying nature of abuse to public. M.G.L.A. c. 119, § 51A. In re Grand Jury Investigation, 437 Mass. 340, 772 N.E.2d 9 (2002).

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[END OF SUPPLEMENT]

§ 7. Antitrust law

The following authority held that the crime–fraud exception applied to force discovery of work product documents in grand jury proceedings involving alleged antitrust law violations.

In In re Antitrust Grand Jury, 805 F.2d 155, 21 Fed. R. Evid. Serv. 1341 (6th Cir. 1986), the Sixth Circuit Court of Appeals held that only where there is evidence to "give a prudent person reasonable cause to suspect perpetration of a crime or fraud" will the crime–fraud exception to the work product doctrine apply to documents withheld from a grand jury antitrust investigation. The Court chose this standard over a suggested "direct or compelling circumstantial evidence" standard for determining whether to apply the exception. The grand jury was investigating possible antitrust violations in the sale of certain assets of one newspaper company to another. Though it found that the evidence formed a reasonable basis for concluding that the negotiations surrounding the transactions were not legitimate and that the price paid was grossly disproportionate to the assets' actual value, it noted that this only presented a reasonable basis for suspecting that a crime had been committed and did not imply that actual antitrust violations had been committed. The court concluded that an in camera hearing was required to determine if each document individually could be produced under the crime–fraud exception.

§ 8. Environmental law

The courts in the following cases held that the crime–fraud exception applied to force discovery of work product documents in grand jury proceedings involving alleged criminal violations of environmental law.

In In re Grand Jury Proceedings, 604 F.2d 798, 13 Env't. Rep. Cas. (BNA) 1519, 4 Fed. R. Evid. Serv. 1330, 9 Envtl. L. Rep. 20553 (3d Cir. 1979), the Third Circuit Court of Appeals held that documents prepared with respect to a client's administrative proceedings before the Environmental Protection Agency would be discoverable under the crime–fraud exception to the work product doctrine, if the crime alleged to have been committed by the client occurred after consultation with counsel. Although the court declined to decide the applicability of the exception to the case at bar due to the district court's failure to determine whether the crime committed by the client occurred before or after the attorney and his firm were retained for the work during which the documents at issue were generated, the court agreed with the district court's ruling that a crime–fraud exception would apply if the work product privilege was perverted, as where it was used to further illegal activities. In this regard, the court noted that allowance of the privilege in such circumstances would not serve the purpose of encouraging proper functioning of the adversary system.

In In re Grand Jury Subpoena, 220 F.3d 406, 54 Fed. R. Evid. Serv. 1496, 178 A.L.R. Fed. 625>"> (5th Cir. 2000), the Fifth Circuit Court of Appeals held that the district court properly applied the crime–fraud exception to the work product privilege where the government had made out a prima facie case of crime or fraud based on a nonfrivolous, although potentially incorrect, reading of some untested environmental regulations in an investigation of possible criminal violations of the

Clean Air Act. The court noted that the corporation being investigated in this case might have had valid defenses against indictment or conviction for fraud or criminal environmental violations, but held that the existence of a potential defense did not mean that the district court had reversibly erred in denying its motion to quash subpoenas of the documents in question.

§ 9. Civil rights

The following authority held that the crime–fraud exception applied to force discovery of work product documents in cases involving alleged criminal violations of civil rights law.

In Greenwood v. State of N. Y., 1992 WL 203859 (S.D. N.Y. 1992), the court affirmed the Magistrate judge's application of the crime–fraud exception to work product documents in a civil rights action brought by a psychiatrist whose clinical privileges were revoked allegedly without the due process of a proper hearing and in violation of his constitutional rights. The psychiatrist's dismissal was allegedly initiated because of the death of a patient in the defendant psychiatric hospital, and the judge found probable cause for the invocation of the crime–fraud exception, based on the conclusion that there had been some type of fraud in the facility's pursuing charges solely against the plaintiff "as a single scape–goat for the lapses of many and to cover up the responsibility of others for a patient death." The court affirmed the Magistrate Judge's rejection of the hospital's argument that its behavior may have constituted bad faith but not fraud, and after conducting an in camera examination of the documents, concluded that they were reasonably related to the criminal or fraudulent activity charged by the plaintiff.

§ 10. Family law

[Cumulative Supplement]

The following authority held that the crime–fraud exception applied to force discovery of work product documents relating to actions involving family law.

In U.S. v. Barrier Industries, Inc., 1997 WL 97842 (S.D. N.Y. 1997), the court held that work product documents pertaining to the allegedly fraudulent disposition of property in a divorce settlement were discoverable under the crime–fraud exception. The government claimed that the husband, as part of the divorce settlement, fraudulently transferred valuable farm property to his wife to frustrate the government's ability to enforce a judgment against him. The court concluded that the structure of the divorce settlement, the testimony of others with whom the husband had spoken to, and the temporal proximity between the divorce and Environmental Protection Agency (EPA) notification to the husband seeking to recover expenditures incurred in removing hazardous waste from a facility owned by the husband's company, provided probable cause to believe that

the couple had communicated with their divorce lawyers in furtherance of a fraudulent transfer of the farm property.

Comment

In a previous order, U.S. v. Barrier Industries, Inc., 44 Env't. Rep. Cas. (BNA) 1318, 1997 WL 16668 (S.D. N.Y. 1997), the court noted two particularly telling nonparty witness affidavits; the first attesting that the husband told the witness that he intended to transfer the farm property as part of his divorce "rather than let EPA get it," and the second affirming that the husband stated that he was "broke" and that he was contemplating transferring this property and other real estate holdings to frustrate any potential judgment against him.

CUMULATIVE SUPPLEMENT

Cases:

Testimony of attorney who had represented defendant in her divorce, that defendant, during child custody dispute, had discussed killing one or both of the children or killing her husband to save the children from husband's alleged child abuse, and that defendant and her best friend had discussed, in front of attorney, shooting husband and then framing him by planting child pornography in his home, was admissible under crime–fraud exception to attorney–client privilege, in prosecution of defendant for conspiracy to murder husband. West's Ann. Md. Code, Courts and Judicial Proceedings, § 9–108. Newman v. State, 156 Md. App. 20, 845 A.2d 71 (2003).

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[END OF SUPPLEMENT]

§ 11. Patent law

[Cumulative Supplement]

The courts in the following cases held that the crime–fraud exception may apply to force discovery of work product documents in cases alleging patent infringement.

In LRC Electronics, Inc. v. John Mezzalingua Associates, Inc., 974 F. Supp. 171 (N.D. N.Y. 1997), the court held that the crime–fraud exception may apply to vitiate the work product doctrine in patent cases as in cases involving any other type of law, both in the context of allegations that a patent was fraudulently procured or that the patent itself was invalid.

In Monon Corp. v. Stoughton Trailers, Inc., 169 F.R.D. 99, 40 U.S.P.Q.2d (BNA) 1625 (N.D. Ill. 1996), the court held that the crime–fraud exception applied to pierce the work product privilege in a patent infringement action where the patent holder failed to disclose prior art and commercial sale of the patented invention. [18] The alleged patent infringer sought to discover all of the plaintiff patentee's attorney–client and work product documents and information which bore any relationship to the issue of the latter's alleged inequitable conduct resulting from its nondisclosure of an on–sale bar and a prior art patent. The court held that to apply the crime–fraud exception, it was not enough to merely show inequitable conduct; the alleged infringer had to prove a prima facie case of common law fraud. The defendant adequately met its burden of proof so the court ordered discovery.

CUMULATIVE SUPPLEMENT

Cases:

Patent infringement defendant was entitled to discover otherwise–protected materials related to plaintiff's document retention program, under crime/fraud exception to attorney–client privilege and work product doctrine; program, resulting in destruction of relevant evidence at time plaintiff reasonably anticipated bringing litigation, was conceived of and implemented with advice and assistance of counsel as part of plaintiff's patent litigation strategy, and materials being sought bore close relationship to program. Rambus, Inc. v. Infineon Technologies AG, 222 F.R.D. 280 (E.D. Va. 2004).

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[END OF SUPPLEMENT]

§ 12. Contract law

[Cumulative Supplement]

It has been held that the crime–fraud exception applied to force discovery of work product documents in a case involving royalty payments due under contract.

In Willits v. Peabody Coal Co., 1993 WL 35249 (W.D. Ky. 1993), the court held that the crime–fraud exception applied to compel discovery of work product documents produced after the date on which the defendant coal company settled a separate dispute with another coal company regarding computation of royalties under written agreements. This suit sought to recover for the defendant's alleged breach of contract and fraud by its calculations of coal royalties due under written agreements with the plaintiffs. The earlier case concerned the computation of royalties in circumstances similar to those in the instant case, and the documents sought for discovery demonstrated how the defendant had calculated and paid royalties on gross realization, allegedly showing its knowledge of the legal propriety of the manner in which it calculated payments under such royalty agreements. The plaintiffs sought to establish that the defendant understood its obligations under the royalty agreements at issue.

CUMULATIVE SUPPLEMENT

Cases:

Crime/fraud exception to work product doctrine was applicable to communications underlying "sting" operation conducted by executive development company and private investigator against deprogrammer, with respect to action brought against consultant, alleging breach of professional service agreement; operation's purpose was to discover deprogrammer's investigative techniques and whether he had other clients associated with development company. NXIVM Corp. v. O'Hara, 241 F.R.D. 109 (N.D. N.Y. 2007).

Plaintiffs in contract dispute, alleging fraudulent inducement, mail fraud, and wire fraud claims, failed to establish that alleged fraud was ongoing at time defense documents were created and that communications were made in furtherance of the fraud, as required to support assertion of crime–fraud exception to attorney–client privilege; defendants' letters and e–mails allegedly supporting fraud claim showed no evidence of intention not to perform promise at time it was made. Triple Five of Minnesota, Inc. v. Simon, 213 F.R.D. 324 (D. Minn. 2002), order aff'd, 2002 WL 1303025 (D. Minn. 2002).

Trial court did not abuse its discretion, in trial of breach of contract, fraud and breach of fiduciary duty action between computer repair company and computer warranty service, by finding that letter repair company wrote to its attorney, evidencing that company was attempting to conceal its true identity from warranty service, was not admissible under the crime/fraud exception to the attorney–client privilege; there was no evidence that repair company contemplated committing a

fraud upon the court when letter was written as letter was written more than two months before suit was filed, whether company's attorney had a duty to disclose letter was not material to issue of whether letter was admissible, and letter did not evidence that company was charging warranty service for nonexistent repairs or that company fraudulently induced service into entering into provider agreement, which were at the crux of service's fraud claims. Rules of Evid., Rule 503(b)(1)(C), (d)(1). 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).

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[END OF SUPPLEMENT]

§ 13. Tort law—generally

The following authority held that the crime–fraud exception applied to force discovery of work product documents in actions involving violations of tort law.

In Klages v. Sperry Corp., 1986 WL 7636 (E.D. Pa. 1986), the court held that evidence of misconduct on the part of the plaintiff's former employer and the private investigators it hired to follow the plaintiff after his termination was sufficient to compel discovery of work product documents relating to that investigation under the crime–fraud exception. The former employee claimed among other issues in this action based on his termination, invasion of privacy and intentional infliction of emotional distress based on this investigation during the pendency of the litigation, and established that the particular documents sought were relevant to those claims.

§ 14. Products liability

It has been held that the crime–fraud exception applied to force discovery of work product documents in a products liability case.

In In re A.H. Robins Co., Inc., 107 F.R.D. 2, 18 Fed. R. Evid. Serv. 849, 3 Fed. R. Serv. 3d 298 (D. Kan. 1985), a products liability action against the manufacturer of an intrauterine birth control device, the court held that memoranda prepared by the attorneys in anticipation of the litigation were discoverable under the crime–fraud exception because they were reasonably related to evidence of crime or fraud. The plaintiffs made a threshold showing, the court found, that the manufacturer obtained the assistance of counsel for the purpose of devising strategies to cover up its responsibilities and to lessen its liability with respect to the product's defects. In addition, the documents demonstrated the attorneys' knowledge of these fraudulent activities, which, the court noted, further indicated that the exception should apply. The court emphasized, however,

that its opinion was not to be construed as a finding of guilt of either crime or fraud, but merely a discovery order holding that the plaintiffs had established a prima facie case for application of the crime–fraud exception.

§ 15. Fraud

[Cumulative Supplement]

The following authority held that the crime–fraud exception might apply to force discovery of work product documents where there were allegations of fraud.

In Madanes v. Madanes, 199 F.R.D. 135 (S.D. N.Y. 2001), the court held that an in camera inspection of documents, to determine whether the crime–fraud exception applied, was appropriate where a party alleged that members of the plaintiff's family defrauded her. In this action brought under the Racketeer Influenced and Corrupt Organizations Act against the plaintiff's brothers for allegedly defrauding her of her share of the family's assets, the court noted that foreign law could not be incorporated into the crime–fraud analysis where there was no American law equivalent. Therefore, an attorney divulging to the sister secrets of the brothers who had formerly been his clients, though criminal under Argentine law, was only perhaps tortious under American law. Nonetheless, such conduct would still undermine the adversary system, so the court ordered in camera review of opinion work product documents to determine whether they fell within the crime–fraud exception.

In In re Rigby, 199 B.R. 358, 36 Collier Bankr. Cas. 2d (MB) 916 (Bankr. E.D. Tex. 1995), the bankruptcy court denied a motion to quash a subpoena served on a debtor's attorney, holding that the attorney's knowledge or constructive knowledge of the debtor's fraud on the Internal Revenue Service called into play the crime–fraud exception to the work product privilege. The court concluded that the attorney's advice and services were instrumental to the debtor's fraudulent scheme because he was fully aware of the debtor's tax troubles, drafted an agreement dividing the community property he shared with his wife which placed the most significant and unencumbered assets with his wife, drafted a trust that eventually received those assets, and was negotiating an agreed tax judgment for delinquent federal taxes at the same time as he was assisting him in this insolvency proceeding.

CUMULATIVE SUPPLEMENT

Cases:

Opinion letters written by defendant's attorney to defendant, regarding defendant's fraudulent solicitations, were admissible against defendant under crime–fraud exception to attorney–client privilege, in his mail fraud trial, although attorney was not party to scheme. 18 U.S.C.A. § 1341. U.S. v. Weingold, 69 Fed. Appx. 575, 92 A.F.T.R.2d 2003-5454 (3d Cir. 2003).

Those documents constituting communications seeking advice or aid in furtherance of client's wrongful scheme to deprive employee of full value of his stock by fabricating story about his resignation were discoverable under Maryland's crime fraud exception to attorney-client privilege and work product doctrine; however, documents relating to fraud allegedly perpetrated by client against employee which were not actually in furtherance of fraud itself were not discoverable under the exception. Fed.Rules Civ.Proc.Rule 26, 28 U.S.C.A.; Restatement (Third) of Law Governing Lawyers § 82. Koch v. Specialized CAre Services, Inc., 437 F. Supp. 2d 362 (D. Md. 2005).

Letters from defendant to witness in prior drugs and firearm case instructing witness to claim gun involved in prosecution as her own were sufficient to make prima facie showing of obstruction of justice and to apply crime-fraud exception to defense attorney's communications with witness and defendant's communications with attorney regarding witness for purposes of overriding attorney-client and work product objections to discovery of communications in subsequent prosecution of defendant for obstruction of justice and perjury. U.S. v. Ruhbayan, 201 F. Supp. 2d 682 (E.D. Va. 2002).

Communications between defendant and his attorney were admissible under the crime–fraud exception to the attorney–client privilege; rather than merely defending himself against civil actions alleging past wrongdoing, defendant was actively continuing the coverup of his extortion and perpetuating his tax fraud. U.S. v. Edwards, 303 F.3d 606 (5th Cir. 2002).

Government made prima facie showing that former corporate employee used law firm's legal advice, including advice on divorce and estate planning, to further alleged fraudulent activities and to hide stolen funds, for purposes of corporate receiver's request to compel production of otherwise privileged documents under "crime–fraud" exception to attorney–client privilege. Grassmueck v. Ogden Murphy Wallace, P.L.L.C., 213 F.R.D. 567 (W.D. Wash. 2003).

Trial court did not abuse its discretion, in trial of breach of contract, fraud and breach of fiduciary duty action between computer repair company and computer warranty service, by finding that letter repair company wrote to its attorney, evidencing that company was attempting to conceal its true identity from warranty service, was not admissible under the crime/fraud exception to the attorney–client privilege; there was no evidence that repair company contemplated committing a fraud upon the court when letter was written as letter was written more than two months before suit was filed, whether company's attorney had a duty to disclose letter was not material to issue

of whether letter was admissible, and letter did not evidence that company was charging warranty service for nonexistent repairs or that company fraudulently induced service into entering into provider agreement, which were at the crux of service's fraud claims. Rules of Evid., Rule 503(b)(1)(C), (d)(1). 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).

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[END OF SUPPLEMENT]

§ 15.5. Obstruction of justice and perjury

[Cumulative Supplement]

The following authority held that the crime-fraud exception to work product privilege was applicable in a federal prosecution for obstruction of justice and perjury.

CUMULATIVE SUPPLEMENT

Cases:

Testimony of defendant's former lawyer, and admission of letters written by lawyer to defendant, in defendant's trial on charges of conspiracy to commit perjury and obstruction of justice, corruptly influencing and attempting to influence testimony of witness, perjury in court proceeding, subornation of perjury, and obstruction of justice, fell within crime–fraud exception to attorney–client and work product privileges, where defendant used his attorney to dupe court and jury at prior trial on drug conspiracy and firearm possession charges. 18 U.S.C.A. §§ 371, 922(g)(1), 1503, 1512(b)(1), 1622, 1623. U.S. v. Ruhbayan, 406 F.3d 292 (4th Cir. 2005).

In prosecution for perjury, subornation of perjury, and related charges, testimony of defendant's counsel for his prior trial at which alleged perjury occurred, and records from counsel's files were admissible under crime-fraud exception to the attorney-client and work-product privileges, since government had established a prima facie case, which defendant did not rebut, that defendant had used counsel to engage in fraudulent or criminal activity by tricking counsel into providing defendant's girlfriend's perjured testimony to the jury. Fed.Rules Evid.Rule 501, 28 U.S.C.A. U.S. v. Ruhbayan, 388 F. Supp. 2d 652 (E.D. Va. 2004), related reference, 302 F. Supp. 2d 634 (E.D. Va. 2004), aff'd in part, vacated in part on other grounds, remanded, 406 F.3d 292, 67 Fed. R. Evid. Serv. 49 (4th Cir. 2005), cert. denied, 126 S. Ct. 291 (U.S. 2005).

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[END OF SUPPLEMENT]

§ 16. Election laws

The following authority held that the crime–fraud exception applied to force discovery of work product documents in an action alleging election law violations.

In In re Special September 1978 Grand Jury (II), 640 F.2d 49, 6 Fed. R. Evid. Serv. 616 (7th Cir. 1980), the Seventh Circuit Court of Appeals held that a client who had filed false reports with the Illinois State Board of Elections with respect to contributions made to politicians by members of the Community Currency Exchange Association of Illinois could not assert the work product doctrine to prevent a grand jury from obtaining these documents. The court did, however, hold further that the attorney in the case would be able to invoke the protection of the work product doctrine with respect to his mental impressions, conclusions, opinions, and legal theories. In reaching its determination, the court observed that when a case being prepared involves a client's ongoing fraud, the purpose of the work product doctrine, which is to assist the client in obtaining complete legal advice, as well as, to establish a protected area in which the lawyer can prepare his case free from adversarial scrutiny, would not be furthered. However, with respect to the attorney in the case at bar, the court held that the attorney's mental impressions, conclusions, opinions, and legal theories must still be protected to avoid an invasion of the attorney's necessary privacy in his work, which would not be justified by the misfortune of representing a fraudulent client. The court concluded that since the work product doctrine must yield to a showing of sufficient need by the party seeking to enforce the subpoena, and since the district judge failed to address the issue of the grand jury's need in the case at bar, a remand was necessary for a determination of whether the grand jury had shown such extraordinary need as to justify production.

§ 16.8. Espionage prosecution

[Cumulative Supplement]

Whether the crime-fraud exception to the Attorney's Work Product privilege may be applied to a federal prosecution for espionage under certain specified circumstances has been considered by the courts.

CUMULATIVE SUPPLEMENT

Cases:

Crime–fraud exception applied to defendant's alleged use of computer media in court–provided law offices in Secure Classified Information Facility (SCIF), even if computer media was allegedly protected by Fourth Amendment, attorney–client privilege, and work product doctrine; government made prima facie showing that defendant, who had been indicted for espionage, had used SCIF to create prohibited forms of communication to people outside of jail through letters suspected to contain instructions to destroy classified information before government could retrieve it, defendant was found to have one–page document of code in jail cell that was believed to be stored on computer, and defendant did not have any other access to computers. U.S. Const. Amend. IV. U.S. v. Regan, 281 F. Supp. 2d 795 (E.D. Va. 2002).

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[END OF SUPPLEMENT]

§ 17. Unspecified actions

[Cumulative Supplement]

The courts in the following cases held that the crime–fraud exception might apply to force discovery of work product documents in cases where underlying allegations are unspecified.

In Avramides v. First Nat. Bank of Maryland, 1997 WL 68559 (S.D. N.Y. 1997), the court held that where the defendant bank, moving to dismiss the complaint, established probable cause that the plaintiff attorney and a defendant colluded to bring the lawsuit, work product documents which represented communications in furtherance of that fraud were discoverable under the crime–fraud exception. The bank presented evidence that the attorney and one of the defendants met several times, that the defendant paid some or all of the attorney's fees, and when the lawsuit was filed, it named but was not served on that defendant. The court noted that this ruling did not determine whether in fact a fraud had occurred, but if it were proven that such fraud was in fact the objective of the client's communication, then the crime–fraud exception would apply, even if the attorney was unaware that his advice was sought in furtherance thereof.

In Sheehan v. Mellon Bank, N.A., 1996 WL 243469 (E.D. Pa. 1996), the court ordered an in camera review of work product documents after it was established that the crime–fraud exception might apply where a lawsuit against the defendant bank may have been baseless from the start.

The defendant established that the plaintiffs may have been attempting to perpetrate a fraud on the court by filing a baseless lawsuit. Even if the plaintiffs' attorneys had been unaware of such fraud, the exception would apply if the clients sought their advice to perpetrate a fraud on the court. The attorneys were simultaneously suing the plaintiffs for unpaid fees and arguing that the plaintiffs had hindered their ability to represent them against the bank.

CUMULATIVE SUPPLEMENT

Cases:

Beneficiaries seeking discovery from group health insurer regarding alleged use of outdated data to calculate usual, customary, and reasonable charges (UCR) for reimbursement of out-of-network medical services made prima facie showing sufficient to warrant in camera review of allegedly privileged documents for possible disclosure under crime-fraud exception to attorney-client and work product privilege through evidence suggesting, among other things, that insurer, through its attorneys, made misleading statements, by omission, to investigating New Jersey health officials by limiting its disclosures to mid-2001 and thereafter, that insurer, through counsel, may have subsequently misrepresented to court existence and progress of purported restitution agreement with New Jersey health agency to reimburse beneficiaries for use of outdated UCRs prior to 2001, and that insurer may have used counsel to delay discovery of relevant e-mails through inaccurate representations that insurer had complied with its obligations to preserve and search for evidence. Fed.Rules Civ.Proc.Rule 26, 28 U.S.C.A. Wachtel v. Guardian Life Ins. Co., 239 F.R.D. 376 (D.N.J. 2006).

Work product created by corporate counsel's associate in course of interview with opposing party during prior litigation was subject to disclosure in subsequent grand jury proceedings against corporation under the crime–fraud exception, where notes were related to ongoing or future criminal activity. In re Grand Jury (OO-2H), 211 F. Supp. 2d 564 (M.D. Pa. 2002).

Crime/fraud exception to the attorney–client privilege and work product doctrine extends to materials or communication created for planning, or in furtherance of, spoliation. Rambus, Inc. v. Infineon Technologies AG, 220 F.R.D. 264 (E.D. Va. 2004), subsequent determination, 2004 WL 1646782 (E.D. Va. 2004).

Evidence that coverup existed supported application of crime–fraud exception to attorney/client privilege with regard to request to depose attorneys for county prosecutor's officer in action against county and county coroner; plaintiffs proffered evidence supporting theory that county employee was singled out as a scapegoat while others, including the coroner, knew about alleged illegal release of crime scene and autopsy photographs and shared responsibility for it, and that county

prosecutor's office had a hand in hiding extent of culpability of those in coroner's office. Chesher v. Neyer, 220 F.R.D. 523 (S.D. Ohio 2004).

Crime-fraud exception to work product privilege required former attorney for target of grand jury proceeding to disclose to grand jury 36 documents generated in furtherance of target's fraud, excluding attorney's opinion work product contained therein; government presented prima facie evidence of that target provided attorney with false back story that became the basis of attorney's legal advice, which was used to perpetrate a crime, and even if court was permitted to consider target's rebuttal evidence, such evidence consisted primarily of statements by the target and others conveying the target's innocence. In re Green Grand Jury Proceedings, 492 F.3d 976 (8th Cir. 2007).

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[END OF SUPPLEMENT]

IV. CRIME–FRAUD EXCEPTION HELD INAPPLICABLE

§ 18. Bankruptcy

The following authority held that the crime–fraud exception did not apply to force discovery of work product documents in bankruptcy cases in which the party seeking discovery failed to demonstrate that the documents were prepared in furtherance of some unlawful activity on the part of the client.

A corporate creditor in a bankruptcy case was held by the court in I.L.G.W.U. National Retirement Fund v. Cuddlecoat, Inc., 2002 WL 265167 (S.D. N.Y. 2002), to be unable to use the crime–fraud exception to gain access to confidential, attorney work product materials exchanged between another creditor and its attorney regarding a case of corporate bankruptcy in which the other creditor, a retirement fund associated with the defunct corporation, sought to compel payment of withdrawal liability by the defunct corporation's employees' labor union. The corporate creditor likewise sought disclosure of similar communications between the union and its attorneys. The court noted that the corporate creditor correctly characterized its burden to provide a factual basis that would "strike a prudent person" as constituting a reasonable basis to suspect the perpetration of a crime or fraud, and that the communications at issue were in furtherance of such crime or fraud. The court further observed the corporate creditor's claim that the proofs of claim by the union did not mention the claim for withdrawal liability, but only about complying with the collective bargaining agreement of the debtor corporation, which omission led the corporate creditor to enter into an unfavorable settlement with the union. On the present record, the court ruled, there

was insufficient evidence of any plan to engage in fraud to provide the requisite probable cause regarding an attempt to defraud the corporate creditor.

In In re Wilkins, 211 B.R. 7 (Bankr. M.D. Pa. 1997), the court held that an internal law firm memorandum relating to a Chapter 7 debtor was not a communication to aid in the purpose of getting or giving advice for the commission of a fraud or crime, and was therefore not subject to the crime–fraud exception. The plaintiff bank alleged that the defendant debtors made misrepresentations to obtain millions of dollars in unsecured loans and made many transfers between accounts, during the year prior to the filing of their bankruptcy petitions, with the intention of hindering, delaying, or defrauding their creditors. The court conducted an in camera examination of the memorandum, and concluded that the crime–fraud exception did not apply and therefore the document was protected from discovery under the work product privilege.

§ 19. Election laws

The following authority held that the crime–fraud exception did not apply to force discovery of work product documents in cases alleging violations of the election laws in which the parties seeking discovery failed to demonstrate that the documents were prepared in furtherance of some unlawful activity on the part of the clients.

In In re Sealed Case, 223 F.3d 775 (D.C. Cir. 2000), the District of Columbia Circuit Court of Appeals held that the crime–fraud exception did not apply to require production of documents prepared by a political party's national committee's general counsel, regarding a foreign national's bank loan guarantee by which a think tank founded by members of the national committee would be able to repay a loan out of a nonfederal account of the committee. The court found no evidence of criminal conduct where the Federal Elections Commission had determined by a 3–3 vote that probable cause did not exist for an enforcement action based on an alleged violation of the Federal Election Campaign Act (FECA) provision prohibiting contributions from foreign nationals.[19] The court reversed as erroneous the district court's order for production of the documents after reviewing them in camera and finding them in violation of the federal election laws and therefore subject to the crime–fraud exception. It deferred to the conclusion of the Federal Elections Commission, that loan repayments did not constitute contributions under the law, and further that the party's national committee and this think tank were separate entities. It thus concluded that this case simply did not fall within the crime–fraud exception because the loan arrangement was not criminal.

§ 20. State Whistleblower Act action

[Cumulative Supplement]

It has been held that the crime–fraud exception did not apply to force discovery of work product documents in a case involving a state Whistleblower Act.

In Gundacker v. Unisys Corp., 151 F.3d 842, 14 I.E.R. Cas. (BNA) 1205, 136 Lab. Cas. (CCH) ¶ 58464, 41 Fed. R. Serv. 3d 874 (8th Cir. 1998), the Eighth Circuit Court of Appeals held that the district court had not abused its discretion in finding that a document inadvertently disclosed to the plaintiff employee by the employer during discovery in a Minnesota Whistleblower Act action was privileged under the attorney work product doctrine and that the crime–fraud exception to that doctrine did not apply. The plaintiff, a software manager in the defendant's defense business, claimed that the company ordered him to make illegal changes, arbitrarily increase a price estimate, and submit unrealistically low bids in a naval contract, and that he was subsequently laid off because he had protested this allegedly illegal activity. The document in question was an internal memorandum regarding an internal investigation conducted by Unisys' lawyers to determine whether there had been any illegal conduct. The court accepted the employer's claims that the material contained in this inadvertently disclosed document was otherwise readily discoverable, and the court concluded that the employee should have obtained the information he sought through the normal channels of discovery.

CUMULATIVE SUPPLEMENT

Cases:

Crime–fraud exception to attorney–client privilege did not apply to defeat privilege between assistant police chief and assistant city attorney, as it did not appear that chief ever sought attorney's assistance or looked to attorney for advice on leaking certain police reports to media, in prosecution of chief for aggravated perjury. Rules of Evid., Rule 503(d)(1). State v. DeAngelis, 116 S.W.3d 396 (Tex. App. El Paso 2003).

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[END OF SUPPLEMENT]

§ 21. Antitrust

[Cumulative Supplement]

The courts in the following cases held that the crime–fraud exception would not apply to force discovery of work product documents in cases allegedly filed for anticompetitive purposes, where the parties seeking discovery failed to demonstrate that the documents were prepared in furtherance of some unlawful activity on the part of the client.

In Lemelson v. Bendix Corp., 104 F.R.D. 13 (D. Del. 1984), the court held that corporate agreement for a joint defense, exchange of settlement information, and attendance at meetings in the context of the joint defense, did not sufficiently establish a conspiracy to violate the antitrust laws, to justify application of the crime–fraud exception to work product documents. The plaintiff attempted to have the court apply the exception to work product documents submitted for in camera inspection in a patent infringement action by the patent holder, charging that the corporate defendants had conspired with one another to boycott him and to refuse to negotiate independently with him to take licenses under his patents.

In In re Burlington Northern, Inc., 822 F.2d 518, 8 Fed. R. Serv. 3d 545 (5th Cir. 1987), overruling on other grounds recognized by, Village Supermarket, Inc. v. Mayfair Supermarkets, Inc., 269 N.J. Super. 224, 634 A.2d 1381 (Law Div. 1993), the Fifth Circuit Court of Appeals held that it was error for a district court to apply the crime–fraud exception to allow discovery of work product documents where it had not considered whether the litigation activities were significantly motivated by a genuine desire for judicial relief or instead illegitimate. In this antitrust action by a coal slurry pipeline company against railroad companies, the plaintiffs contended that the railroads, afraid of losing business to the pipeline, conspired to prevent construction of a pipeline by denying permission for it to cross their rights–of–way and by engaging in sham administrative and judicial challenges to its attempts to secure crossing, water, and administrative rights. It sought discovery of documents relating to lawsuits that the railroads filed and defended for this allegedly anticompetitive purpose. The district court held that the documents were prepared in furtherance of an illegal conspiracy, and were thus not protected by work product immunity because of the crime–fraud exception. The appellate court noted, however, that the railroads' only partial success in one of the lawsuits and their defensive posture in the other lawsuits did not necessarily indicate that the lawsuits had been a sham.

CUMULATIVE SUPPLEMENT

Cases:

Crime-fraud exception to work-product protection and attorney-client privilege did not apply to warrant disclosure of e-mails between technology company's in-house counsel and its counsel in putative antitrust class action, which addressed potential responses to named plaintiff's counsel's inquiries and letters about unlicensed private investigators' secret personal background

investigations of plaintiff and his counsel, which were conducted through the use of false pretenses, where company's class action counsel was victim of inaccurate representations made to him by in-house counsel that, while negligent, did not evidence intentional falsity. Fed. R. Civ. P. 26(b)(3)(A). Meyer v. Kalanick, 212 F. Supp. 3d 437, 2016-2 Trade Cas. (CCH) ¶ 79704 (S.D. N.Y. 2016).

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[END OF SUPPLEMENT]

§ 22. Attorney malpractice

The following authority held that the crime–fraud exception did not apply to force discovery of work product documents in a case alleging attorney malpractice, where the party seeking discovery failed to demonstrate that the documents were prepared in furtherance of some unlawful activity on the part of the client.

In Nesse v. Pittman, 202 F.R.D. 344 (D.D.C. 2001), the court held that where there was not a prima facie showing of any crime or fraud, the crime–fraud exception to the work product privilege would not apply to require a law firm to disclose documents that it generated after it withdrew from representation of a corporate client who subsequently brought a malpractice claim. The plaintiff charged that the firm engaged in a cover–up of its alleged negligence in ceasing its representation just before an important hearing, but it failed to establish prima facie proof of any such cover–up, beyond a single alleged misstatement by one of the firm's attorneys.

§ 23. Patent law

[Cumulative Supplement]

The courts in the following cases held that the crime–fraud exception would not apply to force discovery of work product documents in cases involving the patent laws, where the parties seeking discovery failed to demonstrate that the documents were prepared in furtherance of some unlawful activity on the part of the clients.

In Hercules, Inc. v. Exxon Corp., 434 F. Supp. 136, 196 U.S.P.Q. (BNA) 401 (D. Del. 1977), on a motion to halt production of documents allegedly prepared in furtherance of a fraud on the patent office, the court held that the fraud exception to the work product privilege was not applicable, since many of the documents were dated later than the date of issuance of the patent. The court observed that although communications made before the fact of, or during the commission of a

fraud are not protected by the work product doctrine, communications after the fact are protected, since one of the primary purposes of the work product doctrine is to allow consultation in the interest of establishing a legal defense. Denying the motion for discovery, the court rejected the movant's contention that some of the documents might have contained information relevant to the fraud, finding rather that none of the documents, including those prepared subsequent to the issuance of the patent, related to the alleged fraud perpetrated on the patent office. Instead, the court found that the bulk of the documents were prepared in connection with proceedings other than the ex parte prosecution of the patent, and reflected rather the immediate concerns of the attorney and client with respect to distinct and separate issues.

In Westvaco Corp. v. International Paper Co., 23 U.S.P.Q.2d (BNA) 1401, 1991 WL 398677 (E.D. Va. 1991), the court held that the fraud exception was unlikely to apply to compel production of work product documents relating to the allegedly illegal application for a patent reissue. The plaintiff sought declaratory and injunctive relief and damages arising out of the defendant's paperboard juice container patent reissue, which, the plaintiff claimed, had been obtained through wrongful nondisclosure of prior art. The court ordered in camera inspection to confirm its suspicion that the documents in question had not been produced in furtherance of some fraud on the patent office. The court noted that the exception would apply only if the plaintiff could establish that the defendant had withheld material information from the patent office and that it did so with the intent to defraud.

In In re Murphy, 560 F.2d 326, 41 A.L.R. Fed. 102 (8th Cir. 1977), the court held that opinion work product documents, relating to various patent infringement actions and the preparation and prosecution of patent applications, were not discoverable under the fraud exception, where the government had failed to establish proof that the attorneys' clients had been engaged in or were planning a crime or fraud when they sought legal advice. The court observed that although a panel of masters appointed to make preliminary rulings on the government's discovery motions concluded that one of the clients committed fraud on the patent office due to its failure to provide the patent office with relevant information, this conclusion lacked evidentiary support since the client had been absolved of any wrongdoing before the patent office during a plenary hearing before the Federal Trade Commission. Even though there was a prima facie showing that another client committed fraud on the patent office, the court nonetheless held that because that client had retained the attorney as counsel in an antitrust matter, and not regarding any patent office proceedings, this fraud would not allow discovery of the attorney's opinion work products.

CUMULATIVE SUPPLEMENT

Cases:

Crime-fraud exception to attorney-client and work product privileges did not apply to documents in possession of patentee in action to enforce patent for a method of adding an enzyme to dough to break down fat molecules, despite patentee's alleged failure to disclose to the Patent and Trademark Office (PTO) during patent's prosecution that the enzyme did not break down certain fats, and its alleged misrepresentations regarding effectiveness of prior art enzymes; although effectiveness of the enzymes was open to scientific dispute, there was no evidence that patentee's positions during prosecution were taken in bad faith. Danisco A/S v. Novozymes A/S, 427 F. Supp. 2d 443 (S.D. N.Y. 2006).

Jury's finding in patent infringement that patentee's sole shareholder engaged in inequitable conduct before the United States Patent Office did not establish a prima facie showing of common law fraud for purposes of invoking the crime–fraud exception to the attorney–client privilege and the work–product doctrine. Fed. Rules Civ. Proc. Rule 26(b)(3), 28 U.S.C.A. Vardon Golf Co., Inc. v. Karsten Mfg. Corp., 213 F.R.D. 528 (N.D. Ill. 2003).

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[END OF SUPPLEMENT]

§ 24. Securities law

[Cumulative Supplement]

The courts in the following cases held that the crime–fraud exception would not apply to force discovery of work product documents in cases alleging securities law violations, where it was not adequately demonstrated that the documents were prepared in furtherance of some unlawful activity on the part of the client.

In In re In-Store Advertising Securities Litigation, 163 F.R.D. 452 (S.D. N.Y. 1995), the court held that the crime–fraud exception did not apply to compel discovery of work product documents in an action arising out of a company's initial public offering, where fraud was established but not any evidence that the attorney's work product had been produced in furtherance thereof. The court held that in camera review of the documents would be inappropriate where the requisite evidence had not been presented showing that the work product was produced in furtherance of an ongoing or future fraud.

The court in Lawrence v. Cohn, 2002 WL 109530 (S.D. N.Y. 2002), held that the crime–fraud exception would not apply to cancel the protection of the federal work product privilege for certain papers prepared by a nonparty law firm for the defendant in a securities action brought in

conjunction with the sale of certain real property, in part to the derendant and in part to an estate for which at the time the defendant was acting as executor. The defendant had found an investment opportunity in the real property in the course of acting as administrator, and desired to take personal advantage of the opportunity, so sought the advice of the New York Surrogate's Court as to whether such action would violate his duties as executor. The estate beneficiaries sued to block the personal acquisition of the property by the defendant, and were eventually induced to settle their claim in return for a half share in the property when purchased. The beneficiaries subsequently found that the property was let to a bank on "extremely favorable" terms, and brought the present action for securities fraud on the basis of a claim that but for fraudulent concealment of the terms of the actual business deal as consummated by the defendant for rental of the property, they would not have agreed to the half–share arrangement. The court declared that to invoke the crime–fraud exception to the work product privilege, the beneficiaries would have to demonstrate that there was probable cause to believe that the client or counsel was committing a crime or fraud and that the sought–after communications were undertaken, or the withheld documents created, in furtherance of that crime or fraud. This, the court held, the beneficiaries had not shown in the instant case.

In In re International Systems and Controls Corp. Securities Litigation, 693 F.2d 1235, Fed. Sec. L. Rep. (CCH) ¶ 99036 (5th Cir. 1982), the Fifth Circuit Court of Appeals held that the crime–fraud exception should not be applied to pierce the protection afforded to work product documents without some proof of specific intent by corporate management in development of those documents inasmuch as, in the modern corporate world, with multiple subsidiaries and hundreds of employees, shady practices may occur without directors' and officers' knowledge. The case was a shareholders' derivative suit alleging that the corporation committed fraud by paying bribes and failing to report them to shareholders.

In Southern Union Co. v. Southwest Gas Corp., 2002 WL 169279 (D. Ariz. 2002), the court held that, as of the time of its decision on an appeal from discovery orders of a special master, the plaintiff corporation had not made the prima facie showing of crime or fraud necessary to invoke the crime–fraud exception to the attorney work product privilege for a document prepared by an attorney for the defendant corporation, which was the successful bidder in the sale of a third corporation. The court said that it was unclear at the time of the decision what crime and/or fraud the document at issue would help to establish. Reminding the plaintiff corporation that the only remaining fraud issue in the case was a claim of fraudulent inducement against another defendant, the court said that it would nevertheless allow the plaintiff time at an upcoming hearing to establish, if it could, the application of the crime–fraud exception to the document.

CUMULATIVE SUPPLEMENT

Cases:

District court's ordered disclosure, pursuant to grand jury subpoena, of otherwise privileged documents and communications between investigated corporation and its law firm on the basis of a showing that the firm's services were used in furtherance of securities crimes, and on a showing that there was a reasonable relationship between the communications and the illegality, was an improper application of crime-fraud exception to attorney-client privilege, as the exception applied only to documents and communications that were themselves in furtherance of illegal or fraudulent conduct. In re Grand Jury Investigation, 231 Fed. Appx. 692 (9th Cir. 2007).

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[END OF SUPPLEMENT]

§ 25. Grand jury proceedings

[Cumulative Supplement]

The courts in the following cases held that the crime–fraud exception would not apply to force discovery of work product documents in grand jury proceedings, where there was insufficient evidence of any crime or fraud relating to the discovery order.

Where attorneys appealed the district court's holding officers of two corporations in contempt for refusing to produce certain documents to a grand jury after the court found that the documents fell within the crime–fraud exception to the attorney–client privilege, the court in In re Richard Roe, Inc., 168 F.3d 69, 50 Fed. R. Evid. Serv. 1421, 43 Fed. R. Serv. 3d 585 (2d Cir. 1999), held that where the government was alleging that the very act of litigating was in furtherance of a fraud, disclosure under the crime–fraud exception could only be allowed if there were probable cause that the litigation or an aspect thereof had little or no legal or factual basis and was carried on substantially for the purpose of furthering the crime or fraud. This was an appeal from a civil contempt order that documents relating to a major piece of civil litigation were not subject to disclosure under the crime–fraud exception. The court noted that since the attorney–client and work product privileges play an important role in the judicial system, they should not be framed so broadly as to vitiate much of the protection they afford. The court concluded that in this case it was not established that there was no basis for the litigation, other than furthering a fraud, nor did the documents in question indicate any intent to create or present misleading or false evidence.

In In re Grand Jury Subpoena, 524 F. Supp. 357 (D. Md. 1981), the court refused to enforce a grand jury subpoena requiring the production of records prepared by an attorney which related to the attorney's representation of a former client in a federal criminal trial, absent a prima facie showing

that the attorney engaged in illegal conduct in connection with that representation. The court found that the records sought from the attorney related to allegations that the attorney told the client to give false testimony. However, the court held, such records constituted opinion work product, which may be discovered only in very rare and extraordinary circumstances. The court indicated that this approach would be the most prudent way to protect the attorney's interest in keeping his thoughts inviolate without granting him a virtual shield from prosecution for acts committed in the course of representation of a client.

In In re Grand Jury Subpoenas Duces Tecum, 773 F.2d 204 (8th Cir. 1985), the Eighth Circuit Court of Appeals held that where the government failed to make a prima facie case of fraud or crime practiced by attorneys in connection with a discovery order, their work product documents could not be disclosed pursuant to the crime–fraud exception. The attorneys represented a grain company, which was accused of conspiring to remove and convert some wheat owned by an agency of the United States, and the grand jury sought their notes, memoranda, or correspondence relating to two documents which they failed to produce at a previous criminal trial pursuant to discovery orders. The fact that those two documents had not been included in 800 documents surrendered during the trial, the court held, did not constitute prima facie proof of a fraud or crime. Agreeing with the conclusion of the district court that the proof of alleged crime was too speculative, the court affirmed its order quashing the grand jury subpoenas duces tecum.

In In re Sealed Case, 107 F.3d 46, 37 Fed. R. Serv. 3d 540 (D.C. Cir. 1997), the District of Columbia Circuit Court of Appeals held that the crime–fraud exception did not apply to a file memorandum written by a corporation's general counsel, more than a year after a meeting with its president and vice–president in which they had discussed campaign finance laws, in a grand jury investigation of the vice–president's use of corporate funds to reimburse donors to a former political candidate. Even though within a few weeks of that meeting, the vice–president violated the campaign finance laws, the court held that it could not be assumed that legal advice was sought at that meeting with the intention of committing a crime. The court noted that a meeting to discuss campaign finance laws does not necessarily imply any intention to violate those laws. This particular memorandum was written to the file and related to matters occurring one year after the vice president's illegal actions. Since the crime–fraud exception to work product immunity focuses on the client's intent in consulting the lawyer or in using the materials that the lawyer prepared, to determine whether the client consulted the lawyer or used the materials for the purpose of committing a crime or fraud, it cannot apply if the attorney prepared the material after the client's wrongdoing ended. In any case, the court noted that the client here was the corporation and not the vice–president.

CUMULATIVE SUPPLEMENT

Cases:

Crime-fraud exception to the attorney work-product doctrine did not apply to e-mail which grand jury investigation target had received from his lawyer then forwarded to his accountant, who inadvertently provided it to prosecution; although target may have planned to retroactively amend his tax returns based on lawyer's advice in the e-mail to correct target's business records, he merely forwarded the e-mail to accountant and said he wanted to "discuss" it, but did not otherwise take steps to follow up on the lawyer's advice. In re Grand Jury Matter #3, 847 F.3d 157 (3d Cir. 2017).

Written statements allegedly extracted by force from a witness were not protected from grand jury subpoena by work product doctrine; the statements were not prepared by murder defendant's attorney or his agents. In re Public Defender Service, 831 A.2d 890 (D.C. 2003).

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[END OF SUPPLEMENT]

§ 26. Labor and employment

[Cumulative Supplement]

The courts in the following cases held that the crime–fraud exception would not apply to force discovery of work product documents in employment–related actions, where it was not adequately demonstrated that the documents were prepared in furtherance of some unlawful activity.

In Pandick, Inc. v. Rooney, 1988 WL 61180 (N.D. Ill. 1988), the court held that an attorney's notes regarding his advice on employment contract negotiations were not sufficiently related to an allegedly fraudulent scheme to deprive a corporation of important business relationships as to warrant the discovery of work product under the crime–fraud exception. This suit involved allegations of a scheme to deprive the counterplaintiff corporation of confidential business information, which key employees allegedly took with them when they left for another firm. The court found no evidence in the record or in the documents sought, to indicate that the counterdefendants had employed the attorney's aid in depriving the original employer of confidential information or customers.

In Cox v. Administrator U.S. Steel & Carnegie, 17 F.3d 1386, 146 L.R.R.M. (BNA) 2158, 127 Lab. Cas. (CCH) ¶ 11063, R.I.C.O. Bus. Disp. Guide (CCH) ¶ 8527, R.I.C.O. Bus. Disp. Guide (CCH) ¶ 8682, 28 Fed. R. Serv. 3d 1166 (11th Cir. 1994), opinion modified on reh'g on other grounds, 30 F.3d 1347, 147 L.R.R.M. (BNA) 2012 (11th Cir. 1994) and (abrogation on other

grounds recognized by, Hayden v. Paul, Weiss, Rifkind, Wharton & Garrison, 955 F. Supp. 248, Fed. Sec. L. Rep. (CCH) ¶ 99429, R.I.C.O. Bus. Disp. Guide (CCH) ¶ 9220 (S.D. N.Y. 1997)) and (abrogation on other grounds recognized by, In re Managed Care Litigation, 135 F. Supp. 2d 1253, R.I.C.O. Bus. Disp. Guide (CCH) ¶ 10032 (S.D. Fla. 2001)), the Eleventh Circuit Court of Appeals held that documents regarding alleged concessions agreed to in a collective bargaining agreement were not closely related to or created to further any crime or fraud, and therefore would not fall under the crime–fraud exception to the work product privilege. This action by union members against their union and employer argued that union negotiators agreed to concessions in a collective bargaining agreement in exchange for pension payments to which they were not entitled. The court initially acknowledged that the union and employer might have engaged in an effort to conceal the unlawful activities of their negotiators, but after in camera inspection, the court concluded that there was no basis for applying the crime–fraud exception.

CUMULATIVE SUPPLEMENT

Cases:

Crime-fraud exception to work product and attorney-client privileges did not warrant production of Equal Employment Opportunity Commission (EEOC) documents and deposition of an EEOC attorney concerning EEOC's disability discrimination action against employer, where there was no evidence that EEOC's actions constituted a crime. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A. In re E.E.O.C., 207 Fed. Appx. 426, 18 A.D. Cas. (BNA) 1304 (5th Cir. 2006).

Government's inaccuracies and omissions in discovery responses and disclosures were insufficient alone to invoke crime-fraud exception to protection of attorney work product from discovery, absent prima facie evidence that government consulted with its attorneys with the intent to cover up discrimination against plaintiff. Jinks-Umstead v. England, 233 F.R.D. 49 (D.D.C. 2006).

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[END OF SUPPLEMENT]

§ 27. Improper sales practices

It has been held that the crime–fraud exception would not apply to force discovery of work product documents in an action involving allegations of improper sales practices under the facts and circumstances.

In Garrett v. Metropolitan Life Ins. Co., 1996 WL 325725 (S.D. N.Y. 1996), report and recommendation adopted, 1996 WL 563342 (S.D. N.Y. 1996), the court held that the crime–fraud exception did not apply to reports of surveys conducted among the policyholders of the defendant insurance company. Those policyholders subsequently joined in class actions against the insurance company, challenging its sales practices. The court agreed that the survey reports qualified as work product because they were prepared by an independent third party acting as an agent of the company's attorney, being under his control and acting pursuant to his directions; and because the surveys were undertaken primarily in response to legal claims and investigations into the defendant's allegedly improper sales practices, thus satisfying the "in anticipation of litigation" requirement. The plaintiffs claimed that the insurance company and the survey company had engaged in deceptive conduct by conducting the survey, with plans to use it to obtain statements from opposing parties and potential adversaries. However, the court found no probable cause to believe that a fraud had occurred, because the plaintiffs did not establish any injury resulting from the defendant's alleged intention to use the survey responses against the policyholders in litigation. Even if the plaintiffs had shown probable cause, the court concluded, they failed to establish that the defendant's attorneys intended to facilitate the alleged fraud through their work product; therefore, the crime–fraud exception did not apply.

§ 28. Contract law

[Cumulative Supplement]

It has been held, under the particular circumstances presented in the course of contract litigation, that the crime–fraud exception to the privilege for attorney work product would not apply to avoid that privilege.

The court in Lifewise Master Funding v. Telebank, 206 F.R.D. 298 (D. Utah 2002), held that an attorney's advice to a client corporation as to how legally to terminate a contract was not in furtherance of crime or fraud, so that the crime–fraud exception to the attorney work product privilege did not apply to enable the opposing party to seek discovery of the contents of that advice. The court pointed out that a broad overall claim as to all the communications between attorney and client as being within the crime–fraud exception could not be accepted absent allegations regarding particular communications.

CUMULATIVE SUPPLEMENT

Cases:

Testimony for government of three attorneys, in prosecution for conspiracy, mail fraud, and related offenses, did not implicate attorney-client privilege, where challenged communications either were not made within attorney-client relationship or fell within crime-fraud exception to such privilege. U.S. v. Bryson, 105 Fed. Appx. 470 (4th Cir. 2004), related reference, 2004 WL 1857603 (4th Cir. 2004).

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[END OF SUPPLEMENT]

§ 28.5. Criminal conduct by another

[Cumulative Supplement]

It has been held that the crime-fraud exception to the attorney-client privilege does not apply where the client warns the attorney against anticipated criminal conduct of a third party in which neither the client nor the attorney is expected to participate.

CUMULATIVE SUPPLEMENT

Cases:

Crime–fraud exception to attorney–client privilege did not apply to investigative report and underlying documents prepared by criminal defense firm retained by majority partner in shopping center to investigate overbilling of shopping center tenant for payments in lieu of taxes; report concerned a past, possible malfeasance by someone within the shopping center organization, and did not in any way suggest usage in furtherance of criminal conduct, but rather revealed conduct which was possibly criminal. Lugosch v. Congel, 218 F.R.D. 41 (N.D. N.Y. 2003).

Evidence that defense attorney in criminal prosecution had been present at meetings in which alleged criminal conduct could have been discussed was insufficient to warrant application of crime-fraud exception to claimed attorney-client privilege, so as to require production of attorney's testimony in response to grand jury subpoena; showing of "close relationship" to defendants' existing or future scheme to commit crime or fraud was required. In re Grand Jury Proceedings |5 Empanelled January 28, 2004, 401 F.3d 247 (4th Cir. 2005).

Testimony for government of three attorneys, in prosecution for conspiracy, mail fraud, and related offenses, did not implicate attorney–client privilege, where challenged communications either

were not made within attorney–client relationship or fell within crime–fraud exception to such privilege. U.S. v. Bryson, 105 Fed. Appx. 470 (4th Cir. 2004).

Testimony for government of three attorneys, in prosecution for conspiracy, mail fraud, and related offenses, did not implicate attorney-client privilege, where challenged communications either were not made within attorney-client relationship or fell within crime-fraud exception to such privilege. U.S. v. Bryson, 105 Fed. Appx. 470 (4th Cir. 2004), related reference, 2004 WL 1857603 (4th Cir. 2004).

Crime-fraud exception did not provide basis for plaintiffs to keep privileged information defendants inadvertently produced during course of discovery in civil case, in light of parties' agreed protective order requiring return of privileged document upon request; plaintiffs failed to cite any facts to support their argument that document exposed criminal fraud perpetrated by defendants, or to explain how privileged document unlocked secret to defendants' alleged crime. Rainer v. Union Carbide Corp., 402 F.3d 608, 2005 FED App. 0112P (6th Cir. 2005), opinion amended on reh'g, (Mar. 25, 2005).

In importer's action against United States for malicious prosecution and abuse of process based on Customs-issued penalty notices and Department of Justice suit against it for penalties, crime-fraud exception did not apply to permit discovery of documents protected by attorney-client and work product privileges; most of the documents constituted discrete communications between the attorney and client regarding issues such as how to respond to discovery requests and the exchanging of draft briefs. Fed.Rules Civ.Proc.Rule 26, 28 U.S.C.A. Tri-State Hosp. Supply Corp. v. U.S., 238 F.R.D. 102, 98 A.F.T.R.2d 2006-6798 (D.D.C. 2006).

In camera review of documents relating to Customs' decision to pursue criminal and civil penalties against importer was required in importer's malicious prosecution action against United States to determine if crime-fraud exception to the attorney-client and work-product privileges applied; it was impossible to know, without reviewing the documents in camera, whether government consulted with attorneys with intent to further any unlawful or fraudulent acts or whether its general purpose in consulting with attorneys was to commit a fraud. Tri-State Hosp. Supply Corp. v. U.S., 226 F.R.D. 118 (D.D.C. 2005).

Note from capital murder defendant to his attorney, written during early stages of trial before severance of trials of defendant and his two codefendants, warning attorney that he or one of his codefendants would harm the other codefendant if "something can't be worked out[,]" did not come within "crime–fraud" exception to attorney client privilege, where defendant was not seeking to enlist attorney's assistance in committing crime, but rather in preventing one. West's Ann. Cal.

Evid. Code §§ 954, 956. People v. Michaels, 28 Cal. 4th 486, 122 Cal. Rptr. 2d 285, 49 P.3d 1032 (2002).

State failed to establish a *prima facie* showing that a crime or fraud was ongoing or about to be committed by deputy police chief when he sought counsel from assistant city attorney, and thus, crime–fraud exception did not apply to pierce attorney–client privilege to require disclosure of the protected statements in criminal investigation that focused on misuse of official information, where deputy chief had not been charged with releasing confidential information, and there was no evidence tending to prove that either attorney or deputy chief was source of leak. Rules of Evid., Rule 503(d)(1). State v. Martinez, 116 S.W.3d 385 (Tex. App. El Paso 2003).

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

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[END OF SUPPLEMENT]

V. INSTANCES OF INNOCENT ATTORNEY OR INNOCENT CLIENT

§ 29[a] Where attorney is innocent—Exception may apply

The courts in the following cases held that the crime–fraud exception may be applied to pierce the work product privilege in cases where the attorney was innocent of any fraud.

In In re Grand Jury Proceedings, 102 F.3d 748 (4th Cir. 1996), the Fourth Circuit Court of Appeals held that the crime–fraud exception applied to vitiate the work product privilege of attorneys who unknowingly assisted the bank they represented to violate the Virginia lending limit statute by making loans in excess of the maximum allowed under that law. The attorneys, with no criminal or fraudulent intentions themselves, served to further the bank's fraud by filing pleadings and documents and writing letters which served to misrepresent or conceal what the bank had done. Regarding the work done by a nonattorney employee of the bank, a former Federal Deposit Insurance Corporation (FDIC) examiner who was hired as a consultant to deal with the FDIC and review the FDIC's criticisms of bank policies, the court held that the attorney–client and work product privileges were inapplicable.

In In re Sealed Case, 676 F.2d 793, Fed. Sec. L. Rep. (CCH) ¶ 98647, 82–1 U.S. Tax Cas. (CCH) ¶ 9335, 10 Fed. R. Evid. Serv. 490, 50 A.F.T.R.2d 82–5637 (D.C. Cir. 1982), the District of Columbia Court of Appeals held that work product documents which reflected work which may have been performed in furtherance of a crime or fraud were not protected from discovery, even if the attorney had been completely innocent. This case was an appeal from a district court order holding a corporation's agent in contempt of court for refusing to produce before the grand jury eight items from the files of the defendant company's former general counsel. Ordering production of the documents, the court found that the record established a substantial possibility that the company's chairperson and other senior officers conspired to bribe an official of one foreign government and possibly more, and that they conspired to make illegal corporate contributions to political campaigns in 1972. The court concluded that although in some circumstances an attorney may be innocently involved in his client's crime or fraud, a guilty client may not use the innocence or ignorance of its attorney to claim the court's protection against a grand jury subpoena, and unless the blameless attorney is before the court with an independent claim of privilege, the client's use of an attorney's efforts in furtherance of crime or fraud negates the privilege.

§ 29[b] Where attorney is innocent—Exception may not apply

[Cumulative Supplement]

The following authority held that the crime–fraud exception may not apply to pierce the work product privilege in cases where the attorney was innocent of any fraud.

In In re Grand Jury Proceedings, 43 F.3d 966, 31 Fed. R. Serv. 3d 202 (5th Cir. 1994) (abrogation on other grounds recognized by, F.D.I.C. v. Ogden Corp., 202 F.3d 454, 46 Fed. R. Serv. 3d 772 (1st Cir. 2000)), the Fifth Circuit Court of Appeals, though remanding for the district court's determination of whether the crime–fraud exception would vitiate the work–product privilege in this case, noted that an innocent attorney might be permitted to invoke the work product privilege even if a prima facie case of fraud or criminal activity has been made as to the client. The question facing the court was whether the crime–fraud exception would permit disclosure of materials where the attorney who prepared them had no knowledge that his efforts were furthering his client's criminal activity. The case involved a millionaire's death and subsequent efforts by his family to recover large sums of his investments. The court found that the crime–fraud exception issue had not been sufficiently developed in the district court and therefore remanded for a determination of whether the government could establish the requisite need for particular documents.

In In re National Mortg. Equity Corp. Mortg. Pool Certificates Litigation, 116 F.R.D. 297 (C.D. Cal. 1987), in which a bank alleged fraud by a mortgage equity company, the court held that

"opinion" work product should be shielded from discovery under the crime–fraud exception where the attorney was innocent. It contrasted this type of work product from "fact" work product, which would be discoverable if related to crime or fraud, regardless of the innocence of the attorney. The court ordered in camera review of the work product documents in question to determine whether the crime–fraud exception should apply, and ordered the plaintiff to establish prima facie evidence that the attorney had in fact known of the fraud.

CUMULATIVE SUPPLEMENT

Cases:

Crime–fraud exception to attorney–client privilege did not apply to communications between murder defendant and his attorney regarding alleged witness tampering; the alleged tampering occurred before any communications between attorney and defendant about the statements procured from witness through intimidation, there was no suggestion that attorney did anything that was conducive to the fulfillment of the tampering, and attorney only undertook to investigate the bona fides of witness's statement recanting his testimony against defendant. D.C. Official Code, 2001 Ed. § 22–722(a)(2). In re Public Defender Service, 831 A.2d 890 (D.C. 2003).

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[END OF SUPPLEMENT]

§ 30. Where client is innocent

It has been held that the crime–fraud exception may be applied to pierce the work product privilege in a case where the attorney, but not the client, was guilty of some crime or fraud.

In In re Impounded Case (Law Firm), 879 F.2d 1211, 28 Fed. R. Evid. Serv. 974 (3d Cir. 1989), the Third Circuit Court of Appeals held that the crime–fraud exception applied to work product materials in a case where a law firm, rather than its client, was the object of a criminal investigation. The court rejected the law firm's argument that the exception is applicable only where a client is charged with continuing or planning criminal activity, finding no meaningful client interest that would be served by the application of the work product doctrine here. The district court concluded that only those documents implicating the clients in the criminal activity for which legal advice was sought would be exempted from discovery.

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- A.L.R. Index, Production of Documents
- A.L.R. Index, Work Product Doctrine
- Waiver or Loss of Protection of State Attorney "Work Product" Protection, 45 A.L.R.7th Art. 2

- 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
- Crime-Fraud Exception to Attorney-Client Privilege in State Courts—Contemplated Crime, 9 A.L.R.6th 363
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- What corporate communications are entitled to attorney–client privilege—modern cases, 27 A.L.R.5th 76
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- Attorney–client privilege as extending to communications relating to contemplated civil fraud, 31 A.L.R.4th 458
- 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
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- 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
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- Persons other than client or attorney affected by, or included within, attorney–client privilege, 96 A.L.R.2d 125
- Withdrawal, during same trial, of waiver of privilege of confidential communication, 158 A.L.R. 219
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- Privilege of communication to attorney as affected by termination of employment, 5 A.L.R. 728
- Waiver or Loss of Protection of Federal Attorney "Work Product" Protection for Expert Witnesses Under Fed. R. Civ. P. 26(b)(3), 44 A.L.R. Fed. 3d Art. 2

- Waiver or Loss of Protection of Federal Attorney "Work Product" Protection Under Fed. R. Civ. P. 26(b)(3), 34 A.L.R. Fed. 3d Art. 5
- Attorney's disclosure, in federal proceedings, of identity of client as violating attorney–client privilege, 84 A.L.R. Fed. 852
- 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
- Construction and application of provisions of Federal Rule of Civil Procedure 26(c) providing for the filing of secret or confidential documents or information inclosed in sealed envelopes to be opened only as directed by the court, 19 A.L.R. Fed. 970

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- Proof of Basis for, and Grounds for Lifting, Work Product Protection Against Discovery, 39 Am. Jur. Proof of Facts 3d 1
- Proof of Waiver of Attorney–Client Privilege, 32 Am. Jur. Proof of Facts 3d 189
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- Rothenberg, Evidence: Attorney–Client Privilege & Work Product Doctrine, 76 Denv. U.L. Rev. 825 (1999)
- Soumilas, Comments Compilations: Truth, Privacy, and the Work Product Doctrine, 73 Temp. L. Rev. 227 (2000)

Footnotes

1 This annotation supersedes the annotation of 64 ALR Fed 470.

2 In re Doe, 662 F.2d 1073, 9 Fed. R. Evid. Serv. 578, 64 A.L.R. Fed. 457 (4th Cir. 1981).

3 U.S. v. Zolin, 491 U.S. 554, 109 S. Ct. 2619, 105 L. Ed. 2d 469, 89–1 U.S. Tax Cas. (CCH) ¶ 9380, 27 Fed. R. Evid. Serv. 833, 63 A.F.T.R.2d 89–1483 (1989).

4 E.g., Moody v. I.R.S., 654 F.2d 795, 81–2 U.S. Tax Cas. (CCH) ¶ 9484, 48 A.F.T.R.2d 81–5170 (D.C. Cir. 1981).

5 In re Richard Roe, Inc., 68 F.3d 38, 43 Fed. R. Evid. Serv. 175 (2d Cir. 1995).

6 See Restatement of the Law Governing Lawyers § 142 cmt. c, at 461 (Proposed Final Draft No. 1, 1996).

7 In re American Cyanamid Co., 7 Fed. Appx. 930 (Fed. Cir. 2001).

8 U.S. v. Zolin, 491 U.S. 554, 109 S. Ct. 2619, 105 L. Ed. 2d 469, 89–1 U.S. Tax Cas. (CCH) ¶ 9380, 27 Fed. R. Evid. Serv. 833, 63 A.F.T.R.2d 89–1483 (1989).

9 U.S. v. Zolin, 491 U.S. 554, 109 S. Ct. 2619, 105 L. Ed. 2d 469, 89–1 U.S. Tax Cas. (CCH) ¶ 9380, 27 Fed. R. Evid. Serv. 833, 63 A.F.T.R.2d 89–1483 (1989).

10 In re General Motors Corp., 153 F.3d 714 (8th Cir. 1998).

11 U.S. v. Zolin, 491 U.S. 554, 109 S. Ct. 2619, 105 L. Ed. 2d 469, 89–1 U.S. Tax Cas. (CCH) ¶ 9380, 27 Fed. R. Evid. Serv. 833, 63 A.F.T.R.2d 89–1483 (1989).

12 In re Grand Jury Proceedings, 857 F.2d 710 (10th Cir. 1988).

13 In re Grand Jury Subpoenas, 144 F.3d 653 (10th Cir. 1998).

14 In re Sealed Case, 676 F.2d 793, Fed. Sec. L. Rep. (CCH) ¶ 98647, 82–1 U.S. Tax Cas. (CCH) ¶ 9335, 10 Fed. R. Evid. Serv. 490, 50 A.F.T.R.2d 82–5637 (D.C. Cir. 1982); In re Doe, 662 F.2d 1073, 9 Fed. R. Evid. Serv. 578, 64 A.L.R. Fed. 457 (4th Cir. 1981).

15 Hickman v. Taylor, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947); Upjohn Co. v. U.S., 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584, Fed. Sec. L. Rep. (CCH) ¶ 97817, 81–1 U.S. Tax Cas. (CCH) ¶ 9138, 7 Fed. R. Evid. Serv. 785, 30 Fed. R. Serv. 2d 1101, 47 A.F.T.R.2d 81–523 (1981); In re Special September 1978 Grand Jury (II), 640 F.2d 49, 6 Fed. R. Evid. Serv. 616 (7th Cir. 1980); In re Sealed Case, 676 F.2d 793, Fed. Sec. L. Rep. (CCH) ¶ 98647, 82–1 U.S. Tax Cas. (CCH) ¶ 9335, 10 Fed. R. Evid. Serv. 490, 50 A.F.T.R.2d 82–5637 (D.C. Cir. 1982).

16 In re Grand Jury Proceedings, 867 F.2d 539, 27 Fed. R. Evid. Serv. 705 (9th Cir. 1989).

17 See also Moody v. I.R.S., 654 F.2d 795, 81–2 U.S. Tax Cas. (CCH) ¶ 9484, 48 A.F.T.R.2d 81–5170 (D.C. Cir. 1981); In re Impounded Case (Law Firm), 879 F.2d 1211, 28 Fed. R. Evid. Serv. 974 (3d Cir. 1989).

18 Under 35 U.S.C.A. § 102(b), a patent is barred if the invention was commercially exploited or patented more than one year before the filing of the patent application, and under 35 U.S.C.A. § 103, a patent is barred if the invention was obvious in view of the prior art.

19 2 U.S.C.A. § 441e(a).

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