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TOO HIGH A PRICE FOR TRUTH: THE EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE FOR CONTEMPLATED CRIMES AND FRAUDS

A client who seeks legal assistance for the purpose of committing a crime or fraud will not be shielded by the attorney-client privilege. Professor Fried traces the history of the crime-fraud exception, discusses its rationale, and reviews its expansion. He then compares the exception with an attorney's ethical duty of confidentiality. Professor Fried concludes that the attorney-client privilege has been seriously eroded through an overly expansive interpretation and application of the crime-fraud exception and urges a re-examination of the developments in federal criminal law that have led to this erosion.

The client's privilege to prevent his or her attorney from testifying in court about matters that the attorney learned in professional confidence has long been qualified by an important exception. A client who has sought assistance for the purpose of committing a crime or fraud¹ (others add: 'or tort')² cannot require secrecy. The privilege ends when the client seeks to involve the attorney in *444 wrongdoing. It also ends when the client takes advantage of legal counsel to plan a crime or fraud, perhaps by tailoring evidence or testimony to the requirements of law that the client has learned from his or her attorney. Thus the exception applies whether the client discloses an evil intention to the attorney (making the attorney and client partners), conceals such intention (making the attorney a dupe), or forms such intention only after obtaining legal counsel.³ Therefore, there may be no privilege even though the attorney is innocent of any wrongdoing.

The principle of the exception suggests certain preliminary inquiries in every fact situation. Did the client consult the attorney with respect to past actions and their possible legal consequences so that the communications are privileged, no matter how wrongful or reprehensible the conduct, or was

the consultation with respect to the client's plans for future action? If the latter, did the client seek to know the boundaries of the law to conform his or her behavior to them or to transgress them?

These questions suggest problems of definition and of proof. Past and future wrongdoing are not easily separate categories.⁴ The client's purpose in *445 consulting an attorney is hard to determine without knowing what facts the client disclosed; whether the facts varied, intentionally or otherwise, from the truth; what the attorney advised; and whether the client took the attorney's advice. The confidentiality of the client's communications is at risk, however, if the communications must be disclosed before the court decides whether to admit them into evidence.⁵

Although the crime-fraud exception to the privilege has antecedents traceable to at least 1743,⁶ a host of practical questions about its application has arisen just in the past twenty years. A review of the digests suggests an extraordinary increase in attempts to compel the testimony of attorneys in both civil and criminal cases.⁷ This increase has caused an extensive development of the law concerning the attorney-client privilege in general⁸ and has led to new resolutions of such difficulties as the application of the privilege to corporate employees⁹ and in intracorporate actions, whether direct or derivative.¹⁰

The crime-fraud exception has not remained static in the course of this development. The courts have faced constant pressure to expand the reach of the exception, for example by finding an analogous exception to the work-product immunity established by [Rule 26\(b\)\(3\) of the Federal Rules of Civil Procedure](#)¹¹ or by steadily relaxing the standards for the showing that must be made by the proponent of the exception.¹² In addition, the criminalization of numerous kinds of corporate misbehavior and of violations of administrative law has extended the reach of the exception by defining as 'crime' many sorts of wrongdoing that do not qualify as civil fraud by traditional standards.¹³ This trend is inseparable from the great increase in prosecutions of business frauds and white-collar and organized crime, especially at the federal level. Such prosecutions often present formidable difficulties of proof, with a concomitant temptation to gather evidence from the mouths of the defendants' attorneys. On the civil side, *446 the crime-fraud exception is exploited in discovery to harass the opponent's attorneys and even to compel their disqualification.

Faced with grand jury subpoenas of potential defendants' attorneys and motions to take the depositions of opposing attorneys, the courts have not done well. Taking the crime-fraud exception as a clear-cut rule of law and applying it mechanically, without understanding its underlying principles or historical development, the courts have been led to expand the exception insensibly.¹⁴ Of course, in many cases, the courts' willingness to compel the testimony of attorneys

stems not from bad analysis but from a developed theory of the ethics of attorney-client relations that is hostile to the privilege.

This Article traces the history of the crime-fraud exception; discusses the varying rationales advanced in its favor at different periods; and reviews how the exception has been expanded, both procedurally and substantively, in recent cases. The crime-fraud exception is compared and contrasted with the attorney's ethical obligation or privilege to expose a client's wrongdoing in general, about which the profession has been at loggerheads for several years. The Article concludes that the exception has been abused and distorted, above all in the service of federal prosecutors, to the point where the attorney-client privilege has been seriously eroded.

I. THE PREHISTORY OF THE CRIME-FRAUD EXCEPTION

A. *The Annesley Case*

Any discussion of the history of the crime-fraud exception must begin with *Annesley v. Earl of Anglesea*,¹⁵ a case celebrated on the one hand for its facts, at once mysterious, lurid, and funny; and on the other hand for the unsurpassed cogency and vigor of its examination of the attorney-client privilege. Nonetheless, the case barely qualifies as an ancestor of the modern crime-fraud exception.¹⁶ If the opinion is read narrowly, the court merely held that there is no privilege for communications with attorneys unless the communications were *447 made to obtain legal counsel, which is a truism. For almost a century and a half, *Annesley* was rarely cited or discussed, even for this narrow proposition.¹⁷ The crime-fraud exception either went unrecognized or was confined to narrow limits until 1884 when the Queen's Bench, in *Regina v. Cox*,¹⁸ brought some order to the confused precedents and laid the foundation for the modern scope of the exception. Thus, this Article refers to the period from *Annesley* to *Cox* as the 'prehistory' of the exception. Nonetheless, *Annesley* is worth discussing, both for its intrinsic interest and because its presuppositions and conclusions are much at odds with the modern approach to the fraudulent client.

James Annesley, a young man of twenty-seven, came to England from the West Indies in 1742 with an extraordinary story. He claimed to be the son of Arthur Baron Altham, who died in Ireland in 1727, and the rightful heir both to the barony and to the Earldom of Anglesea (or Anglesey), to which his uncle had succeeded in 1737. As heir to the Earldom, he stood to inherit the largest estate in Great Britain, which consisted of Irish lands that had been granted to the first Earl by Oliver Cromwell in the mid-seventeenth century.

James claimed that upon the death of his father, the Baron, his wicked uncle kidnapped him, sold him 'for a common slave' (an indentured servant), and shipped him to the American colonies.

Uncle Richard was able to do this deed because Baron Altham had put away his supposedly unfaithful wife (after first cutting off her lover's ear) when James was seven. The Baron had then taken a mistress, who induced him to turn little James out on the streets of Dublin where he was supported by several people, partly out of kindness and partly for hope of advantage, until he was kidnapped. James' term of servitude was lengthened by several years because of an attempted escape, but eventually he was set free and shipped for England from the West Indies as a common seaman in the Royal Navy.¹⁹

***448** Soon after his arrival in England, however, James had the misfortune to shoot a gamekeeper. The Earl, hearing of this occurrence, saw a chance once more to put James out of the way. He commissioned his attorney of twenty years, John Giffard, to prosecute James for murder. Giffard did so, but the jury brought in a verdict of 'death by chance-medley'—accidental death—after a trial marked by an early use of forensic evidence.²⁰

James was now free to try the title to the estates by an action of ejectment brought in the Exchequer in Dublin.²¹ One would imagine that it would be easy to establish whether Lady Altham bore a son to her husband in 1715. The witnesses, however, offered reams of circumstantially detailed but flatly contradictory testimony. They could not even agree whether Lady Altham had been pregnant.²² (It is highly probable that both sides suborned perjury.) Therefore, the key testimony proved to be that of John Giffard, the Earl's longtime solicitor. As represented by plaintiff's counsel, Giffard would testify that the Earl said:

I am advised that it is not prudent for me to appear publicly in the prosecution, but I would give 10,000£ to have him hanged. . . . I am in great distress; I am worried by my wife in Ireland; Mr. Charles Annesley is at law with me for part of my estate, and . . . [i]f I cannot hang James Annesley, it is better for me to quit this kingdom and go to France, and let Jemmy have his right, if he will remit me into France 3,000£ a-year; I will learn French before I go.²³

Whether the Earl's statements were privileged was intensely debated. The court, consisting of three distinguished Barons of the Exchequer, finally concluded that they were not, and Giffard was permitted to testify before the jury. It took the court only two hours (some accounts say half-an-hour) to find for James.²⁴

***449** The view that this decision establishes the crime-fraud exception is based on certain sweeping arguments made by Annesley's attorneys. They assumed, or pretended to assume, that the Earl's remarks to his solicitor disclosed a wicked plan to have James hanged for a murder of

which he was innocent. It would be intolerable, they said, to conceal such a plan under the cloak of privilege. One of Annesley's attorneys, Serjeant Tisdall, stated:

If he is employed as an attorney in any unlawful or wicked act, his duty to the public obliges him to disclose it; no private obligations can dispense with that universal one, which lies on every member of the society, to discover every design which may be formed, contrary to the laws of the society, to destroy the public welfare. For this reason I apprehend, that if a secret, which is contrary to the public good, such as a design to commit treason, murder, or perjury, comes to the knowledge of an attorney, even in a cause wherein he is concerned, the obligation to the public must dispense with the private obligation to the client²⁵

Another of Annesley's attorneys, Mr. Harward, made a similar argument:

I take the distinction to be, that where an attorney comes to the knowledge of a thing that is malum in se, against the common rules of morality and honesty, though from his client, and necessary to procure success in the cause, yet it is no breach of trust in him to disclose it, as it can't be presumed an honest man would engage in a trust that by law prevented him from discharging that moral duty all are bound to, nor can private obligation cancel the justice owing by us to the public.²⁶

These are stirring statements of the public duty of the legal profession, but their application to the facts in *Annesley* is dubious. Was the Earl's desire to see Jemmy hanged 'a design to commit treason, murder or perjury'? James had certainly killed the gamekeeper; no evidence was presented to show that the Earl, in Ireland, knew any of the surrounding circumstances. Neither was there any testimony which showed that the Earl had bribed witnesses or jurors or otherwise sought to influence the outcome. The judges made clear that there was nothing unethical in Giffard's undertaking the prosecution, which he apparently did after a grand jury had already indicted the defendant.²⁷ Furthermore, Serjeant Tisdall's statement that all members of society are obliged to reveal illegal schemes which come to their knowledge may be morally unexceptionable, but it does not refer to any legal duty.

The judges' opinions were based upon plaintiff's argument that a privileged communication must be relevant to the subject concerning which the client consulted *450 his lawyer—that is, facts 'necessary to have been communicated.'²⁸ In retaining Giffard to prosecute James, the Earl had no need to discuss his hopes and fears or to express any opinion about 'Jemmy's right.' Therefore,

the Earl had spoken to Giffard not as his attorney but merely as a friend, and whatever expectation of confidentiality the Earl might have had, Giffard could be compelled to testify to facts that he did not learn in the role of an attorney.

Nor do I see any impropriety in supposing the same person to be trusted in one case as an attorney or agent, and in another as a common acquaintance. In the first instance, the Court will not permit him, though willing, to discover what came to his knowledge as an attorney, because it would be in breach of that trust which the law supposes to be necessary between him and his employer: but where the client talks to him at large as a friend, and not in the way of his profession, I think the Court is not under the same obligations to guard such secrets, though in the breast of an attorney.²⁹

Strictly speaking, the *Annesley* court did not create any exception to the attorney-client privilege, as this passage shows. Rather, it held that communications were confidential only if they were made in the pursuit of legal advice.³⁰ The focus, therefore, must be upon the content of the communication, and the judges must know just what was said before they can determine whether it was ‘necessary’ to the legal advice or not. There was no examination of the client's subjective purpose to determine if it was criminal or fraudulent.

The *Annesley* approach to communications in furtherance of civil fraud (as opposed to crime) was dominant for a very long time. The courts came only hesitantly to the idea that the disclosure of a communication that met all the conditions for privilege could be compelled because of the client's subjective purpose in making it.

B. From *Annesley* to Cox

The history of the crime-fraud exception in the century and a half after *Annesley* cannot be reduced to a single line of development. Two generalizations *451 can be made, however. First, the exception applied only to crimes *mala in se*.³¹ *452 Confidential communications in furtherance of fraud upon creditors, for example, were protected. Second, in the few cases in which the court ordered an attorney to testify about a client's civil frauds, the analysis, as in *Annesley*, was always that the lawyer was not acting as an attorney with respect to the particular communication; hence, it was not confidential. The case of an attorney who is a client's partner in fraud is merely a special case of this general rule. In cases of civil fraud, the theory of an exception to the attorney-client privilege simply was not used.

The limitation of the exception to crimes can be abundantly illustrated; in fact, the party seeking to compel the attorney's testimony did not, in many cases of civil fraud, even refer to the exception

in support of his or her position.³² *453 Only one pre-1884 case applied the exception to civil wrongdoing. In *Russell v. Jackson*³³ an attorney was compelled to testify to a deceased testator's intention that a legacy, apparently absolute, was really upon a secret trust for the establishment of a Socialist school in accordance with the principles of Robert Owen.³⁴ Apparently the beneficiaries denied that the legacy was upon a trust, whereas the next-of-kin desired to prove the trust and then have it declared void as illegal because it was inimical to the Christian religion.

The court held that the attorney-client privilege did not apply in a will contest—not because the testator was dead but because ‘[t]he disclosure in such cases can affect no right or interest of the client.’³⁵ The court went on, however, to identify the client's supposedly illegal purpose as fraudulent:

Where a solicitor is party to a fraud no privilege attaches to the communications with him upon the subject because the contriving of a fraud is no part of his duty as solicitor; and I think it can as little be said that it is part of the duty of a solicitor to advise his client as to the means of evading the law.³⁶

Thus the privilege was overcome because the court determined the ultimate issue in the case—the illegality of a bequest to found a Socialist school—before any evidence had been taken, as was ultimately required, on the relationship of Socialist to Christian principles.³⁷ This decision could be viewed as a striking anticipation of the workings of the fraud exception in its twentieth century form, but it is hard not to see it as an ideological deformation.

Russell aside, however, the limitation of the exception to crimes was so well established that even a judge who disapproved of it as a cloak for fraud felt himself bound by it. *Bank of Utica v. Mersereau*³⁸ concerned partners who, in fraud of their other legitimate creditors, confessed judgment to a friendly creditor, the Bank of Utica, in an amount greater than that actually owed. This judgment was intended also to secure later advances, which were not actually made. The Bank used upon the judgment, and certain members of the partnership called their attorney to testify that the transaction was fraudulent and collusive. Other members, however, refused to waive the privilege. Chancellor Walworth held that the attorney's testimony was inadmissible:

[I]t appears that the whole circumstances which [the attorney] was called upon to disclose . . . were conversations of his clients in reference to the subject of his professional employment; which conversations it is wholly improbable they would have held with him if they had not been under the supposed seal of professional confidence. . . . [W]here the attorney is professionally employed, any communication

made to him, by his client, with reference to the object or the subject of such employment, is under the seal of professional confidence, and is *454 entitled to protection as a privileged communication. Such appears to be now the settled rule of the courts of England³⁹

The Chancellor went on to deplore his own ruling:

The seal of professional confidence I believe has never been held to cover a communication made to an attorney to obtain professional advice or assistance as to the commission of a felony or other crime which was *malum in se*. The opinion of Chief Baron Gilbert certainly was that the privilege of attorney and counsel did not extend to such cases. . . . And as no one is entitled to the advice or assistance of counsel, or of an attorney, to enable him to do an illegal act, if the question had arisen for the first time in this case, I should have no hesitation in deciding that the communications made by Hoffman & Mersereau to their attorney were not privileged; because they were made for the purpose of getting his professional assistance in the perpetration of a fraud upon their creditors. It is as contrary to the duty of an attorney . . . to aid his client . . . in the perpetration of a fraud, or in the violation of any law of the state, as it is to aid him in the commission of a felony; although the moral turpitude of the act may be much greater in the one case than in the other. I can therefore see no good reason for extending the principle of privileged communications to the first class of cases and not to the last. The practice, however, appears to have been otherwise for more than a century and a half; and I do not now feel authorized to adopt a new rule on the subject.⁴⁰

The mostly English precedents from which Chancellor Walworth drew his settled rule were overruled after another generation,⁴¹ but until they were, no American court felt itself authorized to depart from them.

The courts, however, could compel an attorney's testimony about a client's civil fraud by determining that the client was not seeking legal advice or—what is essentially the same thing—that the lawyer was not acting in the role of attorney. Such a procedure was not strictly speaking an invocation of any exception to the privilege and the courts did not characterize it as such. *Cobden v. Kendrick*⁴² is the leading and only unambiguous example.⁴³ *Cobden* was an action *455 at law to recover money that the plaintiff had paid to the holder of his promissory note. After plaintiff had confessed judgment, defendant boasted to his attorney ‘that he had only given 10 £ in cash,

and his promissory note for it; and that he knew it was a lottery transaction.’⁴⁴ The implication, presumably, is that the defendant had not given legal consideration for the note.

The *Cobden* court held that the attorney must testify.⁴⁵ The client's damaging admission to his attorney was not made in the course of instructing him how to proceed. Rather, ‘what was said by the client was in exultation to his attorney for having before deceived him as well as his adversary. . . .’⁴⁶

The client's remark in *Cobden* is analogous to the Earl of Anglesea's implied admission that James was the true heir to the earldom and that the Earl must either hang him or settle with him.⁴⁷ However, in *Cobden* the client made his remark after his action had been settled, although final judgment had not been entered.⁴⁸ It was arguably an admission of past wrongdoing, which customarily has been regarded as privileged. Nonetheless, the decision is obviously correct because Kendrick did not admit his fraud for the purpose of obtaining legal counsel, but rather for the purpose of boasting. A confidence was certainly intended, but not a *professional* confidence.

In keeping with this principle, the courts began to recognize that an attorney who actually assisted a client in perpetrating a civil fraud for the attorney's own benefit could be compelled to testify.⁴⁹ No cases, however, actually found such participation. Such an attorney would be ‘acting for himself, though he might also be employed for another’⁵⁰ and might be compelled to testify in the *456 attorney's role as *particeps criminis*.⁵¹ An 1850 dictum of Vice Chancellor Cranworth elaborates upon the reason:

[I]t is not accurate to speak of cases of fraud contrived by the client and solicitor in concert together, as cases of *exception* to the general rule. They are cases not coming within the rule itself, for the rule does not apply to all which passes between a client and his solicitor, but only to what passes between them in professional confidence; and no Court can permit it to be said that the contriving of a fraud can form any part of the professional occupation of an attorney or solicitor.⁵²

Nothing in this statement seems to require that the attorney receive any benefit other than a fee from the fraud.

As late as 1863, however, Chancery found it impossible to compel a solicitor to testify concerning a client's affairs when the client carried out a fraud with the solicitor's assistance but without the solicitor's knowledge. In *Charlton v. Coombes*,⁵³ defendant was a widow who would cease to receive benefits under a trust established by her late husband if she remarried without the trustees'

consent. She secretly remarried and then petitioned Chancery for an order compelling the trustees' consent, representing herself as still unmarried. This action, which apparently failed, was in fraud of her children's rights under the trust.⁵⁴ In a later action by the trustees against her estate to recover sums improperly paid to her on the supposition that she was still unmarried, the trustees sought to examine her solicitor's files. The Vice Chancellor said:

[T]here was no allegation in the bill connecting the solicitor who claims the privilege with the fraud in respect of which relief is sought The bill, no doubt, says that the client of the solicitor committed a fraud; but in order to take the case out of the rule of privilege, there must be some specific charge in the bill connecting the solicitor with the fraud. . . . There is no particular charge in the bill as to those letters⁵⁵

Thus, for the privilege to be overcome, the court required both that the solicitor have been a conscious participant in the client's fraud and that the documents sought have been instrumentalities of fraud. *Charlton* therefore remains a great distance from the modern conception that the client's secret improper purpose opens all communications between the client and his or her attorney to judicial scrutiny.

II. *REGINA v. COX*: THE EXCEPTION TAKES SHAPE

*Regina v. Cox*⁵⁶ was the first case in which a court held unequivocally that there is no privilege when a client consults an attorney for the purpose of committing a crime or fraud, without revealing such purpose. *Cox* was a criminal *457 prosecution for a conveyance in fraud of creditors,⁵⁷ but the facts are indistinguishable from any civil fraud, and the decision has always been understood as applying equally to civil and criminal cases.⁵⁸ Like most seminal decisions in the common-law courts, *Cox* gathered what support it could from anticipations in dicta and claimed to state the true rule implicit in former decisions. The ten judges in *Cox* acknowledged, however, that 'we differ from one decision of the full Court of Common Pleas, and from two decisions at *Nisi Prius*'⁵⁹ on facts difficult to distinguish.

One of the defendants in *Cox*, Railton, consented to a judgment against him for libel. The judgment was for a nominal amount, but carried with it substantial costs.⁶⁰ A bill of sale that purported to convey Railton's stock to defendant Cox before the taxation of costs frustrated plaintiff's attempt to satisfy the judgment out of the stock.⁶¹ Cox was not, however, a bona fide purchaser because he was Railton's (secret) partner in the newspaper business. Cox and Railton were charged with preparing and fraudulently back-dating a memorandum dissolving the partnership.⁶²

At the trial, their solicitor was permitted to testify to his conversation with Railton and Cox, which occurred after costs had been assessed against the former.⁶³ He had told his clients that only a bona fide sale would prevent the property from being seized under an execution and that a sale by Railton to Cox would not pass muster because of the partnership. Railton asked, ‘Does anyone know of the partnership except you and ourselves?’⁶⁴ The solicitor answered, ‘No, not that I am aware of, only my clerks.’⁶⁵ This conversation presumably was offered as evidence that the partnership was still in existence after the date of the supposed dissolution.

The judges upheld the admission of this testimony. The heart of their reasoning is notably ingenious:

In order that the rule may apply there must be both professional confidence and professional employment, but if the client has a criminal object in view in his communications with his solicitor one of these *458 elements must necessarily be absent. The client must either conspire with his solicitor or deceive him. If his criminal object is avowed, the client does not consult his adviser professionally, because it cannot be the solicitor's business to further any criminal object. If the client does not avow his object he reposes no confidence, for the state of facts, which is the foundation of the supposed confidence, does not exist.⁶⁶

The court here made a bold play upon the word ‘confidence.’ Vice Chancellor Cranworth, among others, previously had said that there is no privilege except for ‘what passes between [client and solicitor] in professional confidence.’⁶⁷ This statement is entirely consistent with the *Annesley* approach:⁶⁸ there can be no *professional* confidence when the attorney is either invited to participate in a fraud, which is no part of the attorney's professional role, or when the attorney is told some fact not needed to perform a professional function.

The *Cox* court, however, for the first time conceived that the client has a role to play. No professional confidence existed because the clients failed to take the attorney into their confidence. Because the privilege is intended to make perfect frankness possible, there is no privilege unless the client is perfectly frank. The court equated the technical requirement of ‘confidentiality,’ which both before and since the *Cox* decision has meant that no one but the client and his or her attorney is privy to the communication, with the meaning of the word in ordinary speech. The crime-fraud exception in its modern form, with its focus on the client's intention, was born of this rhetorical figure.

But the court's clever antithesis between 'conspiring' with the attorney and 'deceiving' the attorney is an inadequate justification for the exception even on the facts of *Cox*. There was no evidence before the court to show that Railton had any intention of fraudulently conveying his property at the time he consulted his solicitor. In fact, defendants' intention to prepare fraudulent articles of dissolution may have been formed as a result of the solicitor's advice. Even if the formation of a secret partnership could be evidence of a disposition to future fraud on the part of defendants, (1) such action was not itself fraudulent; (2) the existence of the partnership, far from facilitating the fraudulent conveyance, was an obstacle to it; and (3) the decision did not turn on any such finding.⁶⁹

Thus, there is a middle case, not recognized by the court, between conspiring with an attorney and deceiving an attorney. That is the case in which the *459 client discovers from an attorney that the client's objective cannot be legally attained. As a result, the client decides to commit a fraud, aided by the attorney's unwitting advice. Whether or not *Cox* was such a case, the exception has been applied to such cases since *Cox*.⁷⁰ The court's formulation of the exception—that it applies when 'the accused person may have consulted his legal adviser . . . before the commission of the crime for the purpose of being guided or helped in committing it'⁷¹—is therefore not strictly accurate. The client's purpose when he or she consults an attorney may be irrelevant. The only relevant question may be: Did the client commit a fraud after consulting the attorney?

Implicit in this question are all the difficulties that bedevil modern courts in attempting to apply the exception. Whether the client in fact committed a fraud is commonly the ultimate issue in the case. The best evidence of fraud (perhaps the only evidence) may be the attorney-client communication. If the availability of the privilege further depends on whether the client abused his or her attorney's counsel in perpetrating the fraud, the court must know what the attorney advised the client before it can determine whether the privilege applies.

The Queen's Bench saw some of these problems in the making, but declined, no doubt wisely, to lay down any rule:

We were greatly pressed with the argument that, speaking practically, the admission of any such exception to the privilege of legal advisers as that it is not to extend to communications made in furtherance of any criminal or fraudulent purpose would greatly diminish the value of that privilege. The privilege must, it was argued, be violated in order to ascertain whether it exists. The secret must be told in order to see whether it ought to be kept. We were earnestly pressed to lay down some rule as to the manner in which this consequence should be avoided. The only thing which we feel authorized to say upon this matter is, that in each particular case the Court must determine upon the facts actually given in evidence or proposed to be given in evidence, whether it seems probable that the accused person may have consulted his

legal adviser . . . before the commission of the crime for the purpose of being guided or helped in committing it.⁷²

The rule of *Regina v. Cox* was rapidly adopted in the United States. The case was cited as early as 1886 in Texas⁷³ and was discussed extensively by the New Jersey Court of Chancery in 1891.⁷⁴ Not surprisingly, certain early cases *460 that relied upon the newly stated rule would have fit comfortably within older modes of analysis.⁷⁵

By 1891 the United States Supreme Court had approved the *Cox* rule, introducing, however, a supposed limitation that is probably a dead letter today. *Alexander v. United States*⁷⁶ concerned the murder of an Indian, the business partner of defendant, in Indian territory. After the victim disappeared, Alexander consulted his attorney, saying that his partner had run off with partnership funds and inquiring whether he could recover his share by keeping certain horses belonging to the partnership. The attorney's testimony was admitted to impeach certain other statements of defendant about his partner's disappearance. The Supreme Court held that admitting the testimony was error,⁷⁷ noting that the conversation was innocent on its face and occurred *after* the supposed commission of the crime for which Alexander was being tried. The conversation could only be viewed as in furtherance of a scheme to defraud the victim by assuming the very thing in issue: that Alexander murdered his partner for gain.⁷⁸

This reasoning seems sound enough, although it invites an analysis, which the Court did not make, of the state of the government's case at the time the attorney's testimony was offered.⁷⁹ The Court further stated, essentially without explanation, that the 'rule announced in *Cox* should be limited to cases where the party is tried for the crime in furtherance of which the communication was made.'⁸⁰ The communication was obviously not in furtherance of the *murder* and therefore was inadmissible. The Court provided no justification for this limitation, which seems to be mere dictum. The limitation has never been squarely overruled, but in several cases the federal courts have disregarded it; there appear to be none in which it has been followed.⁸¹

The subsequent development of the future crime or fraud exception to the attorney-client privilege has taken place almost entirely in the United States.⁸² *461 This development is best traced by turning attention to the difficult issues raised by the exception and treating them individually.

III. WHAT SHOWING OF FRAUDULENT INTENT IS NECESSARY TO DISSOLVE THE PRIVILEGE?

As previously suggested, the new formulation of the exception led to an emphasis on whether the client consulted an attorney in furtherance of a scheme of fraud.⁸³ In the great majority of instances, the commission of a crime or fraud is the ultimate issue in the case, and the attorney-client communication is relevant precisely as evidence of such commission. A mere allegation of fraud should not be enough to overcome the privilege, however. It is desirable to avoid the circularity of relying upon the confidential communication itself to prove the client's fraudulent intent, which in turn serves as the necessary justification for disclosure. This difficulty, anticipated by at least one court even before *Cox*,⁸⁴ is central to the modern history of the crime-fraud exception. More particularly, the courts are constantly confronted with the following questions:

(1) What quantum of evidence is necessary to overcome the presumption in favor of the confidentiality of attorney-client communications?

(2) Can the communication itself serve as the necessary evidence?

(3) If so, should the determination be made by the judge after an *in camera* examination of the communication?

In recent years, the courts have lowered the evidentiary standard that the opponent of the privilege must meet to overcome the privilege⁸⁵ and generally have rejected any requirement that there be evidence of fraud independent of the confidential *462 communication itself.⁸⁶ They have attempted instead to reconcile the competing claims of confidentiality and disclosure by *in camera* review of the disputed evidence.

A. Must the Opponent of the Privilege Make Out a Prima Facie Case?

After an initial period of confusion, especially in England,⁸⁷ the courts began to define the burden upon the opponent of the privilege as that of making out a prima facie case of crime or fraud on the part of the person whose attorney is asked to testify.⁸⁸ Of course, the verbal formulas that courts adopted as the test or standard to apply were often not especially revealing.⁸⁹ However, it is undoubtedly significant that American courts in recent years have explicitly abandoned the prima facie test in favor of a lesser burden, sometimes characterized as 'some foundation in fact.'⁹⁰

The 1932 case of *Clark v. United States*⁹¹ is commonly cited in support of the prima facie test.⁹² Clark, a juror in a criminal trial for mail fraud, was found *463 guilty of criminal contempt for answering questions falsely during her voir dire examination.⁹³ Apparently it was her fixed purpose to get on the jury to vote for acquittal.

Justice Cardozo found that other jurors' testimony about what occurred in the jury room could be compelled despite the immemorial privilege of secrecy, drawing an explicit analogy to the crime-fraud exception of the attorney-client privilege.⁹⁴ The privilege, he stated, is overcome when there is 'a showing of a prima facie case sufficient to satisfy the judge that the light should be let in.'⁹⁵ In *Clark* not only had a prima facie case been established, but the juror's perjury had been so abundantly proven by independent evidence that the admission of evidence concerning discussions in the jury room would, if erroneous, have been harmless.⁹⁶ The opinion thus provides little guidance as to the minimum quantum of evidence necessary to overcome the privilege.

Equally influential was the case of *United States v. Bob*,⁹⁷ in which the defendant was charged with using the mails to defraud in the sale of worthless mining stock. Bob's attorney was compelled to testify concerning Bob's connection with certain mining companies in the recent past, to defeat a claim that the statute of limitations had run.⁹⁸ The court held that the testimony of a co-conspirator had already established a prima facie case against Bob and that the privilege had thereby been overcome.⁹⁹

Although certain courts continue to cite *Bob* and *Clark* with approval,¹⁰⁰ others have explicitly criticized the prima facie requirement, saying that the usefulness of attorney testimony in establishing fraud justifies a lower burden. In a 1953 decision the burden was described as 'evidence . . . giving color to the charge.'¹⁰¹ Another opinion described the establishment of a prima facie case as a 'mechanical rule' that may be appropriate for jury trials but rejected it in favor of 'a substantial doubt as to whether or not the charges were true' standard for cases in which the judge has the option of *in camera* inspection.¹⁰² In two recent cases the Colorado Supreme Court held that the opponent of the privilege need establish only a 'foundation in fact,' characterized as an 'intermediate *464 burden of proof,' because of the difficulty of establishing a prima facie case of fraud at the discovery stage.¹⁰³

B. The Rejection of the 'Independency' Test

So far we have assumed that some quantum of evidence, however defined, is a prerequisite for the introduction of otherwise privileged evidence. No such rule was made explicit,¹⁰⁴ however, until

the United States Court of Appeals for the Ninth Circuit decided *United States v. Shewfelt*¹⁰⁵ in 1972. The rule has since been rejected by other courts as an unwarranted obstruction.¹⁰⁶

The *Shewfelt* court upheld a conviction for multiple counts of mail fraud.¹⁰⁷ The trial court permitted defendant's attorney to testify as to communications clearly showing that defendant had instigated the scheme.¹⁰⁸ The court held that such testimony was properly admitted:

[B]efore the privileged status of these communications can be lifted, the government must first establish a prima facie case of fraud independently of the said communications. . . . Herein . . . prior to the testimony of attorney Walton, the government had adduced substantial evidence proving falsehoods in the complaints and mailings which served as the bases of the charges brought against the appellants.¹⁰⁹

This statement of the prima facie rule promptly became known as the *Shewfelt* or 'independency' test. In the context of the facts of *Shewfelt*, the test seems to be dictum. In *Bob*,¹¹⁰ cited as authority in *Showfelt*,¹¹¹ the court merely held that a prima facie case must be first established before the privilege is overthrown.¹¹²

Courts in later decisions have seized upon these deficiencies to attack *Shewfelt* as essentially unsupported.¹¹³ One court has remarked that 'in appropriate *465 cases the subpoenaed material itself may provide prima facie evidence of a violation,'¹¹⁴ without explaining how one determines what is an appropriate case.

Only one decision has provided any reasons for rejecting the independency test. These reasons seem valid for a limited class of cases. *Kockums Industries Ltd. v. Salem Equipment, Inc.*¹¹⁵ was a patent infringement action. Defendant claimed that plaintiff sold the device in question more than one year before filing a patent application. Therefore, the patent was fraudulently obtained and invalid, and the attempt to enforce it gave rise to counterclaims for unfair competition and antitrust violations.¹¹⁶ Defendant moved to compel discovery of numerous documents prepared by plaintiff's attorneys relating both to the application for the patent and to the commencement of the action at bar.¹¹⁷

The court held that defendant had established a 'prima facie case of technical fraud' on the Patent Office independent of any of the disputed documents.¹¹⁸ Plaintiff sought to parlay this finding into a ground for discovery of attorney-client communications *after* the issuance of the patent,

claiming that the infringement action was a further step in the same fraud or, alternatively, a 'fraud upon the court.'¹¹⁹

The court found plaintiff's argument analytically unsatisfactory. A superior analysis would turn on the nature of the proof required to make out the defendant's counterclaims and the documents' relevance to such proof. The bringing of a patent infringement action in bad faith, with the knowledge that the patent is invalid, and for the purpose of intimidating competitors, is an antitrust violation, as well as unfair competition. However, the presumption that such actions are brought in good faith can be overcome only by clear and convincing evidence. The best, and perhaps the only, evidence of the plaintiff's good faith would be the communications with its attorney concerning the decision to bring the action. It is unrealistic to expect the defendant to meet its burden independent of such communications, as a precondition for seeing them.¹²⁰ This fact constitutes an 'extraordinary circumstance' of the sort required before the court will disregard the *Shewfelt* rule and examine the communications *in camera*.

***466** At the same time, the court carefully noted that the patent sued upon was invalid because of the apparently deliberate concealment of relevant prior art.¹²¹ This concealment strongly suggested that plaintiff knew or must have known that it was suing on a void patent, which gave rise to an inference of bad faith. Thus the court's review of the privileged communications was based on something more than defendant's bare allegation.

Kockums is representative of a class of cases in which one party's bad faith is an element in the cause of action. Whether the party charged with bad faith followed the advice of counsel is usually highly relevant.¹²² In *Kockums* the plaintiff-in-counterclaim had the burden of showing bad faith by clear and convincing evidence—a burden made immeasurably more difficult by the privilege. An analogy may be drawn to cases (particularly federal civil rights claims against public officials) in which good faith is an affirmative defense. It is familiar law that the mere assertion of a good faith defense may waive the privilege as to legal advice received because the nature of such advice is highly relevant to one's state of mind.¹²³ Even when the mere assertion of a good faith defense does not constitute a waiver, a party cannot expect to rely on the testimony of his or her attorney at trial if the party has not made the privileged communications available at the discovery stage.¹²⁴ This analogy suggests the correctness ***467** of the *Kockums* approach when applied with due regard to difficulties of proof and to the specific relevance of the communications sought.¹²⁵

C. In Camera Review

Not surprisingly, courts have increasingly employed the device of *in camera* inspection to sidestep the issue of what precise quantum of evidence is necessary to overcome the privilege.¹²⁶ It seems

logical to say that *in camera* inspection, which is a smaller intrusion upon the confidentiality of the attorney-client relationship than is public disclosure, should be permitted on the basis of a smaller quantum of evidence of crime or fraud. Some courts, however, have endorsed the *substitution* of inspection by the judge for the safeguard of requiring independent evidence of fraud.¹²⁷ When courts follow this procedure, the plaintiff may first induce the court to read the defendant's confidential communications on an unsupported charge of crime or fraud; the *prima facie* case needed to justify their introduction into evidence is then constructed out of the communications themselves.

In camera inspection of ostensibly privileged documents is common on motions to quash grand jury subpoenas. In that context, the case for disclosure is not necessarily based solely on the attorney-client communications. Rather, the government may also submit affidavits and transcripts of grand jury testimony *ex parte*, and government attorneys will argue for the applicability of the exception in chambers. As a result, the attorney and the client cannot meaningfully dispute the court's finding that the government has established a *prima facie* case of fraud.¹²⁸ On occasion, this fact has led the client to reverse his or her *468 usual position and demand that the court inspect the confidential communications or examine the attorney *in camera*, rather than rely solely on secret government evidence. In *In re Grand Jury Proceedings (Vargas)*¹²⁹ the trial court ordered the production of the attorney's records solely on the basis of evidence submitted *ex parte*. The United States Court of Appeals for the Tenth Circuit held that the district court had not abused its discretion by refusing to examine such records in chambers:

[O]nce the trial judge has concluded that the privilege does not apply because the government has made such a *prima facie* showing, the trial court need only conduct an *in camera* inspection of the documents if there is a possibility that some of them may fall outside the scope of the exception to the privilege.¹³⁰

The Tenth Circuit's position is consistent with judicial hostility toward 'minitrials and preliminary showings' as a prerequisite for the enforcement of grand jury subpoenas.¹³¹ Judge Skelly Wright has gone so far as to say that the difficulty of *in camera* inspection itself justifies the imposition of a lower standard for overcoming the attorney-client privilege.¹³²

With no great exaggeration one may conclude that the courts, when supervising a grand jury, will examine attorney-client communications *in camera* if necessary to overcome the privilege ('necessary' because the government has no extrinsic evidence of fraud). Courts may refuse to do so, however, when such examination is the only means by which the witness can vindicate the the privilege in the face of secret government affidavits.

Does the confidentiality of grand jury proceedings justify this hostile treatment of the privilege? The United States Court of Appeals for the Seventh Circuit has said that when the attorney-client privilege is overcome by secret grand jury testimony and affidavits submitted *ex parte*, the privilege is not waived, but may still be asserted at trial—at which time the prosecution may of course argue *469 for the applicability of the exception.¹³³ The court, in fact, advanced this conclusion as a justification for allowing the privilege to be overcome by secret evidence. The publication of the confidential communications to the grand jury was appropriate so long as the communications did not thereby become automatically admissible in court.

Apart from the question whether this solution illustrates an adequate understanding of the values served by the attorney-client privilege,¹³⁴ at least one other court has denied that the privilege survives the disclosure of the confidential communications to the grand jury. In *United States v. Dyer*¹³⁵ the United States Court of Appeals for the Fifth Circuit upheld a subpoena compelling an attorney to testify to his discussions with his client, a member of the New Orleans Planning Commission.¹³⁶ Apparently as a result of these discussions the attorney had returned \$25,000 to a developer the next day with a letter explaining merely that the money was being given back because of new developments.¹³⁷

The Court remarked:

[I]n the interest of judicial economy we pause to note that we find no rational basis for concluding that the privilege is defeated for purpose of grand jury testimony but nonetheless is resurrected at trial. . . . When the confidence is broken the values their [sic] protection vindicated would no longer weigh in the balance against the strong policy supporting the right to every person's evidence. . . . Of course, if the evidence at trial persuades the trial court that the earlier established crime or fraud exception is in fact not established the privilege could be recognized.¹³⁸

It is difficult to understand the court's final qualification. Perhaps the court meant that when the attorney's testimony was admitted before the grand jury the burden shifted to the defendant to show at trial that no *prima facie* case of fraud or crime had been established. Ordinarily, of course, the burden is on the proponent of the exception.

IV. THE GROWTH IN FEDERAL CRIMINAL JURISDICTION INCREASES THE REACH OF THE CRIME-FRAUD EXCEPTION

As the discussion above has illustrated, courts have broadened the crime-fraud exception by steadily lowering the procedural threshold for its application. The quantum of evidence required to trigger the exception has decreased, and the confidential communication itself has been used to provide the necessary *470 evidence that the consultation was in furtherance of fraud, often after *in camera* examination. The scope of the exception has also been increased recently by the rapid and continuous growth in the federal criminal law, particularly in the proliferation of statutes intended to attack white-collar crime and to enforce administrative regulation schemes. As more types of wrongdoing traditionally within the province of the civil law are criminalized, it becomes easier to make out a case that the defendant consulted his or her attorney in furtherance of crime. The exception naturally becomes more available as the number of predicate crimes increases.

Until a century ago, the exception was only available if the client consulted the attorney intending to commit some crime that was *malum in se*.¹³⁹ The difficulty, which gave rise to the result deplored by Chancellor Walworth in *Bank of Utica v. Mersereau*,¹⁴⁰ was that crimes *mala in se* were not co-extensive with actions generally held to be morally wrong.¹⁴¹ In particular, a fraudulent conveyance was merely *malum prohibitum*, perhaps because it was neither an indictable offense at common law nor a statutory felony, but a statutory misdemeanor of Elizabethan date. The decision of the Queen's Bench in *Regina v. Cox*¹⁴² was revolutionary partly because it disregarded the distinction between *mala in se* and *mala prohibita*. On the other hand, *Cox* can be read as reaffirming the importance of the real or underlying distinction by focusing on the blameworthiness of the clients' intention as viewed by the standards of ordinary commercial morality. By contrast, the overwhelming modern tendency is to extend the exception to all crimes, without regard to the blameworthiness of the client's exploitation of the attorney's advice. If a client consults an attorney in furtherance of some action prohibited by statute, the privilege is dissolved without any examination of whether the breach is morally reprehensible.

As a result, the crime-fraud exception has been expanded in two ways. First, the imposition of criminal penalties as an ordinary sanction for the violation of administrative and regulatory schemes naturally increases the reach of the exception. Second, the increase in the number of statutes prescribing criminal penalties for such offenses as making false reports to the government or failing to make full disclosure in various commercial contexts tends to make moot the question whether a broad or narrow definition of fraud shall control for purposes of the exception. If the mere act of knowing misrepresentation is criminal, it is irrelevant whether such elements of common-law fraud as reliance and damages are present. These two modes of enlargement overlap extensively because so many regulatory statutes of relatively recent date are concerned with full disclosure.

471 A. *The Expansion of Criminal Sanctions Broadens the Reach of the Exception

The complexities of modern administrative regulation have occasioned a great—one authority says ‘amoeba-like’¹⁴³—growth in federal criminal law. Criminal penalties for violations of the Sherman Act,¹⁴⁴ the Securities Act of 1933,¹⁴⁵ and the Securities and Exchange Act of 1934,¹⁴⁶ and for willful tax evasion¹⁴⁷ have long been established. Recent concern for protection of the environment has brought many new crimes into existence.¹⁴⁸ In an effort to attack organized crime, new federal legislation criminalizes activities legitimate in themselves.¹⁴⁹ Above all, the post-Watergate era has seen a new demand for full disclosure of actual and potential conflicts of interest and for conformity to stringent ethical standards on the part of public officials and corporations, reflected in new criminal legislation such as the Foreign Corrupt Practices Act.¹⁵⁰

The Racketeer Influenced and Corrupt Organizations Act (RICO),¹⁵¹ adopted as part of the Organized Crime Control Act of 1970,¹⁵² is a striking example of a modern criminal statute (also giving rise to civil liability)¹⁵³ whose enforcement has been aided by the exception to the rule forbidding the gathering of evidence from the mouth of the defendant's attorney. RICO criminalizes the investment in a legitimate business of money ‘derived directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt . . . in . . . any enterprise . . . in interstate commerce.’¹⁵⁴ RICO also forbids *472 use of racketeering activity to acquire or maintain an interest in an enterprise,¹⁵⁵ conduct of an enterprise's affairs through a pattern of racketeering activity,¹⁵⁶ and conspiracy to violate any provision of RICO.¹⁵⁷ On occasion prosecutors have attempted to prove RICO violations by compelling the defendant's lawyer to testify to legal advice given about investments in legitimate businesses, supposedly made with proceeds of racketeering activity. Such advice is in furtherance of the violation, even though the attorney neither knows nor suspects the source of the money.¹⁵⁸ It also makes no difference that the client does not know about RICO and is unaware that the investment of his or her ill-gotten gains is itself an offense. RICO, of course, is aimed at making the prosecution of organized crime easier (and making the ‘laundering’ of criminal receipts more difficult) precisely by turning otherwise legal acts into criminal offenses. Some acts proscribed by RICO are therefore merely *mala prohibita*, but the crime-fraud exception still applies.

Federal criminal jurisdiction has also been sensibly expanded by the new interest of federal prosecutors in pursuing white-collar crime and political corruption. Prosecutions may be brought under statutes of long standing such as the Hobbs Act¹⁵⁹ and the mail and wire fraud acts.¹⁶⁰ The latter make it a *473 felony to use the mails, wire, radio, or television communications in interstate commerce for the purpose of executing a scheme or artifice to defraud. They have been interpreted by some courts as effectively criminalizing breaches of private fiduciary duty that cause no tangible injury to the beneficiary, as well as betrayals of the public trust by elected officials of

the sort often called ‘cronyism’—that is, favoritism not clearly attributable to bribery or extortion and effected without damage to the public treasury.¹⁶¹

This recent emphasis on white-collar crime presents prosecutors with new temptations to make the examination of attorneys an integral part of their investigations (often through use of the grand jury subpoena power), as well as new opportunities to do so. This trend has been much decried by civil libertarians.¹⁶² It is paralleled by the penchant of the IRS, the SEC, and other agencies for demanding the confidential communications of attorneys in the course of civil investigations.¹⁶³ In all such investigations, the prosecutor or agency is *474 likely to argue that the communications sought were in furtherance of the crime or breach under investigation¹⁶⁴ and therefore not privileged. Matters are made worse for the defendant by a procedural difficulty. Although the United States attorney may be compelled to identify which statutes' possible violation is the subject of a grand jury investigation, it is not possible to contest a subpoena on the ground that the specific wrongdoing alleged is not prohibited by the statute cited. Such a determination can only be made after indictment, by a motion to quash.¹⁶⁵ The result is that the target's attorney may be compelled to testify on the grounds that the client consulted him or her in furtherance of actions which do not, in fact, constitute an offense. There is little protection against a prosecutor's most reckless imaginings about the reach of some criminal statute. And once the privilege is overcome, the attorney must testify about *all* confidential communications.

*United States v. Dyer*¹⁶⁶ illustrates the extraordinary ploys often used by prosecutors. Dyer, a real estate developer and a member of the New Orleans Planning Commission, was indicted for extortion in violation of the Hobbs Act.¹⁶⁷ Dyer's attorney had written¹⁶⁸ and hand-delivered¹⁶⁹ a letter to the alleged victim (who was cooperating with the FBI) in which the money allegedly extorted was enclosed. The letter gave no real reason for the return of the money, but Dyer explained in a telephone conversation with the informant that he had solicited the money to test the informant's willingness to corrupt public officials.¹⁷⁰ The government sought a superseding indictment, claiming that the return of the money constituted the obstruction of justice in violation of  18 U.S.C. § 1512. Dyer's attorney was subpoenaed to testify before the second grand jury about the conversations that preceded the return of the money.¹⁷¹ *475 By seeking a superseding indictment, the prosecutor sought to turn a past offense—extortion—into a continuing one and thus to strip the cloak of the privilege from any confession or admission made by Dyer.¹⁷² Had the prosecutor been incorrect in characterizing the return of the money as an ‘obstruction of justice,’ the attorney probably could not be compelled to testify to his client's admissions at trial because the failure of the superseding indictment would mean that the communications were not made in furtherance of crime.¹⁷³ The prosecutor, however, would have had the advantage of cross-

examining the attorney about the details of his client's confession despite an ultimate determination that the crime-fraud exception was never applicable.¹⁷⁴

It is not surprising that the proliferation of administrative crimes should have led prosecutors to rely more heavily upon the crime-fraud exception. But such proliferation has also presented plaintiffs' attorneys with an extraordinary opportunity, in purely civil actions, to compel the discovery of the confidential communications of defendants' counsel, on the grounds that such communications were in furtherance of some crime. It does not matter whether such crime gives rise to a civil cause of action¹⁷⁵ or whether the cause of action sued upon is *476 intimately connected with such alleged crime. Particularly popular are allegations that the client consulted an attorney in furtherance of a conspiracy to monopolize trade in violation of the Sherman Act or to defraud the Patent Office. Now that the Supreme Court has upheld an ingenious application of the civil aspect of RICO to contract disputes between legitimate businesspersons,¹⁷⁶ we may expect to see discovery requests based upon the theory that legal advice concerning the interpretation of contracts was obtained in furtherance of racketeering activity. One suspects that such discovery efforts are made at times merely to embarrass the other attorney or to force a change of counsel.

*International Telephone & Telegraph Co. v. United Telephone Co.*¹⁷⁷ is an interesting example. International Telephone & Telegraph Co. (ITT) had a contract to install a telephone system at a retirement village. Defendant sought to block the contract by filing a complaint with the Florida Public Service Commission, which was mooted by the cancellation of the contract.¹⁷⁸ ITT thereupon brought an action for tortious interference with contract and antitrust violations; it sought to discover privileged communications between defendant and its attorney concerning the institution of the complaint with the Public Service Commission.¹⁷⁹ ITT's theory was that a review of the communications would reveal the complaint to be frivolous and a sham. The communications, therefore, were in furtherance of a felony—the attempt to monopolize interstate trade or commerce in violation of section 2 of the Sherman Act.

The court refused to allow discovery of the attorney-client communications for failure to make a colorable showing that the proceedings were indeed a sham.¹⁸⁰ The court thus rejected plaintiff's theory for overcoming the privilege because of its circularity. ITT was assuming the very thing to be proved: a review of the communications would show that defendant's attorneys had advised their client that the action was without merit.¹⁸¹ Apart from the court's conservative approach to the required preliminary showing, the opinion evinced no disapproval of plaintiff's theory. The merit of such theory, from ITT's point of view, was that the privileged material would be discoverable without any showing of common-law fraud or fraud upon the court because the bringing of a frivolous action was under these circumstances supposedly also a felony.

477 B. *The Criminalization of False Reporting Expands the Definition of Fraud for the Purpose of the Exception

There are more than one hundred statutes that proscribe false statements to the Government.¹⁸² The most inclusive of these statutes is probably  18 U.S.C. § 1001:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.¹⁸³

Other more specific federal examples can be found in title 18, chapter 47, ‘Fraud and False Statements,’ forbidding, *inter alia*, the making of false statements for the purpose of inducing HUD to accept, extend, or renew a loan guarantee;¹⁸⁴ the making of false statements by a contractor or others with respect to work done, or to be done, on a federal highway project;¹⁸⁵ and the making of false statements concerning citizenship or residency status.¹⁸⁶ These prohibitions are apart from the criminal penalties set forth for misreporting or concealing material facts in, for example, the tax and securities contexts, and the catchall prohibition of ‘unfair or deceptive acts or practices in or affecting commerce’ in the Federal Trade Commission Act.¹⁸⁷

The existence of numerous statutes criminalizing false reporting and misrepresentations to third persons tends to make moot any debate over whether the exception applies only to communications in furtherance of common-law fraud. The elements of the common-law tort of deceit are misrepresentation of a material fact, scienter, reliance, and damages.¹⁸⁸ Only one modern case has required evidence of these elements as a condition to the applicability of the exception,¹⁸⁹ and there the party seeking disclosure could easily have argued on the *478 facts that the confidential communication was in furtherance of a breach of  18 U.S.C. § 1001. In contrast, courts in two New Jersey cases, *In re Callan*¹⁹⁰ and *Fellerman v. Bradley*,¹⁹¹ denied that the exception is available only when common-law fraud has been committed, extending it to ‘fraud upon the court’:

There is no reason to believe that the use of the word fraud in [New Jersey Evidence Rule 26(2)(a)] is to be limited to conventional notions of tortious frauds. Acts constituting fraud are as broad and as varied as the human mind can invent. Public policy demands

that the fraud exception to the attorney-client privilege . . . be given the broadest interpretation.¹⁹²

The Alaska Supreme Court has similarly characterized the bad-faith nonpayment of an insurance claim as ‘civil fraud’ for the purpose of the exception,¹⁹³ although the assertion of frivolous defenses to an insurance claim has little in common with the tort of deceit. Apart from these three cases, no court in considering the crime-fraud exception has discussed the meaning of fraud.¹⁹⁴

This omission is less surprising when one notes the great predominance of federal cases in this area. In both civil and criminal cases it is almost always possible to allege that the defendant has consulted an attorney in furtherance of a federal crime; it is then irrelevant whether such crime can properly be called a fraud as well. Perhaps the paucity of state cases involving the crime-fraud exception reflects the lack of a parallel increase in state criminal jurisdiction in administrative matters.

***479** Of course, cases do exist in which the courts have applied the crime-fraud exception without ever characterizing the wrongdoing involved as crime or fraud. *In re Grand Jury Subpoenas Dated December 18, 1981 and January 4, 1982*¹⁹⁵ is an instructive example. A grand jury was investigating Brooklyn Congressman Fred Richmond, who, in violation of House Rule 47, supposedly had earned an amount greater than fifteen percent of his government salary from the Walco National Corporation, a company of which he had formerly been chairman.¹⁹⁶ Richmond's pay was disguised as a pension for past services. The grand jury subpoenaed all the communications between Walco's attorney and Richmond concerning the pension agreement, and the district court ordered production of the communications on the grounds that they were all in furtherance of Walco's fraud on the House Ethics Committee.¹⁹⁷ Such ‘fraud’ consisted of a letter from Walco's attorney seeking an advisory opinion regarding Richmond's pension arrangements and representing that Richmond would resign as Chairman of Walco. In fact, the resignation was a sham. There was, however, no evidence that the attorney was aware of any wrongdoing.

The court, ignoring the elements of the common-law tort of deceit, did not explain how the drafting of the pension agreement furthered any ‘fraud’ by Walco or indeed what the fraud was. The advisory opinion was not binding on the Committee, and it is hard to see how the Committee relied upon the letter. Moreover, it was Richmond who supposedly violated Rule 47, not Walco, and the purpose of the misrepresentation was to enable Richmond to continue sitting in Congress. Finally, although in some sense the Committee conferred a benefit upon Richmond, any ‘detriment’ suffered by the Committee was highly inchoate.

The court failed to discuss any of these points, stating merely that ‘[t]he government has established a prima facie case that Walco sought the attorney's advice to further a future wrongdoing.’¹⁹⁸ Yet if the court had relied on ‘crime’ instead of ‘fraud’ it could have reached the same conclusion. Walco used its attorney as its agent for the making of a false representation to Congress—a violation of 18 U.S.C. § 1001.¹⁹⁹

*480 V. ‘IN FURTHERANCE OF CRIME OR FRAUD . . .’

Thus far this discussion has revealed how the crime-fraud exception has been expanded procedurally, through a lowering of the evidentiary threshold for its application, and substantively, by a rapid increase in the number of predicate crimes, especially in the federal arena. There is a third, less easily categorizable, manner in which the application of the exception has been expanded: courts have loosely applied the requirement that the confidential communications whose production is sought have been made in ‘furtherance’ of crime. This looseness is probably not accidental and cannot be explained solely as a result of judicial hostility toward the privilege. Rather the ‘abuse of discretion’ standard for the review of evidentiary determinations, when applied by appellate courts to decisions about the availability of the exception, has resulted in conclusory opinions that provide no clear standard for the future.²⁰⁰ As a result the exception has expanded by an accretion of misunderstandings.

The ‘in furtherance’ element of the crime-fraud exception is certainly opaque. It cannot be taken literally to mean that the communications must somehow ‘advance’ the commission of a crime or fraud. This fact is shown by the ‘two-lawyer’ cases in which the client discloses to one attorney facts inconsistent with recovery and then changes the story when telling it to a second attorney. Very properly, courts have held the first communication discoverable, although obviously it is the second that was perjured and served the client in committing fraud.²⁰¹ Similarly, it is unclear how a communication from attorney to client can be in furtherance of fraud when it simply warns that a proposed disclosure, possibly required by law, may prevent a desired result.²⁰² More generally, how can any communication from attorney to client, as opposed to one from client to attorney or from the attorney to a third person, ‘further’ a crime or fraud unless it reveals that the attorney is an accomplice in the client's illegal purpose?²⁰³

In attempting to define the ‘in furtherance’ element of the crime-fraud exception, *481 it will be helpful to set the ‘two-lawyer’ cases aside. Their real rationale is simple. Just as a client cannot expect an attorney knowingly to introduce perjured testimony,²⁰⁴ a client cannot expect the same attorney to keep silent when a second attorney introduces such testimony unknowingly.²⁰⁵ Analysis is not advanced by saying that the first attorney was consulted ‘in furtherance of fraud

upon the court.’ Similarly, one should ignore the occasional case in which the actual or supposed confidential communication was being offered for a nontestimonial purpose.²⁰⁶

What is left are the many cases in which the client commits a crime or fraud after consulting an attorney or induces the attorney to commit a fraud on the client's behalf. If the attorney wittingly joins in the perpetration of a fraud, there is no analytical difficulty. The communications between attorney and client were obviously in ‘furtherance’ of fraud. The attorney's assistance may, however, be unwitting. The client may start out with a clear understanding of the necessity for withholding or misrepresenting material facts, often to conceal previous wrongdoing. If the attorney then files a report required by law in reliance *482 upon such false information, the confidentiality of the relationship has clearly been abused in furtherance of crime or fraud.²⁰⁷ One difficulty raised by this sort of case has already been considered—how to show that the client knowingly concealed the truth, which is the basis for overcoming the privilege, without first examining the confidential communications.²⁰⁸ There is (or was) a salutary presumption that, in the absence of evidence to the contrary, the consultation had a lawful purpose.²⁰⁹ The workings of such a presumption can be seen in an amusing way in an old Kentucky case, *Cummings v. Commonwealth*.²¹⁰ Defendant was a hired hand charged with the murder of his seventy-three-year-old employer in conspiracy with the latter's wife, age twenty-six, and her parents, for the purpose of getting the old man's farm. About a month before the murder, defendant consulted an attorney about bringing an action for slander against his employer, who had accused him of having an affair with his wife. When asked if the charge was true, Cummings replied, ‘Hell, yes!’ The attorney, who doubled as a prosecutor, testified to this undoubtedly relevant admission over Cummings' objections. The Kentucky Supreme Court reversed the conviction, saying:

[A] person may have a grievance which does not constitute a cause of action and yet in good faith consult with an attorney in reference to a contemplated suit, and be advised as to his rights, and, in such case, be entitled to the privilege²¹¹

The lawfulness of Cummings' purpose in consulting his attorney was not vitiated by the unfortunate revelation that the husband could raise the defense of truth in a slander action, so long as Cummings did not evince any intention to do the old man bodily harm.

Unfortunately, there is a tendency in this area for courts to assert that the cock's crowing made the sun rise, or at least that the client's purpose must have been unlawful because the consultation was followed by the commission of a crime.²¹² This sort of confusion may not be common, but courts have lost sight *483 of the principle of causation with some frequency. *Pollock v. United States*²¹³ is a good example. The government sought to prove the willful filing of fraudulent

income tax returns by the 'increase in net worth' method.²¹⁴ To this end, it called defendant's attorney to testify to Pollock's deposit of currency with him in escrow in connection with real estate purchases. The court held that such testimony was not privileged because the communications concerning such deposit were in furtherance of the crime of tax evasion.²¹⁵ This holding amounts to saying that it is criminal to spend legitimate earnings on a legitimate object if one has not paid taxes thereon, and therefore tax evaders cannot communicate in confidence with an attorney about any subject (at least if they have paid a fee).

*United States v. Horvath*²¹⁶ demonstrates a similar confusion. The client consulted his attorney for assistance with some investments. Apparently by way of justifying his special concern with confidentiality, the client explained that he used to be in the marijuana distributing business, at least implying that such business was the source of the funds he now wished to invest.²¹⁷ The court held that the implicit confession was not protected by the privilege because it was in furtherance of the crime of tax evasion.²¹⁸ Once again, the fact of having and spending the money is evidence of tax evasion, but is not criminal in itself. Telling how the money was acquired is not an act in furtherance of tax evasion. The result is defensible on the basis of the *Annesley v. Anglesea*²¹⁹ analysis, however.²²⁰ The client's admissions were not necessary to the purpose for which he consulted the attorney and therefore were not privileged.

In contrast, in a recent decision, *Pritchard-Keang Nam Corp. v. Jaworski*,²²¹ the court was unusually careful in its treatment of the causation requirement. International Systems & Controls Corporation (ISC), like many companies in the 1970s, established a voluntary special audit committee, assisted by special counsel, to investigate improper payments to representatives of foreign governments.²²² ISC noted the ongoing investigation in its Form 10K for fiscal year 1977.²²³ ISC then sold a subsidiary that had constructed a natural gas processing *484 plant in Algeria to the plaintiff, Pritchard-Keang Nam Corporation (PKN), allegedly representing that the debt owed by the Algerian government for the plant was collectible in full.²²⁴ Fulbright & Jaworski (Fulbright), ISC's general counsel, furnished an opinion letter in connection with the sale stating that there was no governmental investigation pending or threatened against the subsidiary.²²⁵ Eight months later, the SEC filed suit against ISC for violations of securities laws by payments to government officials and intermediaries in connection with the contract to build the Algerian plant. ISC admitted the fact of payment as part of a settlement without, however, admitting that such payments violated Algerian law.²²⁶ As a result, the Algerian government refused to pay the balance due on the grounds that ISC had solicited the contract by making illegal payments to private persons.²²⁷

PKN thereupon sued Fulbright for negligence in rendering its opinion letter and sought discovery of the draft report of special counsel to the audit committee, which general counsel had seen before drafting the opinion letter.²²⁸ The district court ordered production of the report, but was reversed by the court of appeals.²²⁹

Obviously the report was relevant to the issue of the state of Fulbright's knowledge at the time the opinion letter was prepared and would be evidence of illegality if its contents suggested ISC actions in violation of SEC regulations. However, the report was communicated to Fulbright long before ISC requested the letter. The report was not prepared in furtherance of any fraud (there was no allegation that either the report or the SEC filing based upon it were deliberately inaccurate) nor was it communicated to Fulbright in furtherance of a fraud because Fulbright saw the report before the sale to PKN was contemplated.²³⁰ 'That the report may help *prove* that a fraud occurred does not mean that it was *used* in perpetrating the fraud.'²³¹

The court defended its exclusion of admittedly probative evidence on policy grounds. Corporations would not conduct internal investigations of wrongdoing if investigators' reports were discoverable.²³² Moreover, only the report, as a client communication, was not discoverable; the facts contained therein were not privileged and could be discovered from other sources.²³³

VI. CLIENT IDENTITY AND THE CRIME-FRAUD EXCEPTION

Pollock and *Horvath*²³⁴ are two of many cases in which an attorney was *485 asked to testify regarding the identity of a client, the fact of retainer, the amount of legal fees paid, or the deposit of money or other property with the attorney. It has always been recognized that these are facts within the attorney's knowledge, rather than confidential communications,²³⁵ and that therefore these facts are not privileged. But at least in the twentieth century, it also has been recognized that the disclosure of the client's identity may be highly incriminating. Many courts have concluded that fundamental fairness in certain circumstances prohibits the incrimination of the client by his or her attorney's testimony regardless of whether the privilege applies. The result has been the development of at least three separate but overlapping exceptions to the rule that the identity of the client and the fees paid are not confidential matters: (1) the 'communications rationale' exception—the client's identity is protected when the revelation of the client's name will connect the client to a privileged communication the content of which is already known;²³⁶ (2) the 'last link' exception—the client's identity and the fact of retainer are privileged when their release would provide the 'last link' in a chain of evidence tending to incriminate the client, ordinarily because the government knows that an offense was committed and lacks only the identity of the offender;²³⁷ and (3) the 'legal advice' exception—disclosure of the client's identity, the fact of retainer or the payment of fees is privileged when there is a strong probability that disclosure would implicate

the client in the very criminal activity concerning which legal advice was sought.²³⁸ The crime-fraud *486 exception, in turn, has been applied since the 1970s to defeat these new exceptions. This application generally depends on the proposition that the retaining of an attorney to defend a third party is an action in furtherance of the defendant's crime.

*United States v. Hodge & Zweig*²³⁹ is a much-cited example. The IRS was seeking to establish by the 'net worth' method that one Sandino, a suspected drug dealer, had evaded taxes on his illegal earnings. This investigation proceeded almost simultaneously with a grand jury investigation into the activities of Sandino and his associates and eventually resulted in a recommendation that Sandino be criminally prosecuted for tax evasion.²⁴⁰ The IRS served a civil summons on the law partners who represented Sandino to discover all fees which Sandino had paid for his own defense and that of named and unnamed others. The attorneys objected that such clients would be linked with Sandino in a drug conspiracy (and some would be identified for the first time) by virtue of Sandino's having paid their fees.²⁴¹ Sandino and certain others had been indicted and had plead guilty to charges of conspiracy to import marijuana by the time the district court ordered Hodge and Zweig to comply with the summons.²⁴²

On appeal, the court held that the identity of the unknown clients was privileged because disclosure would implicate them in the very criminal activity for *487 which legal advice had been sought.²⁴³ But Sandino had paid their legal fees to acquit a promise made to them when they entered into the conspiracy.²⁴⁴ Sandino's illegal purpose in so doing therefore justified the exposure of the identity of his unknown co-conspirators.

The decision in *Hodge & Zweig* is troubling in several respects. The civil summons was proper only on the premise that the IRS investigation was not being carried out in aid of the police or the United States Department of Justice and that no recommendation had yet been made for Sandino's criminal prosecution.²⁴⁵ If so, the names of those whose defense was paid for by Sandino were irrelevant; the IRS only needed to know the fact and amount of payment. But the court imposed no such restriction, apparently reasoning that the privilege, once overcome, is gone for all purposes. Also troubling is that the prima facie case for the existence of the conspiracy came from the guilty pleas of Sandino and others to the allegations in the information that superseded the grand jury's indictment,²⁴⁶ even though such pleas hardly meant that the specific facts alleged in the information were all true, particularly as to promises supposedly made to persons whom the government could not identify.

Does *Hodge & Zweig* support the conclusion that a promise to pay for the criminal defense of another, if made before the offense has occurred, is necessarily an act in furtherance of crime? *In re Grand Jury Proceedings (Pavlick)*²⁴⁷ appears to answer in the affirmative. An individual

the court referred to as 'Anonymous' promised three sailors that they would be taken care of if caught on a marijuana-smuggling venture.²⁴⁸ They were caught, convicted, granted immunity from further prosecution, and asked where the funds came from to hire their defense attorney and post their bail bonds. They said that they did not know, whereupon Pavlick, their attorney, was asked the same question.²⁴⁹ The court held that he must answer, both because the revelation of the benefactor's identity would not form the 'last link' in the chain of evidence incriminating him and because Pavlick had been hired in furtherance of crime.²⁵⁰

In *Pavlick* the full bench of the United States Court of Appeals for the Fifth Circuit reversed a decision by a Fifth Circuit panel.²⁵¹ Judge Politz, who wrote the panel's majority opinion, dissented on rehearing. In both opinions he emphasized that Pavlick was not retained until the marijuana had been seized and *488 the three sailors were in jail.²⁵² The fact that Anonymous retained Pavlick in fulfillment of his past promise to take care of the three did not mean that the retainer was in furtherance of *future* crime. Therefore, Judge Politz viewed 'the consulting of Pavlick as reflecting the undisclosed client's concern about detection for past offenses and as an attempt to secure timely assistance in the event of his apprehension.'²⁵³ In his concurrence, Judge Rubin expressed the concern that the crime-fraud exception could be construed to apply to agreements for the indemnification of corporate officers and directors in future civil or criminal antitrust actions.²⁵⁴ Such agreements might be viewed as consideration for future wrongdoing, thereby destroying the attorney-client privilege between the indemnifying corporation and its attorneys.

At least one case has built the *Pavlick* rationale into a paradoxical structure—the 'self-cancelling exception.' *In re Grand Jury Proceedings (Fine)*²⁵⁵ concerned an inquiry into the ownership of the motor vessel *Nordakrum*, found scuttled and burning off the Louisiana coast. It had been used to smuggle marijuana into the United States. Attorney Fine, on behalf of an unnamed client, had arranged for the formation of Labol, a Netherlands Antilles corporation in whose name the *Nordakrum* was registered. Fine was subpoenaed by the grand jury and asked the client's name.²⁵⁶ The government's theory, accepted by the district court, was that these circumstances made out a prima facie case that Labol was formed in furtherance of a criminal scheme to smuggle marijuana into the United States. Therefore, Fine was ordered to testify.²⁵⁷

The United States Court of Appeals for the Fifth Circuit held, to the contrary, that this sequence of events, although it raised a 'strong suspicion,'²⁵⁸ did not make out a prima facie case.²⁵⁹ But if the formation of Labol was on its face legitimate, the revelation of the client's identity could not be incriminating; therefore, the 'last link' exception²⁶⁰ did not apply and Fine could be ordered to testify.²⁶¹ The court further stated that revealing the client's identity would tend to incriminate the

client *only* if Labol had been formed in furtherance of a criminal purpose. The attorney therefore would be required to testify under any possible state of the facts.

The court acknowledged that this construction placed the client in a ‘Catch-22.’²⁶² There was, however, no double bind except in the mind of the court. First, the revelation of the client's identity would be incriminating regardless *489 of whether Labol was originally formed for a criminal purpose. It is a necessary link (if not the *last* link) in the chain that the government must forge to convict the client of crime. Second, the client made no affirmative allegation that Labol was formed for innocent purposes, estopping him from invoking the ‘last link’ exception. He merely denied that the government had met its burden of proof on the question whether Labol was formed in aid of a criminal enterprise. The court's confusion probably stemmed from Fine's testimony that Labol was, so far as he knew, formed for legitimate and independent reasons, but such testimony was consistent with a secret improper purpose on the client's part and therefore with an attack on the applicability of the crime-fraud exception.

The self-cancelling exception may prove to be merely a sport in the history of the privilege. Four federal courts of appeals have already rejected the idea that fundamental fairness forbids the gathering of evidence from the mouth of a suspect's attorney unless such evidence is derived from, or will certainly betray, a client communication.²⁶³ This rejection is consistent with (although not mandated by) the United States Supreme Court's treatment of self-incrimination and the attorney-client privilege in *Fisher v. United States*,²⁶⁴ and one would not be surprised to see it followed by several other circuits.

Nonetheless, *Fine* is significant because it is a special case of a common confusion—the failure of the courts to recognize the necessity of a causal connection between consulting an attorney and the subsequent commission of a crime. The true meaning of the ‘in furtherance’ requirement is that there must be evidence of such a connection before the crime-fraud exception may be brought into play.²⁶⁵

***490 VII. ATTORNEY-CLIENT PRIVILEGE AND THE ATTORNEY'S ETHICAL DUTY OF CONFIDENTIALITY**

The narrowing of the attorney-client privilege described in this Article is implicitly based upon a general view not only of the attorney-client privilege but also of the character and social role of the relationship between attorney and client. While the courts have been narrowing the privilege, the legal profession has been engaging in an intense and sometimes acrimonious debate over the limits of the attorney's ethical duty of confidentiality to the client. This debate has had a very public aspect, as attorneys have struggled over amendments to the *Model Code of Professional Responsibility* (Model Code) and its successor, the *Model Rules of Professional*

Conduct (Model Rules). It is remarkable that the proponents of a broad view of the ethical obligation of confidentiality have largely carried the day, at least in the official Model Rules. The attorney's obligation to keep a client's secrets in the ordinary course of events, including plans to commit crime or fraud, and the obligation to testify against the client under the crime-fraud exception are formally reconcilable.²⁶⁶ However, there is a profound theoretical tension between the view of the attorney-client relationship implicit in the modern law of privilege and the view of the relationship that underlies the ethical duty of confidentiality as most attorneys understand it. Although the primary focus of this Article is on the crime-fraud exception, it is necessary to make at least a cursory attempt to elucidate the issues at stake.

A. The 'Instrumental' and 'Intrinsic Value' Justifications for the Attorney-Client Privilege

For at least half a century most courts and scholars have taken a narrow view of the proper role of the attorney-client privilege. According to this view, its only justification is to make possible the obtaining of informed legal advice, which clients would not seek if they thought that their every disclosure could be used against them. '[The privilege] protects only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege.'²⁶⁷ This rationale for the attorney-client privilege has been called the 'instrumental justification.'²⁶⁸ It follows that the privilege must be strictly construed because its application always derogates from the search for truth and therefore contradicts the principal purpose of a trial, whether civil or criminal.²⁶⁹ In the absence of any empirical studies, it is permissible to infer that the *491 privilege, even within its present narrow boundaries, is still fulfilling its only appropriate function so long as clients still confide in their attorneys.²⁷⁰ Indeed, some authorities, concluding that there is no ready substitute for legal advice,²⁷¹ see no reason the privilege should not be narrowed still further or even abolished.²⁷²

By contrast, a minority of commentators has sought to develop a theory of the attorney-client relationship that treats its human claims more generously. The other evidentiary privileges—those between husband and wife, priest and penitent, and therapist and patient—are recognized for the purpose of protecting intimate relationships from forced betrayal. Clients often have a relationship of similar intimacy with their attorneys. The particular loyalty to which such a relationship gives rise is the necessary starting place for a theory of the attorney-client relationship.²⁷³ The claims of society, which find expression as the attorney's *492 institutional obligations, do not necessarily take precedence over the moral claims of the relationship. In this view, the values protected by the privilege are identical with the core values of the fourth and fifth amendments to the Constitution and are not limited to guaranteeing the effective assistance of counsel.²⁷⁴ There is little moral difference between convicting a client by testimony compelled from his or her own mouth and convicting a client by testimony compelled from his or her attorney's mouth. This view may be

called the ‘intrinsic value’ theory of the privilege.²⁷⁵ It is probably the view held by most working attorneys.

B. The Duty of Confidentiality and the Crime-Fraud Exception

One virtue of the ‘intrinsic value’ theory is that it helps answer the vexing question of what limits, if any, should be imposed upon the ethical obligation of attorneys to keep their clients’ secrets. May the attorney ever disclose the criminal or fraudulent acts of clients, quite apart from compulsion by a court? Is disclosure ever ethically required? A difficult aspect of these questions is the relationship between the limits of the duty of confidentiality and the crime-fraud exception. The broadening of the exception during the last fifteen years has coincided with an intensive re-examination of the duty of confidentiality, accompanied by often rancorous debate. The version of the Model Rules adopted by the ABA House of Delegates in 1983 can be called a victory for the proponents of the ‘intrinsic value’ theory. As a result, the tension between the testimonial disclosures mandated by the crime-fraud exception and attorneys’ understanding of their ethical obligations is greater than ever.

The ethical entitlement or obligation of the attorney to disclose a client’s wrongdoing does not correspond perfectly with the crime-fraud exception to the attorney-client privilege, nor should it be expected to. The duty of silence is not *derived* from the attorney-client privilege any more than the secrecy of the confessional is derived from the priest-penitent privilege. Rather, the deference with which courts are willing to treat these ethical obligations gives rise to the several privileges. Nothing in logic or principle requires courts to honor attorneys’ own conceptions of their duty of confidentiality in full. For example, so far as courts are concerned, the attorney may keep confidential only what he or she learned directly from the client (‘communications’), whereas the three official formulations *493 of the attorney’s duty all apparently protect facts learned during the representation, including the client’s physical characteristics, identity, fee arrangements, and wholly gratuitous confessions of wrongdoing.²⁷⁶ In fact, ‘the ethical obligation of a lawyer to guard the confidences and secrets of his client . . . exists without regard to the nature and source of information or the fact that others share the knowledge,’²⁷⁷ which is emphatically untrue of the privilege.

The Model Code, adopted in August 1969, left the right or obligation of attorneys to disclose their clients’ past or contemplated frauds in substantial confusion. Disciplinary Rule 4-101(C)(3) permitted an attorney to reveal ‘the intention of his client to commit a crime and the information necessary to prevent the crime.’ ‘Crime’ of course is not ‘fraud,’ although Canon 37 of the *Canons of Professional Ethics*, from which the Disciplinary Rule was derived, has been interpreted to include ‘fraud’ in at least two states.²⁷⁸ Disciplinary Rule 7-102(B) originally provided:

A lawyer who receives information clearly establishing that:

(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal.²⁷⁹

This obligation is actually broader in scope than the crime-fraud exception because it requires the attorney to reveal past frauds the attorney has learned of from the client's own mouth²⁸⁰ and is not limited to frauds carried out with the attorney's help (witting or unwitting).

***494** As these implications sank in, there was a general protest from the working bar.²⁸¹ Finally, in 1974 the ABA House of Delegates amended Disciplinary Rule 7-102(B)(1) by adding the words 'except when the information is protected as a privileged communication.'²⁸² Thus the substantive law of privilege, in particular the rapidly developing crime-fraud exception, became the measure of the attorney's obligation to reveal client fraud.²⁸³

This might seem a workable compromise, although it meant that the ABA had surrendered the national character of the Model Code and indeed the power to define the scope of the duty of confidentiality to the inconsistent course of local decision. What is worse, because the privilege applies only to the courtroom and its scope is determined in the context of an adversary proceeding, it is impossible to say whether the privilege exists outside such context. These problems were addressed the following year in a way that unfortunately created new difficulties. In a Formal Opinion, the ABA Committee on Professional Ethics equated 'privileged communications' with 'those confidences and secrets that are required to be preserved by DR 4-101.'²⁸⁴ Because DR 4-101 includes all 'information gained in the professional relationship,' whether or not it is privileged, the result was to obliterate the disclosure obligation of DR 7-102(B)(1), except in the improbable event that the attorney learned of the fraud in a manner wholly independent of the relationship with the client.²⁸⁵

This and other problems gave rise to widespread agreement that the Model Code was unsatisfactory.²⁸⁶ As a result, the ABA formed a Commission on Evaluation of Professional Standards in 1977 charged with the reform of the Model Code. The Commission decided to eliminate compulsory disclosure of client wrongdoing except when necessary to avoid actually assisting in crime or fraud or to rectify the results of such assistance in the past²⁸⁷ and decided to ***495** replace compulsory disclosure with permissive disclosure:

A lawyer may reveal . . . information [relating to representation of a client] to the extent the lawyer believes necessary:

....

(2) To prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm, or substantial injury to the financial interest or property of another;

(3) To rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.²⁸⁸

The Commission's stated intention in formulating this Proposed Model Rule was to tie the attorney's right to reveal client wrongdoing as closely as possible to the scope of the evidentiary privilege, which the authors identified as one source of the duty of confidentiality,²⁸⁹ and to 'generally applicable principles of agency law,' which prohibit an attorney from committing torts, including the tort of fraud, on behalf of a client.²⁹⁰ But the requirement of substantial injury was a significant departure from the obligation to disclose intended crimes, presumably including administrative violations, found in both the *Canons of Professional Ethics* and the Model Code. The requirement was, and was probably intended to be, a refusal to follow the substantive extension of the crime-fraud exception characteristic of the preceding decade.²⁹¹

The discretion to disclose conferred upon the attorney by the Proposed Model Rule was far from neutral. The comments make clear that disclosure, except to prevent knowing assistance in a criminal or fraudulent act, is a luxury made available to the morally scrupulous at their own risk.²⁹² An exercise of discretion in favor of silence is unchallengeable from the standpoint of professional ethics, whereas disclosure is always subject to review.

Having thus strikingly limited the obligation to disclose client fraud, the drafters must have been shocked at the mauling that the Proposed Model Rules took on the floor of the ABA House of Delegates. Discretionary disclosure under Model Rule 1.6 was limited to the prevention of crimes threatening death *496 or substantial bodily harm, eliminating disclosure 'to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's

services had been used.’²⁹³ The obligation to ‘reveal material facts to third persons to avoid assisting in crime or fraud’ was qualified in the adopted version of Model Rule 4.1 by the addition of the words ‘unless disclosure is prohibited by Rule 1.6.’ This amendment, replacing the obligation to disclose with an obligation merely to withdraw from representation, nullifies the disclosure requirement in precisely the way that Formal Opinion 341 of the Committee on Professional Ethics nullified the disclosure requirement of Disciplinary Rule 7-102(B)(1).²⁹⁴ Even the obligation of disclosure to the tribunal did not escape unscathed.²⁹⁵

Thus, the conflict between the instrumental theory of the crime-fraud exception and the ethical duty of confidentiality is now more acute than it has ever been. Practitioners have defiantly brought the disciplinary rules into agreement with the ‘intrinsic value’ theory of the attorney-client relationship, which probably always has been the working morality of most attorneys.²⁹⁶ This morality, when applied to the problem of voluntary disclosure, simply forbids the attorney to become a client's partner or agent in crime or fraud, by withdrawal from representation if necessary (but even then without unduly prejudicing the client's affairs).²⁹⁷ Beyond that prohibition, there is no duty to prevent injury to others, least of all by the revelation of anything the attorney knows by virtue of his or her professional role.

As we have seen, this view implicitly contradicts the attorney's obligation to testify under the crime-fraud exception. The ethical problems that flow from this conflict were resolved by the Model Code in a simple way. When called to testify, the attorney is required to assert the privilege if he or she thinks it applicable.²⁹⁸ *497 The attorney may even invite a citation for contempt if that is an appropriate method of getting the issue of privilege finally resolved on appeal. But the Model Code explicitly provides that ‘a lawyer may reveal . . . confidences or secrets when . . . required by law or court order.’²⁹⁹ Moreover, failure ultimately to comply with such order is a violation of Disciplinary Rule 7-102(A)(3).

Thus under the Model Code the attorney has an almost unbounded duty of confidentiality, far broader than the privilege, which when it collides with the privilege reverses field and becomes an *ethical* duty to disclose. The new Model Rules reach the same result in a curiously indirect way. They set forth the obligations of confidentiality without making any reference to the possibility of court-compelled disclosure. Both the attorney's duty to assert the privilege and the duty to comply with a court order appear only in the Comment to Model Rule 1.6 and cannot be inferred from anything in the text.³⁰⁰

Thus both the Model Code and the Model Rules make the attorney's duties as an officer of the court independent of and always superior to the duties to his or her client. The rationale presumably is that the legal system is entitled to obedience as the embodiment of important societal judgments and values, and attorneys, as representatives of that system, have a special responsibility to it.

Therefore, attorneys can never find themselves in a conflict of loyalties, which might lead at best to an unseemly spectacle and at worst to genuine tragedy. But a layperson might be excused for wondering what validity the professional ethics of confidentiality have when they conflict so violently with the considered judgment of the courts. Or to put it crassly, by what magic does a subpoena convert a duty to conceal into a duty to reveal, especially when the duty to reveal is derived from the duty of attorneys not to help their clients commit fraud? Of course, another explanation for the rule that attorneys are ethically bound to obey disclosure orders is simple prudence. Attorneys are excused in every case from the courageous and self-sacrificing (if perhaps misguided) action which journalistic ethics on occasion require of newsmen. Attorneys never have to go to jail for their clients.

It is interesting to contrast the forthright treatment given to this issue in the *American Lawyer's Code of Conduct* (ALCC), of which Dean Freedman was the Reporter. The ALCC rejects the concept that the attorney is an 'officer of the court'³⁰¹ and does not shrink from the logical result that there is no professional duty to obey a court order requiring disclosure.³⁰² The ALCC rule, while not requiring martyrdom, takes seriously the possibility that an attorney may feel ***498** duty-bound not to comply with a disclosure order, either because the court has wrongly limited the privilege or because there is an inherent conflict between the privilege and the attorney's obligation to his or her client.

This discussion began by noting that the attorney-client privilege, like other privileges, has its origin in the deference that the courts saw fit to pay to an existing confidential relationship. The courts recognized the independent necessity and positive value of the relationship and perhaps they recognized that, as with Catholic priests,³⁰³ compelling testimony probably would have been a practical impossibility. The same considerations are tending to produce new privileges today, such as a privilege to protect journalists' sources and a psychiatrist-patient privilege. Perhaps the legal profession must take collective responsibility for bringing the attorney-client privilege more nearly into harmony with its own view of what is necessary and ethically appropriate. The alternative is to adopt the views of its critics, often cogently argued, and base the ethical obligation of confidentiality frankly upon the instrumental view of the attorney-client relationship. The adoption of such a view would surely require the recognition of a meaningful duty voluntarily to disclose client crime and fraud without the compulsion of court process.

VIII. CONCLUSION

Truth, like all other good things, may be loved unwisely, may be pursued too keenly, may cost too much: and surely the meanness and the mischief of prying into a man's confidential consultations with his legal adviser, the general evil of infusing reserve and dissimulation, uneasiness and suspicion and fear into those communications which

must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a price to pay for truth itself.³⁰⁴

It is customary to conclude an Article such as this with recommendations as to the direction that the law should take in the future. The reader will not be surprised to learn that the author favors a reversal of most of the trends described herein—in particular, a reinstatement of the *Shewfelt* rule,³⁰⁵ requiring the opponent of the privilege to make out a prima facie case with extrinsic evidence; a requirement that a federal grand jury make a special showing of need and inability to get the equivalent information by other means before subpoenaing the counsel of the target of its investigation;³⁰⁶ and far more careful attention on the part of the courts to the causal connection between the purpose for which the client consulted the attorney and the fraud allegedly planned or committed.

***499** In addition, because the crime-fraud exception is predicated on the blameworthiness of the intention with which counsel was consulted, before confidential communications can be disclosed there should be a requirement that the client knew or reasonably should have known either before or after he or she sought legal advice that the act contemplated was illegal. For example, if the client consulted an attorney in furtherance of an act innocent in character, such as a legitimate investment the making of which is a criminal offense under RICO, the crime-fraud exception should not apply unless the client knew or learned that such investment was a criminal offense. Such a rule would tend to halt the expansion of the exception in lockstep with the growth of criminal penalties. Finally, if the government compels a defense attorney to testify before a grand jury on the basis of a prima facie case of fraud or crime that cannot be established at trial, not only should the attorney's evidence be excluded at trial, as it is at present, but information gathered by the government as a result of the attorney's grand jury testimony should be excluded as well—a 'fruit of the poisonous tree' rule.³⁰⁷

The new developments in the law of attorney-client privilege traced in this Article are, however, in part simply additional unfortunate consequences of developments in the federal criminal law that are undesirable for many other reasons. The modern tendency of federal criminal law is to federalize state crimes and to criminalize common-law torts. This trend has placed a new power in the hands of federal prosecutors, which they have not been reluctant to exploit. One mode of exploitation has been unprecedented intrusions into attorney-client relationships. Quite naturally, civil litigators have seen the offensive capabilities of the new federal criminal law when yoked with modern principles of discovery. It is past time to seriously examine the social cost of these developments, including their effect on the relationship between attorneys and their clients.

Footnotes

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1 A more precise definition would not be helpful; the application of the exception never turns on precise statutory or code language even in those few jurisdictions that have adopted a statutory definition. An often-cited definition of the attorney-client privilege appears as dictum in [United States v. United Shoe Mach. Corp.](#), 89 F. Supp. 357, 358-59 (D. Mass. 1950) (Wyzanski, J.):

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

This definition is misleading to the extent that it implies that the party claiming the privilege must establish that he or she did not consult an attorney 'for the purpose of committing a crime or tort.' The burden of establishing a right to the attorney-client privilege is indeed on the claimant, but the proponent of the exception has the burden of showing the claimant's unlawful purpose.

Judge Wyzanski's statement of the rule of privilege is an expansion of Professor Wigmore's version:

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

8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292, at 554 (J. McNaughten rev. ed. 1961). The MODEL CODE OF EVIDENCE (1942) expresses the exception to the attorney-client privilege in Rule 212: 'No person has any privilege . . . if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the legal service was sought or obtained in order to enable or aid the client to commit or to plan to commit a crime or a tort.' This formulation was copied in UNIF. R. EVID. 26 (1953) and has been adopted in Kansas. [KAN. STAT. ANN. § 60-426\(b\)](#) (1983).

The Advisory Committee of the Supreme Court proposed Rule 503(d)(1) of the Federal Rules of Evidence to provide that there is no privilege when 'the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud.' [56 F.R.D. 183, 236](#) (1973). This language was copied in UNIF. R. EVID. 502(d)(1) (1974) and has been adopted in several states. [ARK. STAT. ANN. § 28-1001](#) (1979), Rule 502(d)(1); [DEL. R. EVID. 502\(d\)\(1\)](#); [FLA. STAT. ANN. § 90.502\(4\)\(a\)](#) (West 1979); [HAWAII REV. STAT. § 626-1](#) (1980), Rule 503(d)(1); [ME. R. EVID. 502\(d\)\(1\)](#); [NEV. REV. STAT. § 49.115.1](#) (1979); [N.M. R. EVID. 503\(d\)\(1\)](#); [OKLA. STAT. ANN. tit. 12, § 2502.D.1](#) (West 1980); [OR. REV. STAT. § 40.225\(4\)\(a\)](#) (1983); [S.D. CODIFIED LAWS ANN. § 19-13-5\(1\)](#) (1979); [TEX. R. EVID. 503\(e\)\(1\)](#); [TEX. R. EVID. 503\(e\)\(1\)](#); [VT. R. EVID. 502\(d\)\(1\)](#); [WIS. STAT. ANN. § 905.03\(4\)\(a\)](#) (West 1975).

The sections of the proposed Federal Rules of Evidence codifying the law of privilege provoked a storm of criticism and were rejected *in toto* by Congress, which substituted Rule 501:

[T]he privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness . . . shall be determined in accordance with State law.

The language of the first sentence is derived from the Supreme Court's language in [Wolfe v. United States](#), 291 U.S. 7, 12 (1934).

The Supreme Court in [Trammel v. United States](#), 445 U.S. 40, 47 (1980), a case involving spousal immunity, made it plain that the proposed rules may not be regarded as authoritative statements of federal law in the face of Congress' considered rejection of them; Congress endorsed the continuing common-law evolution of the privilege. A number of states have followed Congress and substituted an analogue to Rule 501 for the detailed provisions of the Uniform Rules of Evidence. *See e.g.*, [ARIZ. R. EVID. 501](#); [COLO. R. EVID. 501](#); [MICH. R. EVID. 501](#); [MINN. R. EVID. 501](#); [N.C. GEN. STAT. § 8C-1](#) (Supp. 1981), Rule 501; [OHIO R. EVID. 501](#); [WYO. R. EVID. 501](#).

2 Some modern definitions of the crime-fraud exception include torts as well. *See supra* note 1. The courts have scarcely ever followed these definitions. *See* 2 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 213 (1978); Annot., [2 A.L.R.3D 861, 865](#) (1965). *But see* [Coleman v. American Broadcasting Corp.](#), 106 F.R.D. 201, 207-09 (D.D.C. 1985) (dictum) (exception includes

communications in furtherance of sexual harassment). Rather, the courts have expanded the exception by exploiting the notorious ambiguity of the word 'fraud' to include many kinds of wrongdoing that do not qualify as civil fraud in the strict sense. *See infra* notes 188-99 and accompanying text.

3 *See infra* note 70 and accompanying text.

4 A classic example is the client who informs his or her attorney after the close of testimony but before the close of the case that he or she has committed perjury. Such wrongdoing is in the past, but the client is implicitly inviting the attorney to rely upon the false evidence in closing arguments. *See infra* notes 42-46 and accompanying text; *see also* Lawry, *Lying, Confidentiality and the Adversary System of Justice*, 1977 UTAH L. REV. 653, 682 (past wrongdoing may constitute present fraud, if the 'contextualizing event' is not over).

5 *See infra* notes 127-38 and accompanying text.

6 *See infra* note 15 and accompanying text.

7 *See, e.g.*, NINTH DECENNIAL DIG. *Witnesses* §§ 192-207 (1983).

8 For an overview, see Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464 (1977).

9  *Upjohn v. United States*, 449 U.S. 383, 397 (1981) (rejecting the 'control group test,' which looks at whether the employee is 'responsible for directing [the corporation's] activities in response to legal advice' when determining the application of the attorney-client privilege to communications made by a corporate employee to the attorney,  *United States v. Upjohn*, 600 F.2d 1223, 1225 (1979), *rev'd*,  449 U.S. 383 (1981)).

10  *Garner v. Wolfinbarger*, 430 F.2d 1093, 1102-04 (5th Cir. 1970) (creating a new exception, borrowing certain of the elements of the crime-fraud exception as 'factors'), *cert. denied*, 401 U.S. 974 (1971). *But cf.*  *Dickerson v. Superior Court*, 135 Cal. App. 3d 93, 100, 185 Cal. Rptr. 97, 100 (1982) (California courts have no power to create analogous exception under Evidence Code).

11 *See, e.g.*, *In re*  *John Doe Corp.*, 675 F.2d 482, 492 (2d Cir. 1982); *In re*  *Grand Jury Proceedings*, 604 F.2d 798, 803 (3d Cir. 1979).

12 *See infra* notes 83-138 and accompanying text.

13 *See infra* notes 139-99 and accompanying text.

14 *See infra* notes 83-265 and accompanying text.

15 17 HOWELL'S STATE TRIALS 1139 (1743).

16 Early treatises on evidence have remarkably little to say about *Annesley*. Blackstone mentioned the attorney-client privilege and distinguished between 'mere matters of fact, as the execution of a deed or the like' and 'secrets of the cause.' 3 W. BLACKSTONE, COMMENTARIES *370. Otherwise he seems to have been unaware of any exceptions. The exception is not mentioned, and *Annesley* is not cited in THE LAW OF EVIDENCE (2d ed. London 1760) (1st ed. London 1717). This work, by a 'late learned judge,' is commonly attributed to Chief Baron (Sir Geoffrey) Gilbert, who died in 1727. The 1791 revision by Capel Lofft and later editions allude rather ambiguously to the exception. *See infra* note 31.

In the early 19th century, Phillips treated the privilege at some length. He recognized no crime-fraud exception, but distinguished carefully between communications for the purpose of seeking legal advice, collateral facts within the attorney's knowledge, 'fact[s] which he might have known without being intrusted as attorney in the cause,' and transactions to which the attorney was a party. 1 S. PHILLIPS, A TREATISE ON THE LAW OF EVIDENCE 104 (2d Am. ed. New York 1820) (1st Am. ed. New York 1816).

Thomas Peake's treatment, in COMPENDIUM OF THE LAW OF EVIDENCE (J. Randall ed. 1812), is essentially similar to Phillips'. Peake was not familiar with any exception to the attorney-client privilege except in those cases in which the lawyer is required to testify because of knowledge gained apart from any confidential communication by a client, *e.g.*, as an attesting witness to an instrument, or as a business agent. *Id.* at 181-83.

The analysis in Simon Greenleaf's influential American treatise also contains no hint of a crime or fraud exception other than the case of an attorney who is party to fraud. 1 S. GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE §§ 240, 242 (reprint ed. 1972) (1st ed. Boston 1842).

- 17 *See supra* note 16. *Annesley* is mentioned in Professor Thomas Starkie's early 19th century treatise: Nor in general [does the privilege apply] to any communication, although made to an attorney which is not made in professional confidence. In the case of *Annesley v. The Earl of Anglesea*, it was held, that a conversation which had been held twenty years ago between the Earl of Anglesea and his attorney, as to the prosecution of the plaintiff for murder, might be inquired into, since it was not matter of professional confidence. 2 T. STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE 398 (2d Am. ed. Boston 1828) (1st Am. ed. Boston 1826).
- 18 14 Q.B.D. 153 (1884). *See infra* notes 56-75 and accompanying text.
- 19 Surprisingly, there is good reason to believe this story. Documentary evidence was introduced showing that one James Hennesley [sic] was indentured before the Lord Mayor of Dublin on March 26, 1728. James Annesley appeared on the passenger list of the *James* as an indentured servant shortly thereafter. *Annesley*, 17 HOWELL'S STATE TRIALS at 1213. Andrew Lang, in an extended introduction to a collection of trial transcripts and other documents, concludes that the kidnapping did take place, but declines to say definitely whether James was the legitimate or illegitimate son of Lord Arthur (or possibly of Uncle Richard). *See* THE ANNESLEY CASE (A. Lang ed. 1912). The kidnapping and the Earl's later actions would seem sure evidence of guilt in anyone else, but as Lang justly remarks: 'Both brothers by their unvarying falseness, treachery, and evil temper seem actually to have sought the troubles which befell them.' *Id.* at 4. An unpublished study by Lillian de la Torre, of Colorado Springs, which she has kindly permitted me to read, reaches similar conclusions. Miss de la Torre has asked me, however, not to disclose her original and very plausible theory as to James Annesley's true identity, based in part on newly discovered documents.
- 20 Trial of *Annesley & Redding*, 17 HOWELL'S STATE TRIALS 1094 (1742).
- 21 The sole issue in the case was whether Lord and Lady Altham had a son born alive in wedlock, whose remainder under the will of the third Earl (also James) would vest in possession after the death of Arthur the fourth Earl of Anglesea (Baron Altham's cousin) without male issue in 1737. *Annesley*, 17 HOWELL'S STATE TRIALS at 1143-48, 1255-58. If Baron Altham had such a son, his younger brother Richard concededly had no claim. *Id.* at 1148-49. To a modern lawyer, it also would seem necessary to prove that James Annesley, the fictional lessor of plaintiff in ejectment, was Baron Altham's son, or else plaintiff would have no standing. In fact, some persons who had known James as a child testified unhesitatingly—if not very credibly—that they recognized the child in the grown man. *Id.* at 1178, 1182, 1191, 1193, 1195-97, 1199, 1203. The Earl did not claim that James was a mere imposter. James, like the Earl, was disqualified from testifying as an interested party under the rules of evidence of the day.
- 22 *Id.* at 1150-57 (eyewitnesses to the pregnancy and to a former pregnancy that was ended by miscarriage); *id.* at 1262, 1266, 1267-68, 1272, 1274, 1275, 1282, 1288, 1291 (Lady Altham was never pregnant).
- 23 *Id.* at 1224.
- 24 *Id.* at 1443. James never obtained either the property or the titles. Much of the same evidence was presented at the perjury trial of one of the Earl's principal witnesses, Mary Heath; she was acquitted after a questionable charge. Trial of Heath, 18 HOWELL'S STATE TRIALS 1, 196 (1744). James died in 1760 and his uncle in 1761. The uncle's extraordinary career as a bigamist led after his death to the extinction of the peerage by action of the Parliamentary committee of privileges in 1771. '*Annesley, James*' and '*Annesley, Richard*' in DICTIONARY OF NATIONAL BIOGRAPHY 477-79 (L. Stephen & S. Lee reprint ed. 1949-1950).
- 25 *Annesley*, 17 HOWELL'S STATE TRIALS at 1229.
- 26 *Id.* at 1232. As the rule took shape, Harward's implied limitation of the exception to actions of the client that were *mala in se* was generally followed. *See infra* note 31. The modern exception knows no such limitation.
- 27 *Id.* at 1250 and footnote.
- 28 *Id.* at 1240.

29 *Id.* at 1239.

30 Plaintiff's arguments on this point went far beyond what the court would accept. Plaintiff suggested that the Earl's remarks should be disclosed because the privilege only applies when legal advice is sought with respect to a pending action, and no action *concerning the title to the estate* had been filed when the Earl retained Giffard to prosecute James. Harward went so far as to argue that it could not be 'foreseen that the title to the estate would ever come in question.' *Id.* at 1232. Also, these conversations took place in part before the formal retainer. *Id.* at 1227-28. Mr. Baron Dawson, in particular, rejected this view of when the privilege attaches. *Id.* at 1243-44. Dawson was also careful to point out that the privilege protects all communications that the client reasonably thinks necessary to his or her cause, whether they prove to have any legal relevance or not. *Id.*

The court's sensible resolution of these points did not prevent opponents of the privilege from often successfully asserting in the succeeding 70 years that the privilege only attaches when counsel is consulted with respect to a pending cause. Compare [Greenough v. Gaskell](#), 39 Eng. Rep. 618 (Ch. 1833); [Cromack v. Heathcote](#), 129 Eng. Rep. 857 (C.P. 1820); [Foster v. Hall](#), 29 Mass. (12 Pick.) 89 (1831), all holding that the privilege does attach, with [Williams v. Mudie](#), 171 Eng. Rep. 1143 (Nisi Prius 1824); [Wadsworth v. Hamshaw](#), 129 Eng. Rep. 858, 858 n.(a) (1819), holding that the privilege did not attach because no cause was pending at the time of the consultation. This curious fact reinforces the impression that *Annesley* was largely forgotten in later years.

31 The limitation of the exception to crimes *mala in se* is explicit in an influential statement of the exception in 1791:

Where the original Ground of Communication is *Malum in se*, as if he be consulted on an *Intention* to commit a *Forgery*, or *Perjury*, this can never be included within the Compass of professional confidence: being equally contrary to his Duty in his Profession, his Duty as a Citizen, and as a Man: but if such offence as *Forgery*, for example, *committed* without his being *privy*, comes to his knowledge in the course of confidential transactions with his Client, in the way of business, he shall not be compelled to assist in proving it.

1 J. GILBERT, THE LAW OF EVIDENCE 277-78 (London 1791) (Baron Gilbert died in 1727; the 1777 edition of his treatise, the fourth, does not include this passage). It is difficult to understand just what Baron Gilbert and those who followed him meant by *malum in se*. In fact, it is difficult to ascribe any fixed meaning to the term *malum in se* and to the often contrasted term *malum prohibitum* for any historical period, and for centuries the best authorities have deplored the use of the two terms. They are not fully naturalized common-law categories, as evidenced by the lack of any English equivalent. The distinction between them is drawn differently depending upon the purpose for which it is made, and the terms are ill-chosen for the ethical distinction they purport to make. The essential idea, of course, is that some actions are 'inherently and essentially evil, that is, immoral in [their] nature and injurious in [their] consequences, without any regard to the fact of [their] being noticed or punished by the law of the state.' BLACK'S LAW DICTIONARY 865 (5th ed. 1979). Such actions are *mala in se*, whereas mere violations of positive law are *mala prohibita*. The application of the terms, never very precise, has changed inconsistently throughout history with changes in the predominant purpose for making the distinction.

The distinction may have originated in ecclesiastical law; if a priest committed an offense *malum in se* he could be unfrocked. W. LA FAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 6 n.24 (1972). But to common lawyers and constitutional theorists from the later Middle Ages through the 17th century the distinction mattered because it supposedly marked the limits of the king's prerogative to suspend or dispense with a criminal statute. See 6 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 218 (1924). This distinction led one 15th century judge to describe the obstruction of the public highway as an offense *malum in se*, by which he meant that the king could not license the creation of such a nuisance by his power of dispensation. Y.B. [Mich. 11 Hen. 7](#), ff. 11, 12, pl. 35 (1496). In 1674, however, Chief Justice Vaughan denied the validity of such a conclusion and declared that the king's dispensing power did not extend to all offenses *mala prohibita* because the king might not bar a person who has suffered some particular injury as a result of another's violation of a penal statute from bringing a prosecution thereunder. [Thomas v. Sorrell](#), 124 Eng. Rep. 1098 (C.P. 1674). For example, the king could not suspend a statute forbidding the sale of adulterated wine, although such a sale is *malum prohibitum*, or one forbidding maintenance (which is just in a just cause), but could suspend a statute requiring that wine sellers be licensed. Vaughan also pointed out that not all statutory felonies are *mala in se* (for example, private coining), and neither is every offense at common law. In effect, Vaughan denied the usefulness of the distinction to the problem at hand, saying that '[a]ll penal laws, when made, and in force, are equally necessary, and in things necessary there is no gradation of more or less necessary.' [Thomas](#), 124 Eng. Rep. at 1106. It is interesting that a definition of *mala in se* nearly contemporaneous with *Cox*, and much cited to this day, includes all felonies. See [Commonwealth v. Adams](#), 114 Mass. 323, 324 (1873). Vaughan was obviously correct because the penalty that the legislature assigns to a criminal statute is not a certain indicator of the wrongfulness of its breach in a moral sense.

Despite Vaughan's cogent opinion, Blackstone maintained the validity of the distinction in the abstract, identifying *mala in se* with 'actions that are naturally and intrinsically . . . wrong,' 1 W. BLACKSTONE, COMMENTARIES *54 (without clearly deriving such wrongfulness from divine law, *id.* at *57, as Vaughan did), and *mala prohibita* with 'things in themselves indifferent.' *Id.* at *55. The

legislature is without power to make actions that are *mala in se* lawful, but derives its authority to punish *mala prohibita* from the social contract. 4 W. BLACKSTONE, COMMENTARIES *8.

Despite Blackstone's pronouncements, in 1822 one judge of the King's Bench denounced the distinction. The case was an action by a printer for labor and materials. He was nonsuited (and the rule was made absolute) because he neglected to put his name and address upon the pamphlet printed for the defendant, in accordance with statute:

The distinction between *mala prohibita* and *mala in se* has been long since exploded. It was not founded upon any sound principle, for it is equally unfit, that a man should be allowed to take advantage of what the law says he ought not to do, whether the thing be prohibited, because it is against good morals, or whether it be prohibited, because it is against the interest of the State. The object of [the statute] was to provide the most effectual means of discovering the authors of every publication, in order that they might be made answerable for the contents. . . . There is no legal contract on which an action can be founded, inasmuch as the thing was done in direct violation of the law.

Bensley v. Bignold, 106 Eng. Rep. 1214, 1216 (K.B. 1822) (Best, J.). This conclusion is not, of course, consonant with modern contract law—precisely because the printer's omission, though in violation of a penal statute, was not morally blameworthy and did not injure the defendant. This fact nicely suggests why the courts have continued occasionally to use the terms *malum in se* and *malum prohibitum* to this day, despite Vaughan's and Best's strictures. See, e.g., *Morisette v. United States*, 342 U.S. 246 (1952) (Actual intent is a necessary element of the crime of converting federal property.). The degree of moral blameworthiness of an action in violation of a penal statute is relevant in such contexts as finding involuntary manslaughter when death resulted from the defendant's violation of a penal statute, holding a principal liable for the criminal actions of his or her agent, and determining whether the legislature intended to make scienter or specific intent an element in a criminal offense. Compare R. PERKINS & R. BOYCE, CRIMINAL LAW 880 (3d ed. 1982) (distinction between acts *mala in se* and *mala prohibita* is real and essential to this day) with G. FLETCHER, RETHINKING CRIMINAL LAW §§ 6.2-6.6 (1978) (avoids all 'artificial words of the law' an analytical categories for dealing with intent and blameworthiness).

32

Two pre-*Annesley* cases exist in which attorneys were protected from testifying, although the modern doctrine of attorney-client privilege would have held that the crime-fraud exception applied. See *Anonymus* [sic], 90 Eng. Rep. 179 (K.B. 1693); *Anonymous*, 91 Eng. Rep. 1390 (K.B. 1699). Their facts and holdings are less than clear, but both cases concern illegal agreements for the purchase of the office of under-sheriff.

In *Robson v. Kemp*, 170 Eng. Rep. 735 (Nisi Prius 1803), Lord Ellenborough held that when a bankrupt debtor had transferred a ship to his son for a 'warrant of attorney,' the debtor's attorney could not be called to prove the subsequent destruction of the warrant, a fraudulent act, in his presence. Query whether the doing of a fraudulent act in an attorney's presence counted as a 'communication' at any period and whether it was open to the court to hold that the lawyer did not witness such an act in his capacity as an attorney. Professor Hazard views Lord Ellenborough's decisions on privilege as somewhat aberrational. See Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061, 1081 (1978); see, e.g., *Gainsford v. Grammar*, 170 Eng. Rep. 1063 (K.B. 1809) (communications between attorney and client privileged although attorney was clearly acting merely as a business agent). Other cases of the period, however, were in complete agreement with respect to compelled attorney testimony about fraudulent conveyances. See, e.g., *Hyde v. M.* (Ir. M.R. 1827) (unreported decision), cited in *Scott v. Dunbar*, 1 MOLLOY'S REPORTS OF THE HIGH COURT OF CHANCERY IN IRELAND 442, 450 note c (H.C. Ch. Div. 1828); *Greenough v. Gaskell*, 39 Eng. Rep. 618 (Ch. 1833) (fraudulent concealment of insolvency).

The contemporaneous American cases concerning fraudulent conveyances followed Lord Ellenborough's view. See *Clay v. Williams*, 16 Va. (2 Munf.) 105 (1811) (confession of judgment on fictitious indebtedness); *Parker v. Carter*, 18 Va. (4 Munf.) 273 (1814) (fraudulent conveyance of slaves previously delivered by parol gift; peculiar because the attorney sought to use his knowledge of the conveyance for his own benefit as his client's creditor); *Foster v. Hall*, 29 Mass. (12 Pick.) 89 (1831) (Shaw, C.J.) (fraudulent conveyance while grantor was 'in failing circumstances'); *Coveney v. Tannahill*, 1 Hill 33 (N.Y. Sup. Ct. 1841) (fraudulent alteration of an account stated; court impliedly concluded that such alteration is not *malum in se*).

The only American case before 1884 which implied that the exception may be applicable to civil fraud is *Higbee v. Dresser*, 103 Mass. 523 (1870). In *Higbee*, however, the attorney's testimony was excluded for lack of any independent evidence to show the fraud beyond the allegations in the bill. *Id.* at 526.

33

68 Eng. Rep. 558 (Ch. 1851).

34

Id. at 559.

35

Id. at 560.

- 36 *Id.*
- 37 See [Russell v. Jackson](#), 68 Eng. Rep. 900 (Ch. 1852) (reference to master).
- 38 3 Barb. Ch. 528 (N.Y. 1848).
- 39 *Id.* at 595.
- 40 *Id.* at 598. For a discussion of the distinctions between *mala in se* and *mala prohibita*, see *supra* note 31.
- 41 See *infra* notes 56-72 and accompanying text.
- 42 100 Eng. Rep. 1102 (K.B. 1791).
- 43 [Reynell v. Sprye](#), 50 Eng. Rep. 501 (M.R. 1846), was an action to rescind the sale of an interest in land, title to which was then in litigation, as having been fraudulently induced by defendant, who got his solicitor to misrepresent the legal difficulties of recovering the property. In fact, defendant sent his attorney a rough sketch of the letter that he desired to be sent to Reynell, the petitioner. The court held that Reynell was entitled to see Sprye's draft letter: 'I have no doubt that this is not a letter written in professional confidence for the purpose of obtaining the advantage of professional assistance; for Sprye, having a particular purpose in view, makes this gentleman his tool, and not his adviser.' *Id.* at 503. It is not clear why the court characterized the solicitor as a mere 'tool,' rather than as Reynell's partner in fraud, which he seems to have been (although there was no allegation of personal benefit). The court in [Bramwell v. Lucas](#), 107 Eng. Rep. 560 (K.B. 1824), required an attorney to testify about his client's inquiry whether he might attend a meeting of his creditors without fear of arrest for debt. The attorney responded that the client could not and went alone to the meeting to arrange a safe-conduct for the debtor. The court remarked that '[i]t can hardly be supposed, that a man could ask, as a matter of law, whether he would be free from arrest whilst attending a voluntary meeting of creditors; but he might well ask, as a matter of fact . . . whether any arrangement had been made with the creditors to prevent an arrest . . .' *Id.* at 561-62. To the modern reader, not conversant with debtor-creditor law of the early 19th century, the distinction made by the court is not self-evident, and it is not clear that the client committed any fraudulent act. The case illustrates, however, the instinctive tendency of early courts, when they desired to hear an attorney's testimony, to redefine the nature of the client communication rather than to find an exception to the privilege.
- 44 [Cobden](#), 100 Eng. Rep. at 1103.
- 45 *Id.*
- 46 *Id.*
- 47 See *supra* note 23 and accompanying text.
- 48 [Cobden](#), 100 Eng. Rep. at 1102-03.
- 49 For example, in [Dudley v. Beck](#), 3 Wis. 274 (1854), a mortgage foreclosure action in which the defense was the charging of usurious interest, the Wisconsin Supreme Court ordered the lender's attorney to answer interrogatories attempting to establish that the attorney kicked back to the lender a substantial portion of the sum that the attorney charged the borrower, ostensibly for preparing the loan documents. *Id.* at 278-79. The opinion did not discuss whether the borrower had made, or was required to make, any preliminary showing that the kickback arrangement actually existed. The court said:
If the witness obtained the loan for the defendant from *Dudley*, the mortgagee, in pursuance of the agreement mentioned in the interrogatory, he pretended to act as the attorney of the former, while the principal part of the money which the defendant paid him for his services, went to the mortgagee. It was an act done by the attorney and client in pursuance of an agreement entered into between them, and not a communication from the latter to the former.
Id. at 286.
- 50 [Greenough v. Gaskell](#), 39 Eng. Rep. 618, 621 (Ch. 1833).
- 51 This term means 'accomplice in crime.'
- 52 [Follett v. Jefferyes](#), 61 Eng. Rep. 1, 6 (Ch. 1850).

- 53 32 L.J. Ch. (n.s.) 284 (1863).
- 54 *Id.*
- 55 *Id.* at 286.
- 56 14 Q.B.D. 153 (1884).
- 57 The indictment was for violation of 13 Eliz. ch. 5, §§ 1-3 (1570), which carried a penalty of six months' imprisonment. *Cox*, 14 Q.B.D. at 154.
- 58 *See, e.g.*, *Williams v. Quebrada Ry., Land & Copper Co.*, [1895] 2 Ch. 751; *Matthews v. Hoagland*, 48 N.J. Eq. 455, 21 A. 1054 (Ch. 1891); *Hamil & Co. v. England*, 50 Mo. App. 338, 346-47 (1892).
- 59 *Cox*, 14 Q.B.D. at 175. They were apparently referring to *Cromack v. Heathcote*, 129 Eng. Rep. 857 (C.P. 1820); *Robson v. Kemp*, 170 Eng. Rep. 735 (Nisi Prius 1803); and *Doe v. Harris*, 172 Eng. Rep. 1113 (Nisi Prius 1833). In *Cromack* an attorney refused to assist plaintiff in drawing an assignment of certain property to his son because he knew that execution had already issued against plaintiff. Plaintiff obtained the assistance of another solicitor. The first attorney was not compelled to testify as to his conversations with plaintiff. The only grounds adduced by defendant for compelling the solicitor's testimony were that plaintiff did not consult the solicitor in connection with any cause and that the solicitor refused the employment.
- 60 *Cox*, 14 Q.B.D. at 155.
- 61 *Id.*
- 62 *Id.* at 155-56.
- 63 *Id.* at 156.
- 64 *Id.*
- 65 *Id.*
- 66 *Id.* at 168.
- 67 *Follette v. Jefferyes*, 61 Eng. Rep. 1, 6 (Ch. 1850).
- 68 *See supra* notes 28-30 and accompanying text.
- 69 Defendants' counsel made this very point: 'There was nothing to shew the defendants had any fraud in view when they went to, or, indeed, when they came away from, the solicitor' *Cox*, 14 Q.B.D. at 162. Curiously, this question was discussed in a recent case, *Butler v. Board of Trade*, [1971] 1 Ch. 680, in which the court read *Cox* as finding that Railton and Cox had formed a fraudulent intent before consulting their solicitor. *Id.* at 684. Because the holding in *Butler* was that the document in question was not privileged because it had been made public, it is not clear whether the court believed that there is no exception unless the client consults the attorney with an already formed fraudulent intention.
- 70 *See, e.g.*, *Fidelity-Phenix Fire Ins. Co. v. Hamilton*, 340 S.W.2d 218 (Ky. 1960) (insured lied to his second attorney about the circumstances of a fire after his first attorney told him he had no claim under his policy);  *Gebhardt v. United Rys.*, 220 S.W. 677 (Mo. 1920) (plaintiff admitted to her first attorney that she was not on a trolley when it was derailed, contrary to her later testimony); *In re Stein*, 1 N.J. 228, 62 A.2d 801 (1949) (a couple sought to obtain a divorce by perjury after their first attorney explained that they had no legal grounds).
- 71 *Cox*, 14 Q.B.D. at 175.
- 72 *Id.*
- 73 *Orman v. State*, 22 Tex. App. 604, 616-17, 3 S.W. 468, 471-72 (1886) (Defendant murdered a man who had insulted his mother and sisters after learning from his attorney of the existence of a statute reducing the penalty in such cases from murder to manslaughter.).

- 74 [Matthews v. Hoagland](#), 48 N.J. Eq. 455, 467-70, 21 A. 1054, 1059-60 (Ch. 1891) (dictum).
- 75 See, e.g., [State v. Faulkner](#), 175 Mo. 546, 75 S.W. 116 (1903) (counsel was acting as go-between in a bribery scheme); [Hamil & Co. v. England](#), 50 Mo. App. 338 (1892) (counsel was apparently party to the fraud); cf. [State v. Stone](#), 65 N.H. 124, 18 A. 654 (1889) (murder threats made in attorney's presence admissible; *Cox* not cited).
- 76  [138 U.S. 353 \(1891\)](#).
- 77  *Id.* at 360.
- 78 *Id.*
- 79 The Court did not note whether the attorney's evidence formed part of the prosecution's case-in-chief or whether it was offered in rebuttal. If the latter (as seems likely because it was offered to impeach), there was no problem of circularity of proof such as the court imagined; the prosecution had already introduced ample independent evidence of the murder.
- 80  [Alexander](#), 138 U.S. at 360.
- 81 See *In re*   [Berkley & Co.](#), 629 F.2d 548, 554 n.11 (8th Cir. 1980); *In re*   [Sawyer's Petition](#), 229 F.2d 805, 808-09 (7th Cir.), *cert. denied*, 351 U.S. 966 (1956);  [SEC v. Harrison](#), 80 F. Supp. 226, 230-31 (D.D.C. 1948). In *Berkley*, however, the court held that the communications were in furtherance of the same fraud for which defendant was being tried; in *Sawyer's Petition*, the court found that the nonadmission of the disputed testimony was harmless error. Thus the stated refusal of both courts to follow the *Alexander* limitation was essentially dictum. The court in *Harrison*, on the other hand, interpreted the holding in *Alexander* as turning on the fact that the murder had already been committed when the defendant consulted his attorney and therefore disregarded the *Alexander* limitation as dictum.
- 82 The paucity of cases in Great Britain after *Regina v. Cox* is notable, even considering the small number of reporting courts and the smaller volume of litigation. See *In re Postlethwaite*, 35 Ch. D. 722 (1887); *In re Arnott*, 60 L.T.R. (n.s.) 109 (Q.B. 1888); *Williams v. Quebrada Ry., Land & Copper Co.*, [1895] 2 Ch. 751; *Regina v. Bullivant*, 2 Q.B. 163 (C.A. 1900), *rev'd on other grounds sub nom. Bullivant v. Attorney-General*, 1901 A.C. 196; [Bullivant v. Attorney-General](#), 1901 A.C. 196; *O'Rourke v. Darbishire*, 1920 A.C. 581; [O'Rourke v. Darbishire](#), 1920 A.C. 581; *Butler v. Board of Trade*, [1971] 1 Ch. 680. The contrast with the sophisticated elaboration of the exception in the United States is astonishing. One can only speculate that the division between solicitors and barristers, the small size and social cohesiveness of the trial bar, and the fact that the criminal bar as a whole both prosecutes and defends lead to an unwillingness to make one's case out of the mouth of opponent's counsel. Private communication of Professor J. Christopher Levy, University of Calgary, Faculty of Law (September 1984). The contrast with the United States is most marked in the criminal area, where government prosecutors have lately made a practice of calling the attorneys who represent the subjects of their investigation before the grand jury. See *infra* notes 162-74 and accompanying text. It is noteworthy, too, that the English Reports reveal no case of an attorney consciously conniving in his or her client's fraud.
- 83 See *supra* notes 56-81 and accompanying text.
- 84 In [Higbee v. Dresser](#), 103 Mass. 523 (1870), the court stated:
A mere suggestion of fraud, in general terms, does not furnish sufficient ground for setting aside so well known and salutary a rule as that which protects and privileges the communications of counsel and client. If the case disclosed anything having a tendency to show that the witness was acting for himself as a party to the transaction, or that he was consulted in aid of any intended fraud, or that his advice was asked for any dishonest purpose, the matter would have raised a more serious question.
Id. at 526.
- 85 See *infra* notes 87-103 and accompanying text.
- 86 See *infra* notes 104-25 and accompanying text.

- 87 The early case of *In re Postlethwaite*, 35 Ch. D. 722 (1887), can be read as holding, as an alternative ground, that a mere allegation of breach of fiduciary duty dissolves the privilege. *Williams v. Quebrada Ry., Land & Copper Co.*, [1895] 2 Ch. 751, seems to lend some support to this position, although the sufficiency of a mere allegation to overcome the privilege is apparently left open by *Bullivant v. Attorney-General*, 1901 A.C. 196, 201: [Bullivant v. Attorney-General, 1901 A.C. 196, 201](#): [I]n order to displace the prima facie right of silence by a witness who has been put in the relation of professional confidence with his client, before that confidence can be broken you must have some definite charge either by way of allegation or affidavit or what not. I do not at present go into the modes by which that can be made out Matters were somewhat clarified in *O'Rourke v. Darbishire*, 1920 A.C. 581, 604 (Viscount Finlay) [O'Rourke v. Darbishire, 1920 A.C. 581, 604 \(Viscount Finlay\)](#): If the communications to the solicitor were for the purpose of obtaining professional advice, there must be, in order to get rid of privilege, not merely an allegation that they were made for the purpose of getting advice for the commission of a fraud, but there must be something to give colour to the charge. The statement must be made in clear and definite terms, and there must further be some prima facie evidence that it has some foundation in fact. . . . The Court will exercise its discretion . . . for the purpose of seeing whether the charge is made honestly and with sufficient probability of its truth to make it right to disallow the privilege of professional communications. In its prolixity, this passage hardly lays down a single standard.
- 88 The exception, as it has been stated until now, requires that the communication be 'in furtherance of' crime or fraud; it would seem, therefore, that the prima facie case must relate to the client's purpose in making the particular communication whose production is sought. Typically, courts are less than analytically precise in relating the communication to the fraud. *See infra* notes 200-33 and accompanying text.
- 89 *See In re*  [Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1039 \(2d Cir. 1984\)](#) (defining the required showing as 'a reasonable basis for believing that the objective was fraudulent'). The court stated: Other circuits have referred to the burden in terms of the need to make a prima facie showing. . . . As a practical matter, there is little difference here between the two tests. Both require that a prudent person have a reasonable basis to suspect the perpetration or attempted perpetration of a crime or fraud, and that the communications were in furtherance thereof. *Id.* (citations omitted).
- 90 *See infra* note 103 and accompanying text.
- 91  [289 U.S. 1 \(1932\)](#).
- 92 *See* [Union Camp Corp. v. Lewis, 385 F.2d 143, 144-45 \(4th Cir. 1967\)](#);  [Research Corp. v. Gourmet's Delight Mushroom Co., 560 F. Supp. 811, 813 \(E.D. Pa. 1983\)](#); *In re Grand Jury Subpoenas Dated December 18, 1981*, 561 F. Supp. 1247, 1254 (E.D.N.Y. 1982);  [United States v. King, 536 F. Supp. 253, 261 \(C.D. Cal. 1982\)](#); *In re Blier Cedar Co.*, 10 Bankr. 993, 999 (D. Me. 1981);  [United States v. American Tel. & Tel. Co., 86 F.R.D. 603, 624, 625 n.2 \(D.D.C. 1980\)](#);  [Burlington Inds. v. Exxon Corp., 65 F.R.D. 26, 40-41 \(D. Md. 1974\)](#).
- 93  [Clark, 289 U.S. at 6](#).
- 94  [Id. at 15](#).
- 95 *Id.* (citing *O'Rourke v. Darbishire*, 1920 A.C. 581). [O'Rourke v. Darbishire, 1920 A.C. 581](#)).
- 96 *Id.* at 18.
- 97 [106 F.2d 37 \(2d Cir.\)](#), *cert. denied*, [308 U.S. 589 \(1939\)](#).
- 98 *Id.* at 39-40.
- 99 *Id.* at 40.

- 100 *See, e.g., In re*  Sealed Case, 754 F.2d 395, 399 (D.C. Cir. 1985); Pfizer, Inc. v. Lord, 456 F.2d 545, 549 (8th Cir. 1972);  United States v. Friedman, 445 F.2d 1076, 1086 (9th Cir.), *cert. denied*, 404 U.S. 958 (1971); Union Camp Corp. v. Lewis, 385 F.2d 143, 144-45 (4th Cir. 1967); Buell v. Superior Court, 391 P.2d 919, 924, 96 Ariz. 62, 68 (1964).
- 101 Pollock v. United States, 202 F.2d 281, 286 (5th Cir.), *cert. denied*, 345 U.S. 993 (1953); *accord* International Tel. & Tel. Corp. v. United Tel. Co., 60 F.R.D. 177, 182 (M.D. Fla. 1973) ('colorable showing').
- 102 A. B. Dick Co. v. Marr, 95 F. Supp. 83, 102 (S.D.N.Y. 1950), *aff'd*, 197 F.2d 498 (2d Cir.), *cert. denied*, 344 U.S. 878 (1952).
- 103 Bernard D. Morley, P.C. v. MacFarlane, 647 P.2d 1215, 1222 (Colo. 1982) (records of several clients seized in search of law office, upon warrant);  Caldwell v. District Court, 644 P.2d 26, 33 (Colo. 1982) (discovery in fraud and conspiracy suit against two attorneys and legal counsel employed by these attorneys).
- 104 *See, e.g., Grummons v. Zollinger*, 240 F. Supp. 63 (N.D. Ind. 1964), *aff'd*, 341 F.2d 464 (7th Cir. 1965) (documents whose contents were known through discovery held admissible at trial on account of the crime-fraud exception although there was no evidence apart from the documents to show that they were prepared in furtherance of fraud).
- 105  455 F.2d 836 (9th Cir.), *cert. denied*, 406 U.S. 944 (1972).
- 106 *See infra* note 113 and accompanying text.
- 107  Shewfelt, 455 F.2d at 837.
- 108  *Id.* at 840.
- 109 *Id.* (citations omitted).
- 110 *See supra* notes 97-99 and accompanying text.
- 111 The court also cited *Union Camp Corp. v. Lewis*, 385 F.2d 143 (4th Cir. 1967), which simply restated the prima facie rule.
- 112 *Bob*, 106 F.2d at 40.
- 113 *In re*   Berkley & Co., 629 F.2d 548, 553 n.9 (8th Cir. 1980);  *United States v. King*, 536 F. Supp. 253 (C.D. Cal. 1982). *King* is remarkable for allowing a prima facie case of fraud to be established entirely on the basis of the ostensibly privileged communication, the content of which was obtained from a concealed microphone on the person of the client's employee, who was cooperating with the FBI! In this case, however, as in many others, the crime-fraud exception was cited as an alternative ground for the holding. *Id.* at 261. Perhaps still more remarkable, the principal ground was that the communication was not confidential because the attorney knew that the employee was cooperating with the government. *Id.* at 260. She did not, of course, know that the employee was wired.
- 114 *In re*  Sealed Case, 676 F.2d 793, 815 (D.C. Cir. 1982) (Wright, J.). This case concerned the extension of the future crime or fraud exception to the qualified immunity from production of the attorney's work product under FED. R. CIV. P. 26(b)(3). Judge Wright held that there is a further requirement that a 'valid relationship' must exist between the prima facie crime or fraud and the work product. *In re*  Sealed Case, 676 F.2d at 814-15. This requirement is in effect a revival of the *Alexander* limitation, *see supra* notes 76-78 and accompanying text, and if Judge Wright is correct, it is indeed difficult to see how the relationship between the fraud and the work product can be established without an *in camera* examination of the latter.
- 115  561 F. Supp. 168 (D. Or. 1983).
- 116  *Id.* at 171, 173.
- 117  *Id.* at 170.

- 118 [Id.](#) at 171.
- 119 *Id.*
- 120 *Id.* at 173-74 n.5.
- 121 *Id.* at 174.
- 122 If a corporate client disregards its attorney's advice, an inference of bad faith arises. There is some question whether this is a reason for affirming the privilege or denying it. The American Bar Association (ABA) has stated that the privilege is most necessary where the corporation has sought advice about a prospective transaction, where counsel in good faith has stated his opinion that it is not lawful, but the corporation has proceeded in total or partial disregard of counsel's advice. The ABA urges that the cause of justice requires that counsel be free to state his opinion as fully and forthrightly as possible without fear of later disclosure to persons who might attack the transaction, and that without the cloak of the privilege counsel may be 'required by the threat of future discovery to hedge or soften their opinions.'
- [Garner v. Wolfenbarger](#), 430 F.2d 1093, 1102 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971) (quoting the ABA's amicus curiae brief).
- 123 *See, e.g., In re* [Continental Ill. Sec. Litig.](#), 732 F.2d 1302, 1315 n.20 (7th Cir. 1984) (dictum); [United States v. Exxon Corp.](#), 94 F.R.D. 246 (D.D.C. 1981) (a defense of good faith compliance with government regulations waives the privilege); [Russell v. Curtin Matheson Scientific, Inc.](#), 493 F. Supp. 456 (S.D. Tex. 1980) (plaintiffs put certain communications with their attorneys in issue by seeking equitable relief from the statute of limitations); [Hearn v. Rhay](#), 68 F.R.D. 574, 581 (E.D. Wash. 1975) (in an action under [42 U.S.C. § 1983](#) (1982), plaintiff was entitled to see communications from State attorney general to the prison superintendent when the latter claimed he acted in good faith). Obviously, one party does not waive the privilege because the other party puts his or her good faith at issue by way of counterclaim or affirmative defense. *See* [Chase Manhattan Bank v. Drysdale Sec. Corp.](#), 587 F. Supp. 57 (S.D.N.Y. 1984) (defendants in securities-fraud action denied discovery of privileged communications although they might show that plaintiff did not in fact rely upon defendant's allegedly fraudulent misrepresentations); [Aetna Casualty & Sur. Co. v. Superior Court](#), 153 Cal. App. 3d 467, 200 Cal. Rptr. 471 (1984) (counterclaim for bad-faith denial of insurance coverage did not entitle defendant to examine communications between the insurer and its attorneys with respect to the policy prior to its issuance). Thus it has been held that a party did not waive the physician-patient privilege by a mere denial of allegations about his mental or physical condition. [Clark v. District Court](#), 668 P.2d 3 (Colo. 1983) (en banc). *But cf.* [Honeywell, Inc. v. Piper Aircraft Corp.](#), 50 F.R.D. 117, 120 (M.D. Pa. 1970) (dictum: '[Where] a plaintiff in a patent infringement suit has put the validity of the patents directly in issue, he may have waived any claim of privilege.'). The *Honeywell* dictum seems plainly wrong.
- 124 *See, e.g., International Tel. & Tel. Corp. v. United Tel. Co.*, 60 F.R.D. 177, 186 (M.D. Fla. 1973). The court found that plaintiff had failed to make a prima facie showing that certain administrative proceedings were a mere sham, but cautioned defendant that it might not rely at trial upon its counsel's testimony that the proceedings were brought in good faith if it should refuse to waive the privilege in discovery.
- 125 Certain language in *Kockums* suggests a slightly different analysis—namely, that the defendant could make out a prima facie showing of unfair competition or antitrust violations if the burden of proof were lowered from clear and convincing to a preponderance of the evidence. [Kockums](#), 561 F. Supp. at 173. The implication is that the independency test is inappropriate when a prima facie case is more difficult than usual to establish for procedural reasons—in this case, because the burden of proof of fraud is heavier than ordinary. *See* [id.](#) at 173 n.5.
- 126 The author is aware of no instance of *in camera* inspection before *Williams v. Quebrada Ry., Land & Copper Co.*, [1895] 2 Ch. 751, although the court described such inspection as an old practice. The judge was careful to note, however, that he had made up his

mind that the documents should be produced before he inspected them; the purpose of the inspection, with defendant's permission, was merely to limit the production order as far as possible.

127

The Colorado courts have strongly adopted this position. In [A. v. District Court](#), 191 Colo. 10, 24, 550 P.2d 315, 325-26, *cert. denied*, 429 U.S. 1040 (1976), the court ruled that no showing whatever was required to justify *in camera* inspection of client files subpoenaed by a grand jury from an attorney; if the documents revealed some foundation in fact for the charge they might be admitted into evidence before the grand jury. *See also* [Bernard D. Morley, P. C. v. MacFarlane](#), 647 P.2d 1215, 1221-22 (Colo. 1982) (foundation in fact may be established by *in camera* inspection of client records seized in a search of the attorney's office); [Caldwell v. District Court](#), 644 P.2d 26, 33 (Colo. 1982) (discovery of attorney-client communications permitted in fraud and conspiracy suit against two attorneys and legal counsel employed by these attorneys). *But cf.* [Dura Corp. v. Milwaukee Hydraulic Prods., Inc.](#), 37 F.R.D. 470, 471 (E.D. Wis. 1965) (*in camera* inspection is 'unwarranted 'prying' when a sufficient showing of privilege has been made).

128

See, e.g., In re [Grand Jury Proceedings](#), 727 F.2d 1352 (4th Cir. 1984) (attorney, not a target of the investigation, was denied access to IRS agent's affidavit submitted to defeat privilege); *In re* [John Doe Corp.](#), 675 F.2d 482 (2d Cir. 1982) (government affidavit summarizing secret grand jury testimony obtained under a grant of immunity); *In re* [Grand Jury Proceedings \(Doe\)](#), 575 F. Supp. 197, 200 n.3 (N.D. Ohio 1983) (client may not see the government's oral, *in camera* affidavit without a showing of 'particularized need'), *aff'd*, 154 F.2d 154 (6th Cir. 1985); *In re* [Grand Jury Proceedings \(FMC Corp.\)](#), 604 F.2d 798, 802-03 (3d Cir. 1979) (crime-fraud exception applicable to work product privilege as well as attorney-client privilege); *see also* Weiner, *Federal Grand Jury Subpoenas to Attorneys: A Proposal for Reform*, 23 AM. CRIM. L. REV. 95, 106-07 (1985) (basing a determination of crime or fraud on an *ex parte* government submission *in camera* undermines the attorney-client relationship).

129

[723 F.2d 1461](#) (10th Cir. 1983), *cert. denied*, 105 S. Ct. 90 (1984).

130

[Id.](#) at 1467. The court here adverted to an important subsidiary function of *in camera* inspection—the editing of documents to exclude material not coming within any exception to the privilege. *See, e.g., In re* [Witness before Special March 1980 Grand Jury](#), 729 F.2d 489 (7th Cir. 1984) (exclusion of billing records to the extent they reveal the subject to consultation); *In re* [Shargel](#), 742 F.2d 61, 63 (2d Cir. 1984) (dictum).

131

The quoted phrase appears in [United States v. Dionisio](#), 410 U.S. 1, 17 (1973) (no preliminary showing of 'reasonableness' required before grand jury may summon witness to give voice exemplar).

132

In re [Sealed Case](#), 676 F.2d 793, 814-15 (D.C. Cir. 1982) (Wright, J.). Judge Wright specifically rejected the necessity for 'too precise or rigorous' a standard for the relationship between the work product under subpoena and the prima facie violation, or for a 'specific showing of the client's intent in consulting the attorney.' *Id.*

133

In re [Special September 1978 Grand Jury](#), 640 F.2d 49, 57 (7th Cir. 1980).

134

See infra notes 267-75 and accompanying text.

135

[722 F.2d 174](#) (5th Cir. 1983).

136

Id. at 175, 179.

137

Id. at 176. The government's theory was that the return of the money was an obstruction of justice in violation of [18 U.S.C. § 1512](#) (1982); the letter counted as fabricated evidence, and the client therefore consulted his attorney for a criminal purpose. For a more detailed discussion of this case, see *infra* notes 166-72 and accompanying text.

138

Dyer, [722 F.2d at 179](#) (citation omitted).

139

See supra notes 31-55 and accompanying text.

- 140 3 Barb. Ch. 528 (N.Y. 1848). *See supra* note 40 and accompanying text.
- 141 *See supra* note 31.
- 142 14 Q.B.D. 153 (1884). *Cox* is discussed *supra* notes 56-75 and accompanying text.
- 143 Coffee, *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line between Law and Ethics*, 19 AM. CRIM. L. REV. 117, 126 (1981) [hereinafter cited as *From Tort to Crime*].
- 144  15 U.S.C. § 2 (1982) (made a felony in 1974, Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, § 3, 88 Stat. 1706, 1708 (1974)).
- 145 *Id.* § 77x.
- 146 *Id.* § 78ff(a).
- 147 26 U.S.C. § 7201 (1982).
The advice an attorney gives a defendant almost certainly will be relevant to the issue of willfulness, which is an element in offenses under both securities acts, and to the ‘no knowledge’ defense if it is raised in mitigation of the penalty under 15 U.S.C. § 78ff(a) (1982). The assertion of the ‘no knowledge’ defense may impliedly waive the privilege. *See supra* text accompanying note 123.
- 148 *See, e.g.*, Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 135(a) (1982)U.S.C. § 135(a) (1982); Toxic Substances Control Act, 15 U.S.C. §§ 2614-2616 (1982); Federal Water Pollution Control Act,  33 U.S.C. § 1319(c) (1977); Resource Conservation and Recovery Act, 42 U.S.C. § 6928 (1982) (disposal of hazardous solid waste); Clean Air Act, *id.* § 7413(c).
- 149 In addition to the Racketeer Influenced and Corrupt Organizations Act (RICO),  18 U.S.C. §§ 1961- 1968 (1982) (*see infra* text accompanying notes 151-58), see the Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises Act (Travel Act), *id.* § 1952.
- 150 Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (amending the Securities and Exchange Act of 1934 (codified at  15 U.S.C. §§ 78m(b)(2)-(3), 78dd-1, 78dd-2, & 78ff (1978)). Because the Act forbids payments to foreign officials and political parties to gain a business advantage or to influence legislation in a foreign country, §§ 78dd-1, 78dd-2, it also must require for the first time that corporations keep internal accounting systems in reasonable detail (ending the use of ‘slush funds’). For a general discussion of this development, see *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227 (1979).
- 151  18 U.S.C. §§ 1961- 1968 (1982).
- 152 Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970).
- 153  18 U.S.C. §§ 1964- 1968 (1982).
- 154 *Id.* § 1962(a). A ‘pattern of racketeering activity’ means the commission of two or more of the many state and federal offenses set forth at  § 1961(1). It should be noted that two acts are not necessarily enough to constitute a ‘pattern.’ *See*  *Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3275, 3285 n.14 (1985). Although the offenses are of the sort often associated with organized crime, many or most could be committed by an individual.

An ‘enterprise,’ as defined in  18 U.S.C. § 1961(4) (1982), means any association that functions for financial gain, whether organized for legitimate or illegitimate ends. *See*  *United States v. Turkette*, 452 U.S. 576 (1981); *cf.*  *United States v. Ivic*, 700 F.2d 51, 63 (2d Cir. 1983) (politically motivated conspiracy of Croatian terrorists is not a RICO ‘enterprise’).
- 155  18 U.S.C. § 1962(b) (1982).

156  *Id.* § 1962(c).

157 *Id.* § 1962(d).

158 Reported cases are few, but the point is illustrated by  *United States v. Loften*, 518 F. Supp. 839 (S.D.N.Y. 1981). The government recorded telephone conversations between Loften, the alleged head of a heroin ring, and Socolov, his lawyer. It justified this intrusion into attorney-client communications on the grounds that Socolov was primarily giving business advice.  *Id.* at 845. Socolov was indicted for conspiracy to violate RICO,  18 U.S.C. § 1962(d) (1982). At trial he asserted the attorney-client privilege to suppress the wiretap evidence.  *Loften*, 518 F. Supp. at 845.

The district court found that the evidence was admissible on two grounds: most of Socolov's advice related to business rather than legal matters, and the occasional bit of legal advice given was in furtherance of the investment of racketeering income. It did not matter whether Socolov knew the source of the funds, so long as there was evidence that they were derived from racketeering. Once the privilege was lost on account of Loften's consulting an attorney in furtherance of RICO violations, the communications were admissible against Socolov.  *Id.* at 848.

In re Shargel, 742 F.2d 61 (2d Cir. 1984), reflects another common pattern. Here the grand jury sought the attorney's records of money paid or property given to him by clients under investigation for violations of RICO; the attorney himself was apparently not a target. '[T]he government seeks fee information as evidence of unexplained wealth which may have been derived from criminal activity . . . and as evidence of violation of the tax laws.' *Id.* at 63 (citations omitted). The court held, quite properly, that neither fee information nor the identity of clients nor the identity of those who pay their legal bills is considered confidential, adding in dictum that the records might be confidential if they could be used to support an inference of concerted activity among the clients. *Id.* at 64. The crime-fraud exception is often invoked, however, in cases involving the identity of clients or the amount of fees paid. *See infra* notes 234-38 and accompanying text.

159  18 U.S.C. § 1951(a) (1982) (forbidding extortion). Extortion is defined, inter alia, as 'the obtaining of property from another, with his consent, induced . . . under color of official right.'  *Id.* § 1951(b)(2).

160 *Id.* §§ 1341, 1343.

161 Such, at least, is the interpretation of Professor John C. Coffee, Jr., in two articles: *From Tort to Crime*, *supra* note 143, and *The Metastasis of Mail Fraud: The Continuing Story of the 'Evolution' of a White-Collar Crime*, 21 AM. CRIM. L. REV. 1 (1983) [hereinafter cited as Coffee, *The Metastasis of Mail Fraud*]. He cites two recent appellate cases,  *United States v. Bronston*, 658 F.2d 920 (2d Cir. 1981) (despite absence of any evidence that client was harmed, attorney was convicted for personally representing a client in a known conflict of interest with another client of his firm, without disclosing such conflict), *cert. denied*, 456 U.S. 915 (1982), and  *United States v. Mandel*, 591 F.2d 1347 (4th Cir. 1979), *aff'd by an equally divided court*, 602 F.2d 653 (4th Cir. 1979) (en banc), *cert. denied*, 445 U.S. 961 (1980), as representing the utmost reach of successful prosecutions for mail/wire fraud to date. Coffee, *The Metastasis of Mail Fraud*, *supra*, at 11-15. '[O]ne alternative theory of liability [in the latter case] was that Governor Mandel presented false information to, or concealed material information from, the relevant authorities to advance the interest of his cronies, thereby depriving the citizens of Maryland of his honest and faithful services.' *Id.* at 15 n.68. No evidence was necessary under this theory to show that Mandel had benefited in any tangible way, and no specific or quantifiable injury to the public had to be shown. *Cf.*  *United States v. Isaacs*, 493 F.2d 1124, 1149-52 (7th Cir.) (receipt of bribe by Governor of Illinois constitutes federal mail fraud, although the 'defrauded' citizens of Illinois suffered no monetary loss), *cert. denied*, 417 U.S. 976 (1974). This case is criticized in Comment, *The Intangible Rights Doctrine and Political-Corruption Prosecutions under the Federal Mail-Fraud Statute*, 47 U. CHI. L. REV. 562, 567-72, 587 (1980) (legislative history of mail-fraud statute reveals that it was intended to proscribe only the use of the mail to obtain property by false pretenses).

These cases and others create such decisive advantages for the prosecution that federal prosecutors supposedly repeat the maxim 'when in doubt, charge mail fraud.' Coffee, *supra* note 143, at 126 n.45. In addition to the advantages mentioned above, Professor Coffee argues that mail fraud as now interpreted is an inchoate crime because what is punished is the existence of a scheme to defraud, not the act of defrauding. In contrast, at common law a contemplated fraud must be reasonably close to fruition before it is punishable.

- 162 See, e.g., Weiner, *supra* note 128, at 96 n.4 (list of cases in which civil rights organizations have intervened as *amici curiae*); Zwerling, *Federal Grand Juries v. Attorney Independence and the Attorney-Client Privilege*, 27 HASTINGS L.J. 1263 (1976).
- 163 The power of the IRS to issue administrative summonses is set forth in 26 U.S.C. § 7602 (1982) (significantly expanded by the Tax Equity and Fiscal Responsibility Act of 1982, § 333, Pub. L. No. 97-248, 96 Stat. 324, 622-23); that of the SEC in 15 U.S.C. § 78u(b) (1982); and that of the FTC in 15 U.S.C. § 49 (1982). Such summonses are issued without probable cause. See, e.g., *United States v. Powell*, 379 U.S. 48, 57 (1964) (IRS). In addition, the United States Department of Justice may issue so-called 'civil investigative demands' (CIDs) in antitrust investigations, 15 U.S.C. §§ 1311-1314 (1982), and in connection with RICO, 18 U.S.C. § 1968 (1982). Since 1976, antitrust CIDs may be served upon natural persons and may require oral testimony. Antitrust Improvements Act of 1976, §§ 101-102, Pub. L. No. 95-435, 90 Stat. 1383, 1383-87. See generally *White-Collar Crime: Third Annual Survey of Law*, 22 AM. CRIM. L. REV. 279, 578 (1984) (concerning use of administrative summonses) [hereinafter cited as *White-Collar Crime*]; Wilson & Matz, *Obtaining Evidence for Federal Economic Crime Prosecutions: An Overview and Analysis of Investigative Methods*, 14 AM. CRIM. L. REV. 651 (1977) (concerning use of administrative summonses, grand jury subpoenas, court authorized and consent searches, voluntary disclosures, information obtained from related civil regulatory matters, and foreign documents in federal economic criminal prosecutions). In this context *SEC v. Gulf & W. Indus., Inc.*, 518 F. Supp. 675 (D.D.C. 1981), should be noted. The SEC's civil complaint was based largely on interviews with defendant's attorney, which the attorney consented to give to obtain probation after his conviction for embezzling large sums from the defendant and his law firm. The court refused to dismiss because the SEC had not actively solicited privileged information. *Id.* at 686. Gulf & Western's failure to establish that the information gained was indeed privileged, and not merely business advice, is understandable considering that the SEC did not transcribe its eleven days of interviews with the attorney. The agency did, however, tell the attorney's lawyer that it did not wish to hear any privileged communications. *Id.* at 684.
- 164 The prosecutor or agency may accomplish this through a so-called *Schofield* affidavit. See *In re Grand Jury Proceedings (Schofield)*, 507 F.2d 963 (3d Cir.) (A *Schofield* affidavit requires 'a minimum showing . . . that each item sought was (1) relevant to an investigation, (2) properly within the grand jury's jurisdiction, and (3) not sought primarily for another purpose.'). *cert. denied*, 421 U.S. 1015 (1975). *Contra In re Ousterhoudt*, 722 F.2d 591 (9th Cir. 1983).
- 165 See, e.g., *In re Grand Jury*, 619 F.2d 1022, 1028-29 (3d Cir. 1980) (target may not argue on a motion to quash a subpoena that the short filling of beer bottles does not violate 26 U.S.C. § 5412 (1976) despite 'ingenious contentions').
- 166 722 F.2d 174 (5th Cir. 1983); see *supra* notes 135-38 and accompanying text.
- 167 18 U.S.C. § 1951 (1948).
- 168 *Dyer*, 722 F.2d at 177.
- 169 *Id.* at 176.
- 170 *Id.*
- 171 *Id.* The United States Court of Appeals for the Fifth Circuit upheld the district court's determination that the drafting and delivery of the cover letter were prima facie evidence that Dyer had consulted his attorney in furtherance of the crime of obstructing justice. *Id.* at 178. This conclusion seems dubious. The letter, taken by itself, provides no evidence as to Dyer's original motive in soliciting the money. If the cover letter had contained the same unlikely explanation that Dyer gave over the telephone for the return of the money, it would more clearly be manufactured evidence.
- 172 This use of a superseding indictment is not unique. In *In re Grand Jury Subpoena Duces Tecum Dated January 2, 1985*, 605 F. Supp. 839 (S.D.N.Y.), *rev'd*, 767 F.2d 26 (2d Cir. 1985), defendant was indicted for conspiracy to distribute heroin. After he retained a new attorney, he was reindicted for organizing a continuing criminal narcotics enterprise in violation of 21 U.S.C. § 848 (1970), entitling the government to the forfeiture of his traceable profits from the enterprise. The new attorney was subpoenaed

before the grand jury in connection with a second superseding indictment and asked about his fee arrangements, with the implicit threat that he would be called to testify against his client at trial, thus compelling his disqualification, and would forfeit all fees for an unsuccessful defense. The subpoena was upheld despite the court's acknowledgment that the information sought was clearly incriminating. The United States Court of Appeals for the Second Circuit quashed the subpoena on appeal, however, because its predominant purpose was preparation for trial on the indictment already pending.

- 173 The court of appeals stated, however, that Dyer would run a high risk of waiving the privilege if he should put his attorney's letter into evidence at trial. *Dyer*, 722 F.2d at 178.
- 174 Cf. *In re Grand Jury Subpoena Duces Tecum Dated September 15, 1983*, 731 F.2d 1032 (2d Cir. 1984). Marc Rich & Co., the intervenor, had failed to pay substantial fines for civil contempt levied as a result of its failure to comply with a previous subpoena to its attorney. The grand jury now was investigating Rich's transfer of a wholly-owned American subsidiary to its president, allegedly with the intention of becoming judgment-proof in the United States to avoid the fines. The district court upheld the grand jury's subpoena with regard to documents concerning the transfer, on the theory that the sale was an obstruction of justice in violation of 18 U.S.C. § 1503 (1982) or a conspiracy to defraud the United States, in violation of 18 U.S.C. § 371 (1982)—the very crimes under investigation. The United States Court of Appeals for the Second Circuit rejected this rationale, but upheld the subpoena in part. The court expressed great skepticism about the prosecution's theory that the transfer was in violation of federal statutes. The subpoena was proper, however, because there was evidence tending to show that the transfer was a fraudulent conveyance under New York law. Thus the attorneys were ordered to testify, even though it was apparently likely that any indictment for violation of federal law would ultimately be quashed. Again one must wonder whether the prosecutor's real aim was not to gather evidence from the attorneys for use in a subsequent criminal prosecution for contempt—the offense undoubtedly committed.
- 175 RICO provides a civil cause of action. See *supra* note 153 and accompanying text. RICO has proved a powerful adjunct to the Securities Act of 1934, 15 U.S.C. §§ 78a-78kk (1982), because 'predicate offenses' of § 1961 include 18 U.S.C. § 1961(1)(D) (1982): '[A]ny offense involving . . . fraud in the sale of securities.' Targets of unfriendly corporate takeovers have struck back with the allegation that the filing of two or more inaccurate Forms 13D that conceal the raiders' real intentions constitutes a pattern of racketeering activity. Advantages over a garden-variety securities action include less onerous standing requirements, treble damage, and the publicity advantages of a charge of 'racketeering.' See Note, *RICO and Securities Fraud: A Workable Limitation*, 83 COLUM. L. REV. 1513 (1983).
- 176 *Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3275, 3281-84 (1985) (holding that no 'racketeering injury' apart from that caused by the predicate offenses themselves need be proved and implying that the predicate offenses may be proved by merely a preponderance of the evidence). *Id.* at 3283-84.
- 177 60 F.R.D. 177 (M.D. Fla. 1973).
- 178 *Id.* at 182-83.
- 179 *Id.* at 179.
- 180 *Id.* at 182.
- 181 Many other courts in parallel circumstances have ordered the production of such privileged documents or at least examined them *in camera* without requiring any preliminary showing. See *supra* note 127 and accompanying text.
- 182 See *White-Collar Crime*, *supra* note 163, at 341 n.480.
- 183 18 U.S.C. § 1001 (1982). This statute is notable because it prescribes more severe penalties for unsworn statements than for statements under oath. See *id.* § 1621 (five years' imprisonment or \$2,000 fine for making false statement under oath).
- 184 *Id.* § 1010.
- 185 *Id.* § 1020.

- 186 *Id.* § 1015.
- 187  15 U.S.C. § 45(a)(1) (1982).
- 188 *See, e.g.*,  *Mallis v. Bankers Trust Co.*, 615 F.2d 68, 80 (2d Cir. 1980), *cert. denied*, 449 U.S. 1123 (1981). Professor Prosser adds a fifth element to the four mentioned: '[a]n intention to induce the plaintiff to act or to refrain from action in reliance upon the misrepresentation.' PROSSER AND KEETON ON THE LAW OF TORTS § 105, at 728 (W. Keeton 5th ed. 1984).
- 189 In  *Research Corp. v. Gourmet's Delight Mushroom Co.*, 560 F. Supp. 811 (E.D. Pa. 1983), defendants in a patent infringement action wished to see communications between the applicant for the patent (plaintiff's assignor) and his attorney during the application process, on the theory that such communications were in furtherance of 'fraud on the Patent Office.' Defendants had strong extrinsic evidence of misrepresentation in the application of 'prior art.'
- The district court, however, refused discovery because there was no showing of actual fraud.  *Id.* at 820. The defendant would have to show detrimental reliance and change of position on the part of the examiner—in other words, that the patent would not have been issued but for the applicant's misrepresentations. Such a showing is the same as a prima facie case that the patent was entirely invalid (although some courts have declared a patent unenforceable for lesser misrepresentations). *See* 2 P. ROSENBERG, PATENT LAW FUNDAMENTALS § 15.08 (2d ed. 1985) (citing illustrative cases). Interestingly, the declaration signed by an applicant (on oath) specifically warns that willful false statements (even if they do not necessarily invalidate the patent) are punishable by fine or imprisonment under  18 U.S.C. § 1001 (1982). *See* 37 C.F.R. § 1.68 (1984). Defendant in *Research Corp.* could have argued that the applicant committed the crime of concealing a material fact from a federal agency, and thus any communication in furtherance of such crime should be discoverable.
- 190  122 N.J. Super. 479, 496, 300 A.2d 868, 877 (Ch. Div. 1973), *aff'd per curiam*,  126 N.J. Super. 103, 312 A.2d 881 (App. Div. 1973), *rev'd on other grounds*, 66 N.J. 401, 331 A.2d 612 (1975).
- 191 99 N.J. 493, 503-04, 493 A.2d 1239, 1245 (1985) (Defendant in a divorce action flouted a court order incorporating his agreement to pay accountant's fees by leaving the jurisdiction. Such removal constituted fraud on the court, and his attorney could be compelled to reveal his new address, although communicated in confidence.).
- 192  *Callan*, 122 N.J. Super. at 496, 300 A.2d at 877. The case concerned the active connivance of two attorneys in their clients' flouting of a court order and subsequent concealment of such disobedience. On appeal the New Jersey Supreme Court found the attorneys innocent of any such complicity. *In re Callan*, 66 N.J. 401, 406-07, 331 A.2d 612, 615-16 (1975). Having metaphorically characterized these actions as 'fraud on the court,' the chancellor supposed it necessary to define fraud broadly to circumvent the privilege. The better view is that under these circumstances the privilege never attached. *See supra* note 49 and accompanying text.
- 193  *United Servs. Auto. Ass'n v. Werley*, 526 P.2d 28, 33 (Alaska 1974). The decision in *Werley* seems wrong because the insurance company did not assert a defense of good-faith reliance upon the advice of counsel. *See supra* note 123 and accompanying text.
- 194 The court in  *Fassihi v. Sommers, Schwartz, Silver, Schwartz, & Tyler, P.C.*, 107 Mich. App. 509, 309 N.W.2d 645 (1981), simply assumed that a breach of fiduciary duty—nondisclosure by the corporation's attorney of a business opportunity to a 50% shareholder—was a species of fraud that overcame the corporate attorney-client privilege. This was an alternative ground for the holding. *Id.*
- 195 561 F. Supp. 1247 (E.D.N.Y. 1982).
- 196 *Id.* at 1255.
- 197 *Id.* at 1257.
- 198 *Id.* The greatest difficulty was that the communications sought were those from Walco's attorney to Richmond, asking Richmond for information concerning his future relationship with Walco and explaining the draft pension agreement. The syllogism underlying the *Walco* opinion is: (1) the attorney's request for an advisory opinion was a representation that the pension agreement accurately described the future relationship between Richmond and Walco; (2) because the agreement was a sham, the representation qualified as

a fraud; (3) the attorney acted as Walco's agent in making the misrepresentation; (4) the pension agreement was drafted in furtherance of the misrepresentation; (5) therefore, all communications between Richmond and Walco's attorney relative to the pension agreement were in furtherance of fraud. For this syllogism to work, the court must conclude (as it did, *id.* at 1253) that the attorney was representing Walco only.

- 199  18 U.S.C. § 1001 (1982). It might seem surprising that the House Ethics Committee is a 'department or agency of the United States,' but as least one court has so held. *United States v. Hansen*, 566 F. Supp. 162, 163 (D.D.C. 1983) (falsification of Congressman's financial disclosure statement).
- 200 A trial court's determination that a foundation exists for the application of the crime-fraud exception is an exercise of discretion, not to be overturned unless the court abused its discretion to the prejudice of the defendant.  *Sedco Int'l, S.A. v. Cory*, 683 F.2d 1201, 1207 (8th Cir.), *cert. denied*,  459 U.S. 1017 (1982); *Bernard D. Morley, P.C. v. MacFarlane*, 647 P.2d 1215, 1222 (Colo. 1982); *People v. Board*, 656 P.2d 712, 714 (Colo. App. 1982). When the court denies a motion to quash a grand jury subpoena, such denial will be upheld except when 'clearly erroneous.' *In re*  *Grand Jury Subpoena Duces Tecum (Lahodny v. United States)*, 695 F.2d 363, 365 n.2 (9th Cir. 1982). Appellate courts are not disposed, in making this determination, to restate the evidence, especially when it was originally submitted *in camera* and *ex parte*, as so often occurs. To a student of the crime-fraud exception, it is dispiriting to read scores of cases that state the rule in a sentence and in another sentence state simply that the trial court did not abuse its discretion in determining that the exception applied, without discussing the rationale for the rule, specifying the crime or fraud in furtherance of which the attorney was consulted, discussing the client's intention, reviewing the supporting evidence, or stating whether and how the attorney's testimony is relevant to the case.
- 201 *See supra* note 70 and accompanying text; *State v. Phelps*, 24 Or. App. 329, 545 P.2d 901 (1976) (defendant admitted to first attorney that the witnesses he proposed to call were not actually at the scene; attorney withdrew, and the witnesses were unwittingly called by second attorney).
- 202 For a dubious example, see *Doyle v. Union Ins. Co.*, 202 Neb. 599, 277 N.W.2d 36 (1979).
- 203 This question is raised by *In re Grand Jury Subpoenas Dated December 18, 1981 and January 4, 1982*, 561 F. Supp. 1247 (E.D.N.Y. 1982), the Walco-Richmond case. *See supra* notes 195-99 and accompanying text.
- 204 *See*  *Nix v. Whiteside*, 106 S. Ct. 988, *rev'g*  *Whiteside v. Scurr*, 744 F.2d 1323 (8th Cir. 1985). In *Nix* a state prisoner sought federal habeas corpus on the ground that he had been denied effective assistance of counsel because his attorney, learning that he intended to perjure himself as to facts vital to his claim of self-defense, induced him to testify truthfully by threatening to resign, after which the attorney would be 'allowed' to take the stand to impeach the perjured testimony. *Id.* at 992. (The Supreme Court did not interpret the attorney's words as 'a threat to testify against Whiteside while he was acting as counsel,' *id.* at 997 n.7). The Supreme Court unanimously denied the prisoner's petition. The attorney's behavior conformed to the Iowa standards of professional conduct and to those generally accepted nationally, *id.* at 995-97, and in any case the defendant was not prejudiced thereby. *Id.* at 999.
- 205 Of course, this rationale suggests that the first attorney has an ethical duty to come forward voluntarily, which is not true under the *Model Rules of Professional Conduct*. *See infra* note 287 and accompanying text.
- 206 A lurid example is *Commonwealth v. O'Brien*, 377 Mass. 772, 388 N.E.2d 658 (1979). Defendant fatally shot his wife in his attorney's presence, in the course of divorce negotiations. A few minutes later, he asked the attorney if the latter would represent him at trial. In ruling that the attorney could testify to this remark, the court held that defendant had no reasonable expectation of confidentiality—which as a reason for overcoming the privilege is wholly circular. The better analysis is that the remark was offered not for its content as an implicit confession but for what it revealed about defendant's mental state when it was made. It therefore was admissible solely as the attorney's observations of the client's demeanor at the time of the shooting, and the intrusion into the confidentiality of the attorney-client relationship was minimal. The same rationale justified the holding in *United States v. Weger*, 709 F.2d 1151 (7th Cir. 1983). Defendant was convicted of making false statements in a bank loan application in violation of 18 U.S.C. § 1014 (1982). She had forged a title opinion from her attorney. The government introduced an old letter of innocuous content from defendant to her attorney for the purpose of showing the identity of the typing with that in the forged opinion.

The court held that the old letter was admissible because the characteristics of the type used in the letter were not a ‘communication’ and therefore could not be privileged. Of course the jury got to see the contents of the letter, which were certainly privileged, but also were irrelevant to the present crime, trivial, and nonprejudicial. The court of appeals was not content to let the matter rest there, but went on to characterize the client's act of stealing a sheet of her attorney's stationery to forge the letter as an abuse of the attorney-client relationship destroying the privilege. The court did not explain, however, why it would be appropriate to destroy the privilege retroactively as to *all* communications over the years no matter what their subject. Furthermore, the court's theory assumed that the client stole the stationery—an unproven fact that could have been shown from the typing and the attorney's testimony. This assumption raises the familiar problem of the circularity of the prima facie case. *See supra* notes 87-103 and accompanying text. The opinion in *Weger* exemplifies a common tendency to use the crime-fraud exception as a makeweight, usually in a sloppy way.

- 207 If knowingly filing a false report is a crime, as it always is under federal law, the client has used his or her attorney in furtherance of present wrongdoing. However, a court may treat the cover-up of past wrongdoing as a fraud continuous with, and therefore in furtherance of, the original offense. *See, e.g., In re* [Special September 1978 Grand Jury](#), 640 F.2d 49 (7th Cir. 1980) (false report filed with Illinois State Board of Elections, when defendants already knew they were under investigation, held to be in furtherance of previously made illegal political contributions).
- 208 *See supra* notes 126-38 and accompanying text.
- 209 *See, e.g., Ex parte* [Enzor](#), 270 Ala. 254, 117 So. 2d 361 (1960). In *Enzor* an attorney testified before a grand jury that a client had admitted to him either miscounting election returns or planning to miscount them, but claimed he could not remember which. He was committed to prison for refusing to identify the client. The Alabama Supreme Court reversed the contempt conviction, holding that the attorney-client privilege protects confessions of past wrongdoing and any ambiguity must be resolved in favor of the client. *See also* [SEC v. Harrison](#), 80 F. Supp. 226, 232 (D.D.C. 1948) (privilege not overcome when communication may have been made simply to discover if a certain action had been filed, rather than to induce its filing for fraudulent purposes); *In re* [Selser](#), 27 N.J. Super. 257, 266, 99 A.2d 313, 317-18 (App. Div. 1953) (privilege not overcome merely on showing that mobster retained and conferred with attorney 10 to 12 days before attempting to influence a grand jury).
- 210 221 Ky. 301, 298 S.W. 943 (1927).
- 211 *Id.* at 310, 298 S.W. at 947.
- 212 One court quite baldly stated: ‘If . . . the court determines that the alleged crime occurred after consultation with counsel, then . . . the court may find that the crime-fraud exception bars use of the privileges.’ *In re* [Grand Jury Proceedings \(FMC Corp.\)](#), 604 F.2d 798, 804 (3d Cir. 1979); *cf. In re* [Sealed Case](#), 754 F.2d 395, 402 (D.C. Cir. 1985) (‘[W]e agree that ‘mere coincidence in time,’ without more, cannot support the invocation of the exception . . .’).
- 213 202 F.2d 281 (5th Cir. 1953).
- 214 *Id.* at 284.
- 215 The court recognized that the fact of the deposit of money was not a ‘communication’ and that in his role as escrow agent the lawyer was not even acting as an attorney—a broker could have done the same. The result is thus correct. There is an important difference, however, between saying that the fact of deposit is not privileged and saying that all communications that concerned such deposit are not privileged because they were in furtherance of crime.
- 216 [731 F.2d 557](#) (8th Cir. 1984).
- 217 *Id.* at 561.
- 218 *Id.* at 562.
- 219 17 HOWELL'S STATE TRIALS 1139 (1743). For a detailed discussion of *Annesley*, *see supra* notes 15-30 and accompanying text.

- 220 *See supra* text accompanying note 30.
- 221 751 F.2d 277 (8th Cir. 1984).
- 222 *Id.* at 278.
- 223 *Id.*
- 224 *Id.* at 279.
- 225 *Id.*
- 226 *Id.* at 280.
- 227 *Id.*
- 228 *Id.*
- 229 *Id.*
- 230 *Id.* at 282-83.
- 231 *Id.* at 283.
- 232 *Id.* at 284.
- 233 *Id.*
- 234 *See supra* notes 213-20 and accompanying text.
- 235 The early case of *Rex v. Watkinson*, 93 Eng. Rep. 1072 (Ch. 1740), held that an attorney could not be asked the identity of his client, but the reporter remarked ‘[q]uaere tamen, for this was to a fact in his own knowledge, and no matter of secrecy committed to him by his client.’ *Id.*
- 236 *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1519 (1985) [hereinafter cited as *Privileged Communications*]; *see*  *United States v. Liebman*, 742 F.2d 807 (3d Cir. 1984) (attorneys charged fees only to clients who actually invested in certain real estate partnerships; court held the attorneys could not be compelled by subpoena to furnish a list of such clients to the IRS, which would be tantamount to revealing the attorneys' advice about the propriety of deducting such fees); *see also*  *NLRB v. Harvey*, 349 F.2d 900, 905 (4th Cir. 1965) (privilege may be recognized when so much information has already been disclosed that identifying the client or fees paid would amount to disclosure of confidential information); *cf.*  *United States v. Jeffers*, 532 F.2d 1101, 1115 (7th Cir. 1976) (attorney may be compelled to testify as to legal fees paid by defendant charged with violating  21 U.S.C. § 848 (1970), engaging in a continuing criminal enterprise, an element of which is the obtaining of ‘substantial income’ therefrom), *aff’d on other grounds*,  432 U.S. 137 (1976).
- 237 *See In re*  *Grand Jury Proceedings (United States v. Jones)*, 517 F.2d 666, 674 (5th Cir. 1975) (government claimed to possess information that named individuals had paid attorney fees in excess of their total reported income; therefore, if attorneys identified them as clients and revealed the amount of fees paid by them, the clients would be effectively incriminated).
- 238 *See generally In re*  *Grand Jury Investigation No. 83-2-35*, 723 F.2d 447, 450 (6th Cir. 1983) (exception did not apply when attorney told court that revelation of client's identity would implicate the client in the very criminal activity for which advice was sought but failed to testify or submit evidence to that effect), *cert. denied*, 104 S. Ct. 3524 (1984); *In re*  *Grand Jury No. 81-1*, 676 F.2d 1005, 1009 (attorney may not be compelled to reveal payments by and on behalf of named client when government's refusal to reveal details regarding the purpose of the grand jury investigation makes it impossible to determine whether exception applies), *withdrawn after target was indicted and fled*, 697 F.2d 112 (4th Cir. 1982).

The three exceptions are often said to derive from the decision of the United States Court of Appeals for the Ninth Circuit in [Baird v. Koerner](#), 279 F.2d 623 (9th Cir. 1960). In *Baird* an attorney paid a certain sum on account of delinquent taxes for an anonymous client, whose identity the IRS sought to discover. The court refused to order the attorney to testify for the three reasons later conceptualized as distinct exceptions to the rule that the identity of a client is not privileged information. First, the content of the anonymous client's privileged communication was already known, at least by inference, *viz.*, 'that an additional tax was payable and that the unknown clients owed it.' *Id.* at 630. Second, the voluntary payment 'indicates a feeling of guilt for nonpayment of taxes, though whether it is criminal guilt is undisclosed. But it may well be the link that could form the chain of testimony necessary to convict an individual of a federal crime.' *Id.* at 633. Third, the clients consulted the attorney precisely to discover what they might do to avoid criminal and civil penalties for their former failure to pay. *Id.*

The court of appeals in *Baird* relied upon *Ex parte* [McDonough](#), 170 Cal. 230, 149 P. 566 (1915), for the California law of privilege. [Baird](#), 279 F.2d at 634. In *McDonough* the California Supreme Court held that an attorney need not testify as to the identity of a client who employed him to defend certain others against charges of election fraud and paid their bail. The revelation of the client's identity would be tantamount to an admission of complicity. The court explicitly held, however, that there was 'nothing illegal or contrary to public policy' in paying for the defense of another for a past crime or in providing his bail. [McDonough](#), 170 Cal. at 234, 149 P. at 567-68. This view is contrary to the position of most modern courts. *See infra* notes 247-54 and accompanying text. The court in *McDonough*, however, did not discuss whether the unnamed client promised to pay for the defense of his associates as an inducement for their participation in a criminal scheme.

It will be noted that the court in *Baird* did not actually impose any requirement that the attorney's testimony furnish the *last* link connecting the client to the crime. If the exception is based upon fundamental fairness, the attorney's testimony should be excluded so long as it is 'substantially probative' of the client's guilt. *In re* [Grand Jury Proceedings \(United States v. Jones\)](#), 517 F.2d 666, 674 (5th Cir. 1975); *see also* [Shatkin Inv. Corp. v. Connelly](#), 128 Ill. App. 3d 518, 470 N.E.2d 1230 (1984) (attorney found in contempt of court for refusal to take stand and answer basic questions of a judgment creditor about former client). It has been argued that the literal application of a 'last link' exception merely invites the government to call the attorney first instead of last. *See* Note, *The Attorney-Client Privilege as a Protection of Client Identity: Can Defense Attorneys be the Prosecution's Best Witnesses?*, 21 AM. CR. L. REV. 81, 91 (1983).

The 'last link' and 'legal advice' exceptions have recently come under strong attack. *See infra* note 263 and accompanying text.

- 239 [548 F.2d 1347 \(9th Cir. 1977\)](#).
- 240 [Id.](#) at 1351.
- 241 [Id.](#) at 1352, 1354.
- 242 [Id.](#) at 1350.
- 243 [Id.](#) at 1354.
- 244 The indictment of Sandino and the others alleged that such a promise had been made; his and their guilty pleas constituted the evidence that made out the government's prima facie case. [Id.](#) at 1354-55.
- 245 [Id.](#) at 1350-51.
- 246 [Id.](#) at 1350 n.2. One suspects that the prosecution's purpose in having the defendants plead to a superseding information was to provide additional evidence in support of the government's prima facie case that the provision of legal services to the conspirators was an act in furtherance of the original criminal conspiracy, thus making the crime-fraud exception applicable. *See supra* notes 166-74 and accompanying text.
- 247 [680 F.2d 1026 \(5th Cir. 1982\)](#) (en banc).

- 248  *Id.* at 1027.
- 249 *Id.*
- 250 *Id.*
- 251 *In re*  [Grand Jury Proceedings \(Pavlick\)](#), 663 F.2d 1057 (5th Cir. 1981).
- 252 *Pavlick*, 680 F.2d at 1033, 1061.
- 253 *Id.* at 1033.
- 254 *Id.* at 1030 n.3. Judge Rubin concurred in the result because of the absence of any evidence that Anonymous was a *client* of Pavlick's, as opposed to a mere benefactor of his co-conspirators. *Id.* at 1029.
- 255  641 F.2d 199 (5th Cir. 1981).
- 256  *Id.* at 201.
- 257 *Id.*
- 258 *Id.* at 204.
- 259 *Id.*
- 260 *See supra* note 237 and accompanying text.
- 261  *Fine*, 641 F.2d at 204.
- 262  *Id.* at 204 n.6.
- 263 The United States Court of Appeals for the Sixth Circuit in *In re*  [Grand Jury Investigation No. 83-2-35](#), 723 F.2d 447 (6th Cir. 1983), upheld a judgment of contempt against an attorney who declined to identify a client from whom he had received a check in payment for legal services, which check had been drawn upon the account of a fictitious company in which the client had deposited a stolen check originally made payable to IBM. The government acknowledged that it would arrest the client as soon as it knew the client's name. The court rejected the 'last link' exception simply on the grounds that the client's identity was not a privileged communication. Although acknowledging the existence of the 'legal advice' exception, the court did not find the exception applicable to these facts. *Accord In re Shargel*, 742 F.2d 61, 62-63 (2d Cir. 1984); *In re Witnesses Before Special March 1980 Grand Jury*, 729 F.2d 489 (7th Cir. 1984). The United States Court of Appeals for the Ninth Circuit, on the other hand, has denied the existence of the 'legal advice' exception, saying simply that 'no reasonably informed client could have supposed that [fee information] would be protected from disclosure.' *In re Ousterhoudt*, 722 F.2d 591, 595 (9th Cir. 1983).
- 264  425 U.S. 391 (1976). The *Fisher* Court held that the attorney-client privilege did not protect incriminating documents in the hands of the attorney unless the client would have been justified in refusing to produce them on fifth amendment grounds and that the client would not be so justified where the documents (accountants' work-papers used in preparing tax returns), although in fact incriminating, were not 'testimonial.' *Id.* at 408. The privilege against self-incrimination thus protects the client only from testifying against himself, not from producing evidence against himself. The Court denied that the fifth amendment was intended as a 'general protector of privacy.' *Id.* at 401. Justice Brennan vigorously disputed this statement in his concurrence: '[W]hat . . . highlights the opinion [is] the view that protection of personal privacy is merely a byproduct and not, as our precedents and history teach, a factor controlling in part the determination of the scope of the [fifth amendment] privilege.' *Id.* at 416.
- 265 *See supra* notes 203-20 and accompanying text.
- 266 *See infra* notes 298-302 and accompanying text.

- 267  *Fisher*, 425 U.S. at 406.
- 268 23 C. WRIGHT & K. GRAHAM, *FEDERAL PRACTICE AND PROCEDURE: EVIDENCE* § 5422, at 670-71 (1980).
- 269 *See, e.g.*,  *Nix v. Whiteside*, 106 S. Ct. 988, 996-97 (1986); *In re*  *Grand Jury Proceedings* (No. 83-1661), 727 F.2d 1352, 1355 (4th Cir. 1984); *In re Special*, September 1983, *Grand Jury*, (Klein), 608 F. Supp. 538, 542 (S.D. Ind. 1985); 23 C. WRIGHT & K. GRAHAM, *supra* note 268, § 5422, at 677 n.64. For a defense of this view, see Frankel, *The Search for Truth, an Umpireal View*, 123 U. PA. L. REV. 1031 (1975).
- The premise that the purpose of a trial is to discover the ‘truth’ is highly questionable. The truth being sought is circumscribed by the requirement of legal relevance, which is in turn defined by the legal rules that determine the outcome. Facts undoubtedly relevant to the whole truth of a situation are excluded as a matter of course. This exclusion is appropriate because our legal system has never pretended to discover ‘the truth,’ only to arrive at morally defensible resolutions of human conflicts. *See*  *United States v. Liebman*, 742 F.2d 807, 810 (3d Cir. 1984) (‘It does not advance resolution of the issue to argue . . . that the attorney-client privilege ‘is an obstacle to the search for the truth.’’) (quoting Appellee’s Brief at 8); Nahstoll, *The Lawyer’s Allegiance: Priorities Regarding Confidentiality*, 41 WASH. & LEE L. REV. 421, 441 n.54 (1984) (‘[L]itigation does not aspire to realize truth as an understanding of reality. Rather, it seeks dispute resolution based upon the opinion of an arbitrary portion of those persons who comprise a cluster of arbitrary size, randomly drawn from an arbitrary sample.’).
- 270 The author’s experience as a litigator, together with the anecdotal evidence of other attorneys, suggests another explanation—that clients confide freely in their attorneys because they are well aware of the privilege and entirely unaware of any exceptions to it. When they learn that exceptions exist and may be applicable to their cases, they typically are shocked. It is usual for attorneys, when first interviewing a client, to emphasize that everything the latter says will be kept in confidence. The author has never heard of any attorney issuing a sort of *Miranda* warning as to the limits of confidentiality at the beginning of a professional relationship. Proposed Rule 1.4(b) of the MODEL RULES OF PROFESSIONAL CONDUCT (Discussion Draft 1980) required attorneys to advise clients about ‘the relevant legal and ethical limitations to which the lawyer is subject if the lawyer has reason to believe that the client may expect assistance not permitted by law or the rules of professional conduct.’ Presumably, Proposed Rule 1.4(b) would have mandated just such a *Miranda*-type warning of clients. *See* Hodes, *The Code of Professional Responsibility, the Kutak Rules, and the Trial Lawyer’s Code: Surprisingly, Three Peas in a Pod*, 35 U. MIAMI L. REV. 739, 786-87 (1981). Professor Hodes hailed this requirement as the ‘lynchpin’ [sic] of the Rules. *Id.* at 752 n.44. It was deleted, however, from the Proposed Final Draft of Rule 1.4.
- 271 *See, e.g.*, *In re*  *Grand Jury Investigation (United States)*, 599 F.2d 1224, 1236 (3d Cir. 1979) (limitation of corporate attorney-client privilege will not discourage internal investigation of corporate wrongdoing); Note, *supra* note 8, at 470-71 (the utility of the privilege can survive substantial practical uncertainty as to its application in particular cases).
- 272 Professor Edmund M. Morgan, Reporter for the MODEL CODE OF EVIDENCE, articulately stated this position: Such a privilege suppresses valuable evidence to which the trier of fact is competent to give its proper weight. So serious an interference with a rational inquiry can be justified only by accompanying social benefits of high worth . . . [A] mere sentiment or an outgrown theory as to relative social values can no more serve as a determining factor than can a consideration of professional pride of particular callings. If a privilege to suppress the truth is to be recognized at all, its limits should be sharply determined so as to coincide with the limits of the benefits it creates.
- • • •
- . . . There are no data to furnish a reasoned support for the privilege in general. The reason for its creation is exploded: the system into which it fitted as a rational part is gone. Morgan, *Foreword* to MODEL CODE OF EVIDENCE 7, 27 (1942). According to Morgan, the retention of the privilege in any form in the Model Code was a mere pragmatic compromise.
- 273 A classic exposition of this ethical view is contained in Professor Charles Fried’s *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Privilege*, 85 YALE L.J. 1060 (1976). Dean Monroe H. Freedman is another prominent exponent. *See, e.g.* M. FREEDMAN, *LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM* 1-9 (1975); Freedman, [Untitled Column], 69 A.B.A. J. 866

- (1983). Dean Freedman was the Reporter for a polemical alternative to the Model Rules, THE AMERICAN LAWYER'S CODE OF CONDUCT (The Roscoe Pound-American Trial Lawyers Found. 1980).
- 274 Krattenmaker, *Interpersonal Testimonial Privileges under the Federal Rules of Evidence: A Suggested Approach*, 64 GEO. L.J. 613, 647-48 (1976).
- 275 There are, of course, instrumental arguments for a broad construction of the attorney-client privilege. Experience suggests that attorneys are often successful in dissuading their clients from illegal and unethical courses of action. Such dissuasion cannot occur if clients are reluctant to disclose their plans lest they be betrayed. In fact, the privilege frees the attorney to aggressively persuade the client to tell the truth. See *Privileged Communications*, *supra* note 236, at 1477. If the existence of the privilege persuades the client to reveal facts he or she would otherwise keep secret, the nondisclosure of such communication in court is not a social cost of the privilege. *Id.*
- 276 'A lawyer shall not reveal information relating to representation of a client' MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983). '[A] lawyer shall not knowingly: (1) Reveal a confidence or secret of his client.' MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(B) (1980). Under DR 4-101, "Confidence" refers to information protected by the attorney-client privilege . . . , and "secret" refers to other information gained in the professional relationship . . . the disclosure of which would be embarrassing or would be likely to be detrimental to the client.' *Id.* DR 4-101(A). Compare CANONS OF PROFESSIONAL ETHICS Canon 37 (1967) ('It is the duty of a lawyer to preserve his client's confidences'; 'confidences' is undefined.) with *id.* Canon 6 ('[t]he obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences . . .').
- 277 MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-4 (1980).
- 278 CANONS OF PROFESSIONAL ETHICS Canon 37 (1967), states:
The announced intention of a client to commit a crime is not included within the confidences which [the attorney] is bound to respect. [The attorney] may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened.
The Commission that drafted the Model Rules, in MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 comment (Proposed Final Draft 1981), remarked that 'Canon 37 was interpreted to include not only intended crimes but intended frauds as well. See H. DRINKER, LEGAL ETHICS 137 (1953). This interpretation was implicit in related provisions of the CANONS OF PROFESSIONAL ETHICS, such as Canon 41 (requiring the disclosure of unrectified frauds) and Canon 29 (requiring the disclosure of 'perjury').' Whatever the truth of this contention, Mr. Drinker cited local opinions in New York and Michigan only.
- 279 MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B) (1971).
- 280 The obligation takes precedence over the general duty of confidentiality by virtue of MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C) (1980): 'A lawyer may reveal: . . . (2) Confidences or secrets when permitted under Disciplinary Rules . . .'
- 281 Dean Monroe Freedman led a campaign to put the question of attorneys' duty to reveal fraud to a referendum of the District of Columbia bar. Seventy-four percent of those voting opposed the imposition of such a duty. As a result the District of Columbia Court of Appeals 'emasculated' DR 7-102(B)(1). See Note, *Client Fraud and the Lawyer—An Ethical Analysis*, 62 MINN. L. REV. 89, 98 n.38 (1977).
- 282 ABA, Summary of Action taken by the House of Delegates: Midyear Meeting 3 (1974). The amendment was adopted by only 12 states. Hodes, *supra* note 270, at 779.
- 283 However, it should be noted that the Disciplinary Rule conditions the obligation of disclosure on the receipt of 'information clearly establishing' the fraud. The ABA House of Delegates interpreted this condition as exempting the attorney from disclosure if he or she has a reasonable doubt that the fraud occurred. ABA: Summary of Actions of The House of Delegates: Annual Meeting 32 (1975).
- 284 ABA Comm'n on Ethics and Professional Responsibility, Formal Op. 341, slip op. at 4, *reprinted in* 61 A.B.A. J. 1543, 1544 (1975) [hereinafter cited as Formal Op. 341].
- 285 On the effect of Formal Op. 341, *supra* note 284, compare Kramer, *Clients' Frauds and Their Lawyers' Obligations: A Study in Professional Irresponsibility*, 67 GEO. L.J. 991, 994 (1979), and 55 ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL

CONDUCT 901, 903 (1984), with Lawry, *Lying, Confidentiality and the Adversary System of Justice*, 1977 UTAH L. REV. 653, 689 (Formal Op. 341 leaves the attorney with the right to disclose client fraud.).

- 286 See, e.g., Patterson, *Wanted: A New Code of Professional Responsibility*, 63 A.B.A. J. 639 (1977).
- 287 Proposed Rule 3.3(a)(2) required disclosures of fact ‘necessary to prevent a fraud on the tribunal.’ MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(2) (Proposed Final Draft 1981). Proposed Rule 4.1(b) prohibited a knowing failure to disclose a fact to a third person when such disclosure is necessary to prevent assisting a criminal or fraudulent act. *Id.* Rule 4.1(b). This duty was effectively converted by the House of Delegates into a mere obligation to withdraw from representation. See *infra* note 295.
- 288 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (Proposed Final Draft 1981). This standard is, and was intended to be, broader than the reference to information ‘gained in’ the professional relationship found in the MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1980).
- 289 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 comment (Proposed Final Draft 1981).
- 290 *Id.*
- 291 ‘The provisions of [Proposed Rule 1.6(b)(2)] are based upon the interest in harm prevention, not the prevention of misconduct as such. Crimes and frauds whose likely consequences are insubstantial are not subject to disclosure . . .’ *Id.*
- 292 ‘The term ‘may’ define[s] areas under the Rules in which the lawyer has professional discretion.’ *Id.* Scope. ‘A lawyer’s decision not to take preventive action . . . does not violate this Rule.’ *Id.* Rule 1.6 comment. On the other hand, ‘it is very difficult for a lawyer to know when such a heinous purpose will actually be carried out.’ *Id.* Therefore, the preferred course is to persuade the client ‘to take suitable action.’
- 293 *Id.* Rule 1.6(b)(3).
- 294 ‘The lawyer is not permitted to reveal the client’s wrongdoing, except where permitted by Rule 1.6. However, the lawyer is required to avoid furthering the [criminal or fraudulent] purpose, for example, by suggesting how it might be concealed. . . . Withdrawal from the representation, therefore, may be required.’ MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 comment (1983). A commentator has complained that in making this change, the House of Delegates ignored the fact that a large majority of states declined to adopt the 1974 amendment to Model Code DR 7-102(B)(1). Nahstoll, *supra* note 269, at 437.
- 295 Rule 3.3 was amended to read:
 (a) A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal; (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client . . .
 MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1983). This formulation permits the attorney under certain circumstances to deceive the tribunal by silence (although not by knowingly offering perjured testimony, Rule 3.3(a)(4)). By contrast, the Proposed Rule forbade the attorney to ‘fail to disclose a fact in the circumstances where the failure to make the disclosure is the equivalent of the lawyer’s making a material misrepresentation.’ MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(1) (Proposed Final Draft 1981).
- 296 Some evidence that this is so may be found in the 1972 referendum of the District of Columbia Bar on DR 7-102(B)(1), in which 74% of those voting took a position against obligatory disclosure of client fraud. The United States Court of Appeals for the District of Columbia Circuit amended the Rule accordingly. Note, *supra* note 281, at 98 n.38; see also G. HAZARD, *ETHICS IN THE PRACTICE OF LAW* 53 (1978) (report of a symposium held at Seven Springs Center in 1976).
- 297 See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b)-(d) (1983).
- 298 MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-4 (1980).
- 299 *Id.* DR 4-101(C)(2).
- 300 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 comment (1983) (‘Rule 1.6(a) requires the lawyer to invoke the privilege when it is applicable.’).

- 301 THE AMERICAN LAWYER'S CODE OF CONDUCT *Preface* (Discussion Draft 1980) ('In the context of the adversary system, it is clear that the lawyer for a private party is and should be an officer of the court only in the sense of serving the court as a zealous, partisan advocate of one side in the case before it.').
- 302 *Id.* Rule 1.2 comment.
- 303 On the justification of the priest-penitent privilege, see *In re*  Lifschutz, 2 Cal. 3d 415, 428, 467 P.2d 557, 565, 85 Cal. Rptr. 829, 837 (1970) (legislative extension of privilege to clergy but not to psychiatrists not irrational).
- 304 *Pearce v. Pearce*, 16 L.J. Ch. (n.s.) 153, 159 (1846) (Bruce, V.C.).
- 305 See  *Showfelt*, 455 F.2d at 840; *supra* notes 105-09 and accompanying text.
- 306 This suggestion, unfortunately, has been rejected by the majority of circuits that have considered it. See *Weiner*, *supra* note 128, at 117-21.
- 307 The author is indebted to Professor Christopher B. Mueller for this suggestion. The colorful phrase 'fruit of the poisonous tree' is often used by courts in criminal cases to describe the principle that evidence obtained as a result of a violation of a defendant's constitutional rights is inadmissible against the defendant. See, e.g.,  *Wong Sun v. United States*, 371 U.S. 471, 484-88 (1963).

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