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Dangerous Liaisons: Attorney-Client Privilege, the Crime-Fraud Exception, ABA Model Rule 1.6 and Post-September 11 Counter-Terrorist Measures

Geraldine Gauthier

DANGEROUS LIAISONS: ATTORNEY-CLIENT PRIVILEGE, THE CRIME-FRAUD EXCEPTION, ABA MODEL RULE 1.6 AND POST-SEPTEMBER 11 COUNTER-TERRORIST MEASURES*

INTRODUCTION

The doctrine of attorney-client privilege in American jurisprudence furthers the policies of the adversarial system by promoting clients' full disclosure in communications with their lawyers, so that they may receive appropriate and skilled legal advice.[1] Historically, its application has been circumscribed and subject to exceptions,[2] because it conflicts with policies favoring complete disclosure.[3] One exception to attorney-client privilege is the crime-fraud exception. The exception vitiates the privilege if the relationship that created the privilege was "fraudulently begun or fraudulently continued."[4] In applying the crime-fraud exception, courts have fashioned its boundaries and set the evidentiary thresholds a party must meet to prevail in a crime-fraud challenge to privilege. The resultant judicial determinations create a patchwork of standards that tend to forge the crime-fraud exception into a sword of intrusiveness, rather than a shield of public policy.

The American Bar Association ("ABA") promulgated the Model Rules of Professional Conduct[5] as the basis for many state professional codes. Model Rule 1.6, Confidentiality of

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[1] *See* Hunt v. Blackburn, 128 U.S. 464 (1888).

[2] *See* Clark v. United States, 289 U.S. 1, 15 (1933).

[3] *See* United States v. Zolin, 491 U.S. 554, 562 (1989).

[4] *Clark*, 289 U.S. at 14. "The privilege takes as its postulate a genuine relation, honestly created and honestly maintained. If that condition is not satisfied . . . the relation is merely a sham and a pretense . . . ." *Id.*

[5] MODEL RULES OF PROF'L CONDUCT (2002).

Information, contains a crime-fraud exception to attorney-client privilege that permits lawyers to disclose client confidences under certain circumstances.[6] In August 2001, the ABA House of Delegates debated proposals to broaden the crime-fraud exception and the scope of permissible attorney disclosure under Model Rule 1.6.[7] The ABA Ethics 2000 Commission, which worked on the proposed revisions, said Rule 1.6 was "out of step with public policy and the values of the legal profession as reflected in the rules currently in force in most jurisdictions."[8] Thus, the professional ethics environment that existed prior to the September 11, 2001 terrorist attacks on the United States was imbued with the perception that the disclosure rules were outdated and out of line with public policy favoring less protection for attorney-client confidences.[9]

After the September 11, 2001 terrorist attacks on the World Trade Center and the Pentagon, the U.S. Department of Justice published a regulation amending administrative measures used by the Bureau of Prisons to protect classified and sensitive information from disclosure by prisoners.[10] The new regulation allows the U.S. Attorney General to monitor the attorney-client communications of suspected terrorist prisoners, when he has "reasonable suspicion" that an inmate may use communications with an attorney to facilitate terrorist acts.[11] Explaining the need for this new regulation, the Attorney General reported to Congress that a confiscated Al Qaeda training manual counsels imprisoned terrorists to communicate with terrorists who are still at large,[12] and characterizes the practice of concealing such messages as an "art."[13]

In Parts II and III, this Note traces the development of the crime-fraud exception to attorney-client privilege in the

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[6] *Id.* at R. 1.6.

[7] MODEL RULES OF PROF'L RESPONSIBILITY R. 1.6 (Reporter's Explanation of Changes 2001).

[8] *Id.*

[9] *See id.*

[10] National Security; Prevention of Acts of Violence and Terrorism, 28 C.F.R. § 501.3 (2001).

[11] *Id.*

[12] *DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. (2001) (testimony of U.S. Attorney General John Ashcroft), *available at* http://www.senate.gov/~judiciary/testimony.cfm?id=121&wit_id=42 (last visited Aug. 10, 2002).

[13] *Id.*

federal courts and discusses the inconsistencies in the evidentiary thresholds used to invoke the exception. In Part IV, this Note reviews the crime-fraud exception to disclosure of client confidences contained in the revised ABA Model Rule 1.6, Confidentiality of Information, and the effect of lawyer ethics on attorney-client privilege. Part V examines the recent U.S. Justice Department regulation allowing federal authorities to monitor attorney-client communications to prevent acts of terrorism. This Part concludes that the Justice Department's regulation aptly illustrates application of the crime-fraud exception, as the ABA Model Rule and the federal courts defined it, despite outcries by the ABA and others to the contrary. Finally, this Note proposes ways to develop a consistent standard for applying the crime-fraud exception, which is needed to preserve the attorney-client privilege in the face of offensive incursions upon it by the judiciary and professional ethics codes.

I. ATTORNEY-CLIENT PRIVILEGE IS INHERENTLY PROSCRIBED

The doctrine of attorney-client privilege dates back to the English courts in the early 1500s.[14] The modern formulation protects communications between lawyers and their clients that are made in the context of supplying legal advice,[15] provided the privilege is not waived and the communications are not related to the ongoing or future commission of a crime.[16] The privilege works as an exception to

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[14] 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290 (McNaughton rev. ed. 1961).

[15] "Where a communication neither invited nor expressed any legal opinion whatsoever, but involved the mere soliciting or giving of business advice, it is not privileged." United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 359 (D. Mass. 1950).

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

Id. at 358. Wright & Miller's treatise on the Federal Rules of Civil Procedure notes another well-known formulation of the basic privilege is by Judge Sugarman: "[W]here legal advice of any kind is sought from a

evidence disclosure requirements.[17] Since it "operates to withhold relevant information from the fact finder," it is to be used sparingly.[18] To invoke attorney-client privilege, a party must demonstrate that: (i) the communication was between client and counsel; (ii) the communication was confidential; and (iii) the communication was made for the purpose of obtaining legal advice.[19]

II. THE CRIME-FRAUD EXCEPTION

The Supreme Court first addressed the crime-fraud exception to privileges in *Clark v. United States*.[20] The specific issue in *Clark* was the scope of the privilege attached to jury deliberations.[21] The Court reasoned that once a juror is sworn, she becomes a court officer.[22] As such, she is subject to the same punishment for contempt that would be imposed upon an attorney for deception or concealment.[23] Although the Court's discussion of attorney-client privilege is dictum, *Clark* is frequently cited for its articulation of the crime-fraud exception to attorney-client privilege.[24]

In *Clark*, the defendant served on a jury in a federal criminal trial and cast the only vote for acquittal.[25] She was charged with obstruction of justice for intentionally concealing her former employment with the defendant, and for falsely

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> professional legal advisor in his capacity as such, the communications relevant to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal advisor except the protection be waived."

8 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2017 (2d ed. 1994) (quoting Wonneman v. Stratford Secs. Co., 23 F.R.D. 281, 285 (S.D.N.Y. 1959)).

[17] John Doe Corp. v. United States, 675 F.2d 482, 489 (2d Cir. 1982).

[18] *In re* Berkley & Co., 629 F.2d 548, 555 (8th Cir. 1980).

[19] United States v. Const. Prods. Research, 73 F.3d 464, 473 (2d Cir. 1996).

[20] 289 U.S. 1 (1933).

[21] *Id.* at 11-12.

[22] *Id.* at 12.

[23] *Id.*

[24] *See, e.g.*, United States v. Zolin, 491 U.S. 554, 556 (1989). The New Jersey Supreme Court characterized *Clark's* 1933 discussion of the crime-fraud exception as "reflect[ing] the uniform current legal opinion, here and elsewhere, and [is] based on sound considerations of public policy. . . . In fact, to our knowledge, no other standards are in force elsewhere." *In re* Selser, 105 A.2d 395, 399-400 (N.J. 1954). Nearly seventy years after *Clark*, the Restatement of Law Governing Law, citing *Clark*, said the crime-fraud exception to attorney-client privilege "is uniformly recognized by courts and commentators in evidence codes." RESTATEMENT (THIRD) OF LAW GOVERNING LAW: CLIENT CRIME OR FRAUD § 82 cmt. b (1998).

[25] Clark v. United States, 289 U.S. 1, 15 (1933).

stating that she was "free from bias."[26] She was convicted of criminal contempt and sentenced.[27] On appeal, she argued that the admission of her fellow jurors' testimony regarding her conduct during deliberations violated the privilege attached to jury deliberations and votes.[28] In dicta, the Supreme Court responded that "the privilege does not apply where the relation giving birth to it has been fraudulently begun or fraudulently continued."[29] The Court continued, "to drive the privilege away, there must be 'something to give colour to the charge,' there must be 'prima facie evidence that it has some foundation in fact.'"[30] The prima facie showing "sufficient to satisfy the judge that the light should be let in"[31] was satisfied in *Clark* by a showing that the defendant deliberately withheld information in voir dire, and by her statement that she was "free from bias."[32] While it may be reasonably inferred that the crime-fraud exception in *Clark* was founded upon the totality of the evidence, that is, both the verifiable concealment and the subjective statement that she was "free from bias," the determination of what constitutes a prima facie showing of crime-fraud remains unsettled.[33]

The Supreme Court most recently addressed the crime-fraud exception in 1989 in *United States v. Zolin*,[34] a tax fraud case involving privileged documents that the government sought to discover. The case arose from an IRS investigation of L. Ron Hubbard, head of the Church of Scientology (the "Church").[35] The Church brought suit in Los Angeles Superior Court against a former member, for stealing internal church documents and materials.[36] The allegedly pilfered documents and two audio tapes were filed under seal with the court.[37] The IRS sought access to these materials in connection with its investigation and served a summons upon Zolin, the superior

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[26] *Id.* at 9.
[27] *Id.* at 6.
[28] *Id.* at 12-14.
[29] *Id.* at 14.
[30] *Clark*, 289 U.S. at 15 (quoting O'Rourke v. Darbishire, 1920 A.C. 581 (H.L. 1920)).
[31] *Id.* at 15.
[32] *Id.* at 10.
[33] United States v. Zolin, 491 U.S. 554, 565 (1989).
[34] 491 U.S. 554.
[35] *Id.* at 556.
[36] *Id.* at 557.
[37] *Id.*

court clerk, who produced both the documents and the audio tapes to the IRS.[38]

The Church intervened with a privilege claim, and the U.S. District Court for the Central District of California issued a restraining order, directing the IRS to submit to the district court all of the materials it had obtained by subpoena, pending disposition of the Church's motion to enjoin the IRS from using them.[39] The IRS complied with the district court's order except as to the audio tapes.[40] It retained both the tapes and the notes its agents made concerning them, and it petitioned for enforcement of its summons.[41] The IRS supported its petition with an agent's declaration asserting the relevance of the tapes to the IRS investigation.[42] Partial transcripts of the tapes were appended to the declaration.[43] The IRS claimed it had legally obtained the transcripts through a confidential source.[44] The district court denied the IRS's petition on grounds that the tapes contained attorney-client communications, the Church had not waived privilege, and the excerpts provided by the IRS tended to show past fraud, but did not clearly indicate future crime or fraud.[45]

On appeal, a Ninth Circuit Court of Appeals panel affirmed the district court's ruling, and held that evidence of crime-fraud must be independent from the contested attorney-client communications themselves.[46] The full court of appeals vacated the panel opinion.[47] It ordered en banc review in light of a perceived conflict within the circuit on the issue of whether evidence required to trigger the crime-fraud exception must be independent from the contested attorney-client communications.[48] Upon review, the Ninth Circuit decided that the perceived conflict did not exist, and it reinstated the panel's opinion.[49] The Supreme Court reversed, holding that the evidence used to make the case for crime-fraud exception

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[38] *Id.*
[39] *Zolin*, 491 U.S. at 557-58.
[40] *Id.* at 558.
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Zolin*, 491 U.S. at 558.
[45] *Id.* at 559.
[46] *Id.* at 560-61.
[47] *Id.* at 561.
[48] *Id.*
[49] *Zolin*, 491 U.S. at 561.

applicability need not be independent from the privileged communications themselves.[50]

The Supreme Court declined to address the evidentiary showing required to defeat privilege, stating that, "we need not decide the quantum of proof necessary ultimately to establish the applicability of the crime-fraud exception."[51] The Court acknowledged a law review Note,[52] which pointed to the inherent conflict in the prima facie evidence standard, because ordinarily, the standard shifts the burden and allows the non-discovering party to rebut.[53] In the crime-fraud context, however, "the standard is used to dispel the privilege altogether without affording the client an opportunity to rebut . . . ."[54] The *Zolin* court acknowledged this difficulty but failed to resolve the inconsistency:

> We note . . . that this Court's use in *Clark v. United States* of the phrase "prima facie case" to describe the showing needed to defeat the privilege has caused some confusion. . . . In using the phrase in *Clark*, the Court was aware of scholarly controversy concerning the role of the judge in the decision of such preliminary questions of fact. The quantum of proof needed to establish admissibility was then, and remains, subject to question. . . . In light of the narrow question presented here for review, this case is not the proper occasion to visit these questions.[55]

The federal courts were thus left to develop the standard for a requisite showing of crime-fraud sufficient to trigger the exception.

A. *Divergent Standards for Applicability of the Crime-fraud Exception*

In federal courts, a mere allegation of crime or fraud is insufficient to destroy attorney-client privilege.[56] *Zolin* requires

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[50] *Id.* at 574.

[51] *Id.* at 563.

[52] Susan F. Jennison, Comment, *The Crime or Fraud Exception to the Attorney-Client Privilege: Marc Rich and the Second Circuit*, 51 BROOK. L. REV. 913 (1985).

[53] *Id.* at 918-19.

[54] *Zolin*, 491 U.S. at 565 (quoting Jennison, *supra* note 52, at 918-19).

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

[56] *See* Clark v. United States, 289 U.S. 1, 14 (1933) (noting that "[a] mere charge of wrongdoing" is insufficient); Neuder v. Battelle, 194 F.R.D. 289, 298, (D. D.C. 2000) (noting that "mere allegations of wrongdoing" are insufficient); United States v. Chen, 99 F.3d 1495, 1503 (9th Cir. 1996) (holding that "mere allegations or suspicions by government are insufficient"); *In re* Grand Jury Proceedings, 87 F.3d 377, 381 (9th

a two-part showing to invoke the crime-fraud exception: first, "a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review . . . may reveal evidence to establish the claim that the crime-fraud exception applies"[57] and second, an in camera review of the contested communications to determine whether the exception should be invoked.[58] The first step, "factual basis," can rest upon the attorney-client communications themselves;[59] the evidence need not be "independent."[60] Under *Zolin*, the mere assertion of a privilege claim does not cause a "presumptive privilege" to automatically attach to communications between attorneys and their clients.[61]

In practical effect, the prima facie showing contemplated by *Zolin* creates a broad net to cast upon the ocean of circumstances that arise in the context of crime-fraud exception litigation. A prima facie showing is the minimum evidentiary showing which, if not rebutted, is sufficient to prevent judgment as a matter of law.[62] But the *Zolin* standard lends little predictability to what evidence may or may not be considered a crime-fraud showing sufficient to overcome attorney-client privilege.

Cir. 1996) (reasoning "it is not enough for government merely to allege that it has sneaking suspicion"); *In re* Richard Roe, 68 F.3d 38 (2d Cir. 1995) (holding that a finding of "relevance" does not demonstrate crime-fraud and therefore does not trigger exception); Ward v. Succession of Freeman, 854 F.2d 780, 790 (5th Cir. 1988) (noting that "mere allegations of fraud . . . are not sufficient"); Coleman v. American Broad. Co., 106 F.R.D. 201, 203 (D.C. Cir. 1985) (noting that "more is necessary than mere allegations of wrongdoing"); United States v. Bob, 106 F.2d. 37, 40 (2d Cir. 1939) (noting that "a mere assertion of an intended crime or fraud is not enough") (citations omitted).

[57] *Zolin*, 491 U.S. at 572 (citations omitted).

[58] *Id.*

[59] *Id.* at 575 ("[W]e hold that the threshold showing to obtain *in camera* review may be met by using any relevant evidence, lawfully obtained, that has not been adjudicated to be privileged.").

[60] *Id.* at 574 ("We conclude that the party opposing the privilege may use any nonprivileged evidence in support of its request for *in camera* review, even if its evidence is not 'independent' of the contested communications.").

[61] Nor does it make sense to us to assume. . . that once the attorney-client nature of the contested communications is established, those communications must be treated as *presumptively* privileged for evidentiary purposes until the privilege is 'defeated' or 'stripped away' by proof that the communications took place in the course of planning further crime or fraud.

Id. at 567.

[62] BLACK'S LAW DICTIONARY 712 (7th ed. 1999).

The second step prescribed in *Zolin*, that in camera review, "rests in the sound discretion of the district court"[63] is guided in part by factors that the Court said may be considered by trial judges in exercising their discretion.[64] But these factors rely upon the individual approaches and concerns of the judiciary, which may color discretion.[65]

In the Second Circuit, the standard of proof required to override the privilege is a showing of "probable cause to believe that a crime or fraud ha[s] been committed and that the communications were in furtherance thereof."[66] Once probable cause is shown, the trial judge may exercise discretion to decide whether to conduct an in camera review.[67] The Second Circuit's "first step" presents a higher hurdle for the discovering party than does *Zolin*'s "first step," because *Zolin* merely required a showing that in camera review *may* reveal evidence that the crime-fraud exception applies.[68]

In *In re Richard Roe*,[69] the Second Circuit examined the "in furtherance" requirement in its crime-fraud jurisprudence.

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

[64] [T]he facts and circumstances of the particular case . . . the volume of materials . . . the relative importance to the case of the alleged privileged information, and the likelihood that the evidence produced through *in camera* review, together with other available evidence then before the court, will establish that the crime-fraud exception does apply.

Id. at 572.

[65] *See, e.g.*, the views of Judge Jack B. Weinstein of the U.S. District Court for the Eastern District of New York: "I start from the principle that everything in court should be public and nothing secret except the internal chambers discussions. . . . Each case is different, but in general, where there is a doubt, secrecy should be rejected." Jack B. Weinstein, *Secrecy in Civil Trials: Some Tentative Views*, IX J. L. & POL'Y 53, 53, 65, (2000). See also the opinion of Judge H. Lee Sarokin of the District of New Jersey: "[D]espite some rising pretenders, the tobacco industry may be the king of concealment and disinformation." Haines v. Liggett Group, 140 F.R.D. 681, 683 (D. N.J. 1992). Judge Sarokin, upon review of the magistrate's crime-fraud ruling on privileged documents, considered facts not in evidence before the magistrate. The Third Circuit vacated his opinion for this reason and said the district court was not "anointed with such authority" and that the "clearly erroneous" standard of review should have been applied. The Third Circuit concluded that "the appearance of impartiality will be served only if an assignment to another judge is made" and it removed Sarokin from the case. Haines v. Liggett Group, 975 F.2d 81, 93-94, 98 (3d Cir. 1992).

[66] *In re* John Doe v. United States, 13 F.3d 633, 637 (2d Cir. 1994) (citing *In re* Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1039 (2d Cir. 1984)). The court explained, "This standard has been rephrased as requiring '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.* at 637.

[67] United States v. Jacobs, 117 F.3d 82, 87 (2d Cir. 1997). This mirrors the "second step" in *Zolin*.

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

[69] 68 F.3d 38 (2d Cir. 1995).

The court explored the difference between the "relevant evidence" and the "in furtherance" tests for application of the crime-fraud exception.[70] It reasoned that if the crime-fraud exception could attach to privileged materials merely because they provide evidence of a crime, the privilege would be "virtually worthless" because a client could never discuss anything with counsel that might support a finding of guilt.[71] The crime-fraud exception, it decided, can therefore only apply when the communication itself was "in furtherance" of a crime or fraud, i.e., when it was intended to facilitate or conceal the criminal activity,[72] and if the "requisite purposeful nexus" was shown.[73]

Zolin, in contrast, does not incorporate the "in furtherance" requirement. Under *Zolin*, the threshold showing sufficient to trigger an in camera review "may be met by using any relevant evidence, lawfully obtained, that has not been adjudicated to be privileged."[74] Indeed, in *Zolin*, the matter came before the Court on an affidavit of an IRS agent who merely "stated his grounds for believing that the tapes were relevant to the investigation."[75] Under Zolin, courts do not apply the "in furtherance" requirement at the first step. Rather, the trial judge makes such a finding after conducting the in camera review.[76] The Supreme Court acknowledged that the "first step" evidentiary threshold it set is less than the showing required to defeat privilege by requiring only "a factual basis adequate to support a good faith belief by a reasonable person."[77] The Court's acknowledgment is justified in view of the standard's inherent ambiguities, i.e., the measure of "adequate," and the definitions of "good faith" and "reasonable person."

Post-*Zolin*, some circuits struggled with the standard for satisfying the burden of proof required to "de-privilege"

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[70] *Id.* at 40.

[71] *Id.*

[72] *Id.*

[73] *Id.* (quoting *In re* Grand Jury Subpeona Duces Tecum, 731 F.2d 1032 (2d Cir. 1984)).

[74] *Zolin*, 491 U.S. at 575.

[75] *Id.* at 558.

[76] This may be inferred from the Court's discussion that attorney-client communications need not be treated as "presumptively privileged" just because privilege has not yet been overcome by proof that they were made in furtherance of a future criminal or fraudulent act. *Id.* at 567.

[77] *Id.* at 572. This threshold step is, however, sufficient to initiate an in camera review.

attorney-client communications under the crime-fraud exception.[78] A prime example is *In re Sealed Case*,[79] an action that arose in the D.C. Circuit from a grand jury investigation into whether a corporation violated federal election laws. The privileged matters at issue were a company vice president's testimony about his meeting with general counsel concerning campaign finance law, his subsequent memorandum reflecting communications during the meeting, and a related memorandum written by general counsel to outside counsel.[80] The company asserted the attorney-client privilege with respect to these materials. The district court did not rule on the question and the circuit court assumed that the privilege applied.[81] Although the appellate courts cannot review matters left undecided by a trial court, the D.C. Circuit Court's presumption of privilege in *In re Sealed Case* represents a significant departure from *Zolin*, in which the Supreme Court expressly declined to treat the disputed communications as "presumptively privileged."[82]

As to the nature of the burden proof required to trigger the crime-fraud exception, the D.C. Circuit acknowledged that the "prima facie case" formulation established in *Clark* leads to confusion since it normally shifts the burden to the other party, whereas in the crime-fraud context, the burden is clearly on the party seeking to pierce privilege.[83] In deciding this case, the court "encounter[ed] some confusion" over whether "the level of proof, is a 'prima facie showing' a preponderance of the evidence, clear and convincing evidence, or something else."[84] It noted that "*Zolin* left the standard of proof question for another

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[78] *See, e.g.*, *In re* Grand Jury Subpoena, 223 F.3d 213 (3d Cir. 2000); *In re* Sealed Case, 107 F.3d 46 (D.C. Cir. 1997); United States v. Davis, 852 F.2d 622 (7th Cir. 1993).

[79] 107 F.3d 46 (D.C. Cir. 1997).

[80] *Id.* at 48.

[81] *Id.* The D.C. Circuit said, "Since the district court has yet to pass on this question, we will assume the Company is correct." *Id.*

[82] [It] does [not] make sense . . . that once the attorney-client nature of the contested communications is established, those communications must be treated as *presumptively* privileged for evidentiary purposes until the privilege is "defeated" or "stripped away" by proof that the communications took place in the course of planning future crime or fraud.

Zolin, 491 U.S. at 567.

[83] *In re Sealed Case*, 107 F. 3d at 49-50. The same acknowledgement was made by the Supreme Court in *Zolin*, 491 U.S. at 565 n.7 (citing Jennison, *supra* note 52, at 918-19).

[84] *In re Sealed Case*, 107 F.3d at 49-50.

day."[85] Following its own precedent, the D.C. Circuit held that the burden would be satisfied by evidence which, "if believed by the trier of fact would establish elements of ongoing or imminent crime or fraud."[86]

The D.C. Circuit also departed from *Zolin* when it ruled that the government did not meet its burden of showing crime fraud by merely establishing that a company officer had committed an illegal act.[87] The court said that to establish crime-fraud, the government must show that the company itself sought legal advice for the purpose of furthering illegal acts. It held that "[s]howing temporal proximity between the communication and a crime is not enough."[88] In *Zolin*, the Supreme Court pierced the privilege claimed by the Church on the temporally proximate basis of an IRS investigation of the individual tax returns of a Church leader.[89]

In civil cases, the Third Circuit follows *Zolin*'s threshold standard that triggers in camera review and gives discretion to the district court judge to conduct it.[90] But before the in camera review is conducted, a hearing is held to afford both sides the opportunity to present their arguments and evidence.[91] In Third Circuit criminal cases, however, the applicability of the crime-fraud exception can be determined by the district court on the basis of ex parte government affidavits to avoid "minitrials" before grand juries.[92]

In *Impounded*,[93] the Third Circuit recognized that it "may be salutary and efficacious to safeguard the attorney-

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[85] *Id.*

[86] *Id. Accord, In re* Sealed Case, 162 F.3d 670, 674 (D.C. Cir. 1998).

[87] *In re Sealed Case*, 107 F.3d at 50.

[88] *Id.*

[89] United States v. Zolin, 491 U.S. 554 (1989).

[90] Haines v. Ligett Group, 975 F.2d 81, 96 (3d Cir. 1992).

[91] Deciding whether the crime-fraud exception applies is another matter. If the party seeking to apply the exception has made its initial showing, then a more formal procedure is required than that entitling plaintiff to *in camera* review. The importance of the privilege, as we have discussed, as well as fundamental concepts of due process require that the party defending the privilege be given the opportunity to be heard, by evidence and argument, at the hearing seeking an exception to the privilege. We are concerned that the privilege be given adequate protection, and this can be assured only when the district court undertakes a thorough consideration of the issue, with the assistance of counsel on both sides of the dispute.

Id. at 96-97 (citation omitted).

[92] *In re* Grand Jury Subpoena, 223 F.3d 213, 218 (3d Cir. 2000).

[93] 241 F.3d 308 (3d Cir. 2001).

client privilege" to require a discovering party to demonstrate that it cannot obtain the evidence it seeks except through disclosure of privileged materials,[94] and that "[u]nder appropriate circumstances, it may well constitute the better practice."[95] The court, however, said it had no authority to justify such a requirement.[96]

The Fifth Circuit requires evidence of intent as part of the prima facie showing of crime-fraud. In *Industrial Clearinghouse v. Browning*, the court found that a prima facie showing of crime-fraud was satisfied by "evidence of an intent to deceive."[97] Defendant Browning initiated a malpractice suit against its former attorneys and retained new counsel to represent it in its dispute with the plaintiff, Industrial Clearinghouse.[98] Industrial Clearinghouse sought production of Browning's communications with its former counsel, arguing that the defendant's filing of the malpractice suit was a waiver of privilege, or, alternatively, that the defendant used its relationship with its former counsel to further criminal activity and, therefore, the crime-fraud exception should apply.[99] The case came before the Fifth Circuit on Browning's interlocutory appeal from the district court's order granting plaintiff's motion to compel production on the ground that privilege was waived.[100] The Fifth Circuit reversed on the waiver issue.[101] On the crime-fraud question, the court found that the trial judge did not abuse his discretion in finding that the defendant's alleged misrepresentations were unintentional.[102] The court held that "[a] party must present evidence of an intent to deceive to establish a prima facie case of fraud or perjury."[103] Thus, the Fifth Circuit's ruling is consistent with the "in furtherance" test observed by the Second Circuit and others,[104]

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[94] *Id.* at 315.

[95] *Id.*

[96] *Id.*

[97] 953 F.2d 1004, 1008 (5th Cir. 1992).

[98] *Id.* at 1006.

[99] *Id.*

[100] *Id.* at 1005.

[101] *Id.* at 1007.

[102] *Indus. Clearinghouse*, 953 F.2d at 1008.

[103] *Id.*

[104] The "in furtherance" showing is also required by the First Circuit, *United States v. Reeder*, 170 F.3d 93, 106 (1st Cir. 1999); Third Circuit, *In re Grand Jury Subpoena*, 223 F.3d at 217; Eighth Circuit, *Rabushka v. Crane*, 122 F.3d 559, 566 (8th Cir. 1997); Ninth Circuit, *United States v. Chen*, 99 F.3d 1495, 1503 (9th Cir. 1996); and Tenth Circuit, *Motley v. Marathon Oil*, 71 F.3d 1547, 1552 (10th Cir. 1995).

if actions cannot be taken "in furtherance" of a crime or fraud in the absence of intent.[105]

In *United States v. Davis*,[106] the Seventh Circuit declined to overrule its pre-*Zolin* decision defining what constitutes a prima facie case for triggering the crime-fraud exception.[107] The pre-*Zolin* case, *In the Matter of Michael Feldberg*,[108] arose from a grand jury investigation of a sports agent. In response to a subpoena, the agent produced fifty-one athletes' contracts. In response to a second request, he produced six contracts.[109] The prosecutor brought an obstruction of justice charge for the agent's failure to produce all of the contracts at one time, and sought testimony from the agent's attorney as to how the agent compiled the initial group of contracts for production.[110] The court said:

> The language "*prima facie* evidence" has suggested to some courts enough to support a verdict in favor of the person making the claim. We are not among them. . . . The question here is not whether the evidence supports a verdict but whether it calls for inquiry. . . . [A] *prima facie* case must be defined with regard to its function: to require the adverse party, the one with superior access to the evidence and in the best position to explain things, to come forward with that explanation.[111]

The court reasoned that the agent's retention of suspicious contracts was probably not a random omission, since the contracts were active business documents which should have been readily available, and because the subpoena clearly called for them.[112] Citing *Clark*,[113] the court said the obstruction charge had a factual foundation because "the circumstances

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[105] The First Circuit stands at variance, for although it espouses the "in furtherance" language, it may not actually require any showing of intent since a client need only "reasonably should have known" that the subject matter of the attorney consultation was a crime or fraud. In other words, it would appear that intent may be inferred from negligence. *Reeder*, 170 F.3d at 106 (holding that the attorney-client privilege is overcome by the crime-fraud exception "where the client sought the services of the lawyer to enable or aid the client to commit what the client knew or reasonably should have known to be a crime of fraud") (quoting United States v. Rakes, 136 F.3d 1, 4 (1st Cir. 1998)).

[106] 1 F.3d 606 (7th Cir. 1993).

[107] *Id.* at 609.

[108] 852 F.2d 622 (7th Cir. 1988).

[109] *Id.* at 623.

[110] *Id.* at 623-24.

[111] *Id.* at 625-26 (citations omitted).

[112] *Id.* at 625.

[113] Clark v. United States, 289 U.S. 1 (1933).

give color to the charge"[114] and thus, the circumstances amounted to prima facie evidence of crime-fraud sufficient to trigger the exception.

United States v. Davis presented a nearly identical factual scenario to *Feldberg*—a grand jury subpoena, an initial production of documents, a subsequent production, and an obstruction of justice charge.[115] With respect to whether the prima facie evidence standard had been met, the court again quoted *Clark*,[116] and referred to the defendant's failure at the outset to make a complete production: "All that is needed is something 'to give color to the charge' . . . [w]hether pale or rich or vivid, there is indubitably color here."[117]

Accordingly, in the Seventh Circuit, the burden to make a prima facie case sufficient to trigger the crime-fraud exception is higher than the *Zolin* standard, because it requires a discovering party to have a plausible, supportable theory of crime-fraud *before* privileged communications can be subject to review.[118] *Zolin* allows review of privileged communications with a mere showing that the communications *may*[119] assist the discovering party to show that the crime-fraud exception is applicable.[120]

The Ninth Circuit requires moving parties to show a relationship between the attorney-client communications and the crime or fraud, and that the communications were "in furtherance" of the crime or fraud.[121] In *United States v. Chen*, the court articulated the standard as "reasonable cause to believe that the attorney's services were utilized in furtherance of the ongoing unlawful scheme."[122] But the court went further to define "reasonable cause" as "more than a suspicion but less than a preponderance of evidence."[123] This definition confuses the evidentiary construct, since the preponderance standard cannot come to bear in the context of an ex parte submission.

In the Tenth Circuit, a crime-fraud challenge to privilege requires a prima facie showing that "attorney

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[114] *Feldberg*, 862 F.2d at 625.
[115] *Davis*, 1 F.3d 606 (7th Cir. 1993).
[116] *Clark*, 289 U.S. at 15.
[117] *Davis*, 1 F.3d at 610 (citing *Clark*, 289 U.S. at 15).
[118] *See supra* text accompanying notes 111-17.
[119] *See* United States v. Zolin, 491 U.S. 554, 572 (1989).
[120] *Id.*
[121] United States v. Chen, 99 F.3d 1495, 1503 (9th Cir. 1996).
[122] *Id.*
[123] *Id.*

participation in crime or fraud has some foundation in fact."[124] In *Motley v. Marathon Oil*, the plaintiff alleged that the defendant's decision to terminate her employment was made for "[equal employment opportunity] reasons."[125] The plaintiff sought production of two documents: a memorandum prepared by defendant's legal department containing guidelines for terminations and employee lists prepared at the legal department's request to assist it in advising the committee handling the terminations.[126] The Tenth Circuit acknowledged that the plaintiff offered "evidence of race-based decisions by Marathon when it carried out the reduction in [work] force," but said this was insufficient to show that the documents were prepared in furtherance of a crime or fraud.[127] In *Zolin*, the Supreme Court never reached the question of attorney participation in the crime or fraud, and the Tenth Circuit's decision is at odds with other jurisdictions holding that an attorney's innocence in the alleged crime-fraud has no bearing upon disclosure of the documents.[128]

The lower federal courts have also applied standards of crime-fraud exception applicability that are at variance with *Zolin*. Most notably, the Northern District of California and the District of Kansas both ruled that the discovering party must use evidence independent of the attorney-client communications it seeks.[129]

State court rulings contribute to the troublesome inconsistencies in crime-fraud litigation. A Michigan Court of Appeal[130] and a New Jersey Superior Court[131] enunciated the "independent evidence" standard rejected in *Zolin*.[132] The Massachusetts Supreme Court discussed *Zolin*'s failure to set a "level of showing" for a prima facie case and concluded that it

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[124] Motley v. Marathon Oil, 71 F.3d 1547 (10th Cir. 1995).

[125] *Id.* Specifically, the plaintiff alleged that poor-performing minority employees whose names were on "termination lists" prepared by the company, were removed from those lists and their names replaced by non-minority employees, to avoid racial discrimination claims. *Id.* at 1550.

[126] *Id.* at 1550.

[127] *Id.* at 1551.

[128] *See, e.g.*, *Chen*, 99 F.3d at 1499; *In re* Grand Jury Proceedings, 102 F. 3d 748 (4th Cir. 1996).

[129] United States v. Marshank, 777 F. Supp. 1507, 1527 (N.D. Cal. 1991); Burton v. R.J. Reynolds Tobacco, 167 F.R.D. 134, 141-42 (D. Kan. 1996).

[130] People v. Paasche, 525 N.W.2d 914, 918 (Mich. App. 1994).

[131] Nat'l Util. Serv. v. Sunshine Biscuits, 694 A.2d 319, 324 (N.J. Super. Ct. 1997).

[132] United States v. Zolin, 491 U.S. 554, 574 (1989).

would establish the preponderance standard,[133] without any discussion of the problems associated with applying a preponderance standard in the context of an ex parte proceeding.[134] Connecticut adopted the Second Circuit's "in furtherance" standard in *Olson v. Accessory Controls*.[135] In *Owens-Corning Fiberglas v. Watson*,[136] the Virginia Supreme Court held that an answer to an interrogatory filed in a Texas case, which was inconsistent with information contained in a privileged document in the Virginia litigation, was a showing of fraud sufficient to overcome privilege.[137] In *State v. Fodor*,[138] the Arizona Court of Appeals concluded that the crime-fraud exception to attorney-client privilege will only be applied upon a prima facie showing that a client retained counsel for the express purpose of promoting or continuing a criminal or fraudulent act.[139]

The *Zolin* Court declined to decide the "quantum of proof" required to defeat privilege.[140] Hence, post-*Zolin*, the lower courts have adopted their own varying standards of proof. These disparate standards, coupled with the element of judicial discretion,[141] give rise to a discordant body of admissible evidence that injects randomness into challenging and defending attorney-client privilege. Moreover, crime-fraud disclosures part the protective cloak that the doctrine of attorney-client privilege afforded parties for centuries.[142] The effect of an uncertain evidentiary standard is vexatious enough by itself. It is even more disquieting in view of *Zolin*, which significantly eroded attorney-client privilege protection in holding that evidence of crime-fraud need not be independent of the attorney-client communications at issue.[143] This allows a party who is unable to independently put forward a "factual basis to support a good faith belief,"[144] to trigger inspection of privileged documents to assist it in making its crime-fraud

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[133] Purcell v. Dist. Attorney, 676 N.E.2d 436, 439 (Mass. 1997).
[134] *See supra* text accompanying notes 52-54, 123.
[135] 757 A.2d 14, 30-31 (Conn. 2000).
[136] 413 S.E.2d 630 (Va. 1992).
[137] *Id.* at 638-39.
[138] 880 P.2d 662 (Ariz. Ct. App. 1994).
[139] *Id.*
[140] United States v. Zolin, 491 U.S. 554, 565 (1989).
[141] *See supra* note 65.
[142] *See supra* text accompanying note 14.
[143] *Zolin*, 491 U.S. at 574.
[144] *Id.* at 572.

showing. The pre-*Zolin* law of the Ninth Circuit did not allow indiscriminate forays through privileged communications unless the discovering party had some reasonable basis for alleging crime-fraud at the outset.[145] The *Zolin* court carved a further inroad into the attorney-client privilege doctrine by refusing to treat the attorney-client communications as "presumptively privileged," despite the lower court's finding that they contained confidential attorney-client communications and that privilege had not been waived.[146]

III. PROFESSIONAL DISCLOSURE RULES

Against this background of decreasing judicial protection,[147] in 1997, the ABA established the "Ethics 2000 Commission" to evaluate what the it called a "patchwork pattern of state regulation."[148] The Commission reviewed the Model Rule governing lawyer disclosures against developments in the law since the last revision of the Model Rules in 1983.[149]

The 1983 version of Model Rule 1.6, Confidentiality of Information, permitted attorneys to disclose client confidences where necessary to "prevent clients from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."[150] In 2001, the ABA Ethics Commission recommended permitting attorneys to disclose client wrongdoings "involving substantial economic harm to others."[151] Although the ABA House of Delegates did not approve this proposal,[152] nothing prevents individual states

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[145] *Id.*

[146] *Id.* at 559.

[147] *See supra* text accompanying notes 142-46.

[148] E. Norman Veasey, *Chair's Introduction and Executive Summary to ABA Ethics Commission Final Report* (2001), *at* http://www.abanet.org/cpr/e2k-report.html (last visited Aug. 15, 2002).

[149] Margaret Colgate Love, *ABA Ethics 2000 Commission Final Report—Summary of Recommendations* (June 9, 2001), *available at* http://www.abanet.org/cpr/-e2k-mlove_article.html (last visited Aug. 15, 2002).

[150] "(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary: (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm . . . ." MODEL RULES OF PROF'L CONDUCT R. 1.6 (1983).

[151] Love, *supra* note 149.

[152] Delegates opposed to the rule argued that it would "turn [lawyers] into 'compliance officers' forced to police, prosecute and judge their clients." Molly McDonough, *Caution is the Keynote at ABA Gathering*, NAT'L L.J., Aug. 20, 2001, at A15.

from adopting it into their own professional codes.[153] The ABA Delegates did, however, approve an expansion of the language of Model Rule 1.6(b)(1),[154] which broadens the rule to permit disclosure of client confidences even when the possibility of harm is not immediate and when the potential act is not criminal.[155] This revision now defines permissible disclosure as that needed "to prevent reasonably certain death or substantial bodily harm."[156] The word "imminent" was replaced with "reasonably certain" to allow disclosure of client confidences if there is a threat of future injury.[157] The Ethics Commission Reporter acknowledged that client confidences may now be breached with no requirement of client criminality.[158]

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[153] University of Pennsylvania law professor Geoffrey C. Hazard Jr., an Ethics 2000 member who served as chief reporter when the ABA revamped its rules 20 years ago, said that he wouldn't be surprised if states ignore the delegates and adopt Ethics 2000 recommendations. That's what he says happened in 1983, the last time delegates were asked to expand permissive disclosure rules.

Id. at A1, A15. The professional codes of several states already allow disclosure of crimes or frauds that can cause substantial financial injury. *See, e.g.*, Alaska, ALASKA RULES OF PROF'L CONDUCT R. 1.6 (1999), *available at* http://www.state.ak.us/courts/prof.htm#1.6 (last visited Aug. 10, 2002); Arizona, ARIZ. RULES OF PROF'L CONDUCT ER 1.6 (1998), *available at* http://www.abanet.org/cpr/links.html (last visited Aug. 10, 2002); Georgia, GA. RULES OF PROF'L CONDUCT R. 1.16 (2001), *available at* http://www.gabar.org/grpc16.htm (last updated Oct. 2001); Maryland, MD. RULES OF PROF'L CONDUCT R. 1.6 (2001), *available at* http://www.abanet.org/cpr/links.html (last visited Aug. 10, 2002); New Jersey, N.J. DISCIPLINARY RULES OF PROF'L CONDUCT RPC 1.6 (2001), *available at* http://njlawnet.com/nj-rpc/rpc1-6.html (last modified July 14, 2002); Ohio, OHIO CODE OF PROF'L RESPONSIBILITY DR 4-101 (1970), *available at* http://www.sconet.state.oh.us/Rules/professional (last modified July 2, 2001).

[154] AMERICAN BAR ASS'N, CTR. FOR PROF'L RESPONSIBILITY: REPORT 401 (Feb. 2002), *available at* http://www.abanet.org/cpr/e2k-redline.html (last visited Aug. 15, 2002).

[155] Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

AMERICAN BAR ASS'N, CTR. FOR PROF'L RESPONSIBILITY: PROPOSED RULE 1.6 (Feb. 2002), *available at* http://www.abanet.org/cpr/e2k-rule16.html (last visited Aug. 15, 2002).

[156] MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002).

[157] The Commission Reporter explained that this revision was made "to include a present and substantial threat that a person will suffer such injury at a later date, as in some instances involving toxic torts." MODEL RULES OF PROF'L CONDUCT R. 1.6 (Reporter's Explanation of Changes 2001). Thus the revision thrusts lawyers into the role of expert witnesses, to evaluate, for example, the effects of a particular pollutant.

[158] "The Commission recommends that the exception currently recognized for client crimes threatening imminent death or substantial bodily harm be replaced with a broader exception for disclosures to prevent reasonably certain death or substantial

Like the *Zolin* standard for piercing attorney-client privilege,[159] the Model Rule standard rests the ultimate determination of whether a client confidence will be revealed upon judicial discretion.[160] Although the ABA Model Rules are merely that, models for state professional codes, most state codes contain a crime-fraud exception to their confidentiality rules patterned upon the ABA rule.[161] A few states mandate disclosure of a crime.[162]

IV. POST-SEPTEMBER 11 COUNTER-TERRORIST MEASURES

The revised Model Rule and the trends in crime-fraud litigation point to public policy favoring fuller disclosure of client confidences in the crime-fraud context, existing before the September 11, 2001 terrorist attacks on the United States. In fact, the ABA Ethics Commission's proposal to broaden lawyer disclosure was made in recognition of the fact that many jurisdictions had already adopted such positions.[163] In camera inspections had been increasingly used in the federal courts,[164] allowing the judiciary to rummage, at its discretion,

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bodily harm, with no requirement of client criminality." *Id.*

[159] *See supra* text accompanying notes 57-61.

[160] The 1983 Model Rule 1.6(b)(1) allowed lawyers to "reveal such information to the extent *the lawyer reasonably believes* is necessary: (1) to prevent the client from committing a criminal act that *the lawyer believes* is likely to result in imminent death or substantial bodily harm . . . ." MODEL RULES OF PROF'L CONDUCT R. 1.6 (1983) (emphasis added). The revised rule provides that disclosure is permissible "to prevent *reasonably certain* death or substantial bodily harm." MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002) (emphasis added).

[161] Roger C. Cramton, *The Duty of Confidentiality*, A.B.A. J., May 2001, at 60.

[162] *See, e.g.*, the professional codes of Arizona, ARIZ. RULES OF PROF'L CONDUCT ER 1.6 (1998), *available at* http://www.abanet.org/cpr/links.html (last visited Aug. 10, 2002); Florida, FLA. RULES OF PROF'L CONDUCT R. 4-1.6 (2002), *available at* http://www.flabar.org/tfbtemplates.nsf/newwebsite?openframeset&frame=content&src=/tfb/flabarwe.nsf/f6301f4d554d40a385256a4f006e6566/af8929180e6de08585256b2f006c5375?OpenDocument (last modified Apr. 25, 2002); N.J. DISCIPLINARY RULES OF PROF'L CONDUCT RPC 1.6 (1998), *available at* http://njlawnet.com/nj-rpc/rpc1-6.html (last modified May 14, 2002); Texas, TEX. RULES OF PROF'L CONDUCT R. 1.05 (1989), *available at* http://www.txethics.org/reference_rules.asp?view=conduct&num=1.05 (last visited Aug. 10, 2002); Virginia, VA. RULES OF PROF'L CONDUCT R. 1.6 (2001), *available at* http://www.vsb.org/profguides/rules.pdf; and Vermont, VT. RULES OF PROF'L CONDUCT R. 1.6 (1999), *available at* http://www.vtbar.org/courts&LawRelatedResources/VTRulesOfProf.ConductTableOfContents.htm (last visited Aug. 10, 2002).

[163] "[T]he Commission agrees with the substantial criticism that has been directed at current Rule 1.6 and regards the Rule as out of step with public policy and the values of the legal profession as reflected in the rules currently in force in most jurisdictions." MODEL RULES OF PROF'L CONDUCT R. 1.6 (Reporter's Explanation of Changes 2001).

[164] JOHN W. STRONG, MCCORMICK ON EVIDENCE § 87 (5th ed. 1999).

through attorney-client communications. Yet despite this apparent acquiescence to relaxation of attorney-client privilege, when the U.S. Justice Department decided to allow monitoring of suspected terrorist prisoners' communications with their lawyers,[165] the ABA criticized the new regulation as violating attorney-client privilege.[166] The Justice Department's regulation, however, does not trammel privilege any more than the federal courts' crime-fraud exception standards, nor more than permissive disclosure under ABA Model Rule 1.6.

After the September 11, 2001 terrorist attacks, the Bureau of Prisons published a regulation allowing suspected terrorist prisoners' communications with their attorneys to be monitored, to deter terrorist acts.[167] In testimony before the Senate Judiciary Committee, U.S. Attorney General John Ashcroft said that an Al Qaeda terrorist training manual instructs imprisoned terrorists to "exploit [the American] judicial process" and to "communicate with brothers outside prison and exchange information that may be helpful to them in their work."[168] Ashcroft warned that the manual adds, "[t]he importance of mastering the art of hiding messages is self-evident here."[169] The Justice Department, concerned that imprisoned terrorist suspects might use communications with their attorneys to further terrorist conspiracies, amended the Bureau of Prisons' rule on management of inmates who pose a potential threat to national security.[170] The new rule allows the Attorney General to monitor such inmates' attorney-client communications if he has "reasonable suspicion" that such communications may be used to facilitate terrorist acts.[171]

The measure operates as follows. First, on the basis of information from a law enforcement or intelligence agency head that "reasonable suspicion exists to believe that a

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[165] National Security; Prevention of Acts of Violence and Terrorism, 28 C.F.R. § 501.3 (2001).

[166] Statement of Robert E. Hirshon, President, American Bar Association, Nov. 9, 2001, *at* http://www.abanet.org/leadership/justice_department.html (last visited Aug. 10, 2002).

[167] 28 C.F.R. § 501.3.

[168] *DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. (2001) (testimony of U.S. Attorney General John Ashcroft), *available at* http://www.senate.gov/~judiciary/testimony.cfm?id=121&wit_id=42 (last visited Aug. 15, 2002).

[169] *Id.*

[170] 28 C.F.R. § 501.3.

[171] *Id.*

particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism," the Attorney General may order the Director of the Bureau of Prisons to monitor attorney-client communications.[172] Then, the Bureau of Prisons must give notice to the prisoner, and to his or her counsel, that communications may be monitored.[173] Thereafter, communications are monitored by a "privilege team" comprised of individuals who have no role in, or relation to, investigating the prisoner.[174] Upon the privilege team's determination that a particular communication indicates an imminent act of violence or terrorism, that communication may be disclosed to law enforcement authorities.[175] Except for the information indicating imminent threats, no other information gleaned from the monitoring may be disclosed[176] or used for any investigative or other purpose[177] without approval by a federal judge.[178]

The regulation illustrates how the judicial and ABA disclosure standards for attorney-client privileges in the context of crime-fraud are applied. First, the Attorney General's standard to invoke monitoring[179] is nearly identical to the ABA Model Rule 1.6 standard for an attorney's discretionary disclosure of a client confidence.[180] The Justice Department's standard differs from Rule 1.6 by its inclusion of the "substantial damage to property" provision, but that provision in effect mirrors the ABA Ethics Commission's proposed "economic injury" revision to the Model Rule.[181] The

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[172] *Id.* § 501.3(a).

[173] *Id.* § 501.3(b).

[174] *Id.* § 501.3(d)(3).

[175] 28 C.F.R. § 501.3(d)(3)

[176] *Id.*

[177] *DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. (2001) (testimony of Assistant U.S. Attorney General Viet D. Dinh), *available at* http://www.senate.gov/~judiciary/testimony.cfm?id=128&wit_id=78 (last visited Aug. 10, 2002).

[178] *Id. See also* 28 C.F.R. § 501.3(d)(3).

[179] The standard exists to deter acts "that could result in death or serious bodily injury to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons." 28 C.F.R. § 501.3(a).

[180] Lawyers may "reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm . . . ." MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2002).

[181] The ABA Ethics Commission recommended this language in the proposed revision: "to the extent the lawyer reasonably believes necessary . . . to prevent the client from committing a crime or fraud reasonably certain to result in substantial

Justice Department's standard is more cautious than the Model Rule because it requires that disclosure decisions be made by a team of monitors.[182] The Model Rule allows a single lawyer to make a discretionary decision to disclose.[183]

The Justice Department regulation allows monitoring only upon "reasonable suspicion" that the prisoner poses a potential national security threat.[184] "Reasonable suspicion" is based on intelligence information received from the head of a law enforcement or intelligence agency.[185] In contrast, a lawyer's "reasonable belief" that his or her client might commit a criminal act that will cause "reasonably certain death or substantial bodily harm"[186] need not derive from law enforcement or intelligence information. For example, "reasonable suspicion" could be based on a client's statement that "next time I get drunk, I've got a mind to go beat the tar out of my brother-in-law, and I'm going out drinking tonight."[187]

The counter-terrorist regulation also embodies the standard set by the federal courts, in that, a mere charge of wrongdoing cannot trigger the crime-fraud exception.[188] In the context of the regulation, mere detention as a terrorist suspect will not trigger monitoring.[189] Instead, a reasonable suspicion based on intelligence or law enforcement information must exist.[190] The regulation operates in a similar manner to judicial in camera inspections, by preventing disclosure of privileged communications that do not indicate an imminent threat, without the review and approval of a federal judge.[191]

The regulation also tracks the course of permissible disclosure under both the ABA rule and the judicially applied crime-fraud exception. For example, the Model Rule will allow an attorney to disclose a client's bomb threat.[192] But privileged communications indicating future criminal activity with no imminent threat to human life or limb, such as an announced

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financial injury . . . ." Love, *supra* note 149.

[182] 28 C.F.R. § 501.3(d)(3).

[183] MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1).

[184] 28 C.F.R. § 501.3(d).

[185] *Id.*

[186] MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1).

[187] *See infra* text accompanying note 215.

[188] *See supra* note 56.

[189] 28 C.F.R. § 501.3(d).

[190] *Id.*

[191] 28 C.F.R. § 501.3(d)(3).

[192] MODEL RULES OF PROF'L CONDUCT R. 1.6.

intention to obtain a falsified passport, would be subject to judicial review.[193]

The notice requirement in the monitoring regulation may be a greater safeguard of attorney-client confidences than either the ABA Model Rule or the federal courts, since neither requires that an attorney put a client on notice that certain confidences may be disclosed.[194] The Justice Department regulation offers further protections by allowing the prisoner to seek review of the monitoring through the Bureau of Prisons' Administrative Remedy Program,[195] and by setting time limits on the monitoring.[196] In contrast, the ABA Model Rule affords a client no such right.[197] A lawyer's disclosure of a client confidence moots any review of the decision to disclose. Similarly, the litigant defending crime-fraud exception application has no "review opportunity," and rarely even receives an opportunity to rebut a discovering party's prima facie evidence of crime-fraud.[198]

Thus the "deeply troubl[ing]"[199] "frontal assault on the attorney-client privilege"[200] that the ABA and the American Civil Liberties Union ascribed to the Justice Department's regulation, stems less from the regulation than from the threats posed by the federal courts and the ABA Model Rule. The courts pay verbal homage to attorney-client privilege as the "oldest of the privileges for confidential communications known to the common law"[201] and, along with the ABA, recognize the "centrality of open client and attorney communication to the proper functioning of our adversary system of justice."[202] But action is necessary to preserve the doctrine.

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[193] United States v. Zolin, 491 U.S. 554, 572 (1989).

[194] MODEL RULES OF PROF'L CONDUCT R. 1.6.

[195] 66 Fed. Reg. 55,062.

[196] 28 C.F.R. § 501.2(c).

[197] MODEL RULES OF PROF'L CONDUCT R. 1.6.

[198] *See supra* text accompanying notes 52-55.

[199] Statement of Robert E. Hirshon, President, American Bar Association, Nov. 9, 2001, *at* http://www.abanet.org/leadership/justice_department.html (last visited Aug. 10, 2002).

[200] Comments of the American Civil Liberties Union et al., Regarding Eavesdropping on Confidential Attorney-Client Communications, Dec. 20, 2001, *at* http://www.aclu.org/safeandfree/122001_comments.pdf (last visited Aug. 10, 2002).

[201] Upjohn v. United States, 449 U.S. 383, 389 (1981).

[202] United States v. Zolin, 491 U.S. 554, 562 (1989). *See also*, Amendments to Ethics 2000 Commission Report 401, August 30, 2001, noting that a lawyer's preservation of client confidences "contributes to the trust that is the hallmark of the

V. THE ADMINISTRATION OF JUSTICE—A PROPOSED STANDARD

To achieve uniformity, to observe due process and to protect the attorney-client privilege when it is warranted, a rational scheme for judicial application of the crime-fraud exception to privilege is required. Ironically, the courts have already fashioned appropriate standards; the problem lies in the lack of unified guidelines.

By grafting together the various standards already set down by the courts, a workable, post-*Zolin* standard emerges. This post-*Zolin* standard contains six elements. (1) The mere assertion of crime or fraud is insufficient to trigger the crime fraud exception.[203] (2) Only attorney-client communications that are "in furtherance" of crime or fraud trigger the exception, not those that are merely "relevant" to the crime or fraud.[204] Alternatively, intentional deception must be shown.[205] (3) The attorney-client communications at issue must have a reasonable relationship to an alleged current or ongoing crime or fraud.[206] The privilege is not vitiated merely because the client has committed a crime or a fraud[207] or because the client communicated with counsel while engaged or involved in an alleged crime or fraud.[208] Rather, the exception applies only upon a showing of probable cause to believe that communications with counsel were intended to facilitate or conceal such wrongdoing.[209] (4) The discovering party must demonstrate that it has no alternative means of obtaining the evidence.[210] (5) Whenever reasonably possible, the trial courts should allow the party asserting privilege an opportunity to be heard, rather than relying on ex parte submissions and proceedings.[211] Finally, (6) a sufficient showing of crime-fraud

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client-lawyer relationship," *at* http://www.abanet.ort/cpr/32k-complete_amend.html (last visited Aug. 10, 2002).

[203] *See supra* note 56.

[204] United States v. Jacobs, 117 F.3d 82 (2d Cir. 1997); *In re* Richard Roe, 68 F.3d 38 (2d Cir. 1995).

[205] Either "[s]omething to give colour to the charge" of crime-fraud, Clark v. United States, 289 U.S. 1, 15 (1933); or "evidence of an intent to deceive." Indus. Clearinghouse v. Browning Mfg., 953 F.2d 1004, 1008 (5th Cir. 1992).

[206] Burton v. R. J. Reynolds, 177 F.R.D 491 (D. Kan. 1997).

[207] Burlington Indus. v. Exxon, 65 F.R.D. 26 (D. Md. 1974).

[208] Maloney v. Sisters of Charity Hosp., 165 F.R.D. 26 (W.D.N.Y. 1995).

[209] *Id.*

[210] *Impounded*, 241 F.3d 308, 315 (3d Cir. 2001).

[211] *See supra* text accompanying notes 90-92.

will not remove all attorney-client communications from privilege, but only those with a purposeful nexus to fraud.[212]

The ABA can more aggressively protect client confidences by authoring commentary to accompany Model Rule 1.6 to guide lawyers faced with making discretionary decisions on whether to disclose information adverse to a client.[213] The state of Virginia, for example, recognizes that it is "very difficult for a lawyer to 'know' when proposed criminal conduct will be actually carried out, for the client may have a change of mind."[214]

Another difficulty arising from the exercise of discretion involves defining what constitutes "reasonably certain death or substantial bodily harm."[215] In the hypothetical brother-in-law scenario described above, if the brother-in-law sustains a broken nose and facial lacerations in the context of an assault and battery by the client, those injuries might constitute "substantial bodily harm." Yet the same injuries resulting from an automobile accident would likely be labeled "minor." The scenario is further complicated if the brother-in-law ducks to avoid the punch and in doing so, loses his balance, hits his head on the hardwood floor and sustains irreversible brain damage.

Instructive commentaries would assist lawyers to determine when to make a discretionary disclosure of a client confidence. The following supplemental commentary, constructed from the existing professional codes of individual states, provides such assistance. (1) Disclosure of client confidences is appropriate when the lawyer possesses knowledge that a client intends to commit a crime and the lawyer has the information needed to prevent the crime.[216] (2) In instances where the attorney does not possess evidence beyond a reasonable doubt, disclosure may be permitted if the

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[212] Duttle v. Bandler & Kass, 127 F.R.D. 46 (S.D.N.Y. 1989).

[213] The ABA provided this comment as a guide to lawyers' exercise of discretion with the 1983 Model Rule: "The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question." MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 14 (1983). The comment was deleted from the new rule. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002).

[214] VA. RULES OF PROF'L CONDUCT R. 1.6 cmt. 13 (2000), *available at* http://www.vsb.org/profguides/rules.pdf (last visited Aug. 10, 2002).

[215] MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2002).

[216] OHIO CODE OF PROF'L RESPONSIBILITY DR 4-101(B)(3) (2001), *available at* http://www.sconet.state.oh.us/rules/professional (last visited Aug. 10, 2002).

lawyer has a "reasonable belief" that the client intends to commit a crime. A "reasonable belief" means that the lawyer believes it, and the circumstances are such that the belief is reasonable.[217] (3) Disclosure of confidential information is necessary to prevent the crime.[218] (4) The lawyer's failure to take preventive disclosure measures may aid the client in committing illegal action.[219] (5) The interest in preventing the harm outweighs the interest in preserving client confidentiality.[220] (6) The disclosure should be no greater than the lawyer reasonably believes necessary to the purpose.[221]

Using the brother-in-law hypothetical, a lawyer would have sufficient information of intention to commit a crime as well as the information needed to prevent it, if the client identifies his brother-in-law by name or address and adds some particulars to the threat, such as brandishing a set of "brass knuckles" or identifying a specific place or time for the attack. A "reasonable belief" might be based on the lawyer's knowledge of his client's previous assault on his brother-in-law or others, or the client's enraged issuance of so detailed a threat that it constitutes an actual plan for the crime. Even under these circumstances, the lawyer faces a difficult judgment call on discretionary disclosure, because the client may simply be venting his frustrations in a setting he believes to be confidential. In this instance, it is almost impossible for the lawyer to know whether disclosure to prevent harm outweighs the interest in preserving client confidences. Nonetheless, the adoption of commentary to amplify the obligations to clients and to third parties in the crime-fraud context would assist lawyers in weighing the factors involved in making decisions regarding their discretionary disclosure of client confidences.

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[217] ARIZ. RULES OF PROF'L CONDUCT ER 1.6 cmt. 13 (1998), *available at* http://www.abanet.org/cpr/links.html (last visited Aug. 10, 2002); PENN. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.16 cmt. 13 (1999), *available at* http://www.abanet.org/-cpr/links.html (last visited Aug. 10, 2002).

[218] MASS. RULES OF PROF'L CONDUCT R. 1.6 cmt. 13 (2001), *available at* http://-www.state.ma.us/obcbbo/rpcnet.htm (last modified Dec. 1, 2000).

[219] MICH. RULES OF PROF'L CONDUCT R. 1.6 cmt. 12 (2001), *available at* http://-www.michbar.org/opinions/ethics (last modified Apr. 2002).

[220] UTAH RULES OF PROF'L CONDUCT R. 1.6 cmt. 9 (2001), *available at* http://-www.utahbar.org/rules/html/professional_conduct.html (last visited Aug. 10, 2002).

[221] VA. RULES OF PROF'L CONDUCT R. 1.6 cmt. 14 (2000), *available at* http://www.vsb.org/profguides/rules.pdf (last visited Aug. 10, 2002). Commentary to the former ABA Model Rule 1.6 provided for this limitation to disclosure MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 14 (1983), but the new rule deleted this comment. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002).

CONCLUSION

There is a dangerous tendency, albeit justifiably motivated, to level the playing field on which crime or fraud is committed by ordering fuller disclosure of attorney-client privileged communications. Nevertheless, as the Justice Department's September 11 regulations demonstrate, fuller disclosure presents a difficult problem of how to balance policies favoring disclosure against the safeguards required to protect the adversarial process upon which the justice system is based. Affirmative steps such as those proposed above must be taken to ensure attorney-client privilege protection, because the current environment threatens to transform this critically important doctrine in American jurisprudence into a discretionary application.

Geraldine Gauthier[†]

[†] J.D. Candidate, 2004, Brooklyn Law School. The author thanks Edwin J. Jacobs, Esq. for thoughtful comments on the manuscript.