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Abusing the Privilege: The Crime-Fraud Exception to Rule 501 of the Federal Rules of Evidence

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Abusing the Privilege: The Crime-Fraud Exception to Rule 501 of the Federal Rules of Evidence

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I. INTRODUCTION

As a civil litigant or criminal defendant, one's actions, conversations, and conduct are subject to continuous, if not exhaustive, scrutiny. There are limitations, however, on the extent to which an opponent may delve into the details of a party's relationships with others. Historically, common law recognized a need for evidentiary privileges, excluding otherwise admissible, relevant, non-prejudicial, and non-confusing evidence. This exclusionary practice developed for reasons wholly unrelated to the truth-promoting principles that the adversary system purports to promote.[1] Today, Rule 501 of the Federal Rules of Evidence incorporates the common law protection of certain relationships, including, among others, the relationships between a party and his spouse, a party and his clergy person, and a party and his psychiatrist.[2] The most

1. ERIC D. GREEN & CHARLES R. NESSON, PROBLEMS, CASES AND MATERIALS ON EVIDENCE 519 (1983).

2. *Id.* at 525. Green and Nesson characterize two groups of privileges that are distinguishable based on the relationship between the holder and the person in whom he is confiding. *Id.* They describe the first group as encompassing those privileges which protect communicants in a professional counseling relationship, including lawyer-client, doctor-patient, clergy-church patron, and investor-stockbroker, among others. *Id.* The second group of protected relationships include those where one anticipates that a zone of privacy protects his autonomy. According to Green and Nesson, this group includes marital privilege and the privilege against self-incrimination. *Id.* at 525-26.

Rule 501 of the Federal Rules of Evidence does not make the distinctions between privileges that Green and Nesson do. Rule 501 provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness [or] person . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law

hallowed and entrenched privilege, however, is that which protects a party's relationship with his attorney.[3]

Any advocate retained to assist a party with litigation immediately understands the imperative need for an attorney-client privilege. As Jeremy Bentham explained, "'A counsel, solicitor, or attorney, cannot conduct the cause of his client if he is not fully instructed in the circumstances attending it: but the client could not give the instructions *with safety*, if the facts confided to his advocate were to be disclosed.'"[4]

Bentham's theme resounds in more contemporary debate advocating the need for the attorney-client privilege. Principal arguments supporting an unfettered privilege include: 1) a client should feel uninhibited when disclosing to her counselor embarrassing or damaging information that may aid her attorney in determining the best course of action for this particular client;[5] 2) absent a privilege, attorneys invariably would be compelled to testify in actions in which they represent their clients;[6] and, 3) relative to discovery, very little evidence is suppressed that is not obtained by other means.[7]

There are limitations upon the scope of the attorney-client privilege. The *United States v. United Shoe Machine Corp.* court defined the parameters of the privilege:

> 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

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> supplies the rule of decision, the privilege of a witness [or] person . . . shall be determined in accordance with State law.

FED. R. EVID. 501.

3. *Id.* at 535.

4. 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2291, at 550 (McNaughton rev. ed. 1961) (quoting Jeremy Bentham, *Rationale of Judicial Evidence, in* 7 THE WORKS OF JEREMY BENTHAM 475 (1842)). In 1946, the United States Supreme Court articulated a similar justification:

> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. . . . [W]ere [attorney-client communications or work-product] open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. . . . The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Hickman v. Taylor, 329 U.S. 495, 510-11 (1946).

5. GREEN & NESSON, *supra* note 1, at 522.

6. *Id.*

7. *Id.*

> 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.[8]

Proposed Rule 503 of the Federal Rules of Evidence, although never adopted, best defined the privilege as it exists in modern framework.[9] Either the client, or his attorney, may assert the privilege,[10] which affords the client the right "to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client."[11] If the privilege asserted is one of attorney-client work-product pursuant to Federal Rule of Civil Procedure 26(b)(3), exclusion is warranted if the documents are prepared in contemplation of litigation and if they directly relate to the adversarial trial process.[12] This presupposes that the attorney-client communications at issue were never disclosed to any third parties.

There are limitations on what evidence is considered privileged under the attorney-client privilege doctrine. Proposed Rule 503(d) expressly denies protection if the lawyer's services are "sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud

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8. United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950). As Professor David J. Fried cautioned, however,

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

David J. Fried, *Too High a Price For Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds*, 64 N.C. L. REV. 443, 443 n.1 (1986).

9. *See* Fried, *supra* note 8, at 444 (discussing how Congress codified the law of attorney-client privilege into Rule 501 of the Federal Rules of Evidence, in lieu of enacting Proposed Rule 503).

Attorney work-product privilege is deemed broader than attorney-client privilege as it encompasses any notes or documents generated in anticipation of litigation by an attorney on her client's behalf. United States v. Nobles, 422 U.S. 225, 238 n.11 (1975). Courts have deemed some communications or work generated by an attorney as outside the scope of the attorney-client privilege. *See In re* Grand Jury Proceedings, 517 F.2d 666, 670-71 (5th Cir. 1975); *In re* Grand Jury Subpoena, 926 F.2d 1423, 1431 (5th Cir.), *reh'g denied*, 946 F.2d 893 (1991) ("As a general rule, client identity and fee arrangements are not protected as privileged.").

10. PROP. FED. R. EVID. 503(c). Note that the attorney-client privilege concerning communications may be invoked only by the client, whereas if attempted discovery concerns attorney-client work product, either the attorney or the client may assert the privilege. *See In re* Special September 1978 Grand Jury, 640 F.2d 49, 62 (7th Cir. 1980).

11. PROP. FED. R. EVID. 503(b).

12. Ferguson v. Lurie, 139 F.R.D. 362, 367 (N.D. Ill. 1991).

. . . ."[13] The attorney-client privilege "takes flight if the relation is abused" according to the Supreme Court.[14]

One need not stretch one's imagination to identify a hypothetical scenario depicting abuse of the attorney-client privilege. For example, a Mafia godfather cannot expect to cloak confidential communications with his attorney regarding an arranged payoff to a judge or public official. Such communication facilitates the crime of bribery.

Yet, more subtle instances occur where the boundaries of "aiding" in the commission of a crime or fraud are not as bright. For instance, the need to defeat privilege is not as readily apparent in the following hypothetical:

> P is injured after handling a defective boating part. P sues manufacturer, M, and the distributor, D, separately. After winning on his tort claims and obtaining $4 million and $5 million dollar judgments, respectively, P settles with M and D, as well as their insurers C and Z. During the course of the settlement negotiations, insurer C, who also insures retailer R (who sold P the defective part), does not disclose his relationship with R to P during the course of litigation or at the time of the settlement. However, P also does not sue R until after he reaches a settlement with M, D, C and Z. At the same time, R counterclaims against C. P and R attempt to defeat C's assertion of attorney-client privilege over documents P and R seek to discover. Does the sole fact that C did not disclose its insurer relationship with P indicate an underlying fraudulent intent on the part of C?[15]

13. Proposed Rule 503 defines who, under the rule, is considered to render professional legal services. Protected communications under the attorney-client privilege doctrine include those between 1) the client or his representative and his lawyer or lawyer's representative; 2) the client's lawyer and the lawyer's representative; 3) the client or his lawyer to a lawyer representing another in a matter of common interest; 4) representatives of the client or the client and a representative of the client; and, 5) lawyers representing the client. PROP. FED. R. EVID. 503(d); *see Ferguson*, 139 F.R.D. at 364.

Instances where there is no attorney-client privilege include: a) "communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction"; b) "communication relevant to an issue of breach of duty by [a] lawyer to his client or by the client to his lawyer"; c) "communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness"; and d) "communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common." PROP. FED. R. EVID. 503(d).

14. Clark v. United States, 289 U.S. 1, 15 (1932). Justice Cardozo further explained, "A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law." *Id.*

15. This hypothetical is loosely based upon the facts of *Gagne v. Ralph Pill Elec. Supply Co.*, 114 F.R.D. 22, 23-25 (D. Me. 1987). In *Gagne*, a federal court sitting in diversity held that absent a *prima facie* showing of some intent or, indeed, any intent to defraud, the crime-fraud exception was inapplicable. The court concluded that unless evidence of the insurer's intent to conceal its representation of the retailer existed, the exception could not operate.

The crime-fraud exception to the exclusionary attorney-client privilege proscribes the perpetuation of a crime or fraud under the pretext of privilege. The exception does not operate as a tool for discovering past wrongdoings that a client confided to his attorney. The exception thus remains consistent with the nature of the social relationship between the client and his counselor. As Professor Wigmore explained, the attorney-client privilege protections "cease to operate at a certain point, namely, where the desired advice refers *not to prior wrongdoings*, but to *future wrongdoings*."[16] In order to defeat an assertion of attorney-client privilege, the party seeking admission must demonstrate: 1) that the client was engaged in and planning criminal or fraudulent conduct when he sought the advice of counsel, or that he committed a crime or fraud subsequent to receiving an attorney's advice;[17] and 2) that the accused party or witness sought the assistance of counsel in furtherance of the wrongdoing or in close relation to it.[18]

II. THE *CLARK* LEGACY

The crime-fraud exception to the attorney-client privilege has expanded considerably since the Supreme Court's benchmark decision in *Clark v. United States*[19] more than 60 years ago. It now extends to instances where a client or a client and his attorney use the attorney-client relationship to conceal evidence of prior crimes or fraudulent activity.[20] Mrs. Clark was a juror who was convicted of criminal contempt for providing knowingly misleading answers and false information in response to *voir dire* questions. The case arose after Mrs. Clark became the sole voice on the jury arguing for acquittal. Her insistence resulted in a hung jury.[21] The issue in *Clark* concerned whether Mrs.

16. WIGMORE, *supra* note 4, § 2298, at 573.

17. Haines v. Liggett Group, Inc., 140 F.R.D. 681, 691 (D.N.J.), *vacated*, 975 F.2d 81 (3d Cir. 1992); *see also In re* Grand Jury Investigation (Schroeder), 842 F.2d 1223, 1226 (11th Cir. 1987).

18. *Id.*

19. 289 U.S. 1 (1932).

20. *See* Sound Video Unlimited, Inc. v. Radio Shack, Inc., 661 F. Supp. 1482, 1486 (N.D. Ill. 1987); *see also In re* Grand Jury Investigation (Schroeder), 842 F.2d 1223, 1227 (11th Cir. 1987).

21. *Clark*, 289 U.S. at 9. Specifically, Mrs. Clark did not disclose to the court that she previously was employed by the Foshay Company. *Id.* The men on trial, whose guilt Mrs. Clark would decide, served as officers for Foshay. *Id.* at 7. Mrs. Clark worked for the company for only two weeks and did not know any of the defendants personally. *Id.* Mrs. Clark had also been employed with the bank with which Foshay transacted business. *Id.* Mrs. Clark's husband, the bank's president, did have a personal relationship with the directors of Foshay. *Id.* at 7-8. When asked about her previous employment experience and her experience with the business community, Mrs. Clark did not disclose her relationship the Foshay Company. *Id.* at 8. Mrs. Clark became a member of the jury and early in the eight-week trial articulated her empathy toward the plight of the defendants. *Id.* Furthermore, she disclosed to the jury information about the defendants banking circumstances that had not been entered into evidence. *Id.* Finally, after a

Clark's comments during jury deliberations were discoverable and whether they could be used as evidence in a perjury action against her.[22]

While Mrs. Clark's privileged communications with her counsel were not questioned, Justice Cardozo wrote that the question of the discoverability of comments made during jury deliberations was analogous to the question of the crime-fraud exception, just as the privilege protecting a juror and jury deliberation was tantamount to the privilege protecting attorney-client communications.[23] In applying *O'Rourke*, Justice Cardozo found ample *prima facie* evidence to warrant the disclosure and use of Mrs. Clark's comments and actions during jury deliberation: her concealment of her employment with the defendants' company; her close association with the defendants' banker and personal friend, her husband; and as witnessed by a guard, her husband's visit to the hotel where she was sequestered with the other jurors.[24]

The reason for the invocation of the exception cannot be arbitrary. As Mrs. Clark's situation exemplifies, it may have been insufficient to say that she manifested a bias without offering examples of her attempts to conceal reasons why she was suspected of having a bias. As the court in *United States v. White*[25] explained, "[t]he crime-fraud exception has a precise focus. . . . To subject the attorney-client communications to disclosure, they must actually have been made with an intent to further an unlawful act (or a fraud)."[26] The exception may apply notwithstanding the fact that the attorney is unaware of the intended illegal or fraudulent nature of the attorney-client relationship.[27] Indeed, application of the exception may be appropriate in instances where an attorney, unbeknownst to his client, utilizes his relationship with his client to advance a crime or fraud.[28]

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meeting with her husband, at the jury's sequestered quarters, Mrs. Clark informed her fellow jurors that one of the witnesses for the prosecution had perjured himself. *Id.* at 9.

22. *Id.* at 12.

23. "A talesman, sworn as a juror, becomes, like an attorney, an officer of the court, and must submit to like restraints." *Id.* at 12. Justice Cardozo explained, "We turn to the precedents in the search for an analogy, and the search is not in vain. There is a privilege protecting communications between attorney and client. The privilege takes flight if the relation is abused." *Id.* at 15.

24. The *O'Rourke* court required that the *prima facie* case be grounded in fact. *Id.* (citing O'Rourke v. Darbishire, 1920 App. Cas. 581, 604). "In the record now before us the evidence of guilt is ample, without the happenings in the jury room, to break down the claim of privilege, and thus let in the light." *Id.* at 18.

25. 887 F.2d 267, 271 (D.C. Cir. 1989).

26. *Id.* at 271.

27. "The attorney may be innocent, and still the guilty client must let the truth come out." *Clark*, 289 U.S. at 15; *see also* United States v. Laurins, 857 F.2d 529 (9th Cir. 1988), *cert. denied* 492 U.S. 906 (1989).

28. *See In re* Impounded Case (Law Firm), 879 F.2d 1211, 1213 (3rd Cir. 1989) (considering the crime-fraud exception where the alleged criminality is solely that of the law firm).

An unsubstantiated allegation cannot serve as the basis for invoking the crime-fraud exception.[29] Justice Cardozo initiated the requirement of a *prima facie* showing in *Clark*: "'It is obvious that it would be absurd to say that the privilege could be got rid of merely by making a charge of fraud.' . . . To drive the privilege away, there must be . . . '*prima facie* evidence that [the fraud allegation] has some foundation in fact.'"[30]

Clark's progeny initially reaffirmed the principle that the communications themselves may not be used in making the *prima facie* showing.[31] While the *prima facie* mandate of *Clark* has survived, recent case law has imposed a broad range of requirements in defining a *prima facie* showing[32] and prescribed procedures to follow in evaluating evidence offered to make the showing.[33] Professor David Fried observed,

> [T]he courts are constantly confronted with the following questions:
> (1) What quantum of evidence is necessary to overcome the presumption in favor of the confidentiality of attorney-client communications?
> (2) Can the communication itself serve as the necessary evidence?
> (3) If so, should the determination be made by the judge after an *in camera* examination of the communication?
>
> In recent years, the courts have lowered the evidentiary standard that the opponent of the privilege must meet to overcome the privilege and generally have rejected any requirement that there be evidence of

29. *Clark*, 289 U.S. at 15.

30. *Id.* (quoting O'Rourke v. Dabinshire, [1920] A.C. 581, 604).

31. The *Shewfelt* test is the designated name for the requirement that the *prima facie* showing of the fraud allegation be attributable to an independent source. United States v. Shewfelt, 455 F.2d 836 (9th Cir.), *cert. denied*, 406 U.S. 944 (1972); Fried, *supra* note 8, at 464 (explaining the nominal significance of *Shewfelt*, which Fried argued has generally been limited to its narrow facts). Some courts have rejected the independent source test entirely and required a *prima facie* showing by looking solely at the allegedly privileged information itself. *See* United States v. King, 536 F. Supp. 253, 260 (C.D. Cal. 1982).

32. Fried, *supra* note 8, at 462-67.

33. The recent U.S. Supreme Court decision in United States v. Zolin serves as the high water mark for the procedure question. The *Zolin* Court attempted to strike the balance between affording opportunity to offer a *prima facie* showing and the need to protect privilege by requiring that any such inspection be made *in camera*. United States v. Zolin, 491 U.S. 554 (1989). Central to this balance is the use of an *in camera* inspection of documents by a judge prior to determining the establishment of a *prima facie* case. *Id.* at 564. *But see In re* Impounded Case (Law Firm), 879 F.2d 1211, 1214 (3d Cir. 1989) (arguing that if a party is not implicated in the alleged fraud, that party's attorney may raise privilege challenges to defeat the need for an *in camera* review); Dura Corp. v. Milwaukee Hydraulic Prods., Inc., 37 F.R.D. 470, 471 (1965) (holding that, in the event of a sufficient *prima facie* showing of privilege, an *in camera* inspection is "unwarranted prying"). *But cf.* A. v. District Court, 550 P.2d 315 (Colo. 1976) (holding that if a court decides to review documents *in camera*, the party invoking the exception does not need to make an independent showing).

fraud independent of the confidential communication itself.[34]

While under *Clark* the *prima facie* showing constitutes the threshold for the admission of traditionally protected attorney-client communications and work-product, the questions of what should be required and what procedures are appropriate essentially dictate the applicability of the crime-fraud exception.[35]

III. "The Only Major Recent Case"[36]

In 1989, the Supreme Court's unanimous decision in *United States v. Zolin*[37] significantly changed the longstanding, though somewhat eroded, *Clark* precedent.[38] The Supreme Court granted certiorari to consider two questions concerning the application of the crime-fraud exception which had previously divided the Court of Appeals.[39] The first issue addressed a court's conditioning its enforcement of an Internal Revenue Service summons upon the disclosure of the summoned information;[40] the second issue considered the use of the crime-fraud exception to defeat the testimonial privilege protecting disclosure of attorney-client information.[41]

The facts of *Zolin* do not present the best case for the Supreme Court to make *good law* as to when, how, and if the crime-fraud exception is appropriate. The Criminal Investigation Division of the Internal Revenue Service sought to investigate the 1979 through 1983 tax returns of L. Ron Hubbard, the founder of the Dianetics movement and the Church of Scientology.[42] The IRS sought two tapes, purportedly privileged under attorney-client privilege doctrine, which were filed with fifty-one other documents with the Clerk of the Los Angeles County

34. Fried, *supra* note 8, at 461-62.

35. Federal Rule of Evidence 104(a) provides: "Preliminary questions concerning . . . the existence of a privilege shall be made by the court. . . . In making its determination it [is] . . . bound by the rules of evidence." FED. R. EVID. 104(a). Rule 1101(c) requires: "The rule to respect privileges applies to all stages of all actions, cases, and proceedings." FED. R. EVID. 1101(c).

36. Haines v. Liggett Group, Inc., 140 F.R.D. 681 (D.N.J.), *vacated*, 975 F.2d 81 (3d Cir. 1992)).

37. United States v. Zolin, 491 U.S. 554, 563 (1989).

38. *Id.*

39. *Id.*

40. *Id.* at 556.

41. *Id.* at 556.

42. L. Ron Hubbard died during the course of litigation in 1986. The Church of Scientology and Mary Sue Hubbard intervened, becoming the only active respondents in the action. Although Zolin, the Clerk of Superior Court, is the named respondent, he took no active part in the case. The Church of Scientology and Mary Sue Hubbard argued that the case was moot in light of Hubbard's death and the closure of the IRS's civil audit of his tax records for the period in question. *Id.* at 557 & nn.3-4.

Superior Court in conjunction with the case of *Church of Scientology of California v. Armstrong*.[43] The IRS obtained partial transcripts of the tapes under uncertain circumstances.[44] The *Zolin* Court, however, dismissed the dubious circumstances under which the IRS received access to the tapes as not having an impact on its decision.[45] After serving a summons upon the Clerk of the Los Angeles Superior Court, the IRS inspected and copied the materials listed in the summons, including the tapes, on October 24, 1984.[46] Some were filed under seal.[47]

The Church of Scientology and Mary Sue Hubbard, intervening parties in the *Armstrong* case, successfully petitioned for a temporary restraining order from the U.S. District Court for the Central District of California. The order required the return of the materials and all IRS notes reflecting their content.[48] The IRS responded by petitioning the district court to enforce the summons and facilitate the production of 12 of the sealed documents.[49] The Church of Scientology and Hubbard's widow objected, arguing that the IRS's request was in bad faith, that the requested documents were irrelevant, and that the attorney-client privilege shielded disclosure.[50]

In an attempt to defeat the privilege, the IRS asserted the tapes' relevancy to the investigation.[51] Requesting that the district court review the tapes *in camera*, the IRS proffered partial transcripts of the tapes in question, which were purportedly legally[52] obtained from a confidential source.[53] Rejecting Hubbard's claim of bad faith by the IRS and employing only the quoted excerpts from the partial transcripts sub-

43. *Zolin*, 491 U.S. at 557-58 (citing Church of Scientology of Cal. v. Armstrong, No. C420 153, Los Angeles Superior Court).

44. *Id.*

45. In footnote five of *Zolin*, Justice Blackmun wrote:

> The IRS denied that the transcripts were made using tapes obtained from the Superior Court or from any other illicit source. [The IRS agent] declared that "[t]he partial transcripts were not prepared by the United States from the tapes in the custody of the Superior Court . . . nor from copies of the tapes now in the custody of the Clerk of this Court. The transcripts were obtained from a confidential source by another Special Agent prior to the issuance of this summons. The source was not a party to *Church of Scientology v. Armstrong*, . . . nor any attorney for any party in that proceeding." As the District Court made no finding of illegality, we assume for present purposes that the transcripts were legally obtained.

Id. at 559 n.5 (emphasis added).

46. *Id.* at 557.

47. *Id.*

48. *Id.*

49. *Id.* at 557-58.

50. *Id.* at 558.

51. *Id.*

52. *Id.*

53. *Id.*

mitted by the IRS, the district court determined that while the tapes reflected past fraud, there was no extrinsic evidence that the crime-fraud exception applied to the tapes in question.[54] Notwithstanding the IRS's repeated requests, the district court, adhering to the extrinsic evidence rule and the *Clark* precedent, did *not* review the tapes *in camera*.[55]

Justice Blackmun framed the crime-fraud exception issue as:

> whether the applicability of the crime-fraud exception must be established by 'independent evidence' (i.e. without reference to the content of the contested communications themselves), or, alternatively, whether the applicability of that exception can be resolved by an in camera inspection of the allegedly privileged material.[56]

In weighing the practicality of historical approaches to the exception, the Court concluded that the IRS could introduce the contents of the documents to demonstrate a *prima facie* case for the invocation of the crime-fraud exception.[57] Justice Blackmun rationalized: "A *per se* rule that the communications in question may never be considered [in the determination of whether there is *prima facie* evidence to defeat the privilege] creates . . . too great an impediment to the proper functioning of the adversary process."[58] The Court also upheld the request for *in camera* inspection of the documents, which the Court considered permissible, though not absolutely required.[59]

The question of whether to admit the substance of communications in order to assess whether a *prima facie* case for the invocation of the exception has been made is necessarily a quantitative one. In effect, the Court condones the admission of *additional* substantive evidence derived from the documentation under claim of privilege in the event there is not enough independent extrinsic evidence to establish a *prima facie* case.

After *Zolin*, parties attempting to defeat invocation of the attorney-client privilege may make a quasi-*prima facie* showing, based upon

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54. *Id.*
55. *Id.*
56. *Id.* at 556-57.
57. *Id.* at 568-69.
58. *Id.*
59. The Court held:

> A blanket rule allowing *in camera* review as a tool for determining the applicability of the crime-fraud exception . . . would place the policy of protecting open and legitimate disclosure between attorneys and clients at undue risk. There is also reason to be concerned about the possible due process implications of routine use of *in camera* proceedings. [W]e cannot ignore the burdens *in camera* review places upon the district courts, which may well be required to evaluate large evidentiary records without open adversarial guidance by the parties.

Id. at 571 (citations omitted); *see also* United States v. Reynolds, 345 U.S. 1 (1953).

lesser extrinsic evidence,[60] in order to disclose[61] protected information. The party opposing the privilege thus intends to utilize the protected information to make a *prima facie* showing as to why the protected information should be disclosed. With Justice Blackmun writing for the majority, the Court held, *inter alia*, that *in camera* inspection could be used when the challenging parties request *in camera* review and when they "present evidence sufficient to support a reasonable belief that *in camera* review may yield evidence that establishes the exception's applicability."[62]

The standard resembles that applied in Fourth Amendment search and seizure cases. Specifically, a police officer must provide a judge with "probable cause" to believe that suspected contraband can be found at the location for which the warrant is requested.[63] As Fourth Amendment case law demonstrates, the probable cause standard is difficult to define, even for the Supreme Court.[64] Absent more definitive guidelines, Justice Blackmun's standard will become as problematic over time.

The *Zolin* Court intimated that even a slight offering could satisfy its *prima facie* standard by stating that "[t]he threshold we set . . . need not be a stringent one."[65] Such a proposition deflates the *prima facie* requirement in *Clark* by diluting it to require some showing from which a judge or magistrate can extract a *prima facie* case. The Court did note, however, that the decision concerning whether to review the purportedly privileged information *in camera* to ascertain whether a *prima facie* case is supported is at the discretion of the court.[66]

Courts enjoy broad latitude in determining whether the lesser evidentiary showing can support a reasonable belief that an *in camera*

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60. The extrinsic evidence may be highly suspect at best, as *Zolin* itself exemplifies. There was great speculation as to how or if the IRS legally obtained its information in the first place. *Zolin*, 491 U.S. at 559.

61. The Court pointed out that *in camera* disclosure to a federal court does not constitute disclosure of privileged material. *Id.* Yet, it is the court and not the finder of fact who controls the admission of evidence in a judicial proceeding. A court is as human as the judge who sits on its bench; disclosure to a judge alone still constitutes a disclosure. Irrespective of whether a *prima-facie* case exists, the presumptively privileged item will invariably factor into the judge's or magistrate's evaluation of other evidence, where applicable, presented during the course of litigation.

62. *Id.* at 574.

63. *See* Illinois v. Gates, 462 U.S. 213 (1983).

64. The complexities of the issue become readily apparent when comparing *Gates* with other cases like Terry v. Ohio, 392 U.S. 1 (1968) (stop and frisk), United States v. Watson, 423 U.S. 411 (1976) (limiting exigent circumstances), and California v. Carney, 471 U.S. 386 (1985) (automobile exception).

65. *Zolin*, 491 U.S. at 572.

66. *Id.*

review will establish the application of the exception.[67] The factors that a court should consider, according to Justice Blackmun, include, but are not limited to, the volume of materials to be evaluated, the relevant value of the material to the case, the likelihood the evidence will be produced through *in camera* review, and how the materials fit into the scheme of other previously admitted evidence.[68]

By presuming the legitimacy of the methods whereby the purportedly privileged materials were obtained, the Supreme Court dodged one of the issue's threshold questions: what *qualitative* standards must a litigant satisfy in order to invoke the exception? By abolishing the "independent evidence" rule, the Supreme Court diminished some of the safeguards Justice Cardozo imposed in *Clark* to establish workable parameters for the rule. The modern trend toward increasing federal criminal jurisdiction,[69] however, elevates the importance of the *quality* of the minimal showing that the party attempting to defeat the privilege must advance. The term *quality* in this context can refer to: 1) the legitimacy and biases of the source providing the information; 2) the relationship between the information provided as the minimal showing and the theory of fraud presented in making a case for *in camera* inspection; and, 3) the accuracy of the information proffered to make that case. Justice Cardozo cautioned against the employment of fabricated or illegally obtained information to defeat the attorney-client privilege. The *Zolin* test,[70] should, but does not, consider the quality of information. Such consideration would address Justice Cardozo's concern. Given that the Court acknowledged the issue of where the IRS derived the problematic independent information,[71] it should have addressed the level of quality required of the evidence, particularly if the Court diminished the *Clark* safeguards for the sake of expediency. If the IRS obtained the information used in *Zolin* by unauthorized, illegal means *and* the Supreme Court

67. *Id.* It is important to note that the standard of appellate review is "clearly erroneous." *See* FED. R. CIV. P. 72(a). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

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

69. Professor Fried stated that "[a]s more types of wrongdoing traditionally within the province of the civil law are criminalized, it becomes easier to make out a case that the defendant consulted his or her attorney in furtherance of crime." Fried, *supra* note 8, at 470.

70. The *Zolin* decision advanced a definitive "test" for invoking the crime-fraud exception. While Justice Blackmun's opinion does suggest certain parameters—requiring a "lesser" independent evidence standard as opposed to rejecting the *Shewfelt* test altogether and acknowledging the appropriateness of the use of *in camera* inspection in some instances—if Justice Blackmun did intend to set forth a definitive "test," the opinion does not address key points that a formal test should incorporate. *Zolin*, 491 U.S. at 563.

71. *Id.* at 572.

failed to object to those methods, Justice Cardozo's fear becomes a modern defense attorney's nightmare.

In considering the *prima facie* showing itself, Justice Blackmun vehemently emphasized that *Zolin* does not address, and certainly does not attempt to edify, questions concerning the *quantitative* measure of evidence required to make a *prima facie* showing. Justice Blackmun stated, "A variety of questions may arise when a party raises the crime-fraud exception. . . . [W]e observe, first, that we need not decide the quantum of proof necessary ultimately to establish the applicability of the crime-fraud exception."[72] This shift of the question presented in *Zolin* typifies the Court's misidentification of the parameters for invoking the crime-fraud exception. Whereas Justice Blackmun's opinion does not deal with the quality of the information, it is crucial that the required *amount* of evidence necessary to demonstrate a *prima facie* case be sufficient to safeguard against claims, based upon fabricated evidence, which a party advances for the purpose of exposing as much privileged information as possible. While the ultimate decision of whether to expose the privileged information is contingent upon a federal judge's *in camera* assessment of whether the crime-fraud exception applies, each time a court entertains a motion to defeat the privilege with any information, qualitatively acceptable or not, the court risks disclosing privileged information that should not be disclosed to any party, *including the court.*[73]

The *in camera* disclosure of documents, effected after a quasi-*prima facie* demonstration based on minimal extrinsic evidence, could evolve into an unworkable standard. The Court in *Zolin* asserted that, "[i]n fashioning a standard for determining when in camera review is appropriate[,] . . . [w]e conclude that a lesser evidentiary showing is needed to trigger in camera review than is required to ultimately overcome the privilege."[74] In *Clark*, Justice Cardozo cautioned against the arbitrary application of the exception in the face of an allegation of fraud. The *Zolin* Court's lowering of the quantitative evidentiary standard for defeating the privilege makes Justice Cardozo's point in *Clark* central. In effect, a lesser evidentiary showing further facilitates the

72. *Id.* at 563. The Court similarly did not concern itself with the quality of information necessary for the lesser evidentiary showing when *in camera* inspection is requested. The Court simply acknowledged that the substance of the documents in question may be used to establish a *prima facie* showing warranting a defeat of the privilege.

73. *See supra* note 61. The appointment of a special master or review by a magistrate, functioning in a "chinese wall" capacity and responsible only for actually reviewing the documents or materials at issue, should divert any possible prejudice that would result from the judge's *in camera* review.

74. *Zolin*, 491 U.S. at 572. The Court concluded, "The threshold we set . . . need not be a stringent one." *Id.*; *see also* Fried, *supra* note 8, at 467.

ability of a party to exaggerate claims or to raise skeptical claims of crime or fraud.

IV. THE QUANTITATIVE *ZOLIN* COMPLEMENT

The procedure for ascertaining whether a *prima facie* case is established to defeat attorney-client privilege is only one question with which federal courts must contend. The February 1992 New Jersey district court decision in *Haines v. Liggett Group, Inc.*[75] attempted to create a quantitative standard to supplement *Zolin's* mandates related to *in camera* review and the use of privileged documents to establish *prima facie* proof.[76] In adopting *Zolin* wholesale, the *Haines* court expressed its intent to clarify guidelines for the "quantum of proof necessary to defeat the privilege."[77]

Ironically, the facts of *Haines* provide a strong example of an instance where external evidence may support a *prima facie* showing to invoke the crime-fraud exception without an *in camera* inspection.[78] The court in *Haines* could have reached the same result by using "independent evidence" without incorporating information obtained from attorney-client communications.

The *Haines* case was a companion case to *Cipollone v. Liggett Group, Inc.*[79] In each case, the plaintiff sued Liggett Group, Inc., a tobacco manufacturer, for damages to compensate for injuries sustained by the plaintiffs while using a Liggett's product, which Liggett purportedly knew to be dangerous.[80] The plaintiff in *Haines* alleged that Liggett perpetuated a public fraud when it founded a research agency, the Council for Tobacco Research (CTR), to purportedly conduct independent research on the effects of smoking.[81] The tobacco industry allegedly concealed CTR research that implicated a link between health problems

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75. Haines v. Liggett Group, Inc., 140 F.R.D. 681 (D.N.J.), *vacated*, 975 F.2d 81 (3d Cir. 1992).

76. *Id.* at 692.

77. The *Haines* court argued that the quantum standard should be something "other than [*Clark's*] seminal, ambiguous statement: 'To drive the privilege away, there must be something to give colour to the charge.'" *Id.* at 691.

78. The Director of Research for CTR admitted that, on occasion, CTR researched special projects inconsistent with the program. *Id.* at 688. The fact that testimonial evidence elicited in the trial of a companion case raised grave suspicions about the legitimacy of the information furnished by CTR to the tobacco industry's legal counsel and cloaked under attorney-client privilege could "quantitatively" serve as a strong *prima facie* showing for invoking the exception.

79. *See generally* Cipollone v. Liggett Group, Inc., 683 F. Supp. 1487 (D.N.J. 1988).

80. In *Haines*, as in *Cipollone*, the plaintiff sought damages for wrongful death, claiming that the plaintiff's death was attributable to a design defect in the cigarette manufactured by Liggett and Liggett's failure to market a safer cigarette. *See* Haines v. Liggett Group, Inc., 140 F.R.D. 681 (D.N.J.), *vacated*, 975 F.2d 81 (3d Cir. 1992); *see also Cipollone*, 683 F. Supp. at 1487.

81. *Haines*, 140 F.R.D. at 686.

and smoking.[82] In fact, the CTR researched and identified other sources that could promote the health side effects attributable to smoking.[83]

A clandestine division of CTR, the "special projects division," assisted counsel for Liggett in defending against products liability actions. During discovery, Liggett protected against the disclosure of information generated by CTR by forbidding research personnel from answering questions regarding the opinions which Liggett requested CTR to render. Liggett claimed that it could protect such information by virtue of the attorney-client privilege.[84]

Neither the court nor the attorneys in *Cipollone* addressed the issue of whether the crime-fraud exception may be invoked to discover evidence in support of Cipollone's assertions.[85] The trial court in *Cipollone* denied a motion for directed verdict, acknowledging that CTR's research generally did not relate to the "core health issues implicated by cigarette smoking."[86] During the course of the *Cipillone* trial, however, attorneys for Rose Cipollone's estate adduced testimonial evidence from the Director of Research for CTR, who admitted that the "special projects division" would research issues that did not fit into the Scientific Advisory Board's research.[87] Indeed, Liggett purportedly used the research to assist the tobacco industry in defending suits involving health risks associated with smoking.[88]

The plaintiff in *Haines* sought discovery based upon the theory that Liggett knew of the hazards of smoking, concealed them, and "affirmatively misled the public with regard to the risks of smoking."[89] The plaintiff argued that this last factor, defendant's affirmative misrepresen-

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82. *Id.* at 687.

83. "Plaintiff's counsel also learned that the 'special projects' division was specifically designed to sponsor epidemiological studies which could be of use to cigarette manufacturers in their defense of various current and future suits against them based on the hazards of cigarette smoking." *Id.* at 685.

84. "As a demonstration of the fact that CTR had obtained a dual purpose, Dr. F.G. Colby characterized himself as 'a person wearing two hats. Number one, he was in charge of Research & Development information; number two, he was responsive to the legal department.' . . . Dr. Colby's lawyer directed him [']not to answer questions at his deposition when he served as an armchair advisor to lawyers re pending litigation or threat of litigation, when he communicated to the company, to the R & D department." *Id.* at 688 (quoting deposition of Dr. Colby) (citation omitted) (alterations in original).

85. "Plaintiff's counsel indicated during the *Cipillone* trial that those withheld documents might be subject to discovery on the basis of the crime-fraud exception to the attorney-client and work-product privileges, but this issue was neither pressed nor resolved during the course of the *Cipollone* trial." *Id.* at 685.

86. *Id.*

87. *Id.* at 688.

88. *Id.*

89. *Id.* at 686.

tations to the public, constituted the alleged fraud.[90] Unlike the *Zolin* case, no shadow was cast upon the quality of the information which gave rise to the presented theory of fraud. The court determined that the fraud allegation was properly derived from the testimony of parties associated with CTR and the "special projects division."[91]

In *Haines*, a special master rendered an opinion as to the applicability of the crime-fraud exception.[92] The special master tagged four files of representative documents and identified[93] them as dispositive of his recommendation to uphold the defendant's privilege assertion with respect to all but six documents.[94] A magistrate reviewed the tagged documents *in camera*[95] and ultimately rejected the plaintiff's request for application of the crime-fraud exception to 1500 pages of "special projects" information. The magistrate found inadequate the plaintiff's showing under *Zolin*.[96]

The district court judge to which the plaintiff appealed the magistrate's recommendation reversed the recommendation and deemed the magistrate's decision to reject application of the crime-fraud exception clearly erroneous.[97] The district court judge reviewed the documents *in camera*[98] and concluded that "the evidence overwhelmingly favor[ed] applying the crime-fraud exception in this case."[99]

The court assessed the evidence and admittedly extended *Zolin* by setting guidelines for the *quantum* of evidence necessary to invoke the exception attempted to quantify the term "prima facie" by analyzing several definitions of *prima facie* evidence of crime-fraud.[100] The definitions analyzed included: 1) "'evidence such as will prevail until

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90. *Id.*

91. *Id.* at 689.

92. *Id.* at 685.

93. "The documents [in question] reflect, in the main, discussions concerning the proposed CTR projects, the progress of those projects, the possibility of recommending additional research ideas and the application of research results to the legal theories available in defense of existing and anticipated litigation." *Id.* The plaintiff agreed that the "tagged" documents were representative of the documents they argued necessitate the application of the crime-fraud exception. *Id.*

94. *Id.*

95. *Id.* There was dispute among the parties as to whether the magistrate conducted an *in camera* review of all of the relevant "tagged" documents. *Id.* at 685-86.

96. *Id.* at 685.

97. *Id.* at 692-93. Before rendering its finding of clearly erroneous, the court noted that the magistrate's order was not contrary to law. In citing *Zolin*, the magistrate was generally citing the only major recent case to "discuss the general parameters and purpose of the crime-fraud exception." *Id.* at 692.

98. *Id.*

99. *Id.*

100. *Id.* at 691-92.

contradicted and overcome by other evidence . . .' ";[101] 2) evidence which, if believed, establishes fraud;[102] 3) " 'probable cause that the legal department was used for purposes other than seeking and receiving legal advice.' ";[103] and 4) " 'the fraudulent nature of the objective need not be established definitively; there need only be presented a reasonable basis for believing that the objective was fraudulent.' "[104] The *Haines* court, however, did not attempt to institute a *qualitative* measure into its standard.

The *Haines* court held that all of the proposed standards concerning the quantum of evidence required to satisfy the *prima facie* showing were very similar.[105] The court preferred to ask whether "the party seeking discovery presented evidence which, if believed by the fact finder, supports plaintiff's theory of fraud."[106] Applying this standard, the court first deemed the plaintiff's extrinsic evidence concerning the separation of the "special projects" from the normal operations of CTR as "highly suggestive of the public fraud which plaintiff alleges."[107] The court noted, however, that the most persuasive evidence establishing the required *prima facie* showing emanated from the documents themselves.[108] Applying *Zolin*, the *Haines* court reviewed the purportedly protected documents to find a *prima facie* showing. Remarkably, the court dodged the issue of whether its quantum standard could have been satisfied by using solely independent evidence.

After entertaining Liggett's petition for writ of mandamus, the Third Circuit directed the district court to vacate its order.[109] While the Third Circuit approved the district court's methodology, it maintained that in evaluating a magistrate's findings with respect to whether the crime-fraud exception applies, a district court may only consider evidence presented to the magistrate.[110] The Third Circuit admonished the

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101. *Id.* (quoting the Fifth Circuit's definition—the definition of *prima facie* evidence found in Black's Law Dictionary).

102. *Id.* The court explained that this definition was adopted by the Court of Appeals for the District of Columbia. *Id.*

103. *Id.* at 692 (quoting *In re* John Doe Corp., 675 F.2d 482, 491-92 (2d Cir. 1982)). The court cites the Second Circuit standard, which explained that "probable cause" is effectively the same as "prima facie showing." *Id.* at 692 (" 'Both require that a prudent person have a reasonable basis to suspect the perpetration or attempted perpetration of a crime or fraud, and that the communications were in furtherance thereof.' ") (quoting *In re* Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1039 (2d Cir. 1984)).

104. *Id.* (quoting *In re* Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1039 (2d Cir. 1984)).

105. *Id.*

106. *Id.*

107. *Id.* at 694.

108. *Id.* at 695.

109. Haines v. Liggett Group, Inc., 975 F.2d 81, 98 (3d Cir. 1992).

110. *Id.* at 93-94.

district court for considering information derived from the lower court's familiarity with the *Cipollone* case; this information was never provided to the magistrate.[111] The Third Circuit, in deciding what it termed "the most agonizing aspect of the case,"[112] found the appearance of partiality in the district judge's decision, based partly upon the introductory paragraphs of the district judge's opinion and the ensuing media scrutiny of the judge's conclusions.[113]

Approving the district court's application of a more lenient standard for *in camera* review, the Third Circuit thoughtfully distinguished between evaluating a minimal showing for purposes of seeking an *in camera* review and utilizing the information reviewed *in camera* for a *prima facie* showing regarding application of the crime-fraud exception. Highlighting the *Zolin* Court's failure to distinguish between the two,[114] the Third Circuit explained:

> [T]he objectives of the two proceedings are completely different. One merely seeks *in camera* examination of documents by the court; this is a comparatively non-dispositive procedural way station. The other seeks to break the seal of a highly protected privilege . . . .
>
> For *in camera* inspection, it would be sufficient for the district court, in its discretion, to consider only the presentation made by the party challenging the privilege. The court may decide on this submission alone whether a factual basis is present to support a good faith belief by a reasonable person that the materials may reveal evidence of a crime or fraud. . . . Deciding whether the crime-fraud exception applies is another matter.[115]

The Third Circuit clarification is extremely useful because it emphasizes the distinction between the minimal extrinsic showing required to support *in camera* inspection for purposes of making a *prima facie* showing and actual assessment of whether the exception applies.

Much confusion surrounds the distinction between the standards and procedures for the minimal extrinsic showing required to obtain *in camera* review and those required for the application of the crime-fraud exception. In *In Re Grand Jury Investigation*, the Ninth Circuit corrected a district court's error in articulating these standards.[116] The lower court, which denied a request to review documents *in camera*,

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111. *Id.*

112. *Id.* at 97.

113. The Third Circuit, while articulating its collective belief that the distinguished *Haines* district court judge was not impartial, concluded that "it is impossible for us to vindicate the requirement of 'appearance of impartiality'" and directed that *Haines* be reassigned at the district level. *Id.* at 98.

114. *Id.* at 96 (citing United States v. Zolin, 491 U.S. 554, 563 n.7 (1989)).

115. *Id.*

116. *In re* Grand Jury Investigation, 974 F.2d 1068, 1075 (9th Cir. 1992).

required a factual showing supporting a good-faith belief that the crime-fraud exception applied. Maintaining that the standard employed by the lower court was too stringent, the Ninth Circuit nevertheless upheld the district court's decision denying *in camera* review.[117] After evaluating the record, the Ninth Circuit concluded that the party attempting to defeat the privilege failed to make any sufficient showing under the *Zolin* minimal threshold requirement, thereby rendering the lower court's application of the incorrect standard harmless error.[118]

In assessing whether the government in *In re Grand Jury Investigation* satisfied its burden for a *Zolin* showing, the Ninth Circuit rejected the notion that the defendant corporation's decision to add a blood test to its requirements served as extrinsic evidence of a criminal scheme warranting an *in camera* review of attorney communications concerning the implementation of the new testing procedure.[119] Whereas the district court viewed the government's showing as completely lacking, the Ninth Circuit, and presumably courts in similar situations, did not need to question the qualitative merit of the evidence offered as a minimal extrinsic showing.

The *Haines* facts posed a slightly different problem than those in *In re Grand Jury Investigation.* The Third Circuit in *Haines* evaluated quantitatively the merits of the showing presented to the magistrate. While the Third Circuit's opinion in *Haines* defined standards that magistrates and trial courts should employ procedurally and substantively in assessing whether materials should be considered for crime-fraud purposes, both courts failed to recognize the need for standards regarding the types of information that may be presented by the party challenging the privilege. Theoretically, any showing that is slightly more substantial than that made in *In re Grand Jury Investigation* could satisfy the requirement without consideration as to the origins or credibility of the "minimal" evidence presented.

V. POST-*PRIMA FACIE* SHOWING

The Third Circuit adamantly maintained that, after a *prima facie* showing has been made, the party asserting the privilege must be granted a hearing on why the exception should not apply.[120] The court expressed that "where a fact finder undertakes to weigh evidence in a proceeding seeking an exception to the privilege, the party invoking the privilege has the absolute right to be heard by testimony and argu-

117. *Id.* at 1073.
118. *Id.*
119. *Id.* The defendant corporation allegedly participated in criminal Medicaid fraud.
120. Haines v. Liggett Group, Inc., 975 F.2d 81, 97 (3d Cir. 1992).

ment."[121] Should it not follow that the party invoking the privilege has the right to challenge the veracity of the information provided to make the minimal extrinsic showing that would permit a magistrate or court to intrude upon the privilege? The unilateral nature of the minimal extrinsic showing demonstrates a lack of understanding by courts of the need to substantively evaluate the showing made by the party seeking to defeat the privilege. By maintaining that it is sufficient for a district court to hear from only the party seeking to defeat the privilege in assessing the merit of the minimal showing, the Third Circuit completely dodged the question of what courts should and should not accept as a qualitatively sufficient minimal showing.[122] Without such consideration, minimal showing emerges as an empty requirement.

A *prima facie* showing does not automatically admit the evidence in question. The invoking party must still argue its fraud theory; and, while employing all evidence reviewed *in camera*, the invoking party must demonstrate both the exception's application *and* that the documents in question meet other evidentiary requirements, such as the relevancy and prejudice requirements contained in Rule 403 of the Federal Rules of Evidence.[123]

In instances where a party demonstrates a *prima facie* case using extrinsic evidence, some courts permit disclosure automatically, without verifying that each document requested satisfies the exception.[124] In *Haines*, however, after finding a *prima facie* case, the district court requested that a special master review each document of the 1500 documents in question to ascertain whether requiring the wholesale production of all 1500 documents was too broad.[125] Essentially, the special master determined whether the crime-fraud exception required disclosure of each individual document.[126]

In *Zolin*, the Supreme Court faced a different procedural history than that faced by the district court in *Haines*.[127] After defining guidelines lower courts should follow when determining whether to conduct

121. *Id.*

122. *Id.*; *see also* Matter of Feldberg, 862 F.2d 622 (1988) (holding that the privilege may remain if the party asserting privilege adequately rebuts the presumption created by the *prima facie* showing). The Third Circuit in *Haines* similarly emphasized that the purportedly privileged information must remain under seal until it is finally decided that the exception applies, and all appropriate appellate remedies have been exhausted. *Haines*, 975 F.2d at 97.

123. *See* FED. R. EVID. 403.

124. *See, e.g.*, United States v. Hodge & Zweig, 548 F.2d 1347 (1977) (holding that the *prima facie* evidence was so overwhelming that the court required complete disclosure of all items requested in an IRS summons).

125. Haines v. Liggett Group, Inc., 140 F.R.D. 681, 697 (D.N.J.), *vacated*, 975 F.2d 81 (3d Cir. 1992).

126. *Id.*

127. *See* United States v. Zolin, 491 U.S. 554 (1989).

an *in camera* review of challenged materials for the purpose of finding a *prima facie* case for their exclusion or admission, the *Zolin* Court remanded the case to the intermediate appellate court for a determination of whether, in light of the new guidelines, the district court's denial of *in camera* review was clearly erroneous.[128] Thus, the question of the quantity of evidence giving rise to a reasonable belief emerges as the important question once again.

Criminal crime-fraud exception invocations proliferate in the federal grand jury context.[129] As Professor Fried explained:

> Th[e] recent emphasis on white-collar crime presents prosecutors with new temptations . . . .[ ]through use of the grand jury subpoena power. . . . In all such investigations, the prosecutor . . . is likely to argue that the communications sought were in furtherance of the crime or breach under investigation and therefore not privileged. . . . Although the United States attorney may be compelled to identify which statutes' possible violation is the subject of a grand jury investigation, it is not possible to contest a subpoena on the ground that the specific wrongdoing alleged is not prohibited by the statute cited. Such a determination can only be made after indictment . . . [and] the target's attorney may be compelled to testify.[130]

Ultimately the question of "what happens" after determining the essence of a *prima facie* case is contingent upon the forum and the decision.

A denial of the invocation of the exception for want of an initial showing of fraud, or for want of a *prima facie* case, need not be the death knell of the issue. Some courts preface their denials with the qualification that if, at a later stage, the party attempting to defeat the privilege can offer a greater showing, he may do so.[131] Yet, in the event the exception's advocate does not prevail below, the advocate will want to preserve its right to appeal on the ground that the trial court's actions were clearly erroneous.

On the other hand, if a court believes the exception's advocate has established a *prima facie* case, that court's decision to require wholesale production of the documents to opposing counsel may itself strike a resounding blow. Even though a court must address relevancy and prejudice concerns under Rule 403 of the Federal Rules of Evidence prior to

128. *Id.* at 575.

129. *See, e.g., In re* Grand Jury Investigation, 974 F.2d 1068 (9th Cir. 1992); *In re* Grand Jury Investigation (Schroeder), 842 F.2d 1223, 1227 (11th Cir. 1987).

130. Fried, *supra* note 8, at 473-74.

131. *See* Gagne v. Ralph Pill Elec. Supply Co., 114 F.R.D. 22, 25 (D. Me. 1987); *cf.* International Tel. & Tel. Co. v. United Tel. Co. of Fla., 60 F.R.D. 177 (M.D. Fla. 1973). As Professor Fried explained, "ITT was assuming the very thing to be proved: a review of the communications would show that the defendant's attorneys had advised their client that the action was without merit." Fried, *supra* note 8, at 476.

admitting the critical documents into evidence, opposing counsel has gained exposure to the documents' contents.[132] This is particularly problematic if the court does not painstakingly ensure that the crime-fraud exception applies to each individual document.[133] In addition, in the context of the criminal defendant facing indictment, looser procedural measures at the grand jury stage may facilitate disclosure of privileged information, often from the defendant's counselor's own mouth, even when the crime-fraud exception does not apply.[134]

VI. CONCLUSION

To defeat attorney-client privilege, the current standards certainly differ from those advanced by Justice Cardozo in *Clark.* While some *lesser* evidentiary standard is needed in order to lift the seal of privilege, at least for purposes of inspection by a court or magistrate, the need for a *prima facie* showing derived completely from information independent of the documents remains relevant. Ambiguities regarding the quantity and quality of evidence satisfactory for a *prima facie* showing also linger.

At the same time, *in camera* inspection is the least intrusive manner in which the documents in question can be considered for purposes of determining a *prima facie* showing. While ultimately non-disclosure to *any* party, including a judge or magistrate, is most consistent with the notion of Rule 501's attorney-client privilege, modern courts recognize the need for a balance to ensure that the cloak of privilege is not prostituted to protect an improper purpose. Ultimately, the effects of the shift from Justice Cardozo's stringent protection against the intrusion into the attorney-client relationship to the *Zolin* balance can only be measured by their impact upon client disclosures to attorneys. After *Zolin*, is the client less inclined to properly inform his attorney for fear of the information's disclosure? Perhaps the better question is whether the *Zolin*

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132. One may infer that during the course of scrutinizing the documents in question and the evidence offered to establish the need for an *in camera* review, a court also considers some questions of relevancy and prejudice. On the other hand, a judge reserves judgment on relevancy and prejudice concerns until the documents are actually before the court and a party is requesting their admission.

133. In the *Haines* case, for example, there were at least five documents that the court deemed not privileged in their entirety. The court mandated their disclosure, and in requiring a document-by-document review by a new special master, the court attempted to protect against the disclosure of truly privileged documents. Haines v. Liggett Group, Inc., 140 F.R.D. 680, 697 (D.N.J.), *vacated*, 975 F.2d 81 (3d Cir. 1992).

134. *See* United States v. Dyer, 722 F.2d 174 (5th Cir. 1983) (an example of abuse of the grand jury process to derive privileged information in an instance where the crime-fraud exception was never applicable).

standard will deter clients from exploiting their relationships with their attorneys if such exploitation is more readily discoverable.

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