

**Peering Into Lawyers' Files –
Prosecutors' Use of the Crime or Fraud Exception**

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Environmental lawyers regularly advise clients about possible civil or criminal charges that could result from the client's conduct. Typically, the lawyer also advises of action the client may take to avoid those charges. The lawyer expects the attorney-client privilege and the work product doctrine to shield his advice and strategies from government authorities. But the rules of privilege can be broken. Increasingly, government prosecutors invoke the crime-fraud exception to privilege rules as a basis for peering into a lawyer's files. The government hopes the lawyer's files will provide evidence on which criminal or civil charges against a client can be based. What's more, the government may understand the lawyer's confidential advice to indicate that the lawyer was a conspirator with the client and the lawyer can become a "target" of the government.

The crime-fraud exception has been part of federal privilege law for at least 70 years, *see Clark v. United States*, 289 U.S. 1, 15 (1933), but it has a new vitality for prosecutors examining conduct in regulated industries – industries where lawyers are regularly consulted and relied upon to avoid enforcement actions. Counsel needs to understand the crime-fraud exception and the circumstances where it is properly invoked. Counsel also must know how to resist application of the crime-fraud exception so as to protect the privilege, the client and himself.

Background to the Attorney-Client Privilege, the Work Product Doctrine and the Crime-Fraud Exception:

The attorney-client privilege preserves confidential communications between attorney and client. The communications must be in connection with legal advice sought from the lawyer. *See*, 8 Wigmore, *Evidence*, § 2292 at 554 (McNaughton Rev. Ed. 1961). The purpose of the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Thus, the privilege enables lawyers to give useful advice to their clients because clients can talk candidly with their lawyers without fear that their conversations will be transmitted to the government. *See e.g., United States v. Chen*, 99 F.3d 1495, 1499 (9th Cir. 1996).

The attorney-client privilege applies when the client discusses past criminal violations or fraudulent conduct with the attorney. *See e.g., United States v. Zolin*, 491 U.S. 554, 562-63 (1989). However, the privilege does not apply as to lawyer-client communications related to the client's future wrongdoing. *Id.* The crime-fraud exception operates to nullify the attorney-client privilege when the client seeks advice from the attorney to further a crime or fraud. *See e.g., United States v. Reeder*, 170 F.3d 93, 106 (1st Cir. 1999); *In re Grand Jury Subpoenas*, 144 F.3d 653, 660 (10th Cir. 1998); *Chen*, 99 F.3d at 1500; *In re Murphy*, 560 F.2d 326, 337 (8th Cir. 1977). In that circumstance, the lawyer-client communications "have relatively (if any) positive impact on the goal of promoting the administration of justice." *In re Grand Jury Proceedings (Violette)*, 183 F.3d 71, 76 (1st Cir. 1999). When the lawyer's advice is sought by the client to further a crime or fraud, the "seal of secrecy" normally attendant to lawyer-client communications appropriately is broken. *Zolin*, 491 U.S. at 563.

The work product doctrine is broader than the attorney-client privilege and protects different interests. *United States v. Nobles*, 422 U.S. 225, 238 n.11 (1975); *In re Special September 1978 Grand Jury*, 640 F.2d 49, 63 (7th Cir. 1980). The doctrine protects against "unwarranted inquiries into the files and mental impressions of an attorney." *Hickman v. Taylor*, 329 U.S. 495, 510 (1947). The doctrine thereby promotes the vitality of the adversary system. *See e.g., In re Grand Jury*

Subpoena, 220 F.3d 406, 408-409 (5th Cir. 2000); *In re Sealed Case*, 676 F.2d 793, 812 (D.C. Cir. 1982). Work product encompasses material gathered by the lawyer in the context of actual or threatened litigation, including documents and things obtained from third parties and the lawyer's own mental impressions. See e.g., *In re Grand Jury Proceedings*, 102 F.3d 748, 750 (4th Cir. 1996); *In re Grand Jury Proceedings*, 33 F.3d 342, 349 (4th Cir. 1994). Both the lawyer and client have a protectable interest in, and may assert, the work product rule when the information is sought by an adversary. See e.g., *In re Grand Jury Proceedings*, 43 F.3d 966, 971 (5th Cir. 1994); *In re Sealed Case*, 676 F.2d at 812; *In re Grand Jury Proceedings*, 604 F.2d 798, 802 (3d Cir. 1979)¹. The protection against disclosure granted to work product information, however, is qualified. So-called "fact work product" may be subject to disclosure if the adversary can demonstrate substantial need for the information and an inability to obtain the equivalent of the information without undue hardship. See e.g., *In re Grand Jury Proceedings*, 102 F.3d 748, 750; F.R.Civ.P. 26(b)(3) (civil rule related to work product protection). By contrast, so-called "opinion work product" is more carefully guarded "as it represents the actual thoughts and impressions of the attorney." *In re Grand Jury Proceedings*, 33 F.3d at 348, citing *In re John Doe*, 662 F.2d 1073, 1079-80 (4th Cir. 1981).

The crime-fraud exception also applies to work product materials. However, the reach of the exception is not as broad for work product materials as it is for attorney-client communications. *In re Grand Jury Proceeding*, 102 F.3d 748, 751; *In re Special September 1978 Grand Jury*, 640 F.2d at 63. Just as in the context of attorney-client communications, a client's work product interest is lost when the work product relates to the client's ongoing or future crime or fraud. *Id.* at 802; *In re Sealed Case*, 676 F.2d at 812, n.75. Similarly, the lawyer's interest in so-called fact work product may be lost if the adversary can demonstrate the client's improper use of the attorney to further a crime or fraud. This is because there is little difference in the interests of the attorney and client in fact work product and work product protects only "rightful interests." *In re Special September 1978 Grand Jury*, 640 F.2d at 63 quoting *Hickman*, 329 U.S. at 510. The crime-fraud exception generally cannot cause the disclosure of attorney-opinion work product. Courts reason that an "invasion of the attorney's necessary privacy . . . [may] not [be] justified by the misfortune of representing a fraudulent client." *In re Special September 1978 Grand Jury*, 640 F.2d at 63. However, where the attorney knowingly participates in the client's crime or fraud, the attorney's work product interest also is eliminated. *In re Grand Jury Proceedings*, 33 F.3d at 349.

Application of the Crime-Fraud Exception – the Predicate Proof:

The crime-fraud exception operates in derogation of vital client and attorney interests. Accordingly, courts are required to exercise caution before applying the exception. The crime-fraud exception is properly invoked if the client has "made or received an otherwise privileged communication with the intent to further an unlawful or fraudulent act." *In re Sealed Case*, 107 F.3d 46, 49 (D.C. Cir. 1997); see *In re Grand Jury Subpoenas*, 144 F.3d at 660; *Reeder*, 170 F.3d at 106;

¹ In-house counsel should be aware that at least in the Fifth Circuit they may not have standing to assert work product if the company waives the privilege. *In re Grand Jury Subpoena*, 220 F.3d 406 (5th Cir. 2000). In that case, the court held that because in-house counsel's work was not intended only for the attorney's eyes but was meant to be shared with others in the corporation, the in-house counsel did not have standing to assert the work product protection. *Id.* at 409.

In re Grand Jury Subpoena, 223 F.3d 213 (3d Cir. 2000); *In re Richard Roe, Inc.*, 68 F.3d 38, 40 n.2 (2d Cir. 1995). The exception also applies to efforts to cover up a completed crime. *In re Grand Jury Proceedings (Doe)*, 102 F.3d 748, 749-50 (4th Cir. 1996). Further, the client "must have carried out the crime or fraud." *In re Sealed Case*, 107 F.3d 46, 49 (D.C. Cir. 1997); see *In re Grand Jury Subpoenas*, 144 F.3d at 660; *Reeder*, 170 F.3d at 106; *In re Grand Jury Subpoena*, 223 F.3d 213 (3d Cir. 2000); *In re Richard Roe, Inc.*, 68 F.3d 38, 40 n.2 (2d Cir. 1995). Therefore, the exception does not apply just because, at one time, the client had bad intentions. *In re Sealed Case*, 107 F.3d at 49. Further, the attorney advice (or attorney work product) must bear a close relationship to the client's criminal or fraudulent scheme. See e.g., *In re Grand Jury Subpoenas*, 144 F.3d at 660; *In re Grand Jury Investigation*, 842 F.2d 1223, 1226 (11th Cir. 1987); *In re Murphy*, 560 F.2d at 338 (work product context). Thus, the elements of the crime-fraud exception are: (1) a privileged communication; (2) which the client specifically intends to use and ultimately does use; (3) to assist the client's unlawful or fraudulent act, including a cover up of a prior unlawful or fraudulent act. The crime-fraud exception may apply even if the lawyer is wholly innocent and does not realize that the client intends to use the advice or work product in an illicit manner. See e.g., *In re Grand Jury Subpoenas*, 144 F.3d at 661 n.3; *In re Grand Jury Proceedings*, 87 F.3d 377, 381-82 (9th Cir. 1996); *In re Sealed Case*, 676 F.2d at 812.

Certainly, the prosecutor, as the party opposing privilege, must present some evidence to support each element of the crime or fraud exception. Suggestions that the evidence be merely "relevant" to a possible crime or so strong as to be "direct and compelling" evidence have been brushed aside. Compare, *In re Richard Roe, Inc.*, 68 F.3d at 40-41 with *In re Antitrust Grand Jury*, 805 F.2d 155, 165 (6th Cir. 1986). In *Clark*, a 1933 decision, the Supreme Court referred to the necessary quantum of evidence of each element as "*prima facie*." 289 U.S. at 15. But *Clark* provided little guidance on what "*prima facie*" evidence means in the context of eliminating privileges. In *Zolin*, a 1989 case, the Supreme Court acknowledged that *Clark's prima facie* standard left "subject to question the quantum of proof necessary to application of the exception." *Zolin*, 491 U.S. at 563 n.7.

The Courts of Appeals have established somewhat variant explanations of the *prima facie* proof standard. The Courts of Appeal for the District of Columbia, Third and Eleventh Circuits hold that the *prima facie* proof standard is satisfied by "evidence that if believed by the trier of fact would establish the elements of an ongoing or imminent crime or fraud." *In re Sealed Case*, 107 F.3d at 50; *In re Grand Jury Subpoena*, 223 F.3d 213, 217 (3d Cir. 2000); *In re Grand Jury Investigation*, 842 F.2d 1223, 1226 (11th Cir. 1987). The Second and Sixth Circuits hold that the requisite *prima facie* proof is evidence providing "probable cause" to believe that the particular communication with counsel or attorney work product was in furtherance of a crime or fraud. *In re Richard Roe, Inc.*, 168 F.3d 69, 71 (2d Cir. 1999); *In Richard Roe, Inc. ("Roe I")*, 68 F.3d 38, 41 (2d Cir. 1995) (requiring evidence of "precise factual basis" of the alleged crime); *In re Antitrust Grand Jury*, 805 F.2d at 165-66. The Ninth Circuit holds that *prima facie* proof is proof that provides "reasonable cause to believe the attorney was used in furtherance of an ongoing scheme" and that "would establish the elements of an ongoing violation." *Chen*, 99 F.3d at 1503. The Ninth Circuit states that reasonable cause is less than a preponderance of the evidence. *Id.* The Seventh Circuit has adopted a more traditional burden-shifting definition of *prima facie* evidence, holding that the standard is met if the evidence has sufficient weight to require the privilege holder "to come forward" with an explanation. *United States v. Davis*, 1 F.3d 606, 609 (7th Cir. 1993). The First and Tenth Circuits acknowledge they have not yet determined the meaning of the *prima facie* standard. *In re Grand Jury Proceedings (Violette)*, 183 F.3d at 78; *In re Grand Jury Subpoenas*, 144 F.3d at 660.

Some guiding principles can be derived from the confused, and perhaps inconsistent²

articulation of the *prima facie* proof standard. First, the party opposing privilege must have proof of a particular completed criminal or fraudulent scheme or an attempted cover up of the scheme. *In re Sealed Case*, 107 F.3d at 49 (completed crime); *In re Grand Jury Proceedings*, 102 F.3d at 749-50 (cover up). There must be proof of each legal element of the fraud or crime and its precise factual basis. *In re Sealed Case*, 107 F.3d at 50; *Roe I*, 68 F.3d at 41. Second, the crime or fraud must have been specifically intended by the client. *In re Grand Jury Subpoena Duces Tecum*, 773 F.2d 204, 207 (8th Cir. 1985)³. Evidence that the client committed a mere negligence crime should not support application of the privilege. Third, the party opposing privilege must present proof that the attorney was used in some manner, not tangential, that assisted the client in furthering the scheme. *In re Grand Jury Subpoenas*, 144 F.3d at 660. Finally, the proof must be sufficient to cause the fact-finder to hold “more than a strong suspicion” that the client planned the crime. *In re Antitrust Grand Jury*, 805 F.2d at 166. The proof requirement should be substantial because if the “*prima facie*” case is made, the attorney-client privilege and, at least, the fact work product privilege will be eliminated. *Zolin*, 491 U.S. at 563 n.7 (The crime-fraud exception “is used to dispel the privilege altogether *without* affording the client an opportunity to rebut the *prima facie* showing,” quoting Note 51 Brklyn L. Rev. 913, 918-19 (1985) (emphasis in original)).

Practical Aspects of Litigating the Crime-Fraud Exception in Grand Jury Proceedings:

The crime-fraud exception is most frequently invoked in grand jury proceedings where the government seeks to pry into lawyer-client relationships for information that will incriminate the lawyer's client. Opposing the prosecutor's invocation of the crime-fraud exception often is very difficult due to the general rules of secrecy under which grand jury proceedings are conducted.

The Starting Points:

The typical starting point for a crime-fraud application in grand jury proceedings is a grand jury subpoena to the client's lawyer. The subpoena may seek the lawyer's testimony, documents from the lawyer's file or both. The subpoena should describe, as narrowly as possible, the communications for which the prosecutor thinks the crime-fraud exception may be found to apply. This is because if the crime-fraud exception is applicable, it can be enforced only as to those particular communications that were made for the purpose of furthering the client's illegal conduct. *In re Grand Jury Subpoena*, 144 F.3d at 660-61; *In re Antitrust Grand Jury*, 805 F.2d at 157. Communications not directly related to the privilege abuse retain their privileged character and cannot be disclosed. See *In re Richard Roe, Inc.*, 68 F.3d at 41. Notwithstanding this prudent approach, prosecutors often seek very broad disclosures, perhaps expecting that the scope of their request will be whittled down in the court proceedings that will flow from the grand jury subpoena.

The grand jury subpoena to the lawyer generally is followed by the lawyer's motion to quash the subpoena on the ground that it seeks attorney-client privileged and work product information. The lawyer has an ethical obligation to file this motion because the lawyer serves as the guardian of the client's secrets. See *Haines v. Liggett Group Inc.*, 975 F.2d 81, 90 (3d Cir. 1992); *Republic Gear Co. v. Borg Warner Corp.*, 381 F.2d 551, 556 (2d Cir. 1967). The motion also may assert the lawyer's own work product interest. Of course, the client can intervene in the proceeding and file its own motion to quash because, as the sole owner of the attorney-client privilege and an owner of work product, the client's interests are at stake. See *e.g.*, *In re Grand Jury Subpoenas*, 144 F.3d at 657.

The motion to quash should be accompanied by a privilege log and an affidavit from the lawyer. The privilege log should identify each document within the scope of the subpoena, describing its author(s), recipient(s), date, general subject matter and the basis of the privilege claimed (attorney-client, work product or both). The lawyer's affidavit should state that the attorney-client privileged

documents listed on the privilege log, and other oral communications with the client, were made in the context of confidential communications for legal advice and were not disclosed to third parties.

The affidavit also should state that the work product documents listed on the privilege log were made in connection with particular anticipated or actual litigation and, as appropriate, that the documents reflect the lawyer's mental impressions. A privilege log and affidavit are necessary because the proponent of privilege bears the burden of establishing its applicability. *In re Grand Jury Proceedings*, 219 F.3d 175, 182 (2d Cir. 2000); *United States v. International Brotherhood of Teamsters*, 119 F.3d 210, 214 (2 Cir. 1997); *In re Grand Jury Subpoenas*, 144 F.3d at 658. An adequate privilege log and affidavit present the claim of privilege and transfer to the government the burden of proving that the asserted privileges do not apply. *In re Grand Jury Investigation*, 974 F.2d 1068, 1075 (9th Cir. 1992); *Dole v. Milonas*, 889 F.2d 885, 890 (9th Cir. 1989).

The prosecutor responds to the motion to quash by raising the crime-fraud argument. The argument, in the form of a brief, tells the lawyer little of the prosecutor's basis for invoking the crime-fraud exception. *See In re Grand Subpoena*, 223 F.3d 213 (3d Cir. 2000) (regarding *Schofield* affidavits). The heart of the prosecutor's argument is contained in an *ex parte* submission to the court.

This submission contains the evidence which the prosecutor contends to be sufficient to meet the *prima facie* standard. This *ex parte* filing may include grand jury testimony, affidavits from the prosecutor or investigating agents and other information, not presented to the grand jury, which, in the prosecutor's view, explains the elements of the alleged crime by the client and the client's use of the lawyer to complete the crime. *See e.g., In re Grand Jury Proceedings*, 857 F.2d at 710. The *ex parte* submission must present a strong case because the government bears the burden of proof on the *prima facie* standard. *In re Sealed Case*, 107 F.3d at 49.

Opposing the Prosecutor's Submission:

The obligation and interest in protecting privileges cause the lawyer to oppose the prosecutor's submission through all reasonable methods, including briefing and hearings. The prosecutor resists the lawyer's demands to "litigate" the strength of the *ex parte* submission. These opposing positions, both legitimate, place a balancing obligation on the court – the judge considers both society's interest in protecting privileges from possibly improper invasion and the interests of a properly functioning grand jury whose work is not delayed by "mini trials" over privilege issues. *See United States v. Dionisio*, 410 U.S. 1, 17 (1973). Which interest ultimately is granted more weight will depend on a variety of factors, including the complexity of the alleged criminal scheme, the strength of the evidence regarding the lawyer's assistance in the scheme and the breadth of protected communications sought through the grand jury subpoena. It stands to reason that the court may allow relatively less "litigation" if the subpoena is targeted at a discrete transaction in which the client's use of the lawyer can be readily demonstrated. It is clear, however, that the court has discretion to allow challenges to the prosecutor's submission. *See e.g., In re Grand Jury Subpoena*, 223 F.3d 213 (3d Cir. 2000); *In re Grand Jury Subpoenas*, 144 F.3d at 662-63; *In re Grand Jury Proceedings (Vargas)*, 723 F.2d 1461, 1467 (10th Cir. 1983).

The lawyer's first effort should be a demand for production of the prosecutor's *ex parte* submission. Without a copy of this information, the lawyer literally will not know what needs to be argued. The submission may contain grand jury information, such as witness transcripts and other data that "might reveal the nature and direction of the grand jury proceedings." *In re Grand Jury Proceedings*, 851 F.2d 860, 866-67 (6th Cir. 1988). *See In re Grand Jury Investigation*, 610 F.2d 202, 216-17 (5th Cir. 1980); *Anaya v. United States*, 815 F.2d 1373, 1379 (10th Cir. 1987). Disclosure of such information generally is prohibited by Rule 6(e), F.R.Crim.P., but in the context of a challenge to the application of the crime-fraud exception, the information may be released, at least to the lawyer. *In re Grand Jury Subpoena*, 223 F.3d 213, 218-19 (3d Cir. 2000); *In re Grand Jury*

Subpoenas, 144 F.3d at 663; *see also In re Grand Jury 95-1*, 118 F.3d 1433, 1437, 1439 (10th Cir. 1977) (regarding showing generally necessary for release of grand jury materials).

The lawyer should seek permission to show the prosecutor's *ex parte* submission to the client. A restriction that only the lawyer can review the submission may rob the lawyer and the client of the opportunity for an effective response. Most likely, only the client will understand the full context of the transactions outlined in the prosecutor's *ex parte* submission and without understanding context, wholly innocent transactions may appear to be crimes. If the court is reluctant to allow grand jury materials to be shown to the client, the lawyer should propose that redacted portions of the *ex parte* submission be disclosed or, at the least, that the lawyer be allowed to discuss with the client those transactions on which the *ex parte* submission is focused.

The lawyer's principal counter-attack to the *ex parte* submission should be the lawyer's own submission. The purpose of the lawyer's filing is to demonstrate that the *ex parte* submission does not meet the *prima facie* standard. Deficiencies in the *ex parte* submission may include the prosecutor's failure to articulate all elements of a crime by the client, failure to demonstrate responsibility for the actor's conduct if the client is a corporation, the prosecutor's failure to acknowledge explanations for the client's conduct which are inconsistent with guilt and failure to provide sufficient evidence of a clear connection between the client's alleged conduct and the client's use of the lawyer. The client's use of the lawyer is especially critical because it is the lynch-pin for the prosecutor's crime-fraud argument. Here, the lawyer needs to carefully articulate the nature and purpose of his advice. If the advice cannot be directly tied to illegal conduct the client was then planning or covering up, no abuse of the privilege has occurred and the prosecutor's crime-fraud exception argument must fail. Just because the company committed a crime at about the same time it talked to its lawyer, this does not authorize use of the crime-fraud exception. "Companies operating in today's complex legal and regulatory environments routinely seek legal advice about how to handle all sorts of matters. . . . There is nothing necessarily suspicious about [a company] getting such advice." *In re Sealed Case*, 107 F.3d at 50.

Opposition to the crime-fraud exception need not stop with the lawyer's own submission. Courts examining crime-fraud exception issues have discretion to conduct evidentiary hearings and otherwise to receive evidence countering the prosecutor's position. *See In re Grand Jury Subpoenas*, 144 F.3d at 662-63.

The Zolin Alternative:

The court is not compelled to decide the crime-fraud issue based on the government's submission, the lawyer's response and any hearings. The court, instead, can order an *in camera* review of the lawyer-client communications which the prosecutor contends were used to further the client's crime. The court can use this *in camera* review to finally determine whether the required *prima facie* proof of the crime-fraud exception exists. In effect, the court's own *in camera* review of the lawyer-client communications can supplement the prosecutor's submission. The Supreme Court established this discretionary approach in *United States v. Zolin*. The *Zolin* court determined that *in camera* review can be ordered if the prosecutor's submission constitutes merely "a factual basis adequate to support a good faith belief by a reasonable person" that review of the lawyer-client communications may lead to the conclusion that the crime-fraud exception applies. 491 U.S. at 490.

The *Zolin* approach to resolving crime-fraud arguments may impose substantial burdens on the court. *In camera* review of privileged documents may take substantial time depending upon the complexity of the case (as identified by the prosecutor's and lawyer's submissions) and the volume of privileged documents at issue (as demonstrated by the lawyer's privilege log and affidavit).

Moreover, the court will guard against the possibility that it is being sent on a fool's errand if the privileged communications sought by the prosecutor apparently have little probative value to the grand jury investigation. With these concerns in mind, the *Zolin* court held that the trial court should decide on a case-by-case basis whether to make an *in camera* review of the privileged documents. The trial court should consider factors including the volume of privileged documents, the relative importance to the case of the privileged information and the likelihood that *in camera* review will establish that the crime-fraud exception should be applied. *Zolin*, 491 U.S. at 572. Moreover, after reviewing the communications, the court necessarily has to place them into the rest of the prosecutor's submission. The court, thereby, is forced to assemble and integrate the evidence – a role that typically belongs to advocates, not judges.

Proceedings Following an Adverse Decision:

The lawyer's work in the trial court does not end if the judge determines the crime-fraud exception to apply. At that point, all communications used in furtherance of the client's crime are deemed to be without any privilege, *Zolin*, 491 U.S. at 565 n.7, but those communications still must be identified. Protection continues for all other lawyer-client communications and the court is required to segregate the protected communications from those that have lost privilege. *See e.g., In re Grand Jury Subpoenas*, 144 F.3d at 661; *In re Antitrust Grand Jury*, 805 F.2d at 168; *In re Richard Roe, Inc.*, 68 F.3d at 41; *cf., In re Grand Jury Proceedings*, 857 F.2d 710, 712 (10th Cir. 1988) (substantial evidentiary showing by government and narrow subpoena eliminate need for individual document review).

Where documents are ordered disclosed based upon the crime-fraud exception, the court must be confident with the breadth of its disclosure order. Where there is virtually no chance that compliance with the order would result in the production of still privileged documents no *in camera* review is required. *In re Grand Jury Proceedings (Vargas)*, 723 F.2d at 1467. But if the circumstances present a real risk of improper disclosure, the trial court is required to examine “each document under the proper standard.” *Roe I*, 68 F.3d 41. The “proper standard” requires the court to determine how each document related to or furthered the client's crime. *Id.*; *cf., In re Antitrust Grand Jury*, 805 F.2d at 168 (“plain error” to order production of documents to grand jury without first conducting *in camera* review).

The court has a similar task as to grand jury testimony. Lawyer-client communications can be inquired of only if they were specifically intended to further and were related to the client's crime in a direct way. Other communications remain privileged and are not subject to the prosecutor's inquiry. Thus, the trial court should limit the grand jury questions to discussions between the lawyer and the client or its agents (such as in the case of a corporate client) related to the very specific crime adequately demonstrated in the prosecutor's *ex parte* submission and within the most narrow time frame relevant to the crime. *See In re Grand Jury Subpoenas*, 144 F.3d at 661; *In re Antitrust Grand Jury*, 805 F.2d at 168 (collecting cases).

The lawyer may assist the court in its winnowing process by arguing specific parameters that should apply to documents before they are disclosed or to testimony before it is permitted. *In re Grand Jury Subpoenas*, 144 F.3d at 662 (regarding objections to questions of lawyer-witness during grand jury session). *See United States v. Davis*, 1 F.3d 606, 611 (7th Cir. 1993). (Where lawyer passed on to grand jury information received from his client, court properly restricted grand jury questions of lawyer-witness to whether client lied to lawyer). The lawyer's role ends, however, with the arguments regarding disclosure. The lawyer relinquishes his advocate's role if he suggests to the

court that certain communications are appropriate for disclosure. Ultimately, the court must decide which communications lose privilege due to the client's privilege abuse.⁴

Particular Concerns for Outside Counsel – Does Client Counseling Put You at Risk of Indictment?

The prosecutor's use of the crime-fraud exception may not be focused solely on the client's conduct. The lawyer also may become a criminal target. The prosecutor may suspect that the lawyer who provides day-to-day counseling, or even litigation services, to the regulated-industry client is likely to be a participant in the client's conduct. The theory is that if the client committed a crime, the lawyer must have known of and facilitated the conduct because the lawyer was a key adviser to the client's business. This is not merely an abstract concern: In at least a Kansas City case, healthcare lawyers were indicted based essential on this theory. *United States v. Anderson*, Case No. 98-20030-JWL (D.Kan. 1999).

In *United States v. Anderson*, hospital executives worked with their lawyers to craft contracts with a physician group. The physician group provided out-patient services to a large number of geriatric patients and the hospital executives hoped that those patients could be referred to the hospital by the physicians when the patients required hospital care. The physician group wanted to be paid for the referrals but Medicare laws prohibit payment for referrals. Aware of this law, the hospital lawyers proposed contracts that required the physician group to perform services in return for the payment – a legal purpose. But according to the government, the lawyers knew that the contractually-required services were not performed by the physician group. Despite this knowledge, the lawyers drafted renewal contracts with the physician group which, like the predecessor contracts, called for services by the physicians. In addition, the lawyers advised the hospital executives to avoid any writing that indicated an intent to pay for referrals. Unfortunately, the lawyers also made comments that, taken out of context, indicated that the lawyers considered the contracts they drafted to be “shams” and that the lawyers knew the physicians would not be providing services to the hospital commensurate with the payments they received. (Lawyer comments included : “It's a clean-up deal”; “I don't know what [the physicians] do for their money”; “I don't look good in stripes.” *United States v. Anderson*, trial transcript p. 7346). The government charged the lawyers with violating the Medicare laws and with conspiracy. At the close of the government's evidence, the court ordered the lawyers acquitted. *See United States v. Anderson*, 85 F.Supp.2d 1047 (D.Kan. 1999).

The court determined that the lawyers had performed the legitimate role of counseling and planning with the hospital executives and nothing more. The lawyers drafted contracts which, if performed by both the hospital and the physician group, would not have violated the law. The lawyers obviously were concerned that the Medicare laws had been breached in the past (due to the physician's receipt of compensation without performing adequate services) and that the laws might also be breached in the future. But the lawyers wariness did not translate into culpability. Importantly the evidence revealed that the lawyers relied on information from the hospital executives and did not independently monitor the activities of the physician group.

Although the *Anderson* case dealt with healthcare lawyers, such a predicament could easily befall environmental lawyers. The nature of environmental law often requires lawyers to counsel clients regarding the interpretation of complicated and ambiguous laws and regulations. There is often pressure from clients to find interpretations that will allow activities that the government might otherwise view as violations of the law. In addition, because environmental lawyers counsel clients on continuing conduct, they are at risk of being pulled into the same web as the lawyers in *Anderson*.

Some courts have recognized that “[m]uch of what lawyers actually do for a living consists of helping their clients comply with the law.” *Chen*, 99 F.3d at 1500. The lawyer's proper role includes not only advising clients what they cannot do but also advising clients that certain conduct, although frowned on by regulators, is not clearly proscribed. “When a continuing course of conduct is in question, this may require not only an informed appraisal of risks but the preparation of a plan of action to minimize it.” *Id.* If counseling or planning causes lawyers to become targets of grand juries, lawyers will be less willing to search for safe harbors protecting their clients and the lawyer-client relationship could be jeopardized. *See Fisher v. United States*, 425 U.S. 391, 403 (1976).

Hopefully, the acquittal of the lawyers in *Anderson* will cause prosecutors to deliberate very carefully where the case can be made that lawyer targets really are counseling clients on how to comply with the law. Neither the lawyer's misgivings about the client's own efforts to comply, nor the lawyer's advice that clients litigate their positions, including putting regulators to proof of alleged violations, should cause a criminal focus on the lawyer. However, because even the suggestion that a lawyer may have been involved in criminal conduct can be damaging to a lawyer's career, counsel should be aware of the risks and should take steps to minimize them.

The most important step may be to choose your clients (or your employer) carefully. This can be difficult since the most lucrative clients may be the ones who continually find themselves in violation of the law and these may be precisely the clients who are at risk of prosecution.

Outside counsel faced with possible indictment for assisting clients in a crime or fraud can be placed in a particularly precarious situation. They may have documents in their files which show that they clearly counseled the client against engaging in any criminal or fraudulent conduct but may be prevented from revealing those documents by the attorney-client privilege. Outside counsel should also be aware of other ethical issues and rules to follow when a client may be engaging in a crime or fraud.

A lawyer's ethical duties, particularly the duty of confidentiality, can provide evidence of a lack of the requisite criminal intent by the lawyer. *See United States v. Cavin*, 39 F.3d 1299, 1308-9 (5th Cir. 1994) and *United States v. Kelly*, 888 F.2d 732, 743-4 (11th Cir. 1989). The duty of confidentiality must be balanced, however, with a lawyer's ethical obligation to avoid assisting a client in criminal or fraudulent conduct and to avoid knowingly making a false statement of material fact. Model Rules of Professional Conduct Rules 1.2(d), 1.6, 3.3, 3.9, and 4.1 (1983, amended 2000). “A lawyer who knows or with reason believes that her services or work product are being used or are intended to be used by a client to perpetrate a fraud must withdraw from further representation of the client.” ABA Formal Opinion 92-366 (Aug. 8, 1992).