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Paul Manafort, Monica Lewinsky, and the Penn State Three Case: When Should the Crime-Fraud Exception Vitate the Attorney- Client Privilege

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PAUL MANAFORT, MONICA LEWINSKY, AND THE PENN STATE THREE CASE: WHEN SHOULD THE CRIME-FRAUD EXCEPTION VITIATE THE ATTORNEY-CLIENT PRIVILEGE?

*Lance Cole**

ABSTRACT

This Article examines the application of the crime-fraud exception to the attorney-client privilege in cases involving efforts to use an attorney-client relationship to conceal past misconduct. The Article concludes that the law in some jurisdictions, including Pennsylvania, may make it too difficult to establish that the crime-fraud exception applies in such cases. Accordingly, it argues that the test for application of the exception should require only credible evidence of the client's intentional misuse of the attorney-client relationship, particularly when the misuse of the attorney's services is intended to cover up an ongoing course of criminal conduct such as a conspiracy to obstruct justice.

TABLE OF CONTENTS

INTRODUCTION.....	556
I. OVERVIEW OF THE CRIME-FRAUD EXCEPTION	557
II. THREE ILLUSTRATIVE CASES: PAUL MANAFORT, MONICA LEWINSKY, AND THE PENN STATE THREE.....	562
A. <i>Paul Manafort</i>	562
B. <i>Monica Lewinsky</i>	564
C. <i>The Penn State Three</i>	567
1. The Criminal Charges Against the Penn State Three	567
2. An Attorney-Client Privilege Issue Consumes the Case	571
III. VARYING TESTS FOR WHEN THE CRIME-FRAUD EXCEPTION SHOULD VITIATE THE ATTORNEY-CLIENT PRIVILEGE.....	574
A. <i>The Fifth, Ninth, and D.C. Circuits: A Relatively Lenient Test</i>	576
B. <i>The Fourth and Tenth Circuits: A Stringent Test</i>	577
C. <i>The Second, Third, and Eighth Circuits: A More Stringent Test</i>	578
D. <i>Pennsylvania: An Especially Stringent Test</i>	579

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CONCLUSION: DOES THE PENN STATE THREE CASE DEMONSTRATE THAT COURTS NEED TO ADOPT A NEW TEST FOR APPLICATION OF THE CRIME-FRAUD EXCEPTION TO "COVER-UP" CASES?	580
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INTRODUCTION

The attorney-client privilege is the oldest evidentiary privilege recognized in Anglo-American common law.¹ The privilege and its closely related but much younger² compatriot the attorney work-product doctrine³ play vitally important roles in both civil and criminal cases in the state and federal judicial systems, as well as in administrative and regulatory legal proceedings.⁴ The confidentiality protections provided by the attorney-client privilege and the work-product doctrine are not absolute, however, and are subject to a number of well-recognized exceptions.⁵ This Article focuses on what is arguably the most important of these exceptions: the crime-fraud exception to the attorney-client privilege and the attorney work-product doctrine.⁶

Although the Supreme Court provided guidance on when a court should entertain a crime-fraud exception claim in *United States v. Zolin*,⁷ that case did

1. See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citing 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290 (John T. McNaughton ed., rev. ed. 1961)); see also Lance Cole, *Revoking Our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (And Why It Is Misguided)*, 48 VILL. L. REV. 469, 474-80 (2003) (describing "[t]he [i]mportance of the [a]ttorney-[c]lient [p]rivilege in the American [l]egal [s]ystem").

2. In contrast to the attorney-client privilege's ancient origins, which date back to Roman law, Cole, *supra* note 1, at 474-75; see also 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290 (John T. McNaughton ed., rev. ed. 1961), the Supreme Court approved the attorney work-product doctrine in 1947, see *Hickman v. Taylor*, 329 U.S. 495 (1947). In the federal system, protection for attorney work product was not an issue before the Federal Rules of Civil Procedure permitted extensive pretrial discovery because attorneys previously had not sought information from adversaries prior to trial. See MCCORMICK ON EVIDENCE § 96, at 148 (John W. Strong ed., 5th ed. 1999) ("Thus, under the old chancery practice of discovery, the adversary was not required to disclose, apart from his own testimony, the evidence which he would use, or the names of the witnesses he would call in support of his own case.").

3. See Cole, *supra* note 1, at 480-84 (describing the development of the attorney work-product doctrine and contrasting that doctrine to the attorney-client privilege).

4. In 1888 the Supreme Court described the policy grounds for the attorney-client privilege as "founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888). The Supreme Court reaffirmed the importance of the attorney-client privilege and the work-product doctrine in the leading case on the corporate attorney-client privilege. *Upjohn*, 449 U.S. at 397-402 (recognizing the importance of preserving confidential attorney-client communications).

5. See Cole, *supra* note 1, at 498-514 (describing exceptions to and checks on the application of the attorney-client privilege and the crime-fraud exception).

6. See generally *United States v. Zolin*, 491 U.S. 554 (1989). In *Zolin* the Supreme Court recognized that the privilege should not be available if the purpose of a client's communications with counsel is to further a future or ongoing crime or other wrongdoing. See *id.* at 562-63; see also Cole, *supra* note 1, at 492-95 (summarizing the *Zolin* opinion and the crime-fraud exception).

7. 491 U.S. 554 (1989).

not specify how much or what kind of proof is necessary, or how much evidence of intent by the client is required, for a court to invoke the exception and overcome the application of the privilege.⁸ State courts and the lower federal courts have since been left to grapple with this important issue on a case-by-case basis and have reached differing conclusions.⁹ This Article examines the law that has developed in this area since the Supreme Court decided *Zolin* and argues that setting too high a bar for application of the crime-fraud exception is inconsistent with the policy grounds that underlie the attorney-client privilege¹⁰ and can have serious adverse consequences for the administration of justice. This Article examines three highly publicized cases as vehicles for this analysis.

I. OVERVIEW OF THE CRIME-FRAUD EXCEPTION

The crime-fraud exception is essential to the proper functioning of the attorney-client privilege because it provides a means for the legal system to screen out instances in which clients seek to misuse the attorney-client relationship to commit a crime, perpetrate a fraud, or cover up ongoing crimes or frauds.¹¹ The rationale for the crime-fraud exception is well established and follows from the policy goals that underlie recognition of the attorney-client privilege in the first instance; the attorney-client privilege is intended to promote the administration of justice, and any use of the privilege that is inconsistent with

8. See Fred C. Zacharias, *Harmonizing Privilege and Confidentiality*, 41 S. TEX. L. REV. 69, 80–81 (1999) (“*Zolin* does not identify any new substantive dividing line for assessing when communications fit the crime-fraud definitions. *Zolin* is procedural in nature.”). This “quantum of proof” issue for application of the crime-fraud exception, see *Zolin*, 491 U.S. at 563, is discussed in more detail in Section III *infra*.

9. See, e.g., *In re Grand Jury Subpoena to Carter*, No. 98-068, 1998 U.S. Dist. LEXIS 19497, at *5 (D.D.C. Apr. 28, 1998) (comparing the approaches of the Second Circuit and the D.C. Circuit and noting that “[t]here is some confusion over which of these standards the D.C. Circuit finds controlling”), *aff’d in part and rev’d in part sub nom. In re Sealed Case (Sealed Case III)*, 162 F.3d 670 (D.C. Cir. 1998). See *infra* note 14 and Part II.B for more detailed discussions of the Monica Lewinsky case and the use of the crime-fraud exception to compel testimony from her attorney, Francis D. Carter.

10. The Supreme Court in *Zolin* reaffirmed the notion that by encouraging “full and frank communication[s] between attorneys and their clients,” the attorney-client privilege “promote[s] broader public interests in the observance of law and administration of justice.” *Zolin*, 491 U.S. at 562 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). But the Court also recognized that the interests of the attorney-client privilege are not served when the client seeks to misuse the cloak of confidentiality that the privilege provides to further or cover up a crime or fraud. See *id.* at 562–63.

11. See H. Lowell Brown, *The Crime-Fraud Exception to the Attorney-Client Privilege in the Context of Corporate Counseling*, 87 KY. L.J. 1191, 1218 (1999) (“Today, communications which would otherwise be considered privileged . . . are excepted from the privilege if the communication furthers an ongoing or future crime. Indeed, it is to prevent abuse of the secrecy accorded bona fide attorney-client communications that the modern crime-fraud exception has been fashioned.” (footnote omitted)); Rachel A. Hutzler, Note, *Evidence: The Crime Fraud Exception to Attorney-Client Privilege*, *United States v. Zolin*, 15 U. DAYTON L. REV. 365, 372 (1990) (“The purpose of the crime-fraud exception is generally to prevent the attorney-client privilege from shielding from prosecution the client who uses his attorney’s advice to initiate or continue a fraudulent or criminal activity.”); cf. WIGMORE, *supra* note 2, § 2298, at 572 (“It has been agreed from the beginning that the privilege cannot avail to protect the client in concerting with an attorney a *crime* or other evil enterprise.”).

that end should not be permitted.¹² The crime-fraud exception is intended to prevent use of the attorney-client privilege to protect communications that do not further legitimate purposes and therefore do not promote the administration of justice.¹³

It is important to recognize that the crime-fraud exception applies even if the attorney is completely innocent and unaware of the client's wrongdoing;¹⁴ it is the intent and actions of the client—not the attorney—that determine whether or not the exception applies.¹⁵ It is equally important to recognize that the

12. See EDNA SELAN EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* 418–22 (4th ed. 2001) (reviewing policy reasons for the exception and collecting cases); PAUL R. RICE, *ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES* § 8.2, at 21–26 (2d ed. 2010); see also *Zolin*, 491 U.S. at 568–69 (discussing the “policies underlying the privilege” and “the proper functioning of the adversary process”).

13. The fact that the attorney's representation merely coincides in time with client wrongdoing is not sufficient. Rather than relying upon a mere “temporal nexus” to hold that the crime-fraud exception applies, a court must find that the “requisite purposeful nexus” exists between the communications and the crime or fraud. See *In re Grand Jury Subpoenas Duces Tecum*, 798 F.2d 32, 34 (2d Cir. 1986); see also 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, 482–83 (1986) (decrying “a tendency in this area for courts to assert that the cock's crowing made the sun rise, or at least that the client's purpose must have been unlawful because the consultation was followed by the commission of a crime” and suggesting “courts have lost sight of the principle of causation”). To meet this requirement, a prosecutor often will attempt to rely upon the communications themselves as proof that the exception applies. Cf. Christopher Paul Galanek, Note, *The Impact of the Zolin Decision on the Crime-Fraud Exception to the Attorney-Client Privilege*, 24 GA. L. REV. 1115, 1129–30 (1990) (discussing the trend toward courts basing their application of the privilege upon an examination of the privileged communications at issue). Commentators have criticized “the circularity of relying upon the confidential communication itself to prove the client's fraudulent intent, which in turn serves as the necessary justification for disclosure.” See, e.g., Fried, *supra*, at 461; see also Galanek, *supra*, at 1124 (stating that the “circular proof problem” has “plagued the judicial system since the birth of the [crime-fraud] exception”); Peter J. Henning, *Testing the Limits of Investigating and Prosecuting White Collar Crime: How Far Will the Courts Allow Prosecutors To Go?*, 54 U. PITT. L. REV. 405, 460–61 (1993) (“The circularity in asserting that the communication is dispositive of whether the privilege applies to it is compounded by the fact that prosecutors arguing for the crime-fraud exception will necessarily have only a limited amount of information about the content of the discussions on which to move for disclosure.”). The mere fact that the privileged communications at issue might aid the prosecution in proving its case-in-chief does not make the crime-fraud exception applicable. See *Pritchard-Keang Nam Corp. v. Jaworski*, 751 F.2d 277, 283 (8th Cir. 1984) (“That the [attorney-client communication] may help *prove* that a [crime or] fraud occurred does not mean that it was *used* in perpetrating the [crime or] fraud.”).

14. For a particularly high-profile example of a case in which the crime-fraud exception was invoked even though the lawyer was innocent of any wrongdoing, see *In re Grand Jury Subpoena to Carter*, No. 98-068, 1998 U.S. Dist. LEXIS 19497, at *4–5 (D.D.C. Apr. 28, 1998) (applying the crime-fraud exception to Monica Lewinsky's communications with the attorney who assisted her with the preparation of an affidavit stating that she did not engage in sexual relations with President Bill Clinton and observing that “[t]he attorney does not need to know about his client's potential wrongdoing for the exception to apply”), *aff'd in part and rev'd in part sub nom. In re Sealed Case (Sealed Case III)*, 162 F.3d 670 (D.C. Cir. 1998). See *infra* Part II.B for a more detailed discussion of the Lewinsky case.

15. See RICE, *supra* note 12, § 8.2, at 25–26; see also Brown, *supra* note 11, at 1232 (“[I]t is the client's intent at the time of the communication that is considered determinative of whether the crime-fraud exception will apply.”); Fried, *supra* note 13, at 499 (“[T]he crime-fraud exception is

exception will apply when an innocent and unknowing attorney's advice and representation is used to conceal or hide ongoing criminal activity, such as a conspiracy to hide past misconduct or obstruct justice.¹⁶

Although the rationale for the crime-fraud exception is widely accepted, the application of the exception in actual cases poses difficulties.¹⁷ As one appellate court explained, "The crime/fraud exception to the attorney-client privilege cannot be successfully invoked merely upon a showing that the client communicated with counsel while the client was engaged in criminal activity."¹⁸ The party seeking to overcome the privilege must present evidence of something more than ongoing criminal activity involving the client to establish that the crime-fraud exception applies to communications between a client and an

predicated on the blameworthiness of the intention with which counsel was consulted . . ."); Allison E. Beach et al., Note, *Procedural Issues*, 38 AM. CRIM. L. REV. 1151, 1198 (2001) ("The crime-fraud exception to the attorney-client privilege permits an attorney to disclose communications that indicate a client intends future criminal behavior. Because it is controlled by the client's intent, this exception applies even when the attorney has no actual or constructive knowledge of the crime." (footnote omitted)). The importance of the client's motivation is illustrated by an articulation of a two-part test for application of the exception by the Eleventh Circuit:

First, there must be a prima facie showing that the client was engaged in criminal or fraudulent conduct when he sought the advice of counsel, that he was planning such conduct when he sought the advice of counsel, or that he committed a crime or fraud subsequent to receiving the benefit of counsel's advice. Second, there must be a showing that the attorney's assistance was obtained in furtherance of the criminal or fraudulent activity or was closely related to it.

In re Federal Grand Jury Proceedings 89-10 (MIA), 938 F.2d 1578, 1581 (11th Cir. 1991) (quoting *In re Grand Jury Investigation (In re Schroeder)*, 842 F.2d 1223, 1226 (11th Cir. 1987)).

16. See, e.g., *In re Grand Jury Proceedings, Company X*, 857 F.2d 710, 712 (10th Cir. 1988) (stating that the law firm was used to "cover up and perpetuate" crimes). To establish a causal connection between the privileged communications and criminal activity, the prosecution can make a showing that "there is reasonable cause to believe that the attorney's services were utilized in furtherance of the ongoing unlawful scheme." See *United States v. Martin*, 278 F.3d 988, 1001 (9th Cir. 2002) (quoting *In re Grand Jury Proceedings (In re The Corporation)*, 87 F.3d 377, 381 (9th Cir. 1996)); *In re Richard Roe, Inc. (Roe II)*, 168 F.3d 69, 71 (2d Cir. 1999) ("Where the very act of litigating is alleged as being in furtherance of a fraud, the party seeking disclosure under the crime-fraud exception must show probable cause that the litigation or an aspect thereof had little or no legal or factual basis and was carried on substantially for the purpose of furthering the crime or fraud."); *United States v. Chen*, 99 F.3d 1495, 1503 (9th Cir. 1996) ("Reasonable cause is more than suspicion but less than a preponderance of the evidence."); *In re Federal Grand Jury Proceedings 89-10 (MIA)*, 938 F.2d at 1581 (requiring a showing that "the attorney's assistance was obtained in furtherance of the criminal or fraudulent activity or was closely related to it" (quoting *In re Schroeder*, 842 F.2d at 1226)).

17. See, e.g., Fried, *supra* note 13, at 443 (arguing that "the attorney-client privilege has been seriously eroded through an overly expansive interpretation and application of the crime-fraud exception" and urging "a re-examination of the developments . . . that have led to this erosion"); Henning, *supra* note 13, at 411 (asserting that "courts have shown a willingness to limit defendants' ability to use their attorneys as a shield by expanding the reach of the crime-fraud exception to the attorney-client privilege"); Ronald L. Motley & Tucker S. Player, *Issues in "Crime-Fraud" Practice and Procedure: The Tobacco Litigation Experience*, 49 S.C. L. REV. 187, 198 (1998) ("A point of contention among courts is the exact scope of the crime-fraud exception.").

18. *Subpoenas Duces Tecum*, 798 F.2d at 34.

attorney.¹⁹ Defining precisely what evidence must be presented to trigger application of the exception and what process should be followed in evaluating that evidence has proved difficult for the courts.²⁰

19. See *In re Sealed Case (Sealed Case II)*, 754 F.2d 395, 402 (D.C. Cir. 1985) (stating that “mere coincidence in time,” without more, cannot support the invocation of the exception”); see also *United States v. White*, 887 F.2d 267, 271–72 (D.C. Cir. 1989) (stating that “[i]t does not suffice that the communications may be related to a crime” and the defendant’s “failure to heed his lawyer’s counsel” does not render a communication in furtherance of crime); *In re Antitrust Grand Jury*, 805 F.2d 155, 168 (6th Cir. 1986) (“[M]erely because some communications may be related to a crime is not enough to subject that communication to disclosure . . .”).

20. One troublesome issue is the “circularity” issue referred to in note 13 *supra*. The argument that the client is guilty of a crime and therefore the crime-fraud exception applies is an argument that prosecutors often will present to a court, as evidenced by the Supreme Court’s first encounter with the crime-fraud exception in *Alexander v. United States*, 138 U.S. 353 (1891). In *Alexander*, the Court reversed a murder conviction solely because the trial court had admitted into evidence ambiguous privileged communications between the defendant and an attorney. *Alexander*, 138 U.S. at 360. The defendant consulted counsel regarding property owned jointly with a partner. *Id.* at 357–58. The partner was later found to have been killed before the consultation occurred. *Id.* at 355. At the defendant’s murder trial, the court relied upon the crime-fraud exception to permit the prosecution to introduce the privileged consultation with counsel as evidence that the defendant knew the deceased was missing and would profit from his murder. *Id.* at 358. The Supreme Court held that it was reversible error to admit into evidence privileged communications that would be subject to the crime-fraud exception only if the defendant in fact was guilty:

Now the communication in question was perfectly harmless upon its face. If it were true that his partner was missing, and he had not heard from him, and that [the partner] had taken off [with] the money, there was no impropriety in his consulting counsel for the purpose of ascertaining if he could hold the horses, so as to secure his part of it. . . . *It is only by assuming that he was guilty of the murder that his scheme to defraud his partner becomes at all manifest.*

Id. at 360 (emphasis added). The *Alexander* Court refused to assume that the defendant was guilty and to interpret ambiguous privileged communications as evidence of guilt:

It is evident from [the attorney’s testimony] that defendant consulted with [the attorney] as a legal adviser, and while, if he were guilty of the murder, it may have had a tendency to show an effort on his part to defraud his partner’s estate, and to make profit out of his death, by appropriating to himself the partnership property, it did not necessarily have that tendency and was clearly a privileged communication.

Id. at 358.

To approach the situation otherwise—and assume prior to trial that a defendant is guilty of the crime charged—would emasculate the attorney-client privilege whenever criminal conduct is charged. As Justice Cardozo later observed, “it would be absurd to say that the privilege could be got rid of merely by making a charge of fraud.” *Clark v. United States*, 289 U.S. 1, 15 (1933) (quoting *O’Rourke v. Darbishire*, [1920] A.C. 581, 604 (P.C.)). As the Court concluded in *Alexander*, invocation of the crime-fraud exception is inappropriate in cases where the exception would be applicable only if the defendant is assumed to be guilty. See *Alexander*, 138 U.S. at 360. A flaw in the *Alexander* Court’s reasoning, unrelated to the “circularity” problem, has limited the influence of the case, however. The clarity of the holding in *Alexander* was obscured by a discussion distinguishing the facts of *Alexander* from an English case, *R v. Cox*, [1884] 14 Q.B. 153 (Eng.), in which the *Alexander* Court suggested that the crime-fraud exception should only be invoked when the attorney-client communication furthered the same crime that is being tried. *Alexander*, 138 U.S. at 359–60. Courts discussing *Alexander* have accurately characterized this portion of the opinion as dicta and declined to follow that suggestion. See, e.g., *In re Schroeder*, 842 F.2d at 1228; *In re Berkley & Co.*, 629 F.2d 548, 554–55 (8th Cir. 1980); *In re Sawyer’s Petition*, 229 F.2d 805, 808–09 (7th Cir. 1956). Nothing in these cases undercuts the teaching of *Alexander* that a trial court should not assume a defendant is guilty and interpret ambiguous

The crime-fraud exception is a difficult area of the law, but it provides an important limitation on availability of the attorney-client privilege. If the exception is not properly applied by the courts, unscrupulous clients can misuse the attorney-client relationship to further or cover up their crimes and misconduct. Although the procedure for asserting a claim that the exception applies now is more clearly defined, at least since the Supreme Court's *Zolin* decision,²¹ the courts still have not reached a uniform and consistent test for assessing the ultimate merits of crime-fraud exception claims.²² In *Zolin*, the Court required a relatively low showing of a "factual basis adequate to support a good faith belief by a reasonable person" to obtain in camera review,²³ and it rejected an independent evidence requirement.²⁴ As a result, if law enforcement authorities have credible evidence that legal advice is being or has been misused, they should be able to obtain judicial review to determine if the crime-fraud exception should be invoked.²⁵ As discussed in more detail in Section III below, however, the likely outcome of that judicial review is difficult to predict in many jurisdictions. Because of the importance of the policies served by the attorney-client privilege, it is essential that prosecutors and civil litigants be able to ascertain where the boundary is between appropriate attorney-client consultations and misuse of the attorney-client privilege by clients who are acting in bad faith and seeking to abuse the justice system. This Article seeks to clarify this important area of law.

attorney-client communications as furthering crime and therefore unprivileged. *See, e.g., Berkley*, 629 F.2d at 554 n.11 (stating that *Alexander* held that the crime-fraud exception was inapplicable because "the client's communication with the attorney was harmless on its face and did not necessarily relate to any future intended wrongdoing").

21. Even prior to the Supreme Court's *Zolin* decision, the crime-fraud exception served the important purpose of preventing misuse of the attorney-client privilege. *See In re Sealed Case (Sealed Case I)*, 676 F.2d 793, 812–16 (D.C. Cir. 1982) (overruling a claim of privilege (and work-product protection) based upon the applicability of the crime-fraud exception).

22. *See infra* Section III.

23. *See United States v. Zolin*, 491 U.S. 554, 572 (1989) (quoting *Caldwell v. Dist. Court*, 644 P.2d 26, 33 (Colo. 1982)); *see also infra* notes 110–11 and accompanying text.

24. *See Zolin*, 491 U.S. at 574 ("In sum, we conclude that a rigid independent evidence requirement does not comport with 'reason and experience,' and we decline to adopt it as part of the developing federal common law of evidentiary privileges." (citation omitted) (quoting *FED. R. EVID.* 501)); *see also infra* notes 112–13 and accompanying text.

25. One commentator has asserted that growth of government regulation of business and increased reporting requirements incorporating criminal penalties for failure to comply or for providing false information has expanded the availability of the crime-fraud exception:

Not only can more acts be labeled "criminal" or "fraudulent," but lawyers play such a pervasive role in advising clients on complying with or avoiding regulatory schemes that the opportunity to use legal advice to commit an illegal act has increased correspondingly. Moreover, the improper act does not have to be a violation of a specific criminal provision, and the act only has to be one objective of seeking legal advice for the exception to apply. Therefore, the question of whether an alleged course of conduct qualifies as a crime or fraud is rarely at issue because the breadth of white collar criminal law encompasses most acts which are of questionable legality.

Henning, *supra* note 13, at 460–61.

Section II of this Article discusses the application of the crime-fraud exception to three recent high-profile cases. Section III discusses the varying tests the courts have developed for application of the crime-fraud exception. The Conclusion section of the Article argues that some courts have set the bar for application of the crime-fraud exception too high, making it difficult to apply the exception when an attorney's services are used to conceal or cover up a past crime or fraud.

II. THREE ILLUSTRATIVE CASES: PAUL MANAFORT, MONICA LEWINSKY, AND THE PENN STATE THREE

A. *Paul Manafort*

In late 2017 Special Counsel Robert Mueller's office sought to use the crime-fraud exception to compel the grand jury testimony of an attorney who had represented Paul J. Manafort, Jr. and his business associate Richard W. Gates in connection with submissions of information to the U.S. Department of Justice.²⁶ The communications at issue were representations made by the attorney in two letters submitted on behalf of her clients Manafort and Gates to the Foreign Agents Registration Act Registration Unit of the Justice Department's National Security Division.²⁷ Among other arguments in support of compelling the attorney to testify before the grand jury, the Special Counsel asserted that the crime-fraud exception applied because Manafort and Gates had made materially false statements and misleading omissions in the submissions the lawyer provided on their behalf to the Justice Department as "part of a sustained scheme to hide funds in violation of the applicable money laundering and tax statutes, among others."²⁸

The attorney representing Manafort and Gates declined to provide testimony to the grand jury about her communications with them absent a court order to do so.²⁹ The Special Counsel argued that the crime-fraud exception applied to the attorney's communications with Manafort and Gates because the attorney-client communications at issue "were made with an 'intent' to 'further a crime, fraud, or other misconduct.'"³⁰ The court analyzed the application of the crime-fraud exception to the attorney-client privilege and work-product doctrine protections claimed by Manafort and Gates.³¹ For purposes of this Article, the most important part of the court's analysis was that "[t]o satisfy its burden of proof as to the crime-fraud exception, the government may offer 'evidence that if believed by the trier of fact would establish the elements of *an ongoing* or

26. See *In re Grand Jury Investigation*, No. 17-2336, slip op. at 1-2, 1 n.1 (D.D.C. Oct. 2, 2017).

27. *Id.* at 3.

28. See *id.* at 10.

29. *Id.* at 11. The attorney relied on American Bar Association Formal Opinion No. 473 in declining to testify unless compelled to do so by court order. *Id.*

30. *Id.* (quoting *United States v. White*, 887 F.2d 267, 271 (D.C. Cir. 1989)).

31. See *id.* at 14-27, 30-36.

imminent *crime or fraud*.”³² The court concluded that the evidence submitted by the Special Counsel established that Manafort and Gates “likely violated federal law by making, or conspiring to make, materially false statements and misleading omissions” to the Justice Department.³³ This portion of the court’s analysis is helpful because it confirms, consistent with the D.C. Circuit authorities it cites, that providing false information to the government in connection with an ongoing crime or fraud is grounds for application of the crime-fraud exception.

With regard to the central question analyzed in this Article—the nature and quantum of proof necessary to establish that an attorney’s services are sufficiently linked to a client’s crime or fraud to support application of the crime-fraud exception—the court’s analysis in the Manafort Opinion³⁴ is less helpful. The court noted that “[g]enerally, the crime-fraud exception reaches communications or work product with a ‘relationship’ to the crime or fraud.”³⁵ The court went on to note that “[t]he inquiry focuses on the ‘client’s intent in consulting the lawyer or in using the materials the lawyer prepared’” and that “[t]he question is: Did the client consult the lawyer or use the material for the purpose of committing a crime or fraud.”³⁶ The court then concluded that the Special Counsel was seeking “answers regarding communications” Manafort and Gates had with their attorney “that have, at the very least, ‘some relationship’ with the ‘prima facie violation’ of law.”³⁷ Unfortunately this somewhat opaque and conclusory finding of “some relationship” with a “prima facie violation of law” does not provide a great deal of guidance as to precisely how and why the communications of Manafort and Gates with their attorney furthered “an ongoing or imminent *crime or fraud*.”³⁸

But if one steps back from the verbal formulations and talismanic citations and focuses on the basic facts set forth in the opinion, the analysis is more clear. The court concluded that Manafort and Gates knowingly and intentionally provided materially false or incomplete information to their attorney with the intention that the misleading information would be submitted to the government, and they did so to cover up their prior money laundering and tax

32. *Id.* at 15 (emphasis added) (quoting *In re Grand Jury*, 475 F.3d 1299, 1305 (D.C. Cir. 2007)). See *infra* Part II.C for an analysis of the Penn State Three case, to which the “ongoing” crime or fraud requirement is particularly relevant.

33. *In re Grand Jury Investigation*, slip op. at 25. The court noted at the outset of its analysis that to satisfy its burden as to the crime-fraud exception, the government “need not prove the existence of a crime or fraud beyond a reasonable doubt.” *Id.* at 15 (citing *Sealed Case II*, 754 F.2d 395, 399 (D.C. Cir. 1985)).

34. This Article refers to *In re Grand Jury Investigation*, No. 17-2336 (D.D.C. Oct. 2, 2017), as the Manafort Opinion.

35. *In re Grand Jury Investigation*, slip op. at 25 (citation omitted) (quoting *Sealed Case I*, 676 F.2d 793, 814–15 (D.C. Cir. 1982)) (citing *Sealed Case II*, 754 F.2d at 399).

36. *Id.* (quoting *In re Sealed Case*, 107 F.3d 46, 51 (D.C. Cir. 1997)).

37. *Id.* at 26 (quoting *Sealed Case II*, 754 F.2d at 399) (citing *Sealed Case I*, 676 F.2d at 814–15).

38. See *id.* at 15 (emphasis added) (quoting *In re Grand Jury*, 475 F.3d 1299, 1305 (D.C. Cir. 2007)).

crimes.³⁹ Viewed in this light the Manafort case is an easy crime-fraud exception case—the services of the lawyer were being used to further and conceal an ongoing crime or fraud by providing false information to the government. This case, like the Monica Lewinsky case discussed below, supports a basic principle of crime-fraud exception law: if a lawyer's services are being used to submit false information to the government as part of an effort to further or conceal a crime or fraud, then the attorney-client privilege should be vitiated and the attorney can and should be compelled to testify about communications with the client.

B. *Monica Lewinsky*

The Manafort case, which arose out of Special Counsel Robert Mueller's investigation of Russian interference in the 2016 presidential election, is not the first time the crime-fraud exception has played a role in a high-profile investigation involving the President of the United States. In the late 1990s Whitewater Independent Counsel Kenneth W. Starr shifted his focus from the Whitewater land deal in Arkansas to President Clinton's relationship with White House intern Monica Lewinsky.⁴⁰ Early in its investigation of the Lewinsky affair, Independent Counsel Starr's office invoked the crime-fraud exception to compel grand jury testimony and production of documents from Lewinsky's attorney, much like Special Counsel Mueller relied upon the crime-fraud exception to compel the testimony of the lawyer who had represented Manafort and Gates.⁴¹

39. Gates subsequently pled guilty to conspiracy to commit money laundering and tax offenses and to making a false statement to federal investigators. *See* Plea Agreement at 1–12, *United States v. Gates*, Crim. No. 17-201-2 (D.D.C. Feb. 23, 2018). Manafort was subsequently convicted of eight counts of bank fraud and tax crimes after a jury trial in federal court in Virginia. *See United States v. Manafort*, Crim. No. 1:18-CR-83 (E.D. Va. Aug. 21, 2018). After his conviction in Virginia, Manafort entered into a plea agreement with Special Counsel Robert Mueller to resolve additional federal Foreign Agents Registration Act conspiracy, money laundering conspiracy, tax and foreign bank account conspiracy, and witness tampering conspiracy charges in the District of Columbia. *See* Plea Agreement at 1–3, *United States v. Manafort*, Crim. No. 17-201-1 (D.D.C. Sept. 14, 2018). At the time this Article was being prepared for publication, the Special Counsel had charged that Manafort had breached his plea agreement by lying to federal agents. *See* Sharon LaFraniere, *Manafort Breached Plea Deal by Repeatedly Lying, Mueller Says*, N.Y. TIMES (Nov. 26, 2018), <http://nyti.ms/2zra1Pr> [<http://perma.cc/V5T3-RBHA>]. Manafort was subsequently sentenced to seven-and-a-half years in prison. *See* Sharon LaFraniere, *Paul Manafort's Prison Sentence Is Nearly Doubled to 7 1/2 Years*, N.Y. TIMES (Mar. 13, 2019), <http://nyti.ms/2TAN8ow> [<http://perma.cc/ZV9H-8X6Q>].

40. *See generally* H.R. DOC. NO. 105-310 (1998). For a summary of the various efforts of Starr's office to overcome assertions of privilege by the Clinton White House in the Monica Lewinsky investigation, *see* ROBERT W. RAY, FINAL REPORT OF THE INDEPENDENT COUNSEL *IN RE: MADISON GUARANTY SAVINGS & LOAN ASSOCIATION, REGARDING MONICA LEWINSKY AND OTHERS* 103–08 (2002). This report describes only privilege disputes pertaining to the Monica Lewinsky investigation and does not describe efforts by Starr's office to overcome the privilege in its other investigations, such as the successful efforts to overcome privilege assertions by attorneys in the White House Counsel's Office and the unsuccessful attempt to obtain the notes taken by Deputy White House Counsel Vincent Foster's attorney. *See id.*

41. *See In re Grand Jury Subpoena to Carter*, No. 98-068, 1998 U.S. Dist. LEXIS 19497, at *3–4 (D.D.C. Apr. 28, 1998), *aff'd in part and rev'd in part sub nom. In re Sealed Case (Sealed Case III)*, 162 F.3d 670 (D.C. Cir. 1998). Starr's investigative tactics have been criticized by many commentators, and

For purposes of the analysis in this Article, the important aspect of the Monica Lewinsky investigation is her retention of Washington, D.C. attorney Francis D. Carter to represent her in connection with the Paula Jones civil sexual harassment lawsuit against President Clinton and to prepare an affidavit stating that Lewinsky did not have a sexual relationship with President Clinton.⁴² In early 1998, shortly after Starr's office began investigating the Lewinsky matter, it issued grand jury subpoenas to Carter calling for him to provide testimony and produce documents relating to his representation of Lewinsky.⁴³ Carter moved to quash the subpoenas, arguing, among other things, that the subpoenas improperly sought to invade Lewinsky's attorney-client privilege and work-product doctrine protections.⁴⁴ Starr's office countered with the argument that the crime-fraud exception applied and therefore Carter should be compelled to produce the subpoenaed documents and testify before the grand jury.⁴⁵

Chief Judge Norma Holloway Johnson analyzed the application of the crime-fraud exception to Lewinsky's engagement of Carter to prepare the affidavit.⁴⁶ Based upon an in camera submission of evidence by Starr's office, Chief Judge Johnson concluded that the crime-fraud exception was applicable and overruled the assertions of attorney-client privilege.⁴⁷ The evidence contained in the in camera submission was sufficient to convince the court that Lewinsky "committed perjury when she signed her affidavit, procured as a result of Mr. Carter's legal advice, and used her false affidavit as part of a broader scheme to obstruct justice."⁴⁸ Judge Johnson also concluded that the crime-fraud

the actions of his office in the Lewinsky investigation have been a particular focus of criticism. See, e.g., Sanford Levinson, *Structuring Intimacy: Some Reflections on the Fact that the Law Generally Does Not Protect Us Against Unwanted Gazes*, 89 GEO. L.J. 2073, 2074 (2001) (criticizing Starr's decision to compel Lewinsky's mother to testify before the grand jury); Deborah L. Rhode, *Conflicts of Commitment: Legal Ethics in the Impeachment Context*, 52 STAN. L. REV. 269, 279–80 (2000) (criticizing Starr for not adequately supervising his office's contacts with Linda Tripp). Even the Chief Judge of the United States District Court for the District of Columbia expressed "concern that the Office of Independent Counsel may have acted improperly in conducting immunity negotiations with Ms. Lewinsky without the presence of her counsel." *Carter*, 1998 U.S. Dist. LEXIS 19497, at *28; see also Rhode, *supra*, at 335–36 (criticizing Starr's office for disrupting Lewinsky's attorney-client relationship with Carter). But see RAY, *supra* note 40, at 103–08 (defending the actions of Starr's office and rejecting Department of Justice Special Counsel Jo Ann Harris's finding that poor professional judgment was exercised in planning and executing the office's initial contact with Lewinsky). For a comprehensive critique of Starr's conduct and professional judgment in connection with the Lewinsky investigation, see generally Robert W. Gordon, *Imprudence and Partisanship: Starr's OIC and the Clinton-Lewinsky Affair*, 68 FORDHAM L. REV. 639 (1999).

42. See *Sealed Case III*, 162 F.3d at 672 (describing Lewinsky's retention of Carter and quoting the affidavit that Carter prepared for Lewinsky); see also RAY, *supra* note 40, at 117–18 (summarizing the litigation arising out of the Carter subpoenas).

43. See *Sealed Case III*, 162 F.3d at 672.

44. See *Carter*, 1998 U.S. Dist. LEXIS 19497, at *1–2.

45. See *id.* at *4.

46. *Id.* at *3–18.

47. See *id.* at *5–6.

48. *Id.* at *6–7. In a footnote to the quoted statement, Judge Johnson explained that she was not concluding that Lewinsky necessarily had committed those crimes: "The Court finds here that the [Office of Independent Counsel] has met its burden under the crime-fraud exception. It expressly does

exception should overcome the assertion of work-product doctrine protection because Lewinsky consulted Carter for the purpose of committing perjury and obstruction of justice and used his work-product for that purpose.⁴⁹ Based upon those conclusions, the court ordered Carter to testify and to produce the subpoenaed documents.⁵⁰

The crime-fraud exception ruling, and the success of Starr's office in overcoming the privilege and requiring Carter to testify and produce documents relating to his representation of Lewinsky, did not generate significant attention or controversy at the time.⁵¹ As suggested by the discussion above of the application of the crime-fraud exception in the Manafort case,⁵² Starr's reliance on the exception to compel testimony of an attorney whose client was using the attorney's services (albeit without the knowledge of the attorney) to submit false and misleading information to the government (here the federal court hearing the Jones sexual harassment case) is consistent with the policies underlying and purpose of the exception.⁵³ Moreover, much like the analysis in the Manafort Opinion, the court's analysis in the Lewinsky case does not provide any especially helpful guidance on the difficult question—which is the focus of this Article—of the nature and quantum of proof necessary to establish that an attorney's services are sufficiently linked to a client's crime or fraud to support application of the crime-fraud exception. Rather than analyze that issue, the court merely observed that “case law on the crime-fraud exception nowhere indicates that there must be a particular quantity of crime committed for the exception to apply.”⁵⁴ The court went on to conclude that the message of its decision in the case was simply that “clients may not use their attorneys for the express purpose of committing a crime or fraud and expect their communications with the attorney to remain privileged.”⁵⁵

not find, however, that Ms. Lewinsky in fact committed those crimes.” *Id.* at *6 n.2. In another portion of the opinion, Judge Johnson made clear that “there is no suggestion that Mr. Carter knew about any of the alleged wrongdoing.” *Id.* at *5.

49. *Id.* at *7–8.

50. *Id.* The court did accept Carter's arguments that forcing him to produce certain items that Lewinsky had given to him would violate Lewinsky's Fifth Amendment right against self-incrimination. *See id.* at *18–20. That portion of Judge Johnson's opinion was reversed by the D.C. Circuit Court. *See Sealed Case III*, 162 F.3d 670, 675 (D.C. Cir. 1998) (citing *Fisher v. United States*, 425 U.S. 391 (1976)) (concluding that, because no attorney-client privilege existed, there would be no compulsion in violation of Lewinsky's Fifth Amendment privilege in forcing Carter to produce the subpoenaed items). The D.C. Circuit Court affirmed Judge Johnson's ruling that the crime-fraud exception applied, rejecting Lewinsky's materiality and intent arguments. *See id.* at 673–74.

51. *Cf. Attorney-Client Privilege at Stake in Lewinsky Grand Jury Inquiry*, 22 CHAMPION 7, 7 (1998) (noting that the matter had “received only cursory notice by the media”).

52. *See supra* Part II.A.

53. Chief Judge Johnson rejected as “merely alarmist” the amicus brief arguments of the National Association of Criminal Defense Lawyers and the District of Columbia Association of Criminal Defense Lawyers that application of the exception “under these circumstances would eviscerate the privilege in garden-variety civil and criminal proceedings.” *Carter*, 1998 U.S. Dist. LEXIS 19497, at *10 (quoting the amici brief).

54. *See id.* at *8–9.

55. *Id.* at *11.

Like the conclusory finding in the Manafort Opinion that the attorney-client communications at issue had at least “some relationship” with a violation of law,⁵⁶ these statements about Lewinsky’s actions do not provide a great deal of helpful guidance for future cases on when the crime-fraud exception should be applied. The Lewinsky case also is similar to the Manafort case in that its facts present an easy crime-fraud exception application—the services of the lawyer were being used to subvert the administration of justice by providing false information to the government, in that case a federal court.

Also like the Manafort case, the Lewinsky case supports the basic crime-fraud exception principle set forth above—that if a lawyer’s services are being used to submit false information to the government as part of an effort to further or conceal a crime or fraud, then the attorney-client privilege should be vitiated and the attorney can and should be compelled to testify about communications with the client. Section III of this Article analyzes recent case law relevant to this principle and attempts to provide a more precise explication of the quantum and nature of proof that should be required to apply the crime-fraud exception. Before doing so, however, it is useful to examine another high-profile case in which, despite circumstances that would seem to invite its application, the crime-fraud exception was not invoked, with arguably detrimental consequences for both the justice system and the parties involved in the case.

C. *The Penn State Three*

1. The Criminal Charges Against the Penn State Three

In November 2011 Jerry Sandusky, a respected former Penn State University football coach, was accused by a Pennsylvania special investigating grand jury⁵⁷ of engaging in child sex abuse.⁵⁸ On November 4, 2011, Sandusky was charged with multiple counts of involuntary deviate sexual intercourse, indecent assault, corruption of minors, unlawful contact with minors, endangering the welfare of minors, aggravated indecent assault, and attempt to commit indecent assault.⁵⁹

In addition to the child sexual abuse charges against Sandusky, the Pennsylvania Attorney General’s Office charged two Penn State University administrative officers, Athletic Director Timothy M. Curley and Senior Vice

56. See *In re Grand Jury Investigation*, No. 17-2336, slip op. at 26 (D.D.C. Oct. 2, 2017).

57. Technically the special grand jury returned a “presentment” describing the crimes and prosecutors prepared an indictment formally charging Sandusky with the crimes described in the grand jury presentment report. See Police Criminal Complaint, *Commonwealth v. Sandusky*, No. CR-636-11 (Pa. Ct. Com. Pl. Nov. 4, 2011), <http://co.centre.pa.us/centrecr/media/upload/sandusky%20criminal%20complaint%20422%20OF%202011.pdf> [<http://perma.cc/B4FF-NLB2>]. For an analysis of grand jury law and practice in Pennsylvania, see *Commonwealth v. Schultz*, 133 A.3d 294, 314–15 (Pa. Super. Ct. 2016) (describing “The Grand Jury in Pennsylvania and the Advent of the Statutory Right to Grand Jury Counsel”).

58. See Police Criminal Complaint, *supra* note 57, Ex. A, at 24.

59. *Id.* Ex. A, at 2–15.

President Gary C. Schultz, with failure to report child abuse and committing perjury in their testimony to the Sandusky investigating grand jury.⁶⁰ Curley and Schultz were senior university officials who reported to then-university President Graham B. Spanier.⁶¹ When Curley and Schultz were charged with perjury and failing to report child sexual abuse, Spanier issued a press release expressing “unconditional support” for Curley and Schultz, as well as “complete confidence” that they had acted appropriately.⁶² Spanier’s immediate and unqualified statement of “unconditional support” for Curley and Schultz ultimately proved damaging for him⁶³ and for Penn State University.⁶⁴

60. Information, *Commonwealth v. Curley*, No. CP-22-CR-5165-2011 (Pa. Ct. Com. Pl. March 13, 2017), <http://www.dauphincounty.org/Courts/CurleySchultzSpanier/3-13-17%20Amended%20Criminal%20Information%20and%20Guilty%20Plea%20-%20Curley.pdf> [<http://perma.cc/7UAQ-KK8S>]; Information, *Commonwealth v. Schultz*, No. CP-22-CR-5164-2011 (Pa. Ct. Com. Pl. March 13, 2017), <http://www.dauphincounty.org/Courts/CurleySchultzSpanier/3-13-17%20Amended%20Criminal%20Information%20and%20Guilty%20Plea%20-%20Schultz.pdf> [<http://perma.cc/V3TC-9DC4>]; Sara Ganim, *Penn State Officials Conspired To Protect Themselves and Jerry Sandusky, AG Says*, PATRIOT-NEWS (Nov. 1, 2012, 2:24 PM), http://www.pennlive.com/midstate/index.ssf/2012/11/ag_sandusky_coverup_was_not_a.html [<http://perma.cc/5YRG-TM2U>] [hereinafter Ganim, *Penn State Officials*]. As discussed in more detail below, they and then-Penn State University President Graham Spanier were later charged with conspiracy and obstruction of justice, in addition to the initial perjury and failure to report charges. See *infra* note 71–75 and accompanying text.

61. *Ex-Penn State Officials Accused of ‘Conspiracy of Silence,’* CNN (Nov. 1, 2012, 6:01 PM), <http://www.cnn.com/2012/11/01/justice/penn-state-scandal/> [<http://perma.cc/95U5-4VBE>].

62. Spanier’s initial November 5, 2011, press release stated:

The allegations about a former coach are troubling, and it is appropriate that they be investigated thoroughly. Protecting children requires the utmost vigilance.

With regard to the other presentments, I wish to say that Tim Curley and Gary Schultz have my unconditional support. I have known and worked daily with Tim and Gary for more than 16 years. I have complete confidence in how they have handled the allegations about a former University employee.

Tim Curley and Gary Schultz operate at the highest levels of honesty, integrity and compassion. I am confident the record will show that these charges are groundless and that they conducted themselves professionally and appropriately.

Statement from President Spanier, PENN STATE NEWS (Nov. 5, 2011), <http://news.psu.edu/story/153819/2011/11/05/statement-president-spanier> [<http://perma.cc/8UAJ-SLFM>].

63. As discussed in more detail below, Spanier’s support of Curley and Schultz was later one of the grounds for criminal conspiracy and obstruction of justice charges against Spanier, Schultz, and Curley. See *infra* notes 70–74 and accompanying text for a discussion of these charges.

64. Spanier’s statement in support of Schultz and Curley had significant negative financial repercussions for the university. See Mark Tracy, *Mike McQueary Is Awarded \$7.3 Million in Penn State Defamation Case*, N.Y. TIMES (Oct. 27, 2016), <http://nyti.ms/2dN46eF> [<http://perma.cc/F3R4-7DTM>]. In October 2016 a jury awarded former Penn State assistant football coach Mike McQueary, who had testified to the investigating grand jury that he had seen Sandusky abusing a child in a Penn State athletic facility shower room, \$7.3 million in damages in a defamation case based largely on Spanier’s public statement of support for Schultz and Curley. See *id.*; see also Verdict Slip, *McQueary v. Pa. State Univ.*, No. 2012-1804 (Pa. Ct. Com. Pl. Nov. 30, 2016), <http://co.centre.pa.us/centrecol/media/upload/mcqueary%20verdict%20slip.pdf> [<http://perma.cc/A7UK-GKG3>] (awarding \$1,150,000 in compensatory damages for defamation, \$1,150,000 in compensatory damages for misrepresentation, and \$5,000,000 in punitive damages for misrepresentation). McQueary alleged that he was terminated after he told investigators from the Pennsylvania Attorney General’s Office that in 2001 he had reported an incident of child abuse by Sandusky to then-head football coach Joe Paterno, who then

The day after the charges against Sandusky, Schultz, and Curley were announced, the Penn State University Board of Trustees met with Spanier.⁶⁵ After that meeting Spanier issued a second press release stating that Curley and Schultz were being placed on administrative leave while they defended themselves against the perjury and failure to report child abuse charges.⁶⁶ An investigative report that was later prepared for the Board of Trustees by former Federal Bureau of Investigation Director Louis Freeh (the Freeh Report) stated that “several Trustees described the second press release as a ‘turning point’ for Spanier” because the Board itself had decided that Curley and Schultz should be suspended, and the Board was displeased with the wording of Spanier’s press release.⁶⁷ On November 9, 2011, the Penn State Board of Trustees met and decided to terminate Spanier without cause.⁶⁸

reported the matter to Curley and Schultz. *See* Complaint ¶ 12, *McQueary v. Pa. State Univ.*, No. 2012-1804 (Pa. Ct. Com. Pl. Nov. 30, 2016), <http://co.centre.pa.us/centrecr/media/upload/mcqueary%20vs%20the%20pennsylvania%20state%20university%20complaint.pdf> [http://perma.cc/atp6-jswb]. In the same case the trial judge subsequently awarded McQueary an additional \$4,900,000 for his state law whistleblower claim against Penn State. *See* Order, *McQueary v. Pa. State Univ.*, No. 2012-1804 (Pa. Ct. Com. Pl. Nov. 30, 2016), <http://co.centre.pa.us/centrecr/media/upload/mcqueary%20order%20filed%20november%2030%202016.pdf> [http://perma.cc/G7ME-53RB] (awarding \$3,974,048 for past/future economic loss and \$1,000,000 for past/future non-economic loss).

65. *See* Sara Ganim & Jan Murphy, *Inside Penn State Board of Trustees, Battle Brews Over Sex Scandal*, PATRIOT-NEWS (Nov. 9, 2011, 7:17 AM), http://www.pennlive.com/midstate/index.ssf/2011/11/jerry_sandusky_penn_state_trus.html [http://perma.cc/DGM6-ACR4]. The only official record of a November 2011 meeting is the minutes of the November 11, 2011, meeting. *See* PAULA R. AMMERMAN, PA. STATE UNIV. BD. OF TRUSTEES, MINUTES OF MEETING 6 (Nov. 11, 2011), <http://trustees.psu.edu/pdf/november2011minutesbot.pdf> [http://perma.cc/Y854-SZU8]. The Board of Trustees did not allow public access to the minutes of other meetings in November 2011. *See* Lauren Davis, Opinion, *Transparency to Public Vital for Board of Trustees*, DAILY COLLEGIAN (Oct. 31, 2016), http://www.collegian.psu.edu/opinion/editorials/article_117d2262-9efc-11e6-9c62-47129c2178d2.html [http://perma.cc/7LJW-4LCC].

66. *See* *Trustees Announce 2 Officials To Step Down While Case Is Investigated*, PENN STATE NEWS (Nov. 7, 2011), <http://news.psu.edu/story/153816/2011/11/07/trustees-announce-2-officials-step-down-while-case-investigated> [http://perma.cc/XXF5-5HER].

67. FREEH SPORKIN & SULLIVAN, LLP, REPORT OF THE SPECIAL INVESTIGATIVE COUNSEL REGARDING THE ACTIONS OF THE PENNSYLVANIA STATE UNIVERSITY RELATED TO THE CHILD SEXUAL ABUSE COMMITTED BY GERALD A. SANDUSKY 93 (2012) [hereinafter FREEH REPORT], <http://www.documentcloud.org/documents/396512-report-final-071212.html> [http://perma.cc/VAF4-K6F5]; *see also* *Former FBI Director Freeh To Conduct Independent Investigation*, PENN STATE NEWS (Nov. 21, 2011), <http://news.psu.edu/story/153530/2011/11/21/former-fbi-director-freeh-conduct-independent-investigation> [http://perma.cc/64KU-VZRY].

68. *See* AMMERMAN, *supra* note 65, at 6; *Report of the Board of Trustees Concerning Nov. 9 Decisions*, PENN STATE NEWS (Mar. 12, 2012), <http://news.psu.edu/story/150954/2012/03/12/report-board-trustees-concerning-nov-9-decisions> [http://perma.cc/U4K3-3SK7]; *see also* Sara Ganim & Jeff Frantz, *President Graham Spanier Ousted by Penn State Trustees*, PATRIOT-NEWS (Nov. 10, 2011), http://www.pennlive.com/midstate/index.ssf/2011/11/president_graham_spanier_also.html [http://perma.cc/D86R-JHES]. At the November 9 meeting, the Board of Trustees also decided to terminate Penn State’s long-serving head football coach Joe Paterno. *Report of the Board of Trustees Concerning Nov. 9 Decisions*, *supra*; *see also* David Jones, *Penn State’s Firing of Graham Spanier, Joe Paterno the First Step Toward Cleansing*, PENN LIVE (Nov. 11, 2011), http://blog.pennlive.com/davidjones/2011/11/penn_state_board_of_trustees_d.html [http://perma.cc/RJ82-8G9V]. The Board’s decision to terminate Paterno has proved to be one of the most controversial actions in the entire Sandusky debacle, in part

Spanier's termination by the Board of Trustees was only the beginning of the travails he would face as a result of his actions in connection with the Sandusky scandal. In their investigation for the preparation of the Freeh Report, investigators found emails and documentary evidence⁶⁹ about Spanier, Schultz, and Curley that had not previously been produced to the investigating grand jury in response to grand jury subpoenas to the university.⁷⁰ In his final report Freeh concluded that this evidence showed "total and consistent disregard by the most senior leaders at Penn State for the safety and welfare of Sandusky's child victims."⁷¹ Freeh's investigators "immediately provided [the emails and documentary evidence] to law enforcement when they were discovered,"⁷² and on November 1, 2012, the Pennsylvania Attorney General's Office charged Spanier with eight counts of endangering the welfare of children, failure to report child abuse, perjury, obstruction of justice, and conspiracy to obstruct justice, commit perjury, and endanger the welfare of children.⁷³ The Attorney General's Office also filed additional charges against Curley and Schultz for endangering the welfare of children, obstruction of justice, and conspiracy to obstruct justice, commit perjury, and endanger the welfare of children.⁷⁴ Then-acting Attorney General Linda Kelly held a press conference to announce the charges against Spanier, Schultz, and Curley, and stated: "This was not a mistake by these men. It was not an oversight. It was not misjudgment on their part. This was a conspiracy of silence by top officials working to actively conceal the truth, with total disregard for the children who were Sandusky's victims in this case."⁷⁵

because of the manner in which Paterno was terminated—by a telephone call with no advance notice. See Dave Sheinin, *Joe Paterno Fired as Football Coach at Penn State*, WASH. POST (Nov. 9, 2011), http://www.washingtonpost.com/sports/colleges/joe-paterno-will-retire-at-end-of-penn-state-football-season/2011/11/09/gIQAQbkb6M_story.html [<http://perma.cc/4JKH-A23R>]. Paterno's termination remains a subject of controversy and contention among Penn State supporters and detractors. See, e.g., Wallace McKelvey, *Five Years After Joe Paterno's Firing, Penn State Trustee Continues To Rail Against Decision*, PENN LIVE (Nov. 5, 2016, 8:21 AM), http://www.pennlive.com/news/2016/11/five_years_after_joe_paternos.html [<http://perma.cc/V6JU-DCRA>].

69. See FREEH REPORT, *supra* note 67, at 68–78.

70. See *id.* at 16, 50–76.

71. See *id.* at 14.

72. *Id.* at 11.

73. Criminal Docket at 2, *Commonwealth v. Spanier*, No. MJ-12303-CR-0000419-2012 (Pa. Ct. Com. Pl. Nov. 1, 2012), <http://www.scribd.com/document/111792451/Graham-Spanier-charged-in-Jerry-Sandusky-case> [<http://perma.cc/W8AA-XREX>]; see also Steve Eder, *Former Penn State President Is Charged in Sandusky Case*, N.Y. TIMES (Nov. 1, 2012), <http://nyti.ms/2E1Gmiv> [<http://perma.cc/R8UQ-T3NN>]; Ganim, *Penn State Officials*, *supra* note 60; *University Officials Issue Statement on Attorney General's Actions*, PENN STATE NEWS (Nov. 28, 2012), <http://news.psu.edu/story/145000/2012/11/01/university-officials-issue-statement-attorney-generals-actions> [<http://perma.cc/4MV3-AT49>].

74. See Criminal Docket, *Commonwealth v. Schultz*, No. MJ-12303-CR-0000420-2012 (Pa. Ct. Com. Pl. Nov. 1, 2012), <http://www.scribd.com/document/111795193/Schultz-Charges> [<http://perma.cc/JY9S-4QN9>]; Criminal Docket, *Commonwealth v. Curley*, No. MJ-12303-CR-0000421-2012 (Pa. Ct. Com. Pl. Nov. 1, 2012), <http://www.scribd.com/document/111794212/Curley-Charges> [<http://perma.cc/S7WD-XQCN>].

75. *Ex-Penn State Officials Accused of 'Conspiracy of Silence,' supra* note 61 (quoting Kelly).

Spanier, Schultz, and Curley vigorously contested the criminal charges against them for almost five years, but in March 2017 Curley and Schultz each pled guilty to a single misdemeanor charge of endangering the welfare of children and agreed to cooperate with the Attorney General's Office in Spanier's criminal trial.⁷⁶ Spanier continued to contest the criminal charges against him by proceeding to trial, but on March 24, 2017, a jury found Spanier guilty of one misdemeanor charge of endangering the welfare of children.⁷⁷

2. An Attorney-Client Privilege Issue Consumes the Case

An in-depth analysis of the evidence and the criminal charges against Curley, Schultz, and Spanier is beyond the scope of this Article, and the relevant information is readily available in judicial opinions⁷⁸ and the Freeh Report.⁷⁹ Instead, the focus of this Article is the attorney-client privilege issue that arose when Penn State's in-house general counsel Cynthia Baldwin accompanied Curley, Schultz, and Spanier to their state grand jury appearances.⁸⁰

After Freeh's investigation revealed emails and documents that had not been produced to the Sandusky grand jury, but prior to the filing of criminal charges against Spanier and additional criminal charges against Curley and Schultz, Penn State University waived its attorney-client privilege with respect to Baldwin's representation of the university in the Sandusky matter and, in particular, the university's compliance with investigative efforts in the Sandusky

76. See Guilty Plea Agreement at 1–2, *Commonwealth v. Curley*, No. CP-22-CR-0003614-2013 (Pa. Ct. Com. Pl. Mar. 13, 2017), <http://www.dauphincounty.org/Courts/CurleySchultzSpanier/3-13-17%20Amended%20Criminal%20Information%20and%20Guilty%20Plea%20-%20Curley.pdf> [http://perma.cc/7UAQ-KK8S]; Guilty Plea Agreement at 1–2, *Commonwealth v. Schultz*, No. CP-22-CR-0003616-2013 (Pa. Ct. Com. Pl. Mar. 13, 2017), <http://www.dauphincounty.org/Courts/CurleySchultzSpanier/3-13-17%20Amended%20Criminal%20Information%20and%20Guilty%20Plea%20-%20Schultz.pdf> [http://perma.cc/V3TC-9DC4]; see also Charles Thompson, *Tim Curley, Gary Schultz Plead Guilty in Sandusky Coverup Case*, PENN LIVE (Mar. 13, 2017), http://www.pennlive.com/news/2017/03/tim_curley_files_plea_in_sandu.html [http://perma.cc/22SC-CA44].

77. See Will Hobson, *Former Penn State President Graham Spanier Convicted of Child Endangerment*, WASH. POST (Mar. 24, 2017), http://www.washingtonpost.com/sports/colleges/former-penn-state-president-graham-spanier-convicted-of-child-endangerment/2017/03/24/d1936e34-109a-11e7-9b0d-d27c98455440_story.html [http://perma.cc/U9LA-EU5T]. Spanier was acquitted of a felony charge of endangering the welfare of children and a felony charge of conspiring to endanger the welfare of children. See *id.* On June 26, 2018, the Pennsylvania Superior Court affirmed Spanier's conviction for one count of endangering the welfare of children. See *Commonwealth v. Spanier*, 192 A.3d 141, 142 (Pa. Super. Ct. 2018).

78. See *Commonwealth v. Curley*, 131 A.3d 994 (Pa. Super. Ct. 2016); *Commonwealth v. Schultz*, 133 A.3d 294 (Pa. Super. Ct. 2016); *Commonwealth v. Spanier*, 132 A.3d 481 (Pa. Super. Ct. 2016); Order, *Commonwealth v. Curley*, Nos. 3614 CR 2013, 5165 CR 2011, 3616 CR 2013, 5164 CR 2011, 3615 CR 2013, 2015 WL 13216773 (Pa. Ct. Com. Pl. Jan. 14, 2015), <http://www.scribd.com/document/252653399/Order-on-Curley-Schultz-and-Spanier> [http://perma.cc/S789-VKY2].

79. See generally FREEH REPORT, *supra* note 67.

80. In Pennsylvania, unlike in the federal criminal justice system, an attorney is permitted to accompany a witness during the witness's grand jury testimony. Compare 42 PA. STAT. AND CONS. STAT. ANN. § 4549(c) (West 2019) (granting the right to counsel at a grand jury appearance), with FED. R. CRIM. P. 6(d)(1) (stating that only attorneys for the government, a witness being questioned, an interpreter, and the court reporter or operator of the recording devise are permitted to be present).

grand jury investigation.⁸¹ This waiver of attorney-client privilege by the university allowed Baldwin, who had served as the university's in-house counsel during the grand jury investigation of Sandusky, to provide grand jury testimony in October 2012 about Penn State's previous efforts to comply with grand jury subpoenas for documents and records relating to Sandusky.⁸² The university and Baldwin agreed with the Attorney General's Office, however, that Baldwin would not testify about "any of the issues relating to the testimony of Mr. Schultz and Mr. Curley and conversations she had with them about that testimony."⁸³ The reason for this limitation on the scope of Baldwin's grand jury testimony was that Schultz and Curley had asserted, through their counsel, that they each had a personal attorney-client relationship with Baldwin because she had accompanied them to their grand jury testimony.⁸⁴

The Attorney General's Office disputed the personal attorney-client privilege claim by Schultz and Curley,⁸⁵ but in an effort to ameliorate the personal attorney-client privilege dispute, the lead prosecutor for the Attorney General's Office represented to the supervising judge for the grand jury investigation that he would not question Baldwin about her communications with Curley and Schultz relating to their grand jury appearances.⁸⁶ The supervising judge agreed that Baldwin could testify before the grand jury under that limitation.⁸⁷

Despite that limitation, during Baldwin's grand jury testimony she was asked a number of questions about her interactions with Spanier, Schultz, and Curley prior to their grand jury testimony, and in particular, she testified that when she accompanied Spanier, Schultz, and Curley to their grand jury appearances, she had no knowledge of the email communications and documents that had not been produced to the grand jury.⁸⁸ In response to questions from the prosecutor, Baldwin testified that Spanier, Schultz, and Curley had not told her the truth about their knowledge of the Sandusky matter and that she had concluded Spanier was "not a person of integrity" and she had "no doubt that he

81. See Transcript of Proceedings of Grand Jury at 3–4, Commonwealth of Pennsylvania, Thirty-Third Statewide Investigation Grand Jury, *In re* Notice No. 1 (Oct. 22, 2012), <http://www.scribd.com/document/192201108/Cynthia-Baldwin-grand-jury-proceedings-October-22-2012> [http://perma.cc/u2sj-nf8n].

82. See *id.* at 1–4.

83. See *id.* at 4–6.

84. See *id.* at 4 (recounting the statement to the court by counsel for the Pennsylvania Attorney General's Office describing the claims of attorney-client privilege by Schultz and Curley).

85. See *id.* at 11 ("The Commonwealth . . . is going to take a very clear position as does Miss Baldwin that she was University Counsel and she was not individually representing those two gentlemen" (statement of Michael M. Mustokoff, counsel for the Pennsylvania Attorney General's Office)).

86. See *id.* at 10.

87. See *id.* at 11–14.

88. See Transcript of Proceedings of Grand Jury at 69, Commonwealth of Pennsylvania, Thirty-Third Statewide Investigation Grand Jury, *In re* Notice No. 1 (Oct. 26, 2012), <http://www.scribd.com/document/192201126/Cynthia-Baldwin-grand-jury-transcript-from-October-26-2012> [http://perma.cc/ZK94-8XKD].

lied to [her].”⁸⁹ This testimony ultimately had very significant consequences in the criminal prosecutions of Spanier, Schultz, and Curley.⁹⁰

As noted above, in November 2012, after Baldwin’s grand jury testimony, the Pennsylvania Attorney General’s Office filed criminal charges against Spanier and additional charges of conspiracy and obstruction of justice against Curley and Schultz, charging the three men with a “conspiracy of silence” to cover up Sandusky’s crimes.⁹¹ Spanier, Schultz, and Curley all later moved to have the charges against them quashed because they contended that Baldwin’s grand jury testimony had violated their personal attorney-client privilege with Baldwin.⁹² The trial court issued a lengthy opinion rejecting the three defendants’ personal attorney-client privilege claims and concluding that Baldwin had represented them only as agents of the university⁹³ and had acted appropriately in doing so based on the information known to her at the time.⁹⁴ The three defendants then appealed to the Pennsylvania Superior Court.⁹⁵

The Superior Court took a different analytical approach to the personal attorney-client privilege claims, rejecting the trial court’s agency analysis and focusing on Pennsylvania’s statutory right to counsel during grand jury testimony.⁹⁶ The Superior Court concluded that Baldwin had failed to adequately advise Schultz that she was representing him only in his capacity as an officer of Penn State University and not in his personal capacity.⁹⁷ Based on

89. *Id.* at 70.

90. See *infra* notes 96–103 and accompanying text for a discussion of the trial court’s analysis of Baldwin’s attorney-client privilege claim.

91. See Sara Ganim, *Graham Spanier, Other Penn State Officials Showed ‘Total Disregard to the Suffering of Children,’ AG Says*, PATRIOT-NEWS (Nov. 2, 2012), http://www.pennlive.com/midstate/2012/11/graham_spanier_other_penn_stat.html [<http://perma.cc/P4D8-GPBR>] (quoting Pennsylvania Attorney General Linda Kelly). See *supra* notes 69–75 and accompanying text for a discussion of the criminal charges against Spanier, Curley, and Schultz.

92. Order, *Commonwealth v. Curley*, Nos. 3614 CR 2013, 5165 CR 2011, 3616 CR 2013, 5164 CR 2011, 3615 CR 2013, 2015 WL 13216773, at *2–3 (Pa. Ct. Com. Pl. Jan. 14, 2015).

93. See *id.* at *14.

94. See *id.* at *15.

95. See *Commonwealth v. Curley*, 131 A.3d 994 (Pa. Super. Ct. 2016); *Commonwealth v. Schultz*, 133 A.3d 294 (Pa. Super. Ct. 2016); *Commonwealth v. Spanier*, 132 A.3d 481 (Pa. Super. Ct. 2016).

96. See *Schultz*, 133 A.3d at 320–24 (“Pointedly, the presence of the attorney in the grand jury room would be rendered nugatory if that lawyer is not present for the purpose of protecting the witness against incriminating himself.”).

97. See *id.* at 323 (“Ms. Baldwin did not explain to Schultz that her representation of him was solely as an agent of Penn State and that she did not represent his individual interests.”). As this Article was being prepared for publication, the Hearing Committee of the Disciplinary Board of the Supreme Court of Pennsylvania issued a report concluding that, based upon the information then reasonably available to Baldwin and her reasonable investigation, she had reasonably concluded that the interests of Penn State University and the senior officials were consistent, she properly informed the individual officials of those circumstances, and they effectively consented to being jointly represented with the University. Report and Recommendation of the Hearing Committee at 41, *Office of Disciplinary Counsel v. Baldwin*, No. 151 DB 2017, (Pa. Disciplinary Bd. Oct. 26, 2018). The Hearing Committee further concluded that Baldwin had not violated any ethical rules in her grand jury testimony. *Id.* at 42.

that conclusion, the Superior Court went on to hold that all communications between Schultz and Baldwin were protected by the attorney-client privilege and Baldwin had “breached that privilege by testifying before the grand jury with respect to such communications.”⁹⁸ The court went on to quash the perjury, obstruction of justice, and conspiracy charges against Schultz.⁹⁹ Following its analysis in that case, the Superior Court also quashed the perjury, obstruction of justice, and conspiracy charges against Curley¹⁰⁰ and Spanier.¹⁰¹

While the individual and entity attorney-client privilege issues that divided the trial court and the Superior Court are important legal issues that are worthy of careful study and analysis, they are not central to the primary focus of this Article, which is the crime-fraud exception to the privilege. In a somewhat enigmatic footnote in *Commonwealth v. Schultz*,¹⁰² the Pennsylvania Superior Court noted that the prosecution “did not raise any argument that Ms. Baldwin could testify regarding any privileged communications as a result of the crime-fraud exception to the attorney-client privilege.”¹⁰³ This footnote might be read as questioning why the prosecution did not seek to invoke the crime-fraud exception. Alternatively, and in light of the case citation in the footnote,¹⁰⁴ it might be read as suggesting that under Pennsylvania law the requirements for application of the crime-fraud exception would not have been met. The next Section of this Article focuses on that issue.

III. VARYING TESTS FOR WHEN THE CRIME-FRAUD EXCEPTION SHOULD VITIATE THE ATTORNEY-CLIENT PRIVILEGE

As noted above,¹⁰⁵ the United States Supreme Court weighed in on the issues presented by application of the crime-fraud exception in 1989 with its decision in *United States v. Zolin*.¹⁰⁶ *Zolin* did not answer every question concerning application of the exception, and it failed to provide guidance on the critical issue that is the focus of this Article.¹⁰⁷ The focus of the Court’s opinion in *Zolin* was not “the quantum of proof necessary ultimately to establish the applicability of the crime-fraud exception” but rather the showing required to obtain in camera judicial review of the privileged communications at issue so

98. *Schultz*, 133 A.3d at 325.

99. *Id.* at 327–28.

100. *See Curley*, 131 A.3d at 1007.

101. *See Commonwealth v. Spanier*, 132 A.3d 481, 498 (Pa. Super. Ct. 2016).

102. 133 A.3d 294 (Pa. Super. Ct. 2016).

103. *Schultz*, 133 A.3d at 306 n.13.

104. After stating that no crime-fraud exception argument had been advanced, the Superior Court cited *In re Investigating Grand Jury of Philadelphia County*, 593 A.2d 402 (Pa. 1991), for the proposition that the “crime-fraud exception excludes . . . communications between an attorney and client that are made for the purpose of committing a crime or fraud.” *Schultz*, 133 A.3d at 306 n.13.

105. *See supra* notes 7–8 and accompanying text.

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

107. *See Zacharias, supra* note 8, at 80–81 (“*Zolin* does not identify any new substantive dividing line for assessing when communications fit the crime-fraud definitions. *Zolin* is procedural in nature.”).

that a court can make the determination of whether or not the exception applies.¹⁰⁸

The Court first made clear that “[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” and that the party seeking review could not “engage in groundless fishing expeditions.”¹⁰⁹ The Court then set forth a test to determine whether *in camera* review should be granted by a court considering a crime-fraud exception claim: “[T]he judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person, that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.”¹¹⁰ The Court left the final determination of whether that test was satisfied to the discretion of the district court to decide on remand.¹¹¹

The *Zolin* Court also rejected the “independent evidence requirement” that had been applied by the appellate court below, concluding that “evidence directly but incompletely reflecting the content of the contested communications” could be used by a court to determine whether *in camera* review of the privileged communications themselves would be appropriate.¹¹² The Court held that “the party opposing the privilege may use any nonprivileged evidence in support of its request for *in camera* review, even if its evidence is not ‘independent’ of the contested communications.”¹¹³

Zolin’s adoption of the reasonable belief standard and rejection of the independent evidence requirement removes significant procedural obstacles for parties seeking to establish that the crime-fraud exception applies, while retaining the important safeguard of judicial review (in *camera* to protect the confidentiality of the privileged communications if the challenge fails) in determining whether the exception should be applied. Unfortunately, the *Zolin* opinion does not provide further guidance as to what constitutes sufficient proof to establish applicability of the crime-fraud exception and does not suggest how that quantum of proof exceeds the showing necessary to obtain an *in camera*

108. See *Zolin*, 491 U.S. at 563–65.

109. *Id.* at 571.

110. *Id.* at 572 (citation omitted) (quoting *Caldwell v. Dist. Court*, 644 P.2d 26, 33 (Colo. 1982)).

111. *Id.*

112. *Id.* at 573–74. The Court concluded that “the party opposing the privilege may use any nonprivileged evidence in support of its request for *in camera* review, even if its evidence is not ‘independent’ of the contested communications.” *Id.* at 574. In a footnote to the quoted statement, the Court also concluded that such evidence “may be used not only in the pursuit of *in camera* review, but also may provide the evidentiary basis for the ultimate showing that the crime-fraud exception applies.” *Id.* at 574 n.12.

113. *Id.* at 574. For more detailed analysis of the *Zolin* case, see Galanek, *supra* note 13, at 1115; Hutzel, *supra* note 11, at 365; S. Aftab Sharif, Note, *Another Independent Evidence Rule Goes Up in Smoke: The Supreme Court Strikes a Balance in United States v. Zolin*, 16 T. MARSHALL L. REV. 127, 127 (1990).

inspection.¹¹⁴ The law in this difficult area is unsettled and still evolving,¹¹⁵ and this Section examines the approaches that various courts have taken to determine when to rely upon the crime-fraud exception to vitiate the confidentiality protections of the attorney-client privilege and the attorney work-product doctrine.

A. *The Fifth, Ninth, and D.C. Circuits: A Relatively Lenient Test*

The crime-fraud exception varies among circuits because courts disagree on the relationship or relatedness required between the documents and communications sought through application of the exception and the *prima facie* violation.¹¹⁶ The least stringent test has been developed in the Fifth, Ninth, and D.C. Circuits. The Fifth Circuit outlined its crime-fraud exception test in *In re Grand Jury Subpoena*.¹¹⁷ In a case involving a witness and his attorney who allegedly worked together to falsify a sworn affidavit,¹¹⁸ the court in *In re Grand Jury Subpoena* articulated the test for the application of the crime-fraud exception as follows: “[T]he only attorney-client communications and work product materials falling within the scope of the crime-fraud exception are those shown to hold ‘some valid relationship’ to the *prima facie* violation such that they ‘reasonably relate to the fraudulent activity.’”¹¹⁹ The D.C. Circuit uses similar “relates to” language in its crime-fraud exception test—the work product

114. The Supreme Court noted that use “of the phrase ‘*prima facie* case’ to describe the showing needed to defeat the privilege has caused some confusion,” *Zolin*, 491 U.S. at 563 n.7, and quoted criticism of courts that “have allowed themselves to be led into holding that only a superficial, one-sided showing is allowable on any admissibility controversy,” *id.* at 564 n.7 (quoting John MacArthur Maguire & Charles S. S. Epstein, *Preliminary Questions of Fact in Determining Admissibility of Evidence*, 40 HARV. L. REV. 392, 400 (1927)). The Court also acknowledged that “[t]he quantum of proof needed to establish admissibility was then, and remains, subject to question.” *Id.* The greater “quantum of proof” needed to establish applicability of the crime-fraud exception may be demonstrated by the Ninth Circuit’s opinion after *Zolin* was remanded by the Supreme Court. See *United States v. Zolin*, 905 F.2d 1344, 1345 (9th Cir. 1990). The Ninth Circuit found that the parties to the taped conversations at issue “admit on the tapes that they are attempting to confuse and defraud the U.S. Government.” *Id.* The Ninth Circuit thus held that the crime-fraud exception is applicable when an *in camera* review revealed explicit admissions of an intent to defraud. *But cf.* Henning, *supra* note 13, at 462 (“While *Zolin* thus rejects the proposition that it is addressing the issue of what quantum of proof is necessary to vitiate a claim of privilege, the Court’s analysis of how much evidence must be introduced to have a district court conduct an *in camera* review effectively resolves the issue of what proof is sufficient to establish the application of the crime-fraud exception.”).

115. See Zacharias, *supra* note 8, at 80–81 (“*Zolin* does not identify any new substantive dividing line for assessing when communications fit the crime-fraud definitions. *Zolin* is procedural in nature.”). For post-*Zolin* applications of the crime-fraud exception by the lower federal courts, see *Roe II*, 168 F.3d 69, 70 (2d Cir. 1999) (“[A] party seeking to invoke the crime-fraud exception must at least demonstrate that there is probable cause to believe that a crime or fraud has been attempted or committed and that the communications were in furtherance thereof.” (quoting *In re Richard Roe, Inc.* (Roe I), 68 F.3d 38, 40 (2d Cir. 1995))).

116. See *Sealed Case I*, 676 F.2d 793, 815 (D.C. Cir. 1982).

117. 419 F.3d 329 (5th Cir. 2005).

118. *In re Grand Jury Subpoena*, 419 F.3d at 331–34.

119. *Id.* at 346 (quoting *In re Int’l Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1243 (5th Cir. 2002)).

or communication must “reasonably relate[] to the subject matter of the possible violation”¹²⁰—which is similar in effect to the Fifth Circuit test. The Ninth Circuit follows a similar approach.¹²¹

These three circuits thus apply a test that requires only some kind of reasonable relationship or nexus, which in most instances will be a relatively easily satisfied test where there is credible evidence of an ongoing crime or conspiracy to cover up prior criminal misconduct. This is the test that was applied in the Manafort Opinion.¹²² This more lenient test allows for a more readily available application of the crime-fraud exception in cases in which the privilege is being abused in connection with an ongoing or future crime or fraud.

B. The Fourth and Tenth Circuits: A Stringent Test

The Fourth and Tenth Circuits significantly tighten the test for the application of the crime-fraud exception by applying a test that is satisfied only with a close nexus between the privileged communications or documents and the prima facie violation. The Fourth Circuit in *In re Grand Jury Proceedings # 5 Empanelled January 28, 2004*¹²³ articulated the test as follows: “[T]he documents containing the privileged materials [must] bear a close relationship to the client’s existing or future scheme to commit a crime or fraud.”¹²⁴ The Tenth Circuit applies a similar test: “The evidence must show that the client was engaged in or was planning the criminal or fraudulent conduct when it sought the assistance of counsel and that the assistance was obtained in furtherance of the conduct or was closely related to it.”¹²⁵

These circuits thus require a significantly more stringent test than the Fifth, Ninth, and D.C. Circuits, in that not just “some relationship” or connection is required but rather a “close” relationship between the privileged communications and the criminal activity.

120. *Sealed Case I*, 676 F.2d at 815.

121. See *United States v. Martin*, 278 F.3d 988, 1001 (9th Cir. 2002) (stating that the government must show “that the communications with the lawyer were ‘in furtherance of an intended or present illegality and that *there is some relationship* between the communications and the illegality’ [in order to make] a prima facie case” (emphasis added) (internal quotation marks omitted) (quoting *United States v. Bauer*, 132 F.3d 504, 509 (9th Cir. 1997))); *United States v. Chen*, 99 F.3d 1495, 1503 (9th Cir. 1996) (“To invoke the crime-fraud exception successfully, the government has the burden of making a prima facie showing that the communications were in furtherance of an intended or present illegality and that *there is some relationship between the communications and the illegality*.” (emphasis added) (quoting *In re The Corporation*, 87 F.3d 377, 380 (9th Cir. 1996))).

122. See *supra* notes 26–38 and accompanying text.

123. 401 F.3d 247 (4th Cir. 2005).

124. *In re Grand Jury Proceedings # 5*, 401 F.3d at 251; see also *In re Grand Jury Subpoena*, 642 F. App’x 223, 226 (4th Cir. 2016); *In re Grand Jury Subpoena # 06-1*, 274 F. App’x 306, 309 (4th Cir. 2008); *Chaudhry v. Gallerizzo*, 174 F.3d 394, 403 (4th Cir. 1999); *United Bank v. Buckingham*, 301 F. Supp. 3d 547, 552–53 (D. Md. 2018).

125. *In re Grand Jury Subpoenas*, 144 F.3d 653, 660 (10th Cir. 1998).

C. *The Second, Third, and Eighth Circuits: A More Stringent Test*

The Third Circuit, following precedent from the Second and Eighth Circuits, applies the most stringent test of all the federal circuits. The Third Circuit requires that the communication *lead* the client in the commission of the criminal act.¹²⁶ *Haines v. Liggett Group Inc.*¹²⁷ sets out this test.¹²⁸ In *Haines* the administrator of the estate of a deceased smoker filed a personal injury suit against Liggett Group, Inc., Loew's Theatres, Inc., R.J. Reynolds Tobacco Co., Philip Morris Incorporated, and the Tobacco Institute.¹²⁹ The plaintiff alleged product liability, tort, and conspiracy claims and eventually sought discovery of documents related to the Council for Tobacco Research.¹³⁰ In response to the plaintiff's discovery request, Liggett Group withheld 1,500 documents that it claimed were protected by the attorney-client privilege and the work-product doctrine.¹³¹ The plaintiff argued that the crime-fraud exception applied.¹³² The *Haines* court explained the application of the crime-fraud exception and articulated the following test:

We must always keep in mind that the purpose of the crime-fraud exception is to assure that the "seal of secrecy" between lawyer and client does not extend to communications from the lawyer to the client made by the lawyer for the purpose of giving advice for the commission of a fraud or crime. *The seal is broken when the lawyer's communication is meant to facilitate future wrongdoing by the client.* Where the client commits a fraud or crime for reasons completely independent of legitimate advice communicated by the lawyer, the seal is not broken, for the advice is, as the logicians explain, *non causa pro causa*. *The communication condemned and unprotected by the attorney-client privilege is advice that is illicit because it gives direction for the commission of future fraud or crime. The advice must relate to future illicit conduct by the client; it is the causa pro causa, the advice that leads to the deed.*¹³³

This case demonstrates that in the Third Circuit successful invocation of the crime-fraud exception is difficult. The Third Circuit's test is satisfied only if the advice "is meant to facilitate" or "gives direction for the commission" of criminal or fraudulent actions by the clients—a much higher standard than "a close

126. See *Haines v. Liggett Grp. Inc.*, 975 F.2d 81, 90 (3d Cir. 1992).

127. 975 F.2d 81 (3d Cir. 1992).

128. See *Haines*, 975 F.2d at 90.

129. *Id.* at 84-85.

130. *Id.* at 85.

131. *Id.*

132. *Id.* at 86.

133. *Id.* at 90 (emphases added).

relationship” standard.¹³⁴ The Second and Eighth Circuits follow a similarly stringent test.¹³⁵

In addition to being arguably out of step with the more lenient tests in other circuits that are discussed above,¹³⁶ this “facilitate or direct” test appears to suggest that some measure of knowledge of wrongdoing or intent to facilitate wrongdoing by the attorney is required for the exception to apply. Such a requirement not only is contrary to the well-settled rule that it is the intent and actions of the client, not the attorney, that govern whether the exception should apply¹³⁷ but also is inconsistent with the policy grounds upon which the exception is based.¹³⁸ If the crime-fraud exception can be applied only when the attorney participates in or even knows of the client’s crime or fraud, then it could not be applied in cases, such as the Manafort and Lewinsky cases described above,¹³⁹ when an attorney’s services are being used to provide false information in a court case or to the government—an untenable result. For that reason alone, the language from the Third Circuit that is highlighted above should not be read literally, and courts in the Second, Third, and Eighth Circuits should take care not to permit a too-restrictive test for application of the crime-fraud exception to allow clients to give false testimony or submit false and misleading information to the government.

D. *Pennsylvania: An Especially Stringent Test*

As recognized by the Pennsylvania Superior Court in the Penn State Three cases that are discussed above, the Supreme Court of Pennsylvania has adopted an especially stringent test for application of the crime-fraud exception in Pennsylvania state court cases.¹⁴⁰ In *In re Investigating Grand Jury of Philadelphia County*,¹⁴¹ the Pennsylvania Supreme Court recognized that “[t]he privilege does not protect communications made for the purpose *or in the course of* the commission of proposed crime or fraud.”¹⁴² On its face, this definition would appear to be quite broad, particularly the recognition in the emphasized clause that communications “in the course of” an ongoing crime or fraud (presumably including a conspiracy to cover up past crimes and ongoing

134. Compare *id.* at 90 (“The communication condemned and unprotected . . . is advice that is illicit because it gives direction for the commission of future fraud or crime.”), with *In re Grand Jury Proceedings #5*, 401 F.3d 247, 251 (4th Cir. 2005) (“[T]he privileged material [must] bear a close relationship to the client’s exiting or future scheme to commit a crime or fraud.”).

135. See *In re BankAmerica Corp. Sec. Litig.*, 270 F.3d 639, 642 (8th Cir. 2001) (stating that the communication must be “made in furtherance of the client’s alleged crime or fraud”); *Roe I*, 68 F.3d 38, 40 (2d Cir. 1995) (stating that the communication must be in “furtherance” of the crime).

136. See *supra* Parts III.A–B.

137. See *supra* notes 14–16 and accompanying text.

138. See *supra* notes 11–13 and accompanying text.

139. See *supra* Parts II.A–B.

140. See *supra* Part II.C.

141. 593 A.2d 402 (Pa. 1991).

142. *In re Investigating Grand Jury of Phila. Cnty.*, 593 A.2d at 406 (emphasis added).

obstruction of justice, as was alleged by the Attorney General's Office in the Penn State Three case) would be subject to the exception.¹⁴³

The Pennsylvania Supreme Court went on, however, to set a high evidentiary bar for application of the exception, especially in a case involving an alleged ongoing "cover-up" of past criminal misconduct:

The Commonwealth's claim of abuse requires us in the first instance to reject outright the bank president's grand jury testimony . . . and to accept its own characterization of the testimony as an "implausible cover-up". Simply stated, [if] the Commonwealth believes it is so, then it must be so. But, *two conclusions conceivably may be drawn from that same evidence*—that suggested by the Commonwealth, and that argued by the Petitioners. *That is insufficient to satisfy the requisite burden of proof placed upon the Commonwealth to produce prima facie evidence that the communications were made in the course of the commission of a proposed crime or fraud.*¹⁴⁴

The Pennsylvania Supreme Court's refusal to apply the crime-fraud exception when two different conclusions "conceivably may be drawn" from the evidence before the court places an exceptionally high burden on the party seeking to invoke the crime-fraud exception. When that approach is applied to a case involving allegations of a "cover-up" of illegal conduct, where by definition much of the evidence may be hidden or even destroyed by the parties engaged in the cover-up, it makes it very difficult for the prosecution to have confidence that it will be able to satisfy its burden of proof—production of prima facie evidence that the communications were made in the course of an ongoing crime or fraud.¹⁴⁵ In this regard, the Pennsylvania Supreme Court's approach to the crime-fraud exception is arguably even more stringent than the most stringent of the differing federal court approaches summarized above.¹⁴⁶ As discussed below, the Pennsylvania Supreme Court's very strict evidentiary test for application of the crime-fraud exception could explain why the Pennsylvania Attorney General's Office did not pursue a crime-fraud exception argument in the Penn State Three case.

CONCLUSION: DOES THE PENN STATE THREE CASE DEMONSTRATE THAT COURTS NEED TO ADOPT A NEW TEST FOR APPLICATION OF THE CRIME-FRAUD EXCEPTION TO "COVER-UP" CASES?

The allegations of perjury, conspiracy, and obstruction of justice in the cases that the Pennsylvania Attorney General's Office brought against the Penn State Three, as well as the conclusions reached by former FBI Director Louis Freeh in

143. See *infra* Conclusion for an analysis of how the potential application of the crime-fraud exception to an alleged ongoing conspiracy to cover up past criminal conduct is the key issue in evaluating the application of the exception to the Penn State Three case.

144. *In re Investigating Grand Jury of Phila. Cnty.*, 593 A.2d at 407 (emphasis added).

145. See Galanek, *supra* note 13, at 1125 (discussing "The Evidentiary Threshold" for application of the crime-fraud exception).

146. See *supra* Parts III.A–C for a discussion of the different approaches of the Second, Third, Fourth, Fifth, Eighth, Ninth, Tenth, and D.C. Circuits.

his report, at a minimum raise the question of whether, if those allegations and conclusions had merit, the crime-fraud exception should have applied to the cases. For reasons that remain unknown, however, the crime-fraud exception was not invoked by the Pennsylvania Attorney General's Office in its prosecution of the cases, despite the prosecution's allegations of "a conspiracy of silence" and an ongoing effort to cover up prior criminal activity by the defendants.¹⁴⁷

While the public record does not answer this important question, analysis of the case law that is discussed above suggests that perhaps the reason the prosecution never sought to utilize the crime-fraud exception may stem from the Pennsylvania Supreme Court's especially stringent test for when the crime-fraud exception applies. It may be that the prosecution concluded that it would not have been able to meet the requirements of Pennsylvania's¹⁴⁸ stringent test because "two conclusions conceivably may be drawn from th[e] same evidence"¹⁴⁹ regarding the conduct of Spanier, Schultz, and Curley. Based on the publicly available record, it may have been difficult for the prosecution to "produce prima facie evidence" that not only proved that the communications with Baldwin were in the course of an ongoing cover-up but also rebutted the other conclusion that "conceivably may be drawn from that same evidence"¹⁵⁰—the defendants' ardent protestations that no crimes had occurred and no cover-up had taken place.¹⁵¹

The D.C. Circuit's "reasonable relationship" or "nexus" test, in contrast, would be an easier test for the prosecution to satisfy.¹⁵² Under the Pennsylvania Supreme Court's crime-fraud exception test, however, proving that there was only one conceivable conclusion that could be drawn from the evidence may have been seen as too difficult an obstacle for the prosecution to overcome. If that was the reasoning behind the prosecution's decision not to assert a crime-fraud exception argument, it might have been a prudent tactical legal

147. In its opinion in Schultz's case, the Pennsylvania Superior Court noted that "[t]he Commonwealth did not raise any argument that Ms. Baldwin could testify regarding any privileged communications as a result of the crime-fraud exception to the attorney-client privilege." *Commonwealth v. Schultz*, 133 A.3d 294, 306 n.13 (Pa. Super. Ct. 2016). The court then cited *In re Investigating Grand Jury of Philadelphia County*, 593 A.2d 402 (Pa. 1991), for the proposition that the "crime-fraud exception excludes from protection those communications between an attorney and client that are made for the purpose of committing a crime or fraud." *Schultz*, 133 A.3d at 306 n.13. Whether this statement and citation were intended to signal that the Pennsylvania Superior Court questioned whether the crime-fraud exception should have been invoked is a matter of speculation, but it would seem to suggest that the court at least recognized the possibility that the crime-fraud exception might be relevant to the case. *See id.*

148. In addition to the Pennsylvania Supreme Court authority on the crime-fraud exception that is discussed in Part III.D *supra*, prosecutors in the Pennsylvania Attorney General's Office may have been concerned about the persuasive impact of the Third Circuit's very stringent test for application of the exception, also discussed in Part III.C *supra*.

149. *In re Investigating Grand Jury of Phila. Cnty.*, 593 A.2d at 407.

150. *See id.*

151. *See supra* notes 76–77 and accompanying text.

152. *See supra* notes 26–38, 120–22 and accompanying text.

judgment by the prosecution, but it does not necessarily reflect either an optimal application of the crime-fraud exception or good public policy.

With respect to this important public policy issue, it is instructive to note two findings reached by the Hearing Committee of the Disciplinary Board of the Supreme Court of Pennsylvania in Baldwin's case.¹⁵³ First, the Hearing Committee's report included a finding of fact that "[t]he individual employees lied to [Baldwin] regarding their prior knowledge of reports regarding certain conduct by Sandusky and the existence of documents responsive to the University's [grand jury] subpoena."¹⁵⁴ Second, in its analysis of the ethical issues surrounding Baldwin's grand jury testimony, the Hearing Committee concluded that the employees' statements to Baldwin had been made "for the expressed purpose of communicating them back to the [Pennsylvania Office of Attorney General]."¹⁵⁵ These two conclusions make the Penn State Three case difficult to distinguish from the efforts to convey false information to government officials in the Manafort and Lewinsky cases that are discussed above.¹⁵⁶

For this reason, the Manafort and Lewinsky cases are instructive on the issue of the application of the crime-fraud exception to the Penn State Three case. Special Counsel Mueller prevailed with his crime-fraud exception argument in the Manafort case based upon an argument that Manafort and Gates had sought to use their attorney to convey false information to the federal government.¹⁵⁷ Manafort and Gates subsequently pled guilty to numerous federal crimes, including conspiracy to violate the Foreign Agents Registration Act—the subject of the legal work that was the focus of the crime-fraud exception case.¹⁵⁸ These subsequent developments support the court's conclusion that application of the crime-fraud exception was appropriate in the Manafort case.

The conclusion is even more clear in the Monica Lewinsky case. Subsequent events demonstrated that Lewinsky had not been truthful in providing information to her attorney for inclusion in a sworn affidavit that she knew would be submitted in a judicial proceeding.¹⁵⁹ The judge in that case concluded, and the D.C. Circuit confirmed, that application of the crime-fraud exception to Lewinsky's communications with her attorney was appropriate.¹⁶⁰

The Pennsylvania Attorney General's Office charged Spanier, Schultz, and Curley with lying in their grand jury testimony about their prior actions in the Sandusky matter and based those charges on testimony of other witnesses, one of whom was subsequently found credible in an independent legal proceeding,¹⁶¹

153. Report and Recommendation of the Hearing Committee, *supra* note 97, at 41.

154. *Id.* at 40.

155. *Id.* at 32–33.

156. *See supra* Parts II.A–C.

157. *See supra* notes 26–38 and accompanying text.

158. *See supra* note 39.

159. *See supra* notes 40–50 and accompanying text.

160. *See supra* notes 46–50 and accompanying text.

161. *See supra* note 64 for an overview of the successful whistleblower case brought by former Penn State assistant football coach and Sandusky investigation witness Mike McQueary.

as well as relevant contemporaneous emails and documentary evidence that initially were not produced in response to grand jury subpoenas.¹⁶² Moreover, as noted above, the Hearing Committee of the Disciplinary Board of the Supreme Court of Pennsylvania found that the three Penn State University officials lied to Baldwin and did so with the intent that false information would be provided to the Pennsylvania Attorney General's Office and its Sandusky grand jury investigation.¹⁶³

In terms of the administration of justice and the application of the crime-fraud exception, it is difficult to make a meaningful distinction between the Manafort and Lewinsky cases and the Penn State Three case. The difference may be that under the Pennsylvania Supreme Court test, unlike the D.C. Circuit test applied in the Manafort and Lewinsky cases, the evidentiary burden is too high for the prosecution to be confident that it can succeed in invoking the crime-fraud exception in Pennsylvania—even in a case involving allegations of a cover-up of subsequently proven sexual abuse of children.

This analysis suggests that the Pennsylvania courts or the state legislature should consider developing a clearer and less stringent test for application of the crime-fraud exception. For example, Pennsylvania could adopt a test that is modeled on the well-developed D.C. Circuit test that has proved effective in a wide range of circumstances, including the Manafort and Lewinsky cases described above.¹⁶⁴ An approach like the Third Circuit test, which requires showing that the lawyer's advice is intended to facilitate or direct the client's commission of a crime or fraud,¹⁶⁵ is too high a burden and might allow the privilege to protect communications, like those in the Manafort and Lewinsky cases, that are meant to mislead and deceive courts and governmental authorities.

Similarly, the Pennsylvania Supreme Court's requirement that use of the attorney's advice to facilitate or cover up a crime or fraud must be the only plausible interpretation of the evidence¹⁶⁶ also sets the bar too high, as perhaps was illustrated by the prosecution's decision not to invoke the crime-fraud exception in the Penn State Three case. Instead, the test for application of the

162. See *supra* notes 69–70 and accompanying text.

163. See *supra* notes 154–55 and accompanying text. In this regard, it is particularly important to note that the Hearing Committee found that:

Here the individual employees had obstructed justice by failing to produce responsive documents they knew existed with intent to prevent themselves from being incriminated. They did so by lying to Respondent [Baldwin] with the understanding that she would knowingly use their denials of additional information in responding to the subpoena for the University and them, which is precisely what she did: She responded to a lawful subpoena in her capacity as their lawyer and an officer of the court by unwittingly transmitting their lies as truth.

Report and Recommendation of the Hearing Committee, *supra* note 97, at 31–32. This finding supports the conclusion that the crime-fraud exception should have applied to the Penn State Three cases in the same manner as it did in the Manafort and Lewinsky cases.

164. See *supra* Parts II.A–B.

165. See *supra* Part III.C.

166. See *supra* Part III.D.

crime-fraud exception should be based upon credible evidence of the client's intentional misuse of the attorney-client relationship, particularly when the misuse of the attorney's services is intended to interfere with the administration of justice or cover up an ongoing course of criminal conduct, such as a conspiracy to obstruct justice. This approach strikes a proper balance between the important policy interests underlying the attorney-client privilege and the work-product doctrine, while ensuring that clients cannot lie to or conceal information from their attorney and by so doing use the legal services of an unwitting attorney to further their efforts to obstruct justice and cover up past criminal activity.