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ATTORNEY-CLIENT PRIVILEGE-CRIME-FRAUD EXCEPTION-USE OF IN CAMERA REVIEW

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ATTORNEY–CLIENT PRIVILEGE—CRIME-FRAUD EXCEPTION—USE OF *IN CAMERA* REVIEW

In re Grand Jury Subpoena, 745 F.3d 681 (3d Cir. 2014).

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I. INTRODUCTION

Between 2007 and 2009, five companies hired an unnamed consulting corporation ("Corporation") located in Pennsylvania to assist them in obtaining funds for oil and gas projects from a United Kingdom financial institution ("Bank").[1] For all of these projects, a single official at the Bank, ("Banker"), managed the financing processes.[2] During that time, the president of Corporation ("Client") had a working relationship with an independently practicing attorney ("Attorney") who was permitted to work in Corporation's office rent-free in exchange for periodically providing Client with advice on basic legal matters.[3] In April 2008, Client consulted Attorney about problems arising from one of the projects.[4] After explaining that Banker was threatening to slow down the approval process, Client expressed his intention to pay Banker to ensure the

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1. *In re* Grand Jury Subpoena, 745 F.3d 681, 685 (3d Cir. 2014). The Bank is headquartered in the United Kingdom and is owned by various foreign countries. *Id.*

2. *Id.*

3. *Id.*

4. *Id.*

project's timely advancement.[5] Attorney's preliminary research revealed that such a payment might violate the Foreign Corrupt Practices Act ("FCPA").[6] Attorney asked Client questions concerning the Bank and Banker's association with the government.[7] Although Attorney was uncertain whether the planned action was legal or illegal, he advised Client not to make the payment to the Banker.[8] Client then told Attorney that he would make the payment anyway and continued to assert that such action was not illegal under the FCPA.[9] Attorney provided Client with a copy of the FCPA and their working relationship ended.[10] Corporation was ultimately successful in obtaining financing from the Bank for two of the five projects and received roughly $8 million in success-fees.[11] Between 2008 and 2009, within months of the success-fee payments, Corporation paid a total of $3.5 million to Banker's sister, who had no working connections with the Bank or any of the financing projects.[12]

The Bank initiated an internal investigation of the transactions between Client, Corporation, and Banker's sister in February 2010.[13] The Overseas Anti-Corruption Unit soon became involved and informed the Federal Bureau of Investigation, which began its own investigation of Client and Corporation.[14] Banker and Banker's sister were subsequently arrested in the United Kingdom and are currently part of an ongoing prosecution.[15] Client and Corporation became the subjects of a grand jury investigation in the Eastern District of Pennsylvania concerning alleged violations of the FCPA.[16] The grand jury served Attorney with a subpoena in order to compel him to testify before the grand jury concerning his conversation with

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5. *Id.*

6. *Id.* The FCPA was enacted in 1977 to prevent United States citizens from bribing foreign officials to achieve or protect a commercial interest. BLACK'S LAW DICTIONARY (9th ed. 2009), *available online at* Westlaw BLACKS (definition of Foreign Corrupt Practices Act). It also requires certain United States companies to comply with particular accounting practices. *Id.*

7. *In re Grand Jury Subpoena*, 745 F.3d at 685. Attorney "asked Client whether the Bank was a governmental entity and whether Banker was a government official." *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 686.

14. *Id.*

15. *Id.*

16. *Id.* at 684.

Client.[17] The Government moved to enforce the subpoena on June 18, 2012, arguing that any protection under the attorney–client privilege was defeated by the crime-fraud exception.[18] On September 4, 2012, Client and Corporation (together "Intervenors") successfully moved to intervene.[19]

After briefing, the United States District Court for the Eastern District of Pennsylvania determined that it would hold an *in camera* review on January 8, 2013, with Attorney and Attorney's counsel to determine whether the crime-fraud exception applied to the privileged communications between Attorney and Client.[20] The District Court allowed the Government and Intervenors to submit questions for the Attorney but precluded both parties from the review and denied Intervenors' request for a release of the transcript of the *in camera* testimony.[21] On January 18, 2013, the District Court granted the motion to compel Attorney's testimony under the crime-fraud exception, reasoning that the Government's ex parte affidavit, and the *in camera* testimony created a "reasonable basis to suspect that Intervenors intended to commit a crime when Client consulted Attorney and could have used the information gleaned from the consultation in furtherance of the crime."[22] On appeal, Intervenors challenged the standard the District Court used to determine whether to conduct an *in camera* review, the decision to hold the *in camera* review, the procedures it used to limit their access to the review and the final determination that the crime-fraud exception applied.[23] The District Court granted a stay of the order compelling Attorney's testimony until the conclusion of the

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17. *Id.* at 686.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* Both parties submitted questions for the District Court to ask Attorney during the *in camera* review. *Id.*

22. *Id.*

23. *Id.* at 687, 691. Intervenors also argued that the *in camera* examination of Attorney violated the separation of powers doctrine. The Third Circuit notes that this claim

> plainly misunderstands the roles of the grand jury in investigating independently from any branch of government and of the district court in ensuring that the grand jury does not infringe upon common law privileges. . . . The District Court was fulfilling its obligation to check the grand jury's investigative power by reviewing the grand jury subpoena in order to protect the attorney-client privilege.

Id. at 694 n.2.

appeal.[24] On appeal to the United States Court of Appeals for the Third Circuit, the court *held*, affirmed.[25] The use of *in camera* review and the final determination that the crime-fraud exception applies are proper because: (1) the standard in *United States v. Zolin*[26] was properly applied to determine whether *in camera* review of live witness testimony is necessary to establish the crime-fraud exception, (2) the District Court was within its discretion in limiting Intervenors' access to the *in camera* testimony, and (3) the District Court acted within its discretion in ultimately concluding that Client intended to commit a crime at the time of the consultation and used the information divulged in furtherance of the crime. [27] *In re Grand Jury Subpoena*, 745 F.3d 681 (2014).

II. ISSUE: ATTORNEY–CLIENT PRIVILEGE AND THE CRIME-FRAUD EXCEPTION

The fundamental issue in *In re Grand Jury Subpoena* concerns the appropriate process for applying the crime-fraud exception to the

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24. *Id.* at 686.

25. *Id.* at 694.

26. 491 U.S. 554, 572 (1989) (holding that the party seeking to use *in camera* review must demonstrate "'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" (quoting Caldwell v. District Court, 644 P.2d 26, 33 (Colo. 1982) (citation omitted)).

27. *In re Grand Jury Subpoena*, 745 F.3d at 689–92. The Third Circuit also held that it had jurisdiction over the appeal and that protection under the work-product doctrine does not apply to the communication in question. *Id.* at 686–87, 694. Usually, under the Collateral Order Doctrine, appellate courts only have jurisdiction over the final decisions of the district courts. *Id.* at 686 (citing 28 U.S.C. § 1291 (2006)). Thus, orders to produce documents or to compel witness testimony are not immediately appealable, and the objecting witness "'must refuse compliance, be held in contempt, and then appeal the contempt order.'" *Id.* (quoting *In re* Grand Jury, 705 F.3d 133, 143 (3d Cir. 2012) [hereinafter *ABC Corp.*]). However, there is an exception to this rule under *Perlman v. United States*, when a "disinterested third party who is likely to disclose the information rather than be held in contempt" holds the privileged information. *ABC Corp.*, 705 F.3d at 138 (citing Perlman v. United States, 247 U.S. 7 (1918)). Since Attorney qualifies as a disinterested third party, immediate appeal is available in this case. *In re Grand Jury Subpoena*, 745 F.3d at 686. The Third Circuit also concluded that the work-product privilege did not apply because the Intervenors could not assert the privilege on behalf of Attorney, and the statements were not made "in the course of preparation for possible litigation." *Id.* at 694 (quoting Hickman v. Taylor, 329 U.S. 495, 505 (1947)). Furthermore, a finding of crime-fraud waives both the attorney–client privilege and the work-product privilege. *Id.* Since these two issues were only briefly addressed by the court and are ancillary to the focus of this case note, they will not be examined in depth.

attorney–client privilege.[28] The Supreme Court has stated that the party seeking to overcome the attorney–client privilege must make a prima facie showing that the crime-fraud exception applies.[29] Nevertheless, the circuit courts have been split as to the burden of proof required for such a showing.[30] In *United States v. Zolin*, the Supreme Court established an alternative path to attaining the crime-fraud exception: *in camera* review of privileged documents to determine whether the exception applies.[31] In addition to requiring a threshold showing for the necessity of *in camera* review, the Supreme Court noted three concerns that must be considered before allowing an *in camera* review: (1) erosion of the privilege that is aimed at fostering disclosure between attorney and client, (2) due process implications, and (3) additional burdens on the district courts.[32] The Court in *Zolin*, however, addressed the standard of proof required to allow *in camera* review of privileged *documents* and did not specifically reference *oral testimony*.[33] In *In re Grand Jury Subpoena*, the Third Circuit had to address whether the *Zolin* standard also applied to determine whether *in camera* review of unmemorialized oral exchanges was required, the appropriate procedures for executing that review in light of the grand jury proceedings, and the District Court's final decision that the crime-fraud exception applied to the communications at issue.[34]

III. DEVELOPMENT OF THE ATTORNEY–CLIENT PRIVILEGE

The attorney–client privilege, recognized as early as 1577, has often been distinguished as one of the oldest evidentiary privileges in the history of English law.[35] The privilege protects confidential

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28. *Id.* at 687. Judge Fisher specifies that the opinion will review the various legal issues concerning the application of the crime-fraud exception to the attorney–client privilege. *Id.*

29. Clark v. United States, 289 U.S. 1, 14 (1933); *see also* Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 354 (1985).

30. David M. Greenwald, *Protecting Confidential Legal Information: A Handbook for Analyzing Issues Under the Attorney–Client Privilege and Work Product Doctrine*, SL081 A.L.I.-A.B.A. 889, 996–98 (2006) (explaining the different burdens of proof required by the prima facie case standard).

31. 491 U.S. at 572.

32. *Id.* at 571.

33. *In re Grand Jury Subpoena*, 745 F.3d at 688 (citing *Zolin*, 491 U.S. at 574).

34. *Id.* at 687 ("We explore the contours of *in camera* review and the ultimate crime-fraud finding in this appeal.").

35. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 5:13 (4th ed. 2014) (citing Berd v. Lovelace, 21 Eng. Rep. 33 (1577); Dennis v. Codrington, 21 Eng. Rep. 53 (1580)); *see also* Upjohn Co. v. United States, 449 U.S.

communications between an attorney and client made for the purpose of obtaining or providing legal advice.[36] The Supreme Court has stated that the purpose of the privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."[37] The modern reasoning[38] behind the attorney–client privilege is grounded in utilitarianism.[39] Without the assurance of confidentiality, a client would be deterred from disclosing important information to the attorney and may even be dissuaded from seeking legal advice in the first place.[40] Attorneys, in turn, would not be able to defend the client efficiently, as they might miss out on valid claims or defenses and could be surprised at trial by new evidence against their client.[41] Nevertheless, the privilege may sometimes obstruct the disclosure of certain information that is relevant to the issue before the court.[42] Therefore, the Supreme Court has held that the privilege should be construed narrowly in order to assure it does not create an obstacle to the truth seeking process of the courts.[43] Although many common law evidentiary

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383, 389 (1981) ("The attorney–client privilege is the oldest of the privileges for confidential communications known to the common law.").

36. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (2000).

37. *Upjohn Co.*, 449 U.S. at 389.

38. Edward J. Imwinkelried & Andrew Amoroso, *The Application of the Attorney–Client Privilege to Interactions Among Clients, Attorneys, and Experts in the Age of Consultants: The Need for a More Precise, Fundamental Analysis*, 48 HOUS. L. REV. 265, 267 (2011) (explaining that the original motivation behind the privilege was to protect "the oath and the honor of the attorney").

39. MUELLER & KIRKPATRICK, *supra* note 35, at § 5:13.

40. *Id.* (citing Fisher v. United States, 425 U.S. 391, 403 (1976) (explaining that the purpose of the privilege "is to encourage clients to make full disclosure to their attorneys").

41. *Id.* (citing Ronald J. Allen et al., *A Positive Theory of the Attorney–Client Privilege and the Work Product Doctrine*, 19 J. LEGAL STUD. 359, 374–83 (1990) (explaining that the "privilege is necessary to allow clients to assert 'contingent claims' whose existence depends on disclosure of unfavorable information about client")).

42. *Id.*; *see also* Haines v. Liggett Grp., Inc., 975 F.2d 81, 84 (3d Cir. 1992) ("[S]ince the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose."); Greenwald, *supra* note 30, at 898 ("Because the privilege obstructs the search for truth, however, it is construed narrowly.").

43. *Fisher*, 425 U.S. at 403 (explaining that since the privilege has the effect of withholding relevant information, it applies "only where necessary to achieve its purpose" and "protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege").

rules were eventually codified by the adoption of the Federal Rules of Evidence in 1975, Congress chose not to codify the attorney–client privilege, which allowed the federal courts to continue to shape the parameters of the privilege through common law.[44]

A. The Crime-Fraud Exception

Once the attorney–client privilege is determined to apply to a particular communication, an opponent may claim certain exceptions that will negate the privilege.[45] One exception,[46] long recognized at common law,[47] applies when the privileged communication was used to commit or further a plan to commit a crime or fraud.[48] As Justice Cardozo explained, "The

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44. Timothy P. Glynn, *Federalizing Privilege*, 52 AM. U. L. REV. 59, 87–88 (2002). In 1975, Congress declined to adopt Article V, which would have codified the attorney–client privilege. *Id.* Instead, Congress chose to enact Federal Rule of Evidence 501, which states as follows:

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

FED. R. EVID. 501. Accordingly, the federal law of privilege will generally apply in federal courts but state law will apply when the case involves a civil claim or defense for which the state law provides the rule of decision. Brian Sheppard, Annotation, *Views of the United States Supreme Court as to Attorney–Client Privilege*, 159 A.L.R. FED. 243, § 5 (2000); *see also* Glynn, *supra* at 91.

45. *See generally* Sheppard, *supra* note 44.

46. Other recognized privileges include a spousal testimonial privilege, a spousal confidential communications privilege, a clergyman–penitent privilege, and qualified privileges for trade secrets, secrets of state, and informer's identity. Some federal courts also recognize a privilege for political vote and recently, a highly qualified journalist's privilege. MUELLER & KIRKPATRICK, *supra* note 35, at § 5:4.

47. *See* Clark v. United States, 289 U.S. 1, 14–15 (1933); Alexander v. United States, 138 U.S. 353, 358–59 (1891).

48. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 82 (2000). *See generally* Deborah F. Buckman, Annotation, *Crime-Fraud Exception to Work Product Privilege in Federal Courts*, 178 A.L.R. FED. 87 (2002). Some courts have also expanded the crime-fraud exception to apply to torts. *See* Glynn, *supra* note 44, at

[attorney–client] privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law."[49] This exception applies whether or not the attorney is aware that his or her legal advice is being used for wrongful purposes.[50] Generally, the crime-fraud exception applies only when the advice relates to future wrongdoing, not past illegal actions.[51] However, the exception may terminate the privilege when the communications concern efforts to cover up past illegal conduct or obstruct justice.[52] Like the privilege itself, the exception is supported by utilitarian concerns; if the attorney–client privilege could be used to hide the furtherance of criminal, fraudulent, or other wrongful acts, society would be harmed by that protection.[53]

The Supreme Court has elaborated on the application of the crime-fraud exception in a few cases.[54] In 1933, in *Clark v. United States*, the Court explained that the party seeking the crime-fraud exception must make a prima facie showing that the client used the attorney's advice to further a crime or fraud.[55] In 1989, in *United States v. Zolin*, the Supreme Court noted the uncertainty as to the exact interpretation of the "prima facie case" requirement in *Clark*.[56] Because the phrase prima facie, as used in civil cases, involves

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

50. United States v. Weingold, 69 F. App'x 575, 578 (3d Cir. 2003) (even if attorney is innocent, the crime-fraud exception may still apply to waive the privilege); *In re* Grand Jury Proceedings, 87 F.3d 377, 381–82 (9th Cir. 1996) [hereinafter *California Corporation*] (privilege is lifted even though attorney was unaware of the criminal activity); *In re* Grand Jury Investigation, 842 F.2d 1223, 1227 (11th Cir. 1987) [hereinafter *Schroeder*] (crime-fraud exception applies whether or not attorney is aware of client's improper purpose).

51. United States v. Zolin, 491 U.S. 554, 562–63 (1989) (citing 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2298, 573 (McNaughton ed. 1961)).

52. Greenwald, *supra* note 30, at 995 (citing *In re* Fed. Grand Jury Proceedings, 938 F.2d 1578 (11th Cir. 1991); Duttle v. Bandler & Kass, 127 F.R.D. 46 (S.D.N.Y. 1989)).

53. Glynn, *supra* note 44, at 113 (citing Note, *Developments in the Law – Privileged Communications*, 98 HARV. L. REV. 1501, 1508–10 (1985)) (discussing why, from a utilitarian perspective, attorney–client communications intended to further a crime or fraud should not be privileged).

54. *See* Sheppard, *supra* note 44, at § 11 (summarizing cases where the Supreme Court has mentioned the crime-fraud exception to the attorney–client privilege).

55. 289 U.S. 1, 15 (1933).

56. *Zolin*, 491 U.S. at 563 n.7.

shifting the burden from one party to the opposing party who is then allowed a rebuttal, such a process is implied by its use.[57] However, in practice, not all courts ensure that the opposing party has a right to a rebuttal.[58]

In addition to the unclear standard on allowing a rebuttal, the circuit courts have also assigned varying burdens of proof required to meet the prima facie case.[59] The First, Second, Third, Sixth, and Ninth Circuits all require the party seeking to invoke the crime-fraud exception to establish "probable cause or a reasonable basis to suspect or believe that the client was committing or intending to commit a crime or fraud and that the attorney–client communications were used in furtherance of the alleged crime or fraud."[60] The Fifth and Seventh Circuits follow the traditional definition of prima facie as noted in the fourth edition of Black's Law Dictionary, requiring "[evidence] [s]uch as will suffice until contradicted and overcome by other evidence . . . [a] case which has proceeded upon sufficient proof to that stage where it will support [a] finding if evidence to the contrary is disregarded."[61] Under this standard, the party seeking to invoke the crime-fraud exception must present evidence that would establish a crime or fraud if unrebutted.[62] The Fourth, Eleventh, and District of Columbia Circuits require "evidence that, if believed by a trier of fact, would establish the elements of some violation that was ongoing or about to

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57. *Id.* at 563–64 (citing Gardner, *The Crime of Fraud Exception to the Attorney–Client Privilege*, 47 A.B.A.J. 708, 710–11 (1961); Note, 51 BROOKLYN L. REV. 913, 918–19 (1985)) ("The *prima facie* standard is commonly used by courts in civil litigation to *shift* the burden of proof from one party to the other. In the context of the fraud exception, however, the standard is used to dispel the privilege altogether *without* affording the client an opportunity to rebut the *prima facie* showing.").

58. *Id.*

59. *See* ABC Corp., 705 F.3d 133, 152 (3d Cir. 2012) ("[C]ourts of appeals are divided as to the appropriate quantum of proof necessary to make a *prima facie* showing.").

60. *Id.* (citing *In re* Grand Jury Proceedings, 417 F.3d 18, 23 & n.4 (1st Cir. 2005) [hereinafter *Massachusetts Attorney*]; United States v. Jacobs, 117 F.3d 82, 87 (2d Cir. 1997); United States v. Collis, 128 F.3d 313, 321 (6th Cir. 1997); California Corporation, 87 F.3d 377, 381 (9th Cir. 1996)).

61. *In re* Int'l Sys. & Controls Corp. Sec. Litig., 693 F.2d 1235, 1242 (5th Cir. 1982) (citing BLACK'S LAW DICTIONARY (4th ed. 1968)); *see also* United States v. B.D.O. Seidman, LLP, 492 F.3d 806, 818 (7th Cir. 2007) (the evidence must be sufficient to require the opposing party to offer an explanation and the privilege will remain if the explanation is acceptable).

62. United States v. Boender, 649 F.3d 650, 655–56 (7th Cir. 2011); *In re* Grand Jury Subpoena, 419 F.3d 329, 336 (5th Cir. 2005) [hereinafter *Louisiana Attorney*].

be committed."[63] These varying interpretations are not unexpected since, "'[p]rima facie' is among the most rubbery of all legal phrases; it usually means little more than a showing of whatever is required to permit some inferential leap sufficient to reach a particular outcome."[64] Despite recognizing these discrepancies, the Supreme Court has yet to dictate a more specific requirement for the burden of proof necessary to establish the crime-fraud exception.[65]

Hidden beneath the varying interpretations of the ultimate burden of proof, there is some agreement among the circuits concerning the elements needed to establish the crime-fraud exception.[66] The application of the crime-fraud exception to the attorney–client privilege requires evidence of two elements: (1) The client was planning a future crime or fraud or currently committing a crime or fraud when he or she consulted the attorney, and (2) the attorney's advice was used in furtherance of that crime or fraud.[67] Therefore, the exception turns on two factors: the intent of the client to commit or continue a wrongful act,[68] and the client's use of the attorney's advice to commit the act.[69] Circuit courts have generally agreed that the required intent must exist at the time the client consulted the attorney.[70] Furthermore, the client must know, or

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63. *In re* Grand Jury Proceedings #5, 401 F.3d 247, 251 (4th Cir. 2005) (citing *In re* Sealed Case, 754 F.2d 395, 399 (D.C. Cir. 1985) [hereinafter *District of Columbia Attorneys*]; *In re* Int'l Sys. & Controls Corp. Sec. Litig., 693 F.2d at 1242; *In re* Sealed Case, 676 F.2d 793, 815 (D.C. Cir. 1982)).

64. *Massachusetts Attorney*, 417 F.3d at 22–23 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); BLACK'S LAW DICTIONARY 1228 (8th ed. 2004)).

65. Glynn, *supra* note 44, at 114 (describing the failure of the Court in *Zolin* to clarify the burden of proof necessary to lift the privilege and the resulting disparate standards in the lower courts).

66. *Id.* at 132.

67. ROBERT E. JONES ET AL., RUTTER GROUP PRACTICE GUIDE: FEDERAL CIVIL TRIALS AND EVIDENCE, 8:3556 (2013 ed.).

68. Courts will usually examine extrinsic evidence of the client's intent at the time of the consultation, whereas the intent of the attorney is irrelevant. *See* Greenwald, *supra* note 30, at 994–95 (citing United States v. Weingold, 69 Fed. App'x 575, 578 (3d Cir. 2003); *In re* BankAmerica Corp. Sec. Litig., 270 F.3d 639, 643 (8th Cir. 2001); California Corporation, 87 F.3d 377, 381–82 (9th Cir. 1996); Schroeder, 842 F.2d 1223 (11th Cir. 1987)).

69. JONES ET AL., *supra* note 67.

70. *In re* Grand Jury Subpoenas, 144 F.3d 653, 660 (10th Cir. 1998) [hereinafter *Jane Roe*] (citing *Schroeder*, 842 F.2d at 1226); United States v. Jacobs, 117 F.3d 82, 88 (2nd Cir. 1997) (explaining that for the advice to be used in furtherance of the crime, the client must have formed the intent before consulting counsel); *California Corporation*, 87 F.3d at 381 (client must intend to commit the illegal act when it sought the advice); District of Columbia Attorneys, 754 F.2d 395,

should reasonably have known, that his intended action was illegal.[71] Once intent is established, the second element requires some level of relationship between the advice and the crime or fraud.[72]The appellate courts have established various requirements for the extent of relatedness necessary to apply the crime-fraud exception.[73] The Second Circuit requires a "purposeful nexus" which is more than a "relevant evidence" test, the Fourth and Eighth Circuits require a "close relationship," the Fifth and D.C. Circuits require the advice to be "reasonably related" to the crime or fraud, and the Ninth and Tenth Circuits require only that there be "some relationship" or a "potential relationship."[74] Although the appellate courts differ slightly in their wording of the "in furtherance" element, generally the prima facie case must support a reasonable conclusion that the advice was used to commit the wrongful act as opposed to merely being related to the wrongful act.[75]

The discrepancies between the circuits concerning the prima facie case requirements have led to due process concerns[76] when the party opposing the crime-fraud exception is denied a chance to rebut the courts finding of that exception.[77] Many circuits hold that once a

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399 (D.C. Cir. 1985) (client must have the intent when it sought advice of counsel).

71. PAUL R. RICE ET AL., ATTORNEY–CLIENT PRIVILEGE IN THE UNITED STATES § 8:6 (2013–2014 ed. 2013).

72. *Id.* at § 8:14.

73. *Id.*

74. *Id.*

75. Greenwald, *supra* note 30, at 998; *see also* United States v. White, 887 F.2d 267, 271 (D.C. Cir. 1989) ("It does not suffice that the communications may be related to a crime."); *In re* Antitrust Grand Jury, 805 F.2d 155, 168 (6th Cir. 1986) (being merely related to the crime is not enough to invoke the crime-fraud exception); Pritchard-Keang Nam Corp. v. Jaworski, 751 F.2d 277, 283 (8th Cir. 1984) (the advice must be used to commit the illegal activity and be closely related to it).

76. Because the Sixth Amendment requires confidentiality of communications between an attorney and client, opponents of the crime-fraud exception sometimes also claim that the waiver diminishes their right to adequate representation. MUELLER & KIRKPATRICK, *supra* note 35, at § 5:13 n.25. However, this is not an issue in a grand jury proceeding because parties "cannot claim that their rights to the effective assistance of counsel were infringed because that right does not attach until criminal proceedings with a known defendant have been instituted." *In re* Grand Jury Subpoena 223 F.3d 213, 220 (3d Cir. 2000) [hereinafter *Pennsylvania Attorney*] (quoting *In re* Special September 1978 Grand Jury (II), 640 F.2d 49, 64 (1980) [hereinafter *Special September*]); *see also* Davis v. United States, 512 U.S. 452, 456–57 (1994) (stating that there is a Sixth Amendment right to counsel "only at the initiation of adversary criminal proceedings"); United States v. Gouveia, 467 U.S. 180 (1984) (same general holding).

77. RICE ET AL., *supra* note 71, at § 8:6 ("It is questionable whether [denying a

prima facie case of the crime-fraud exception is established, denying the opposing party a rebuttal does not violate due process.[78] But the Fifth and Seventh Circuit's more traditional definition of prima facie seem to imply the right to a rebuttal.[79] In the context of grand jury investigations, concerns for maintaining secrecy have also led several courts to maintain: (1) that refusal to disclose the government's ex parte affidavit submitted to prove the crime-fraud exception does not violate due process in the context of a grand jury proceeding,[80] and (2) that due process is not violated when an opposing party is denied a rebuttal to the prima facie case of crime-fraud.[81] Rather, the lower court could be entrusted to "vigorously test the factual and legal basis for any subpoena."[82] Relatedly, the Supreme Court has ruled that "[a]ny holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws."[83]

B. Use of In Camera *Review to Establish the Crime-Fraud Exception*

In the past, many lower courts followed the *Shewfelt* or "independency test," requiring a submission of evidence independent of the privileged information to invoke the crime-fraud exception.[84] In some situations, however, the evidence needed to establish a prima facie case of the crime-fraud exception is impossible to obtain through independent evidence precisely because the evidence needed

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rebuttal of a prima facie showing of the crime-fraud exception] is consistent with the constitutional right to due process of law.").

78. Jane Roe, 144 F.3d 653, 662 (10th Cir. 1998) (citing *In re* Grand Jury Proceedings, Thursday Special Grand Jury, 33 F.3d 342, 352–53 (4th Cir. 1994) [hereinafter *Thursday Special*]; *In re* John Doe, Inc., 13 F.3d 633, 637 (2d Cir. 1994); *In re* Grand Jury Proceedings, 723 F.2d 1461, 1467 (10th Cir. 1983)).

79. *See* United States v. Boender, 649 F.3d 650, 655–56 (7th Cir. 2011); Louisiana Attorney, 419 F.3d 329, 336 (5th Cir. 2005).

80. *Pennsylvania Attorney*, 223 F.3d at 219 (citing *In re* Grand Jury Subpoena as to C97-216, 187 F.3d 996 (8th Cir. 1999) [hereinafter *Iowa Attorney*]; *Jane Roe*, 144 F.3d at 653; *In re* John Doe, Inc., 13 F.3d at 633; *Thursday Special*, 33 F.3d at 353; *In re* Grand Jury Proceedings, 867 F.2d 539, 540–41 (9th Cir. 1989) [hereinafter *John Doe*]; *Special September*, 640 F.2d at 57).

81. *Pennsylvania Attorney*, 223 F.3d at 215; *In re John Doe, Inc.*, 13 F.3d at 633; *Jane Roe*, 144 F.3d at 653.

82. *Pennsylvania Attorney*, 223 F.3d at 219.

83. United States v. Dionisio, 410 U.S. 1, 17 (1973).

84. 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, 464 (1986).

is protected by the privilege.[85] Because this would create an impossible burden for the enforcement of the crime-fraud exception, courts have since rejected this requirement of independent evidence and, in certain situations, permit the examination of the privileged material itself to determine if the attorney–client privilege was violated.[86]

In *United States v. Zolin*, the Supreme Court held that a court may conduct an *in camera* review of privileged documents to determine if the crime-fraud exception applies to waive the privilege.[87] The Court further qualified that the party seeking the *in camera* review must first make a threshold showing of "a factual basis adequate to support a good faith belief by a reasonable person that [such a] review . . . may reveal evidence to establish the claim that the crime-fraud exception applies."[88] Once a party makes this showing, "the decision whether to engage in an in camera review rests in the sound discretion of the district court."[89] In making this decision, the court may consider any non-privileged, legally obtained information, "even if its evidence is not 'independent' of the contested communications . . . ."[90] If the court conducts an *in camera* review, it then must determine whether the evidence meets the ultimate prima facie standard to invoke the crime-fraud exception.[91]

While noting a potential limitation on the power of the district courts to administer *in camera* reviews under Federal Rule of Evidence 104(a), the Court in *Zolin* reasoned that an absolute bar on the use of *in camera* review would effectively destroy the function of the crime-fraud exception.[92] Because it is easy for a party to claim the attorney–client privilege and it can be restrictively difficult for an opposing party to offer independent proof of the crime-fraud

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85. United States v. Zolin, 491 U.S. 554, 569 (1989).

> No matter how light the burden of proof which confronts the party claiming the exception, there are many blatant abuses of privilege which cannot be substantiated by extrinsic evidence. This is particularly true . . . of . . . situations in which an alleged illegal proposal is made in the context of a relationship which has an apparent legitimate end.

Note, *The Future Crime or Tort Exception to Communications Privileges*, 77 HARV. L. REV. 730, 737 (1964).

86. Fried, *supra* note 84, at 464–65.

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

88. *Id.*

89. *Id.*

90. *Id.* at 574.

91. *Id.* at 572.

92. *Id.* at 565–67.

exception, the use of *in camera* review ensures preservation of the policies behind the privilege and its exception.[93] Alternatively, indiscriminate use of *in camera* review would essentially negate any protection under the attorney–client privilege.[94] The Court concluded, therefore, that a lower standard of proof is required to attain an *in camera* review of privileged material because the intrusion of a judge is less significant than full disclosure to the court.[95] In *Zolin*, the Supreme Court also noted three concerns which should be considered before allowing an *in camera* review of privileged information: (1) erosion of the privilege that is aimed at fostering disclosure between attorney and client, (2) due process implications of routine *in camera* use, and (3) additional burdens on the district courts.[96]

IV. ANALYSIS OF *IN RE GRAND JURY SUBPOENA*

Because the crime-fraud exception to the attorney–client privilege is controlled by the development of common law,[97] this decision is likely to influence federal circuit courts throughout the nation. This is especially possible due to the lack of clarity from the Supreme Court concerning many of the details involved in the application of the attorney–client privilege and its exceptions.[98] The Court's three major holdings were the following: (1) The *Zolin* standard should be used to determine whether a court should conduct an *in camera* review of witness testimony, (2) the district court acted within its discretion in determining the procedures used for limiting the parties' access to the *in camera* review, and (3) the district court acted within its discretion in determining that the crime-fraud exception applied to the communications in question.[99] The reasoning behind the holdings in *In re Grand Jury Subpoena* further illuminate some of the blurry contours surrounding the

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93. *Id.* at 569; *see also* Sheppard, *supra* note 44, at § 12(b) ("[I]t is all too easy . . . to claim the privilege, and it is all too hard for the person opposing the claim to produce evidence independent of the communication of the applicability of the exception.").

94. *Zolin*, 491 U.S. at 570–71.

95. *Id.* at 572.

96. *Id.* at 571.

97. Glynn, *supra* note 44, at 87–88.

98. *See Zolin*, 491 U.S. at 563 n.7 (declining to "decide the quantum of proof necessary" to establish the crime-fraud exception); *see also* Note, *The Attorney–Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464, 479–80 (1977).

99. *In re* Grand Jury Subpoena, 745 F.3d 681, 689–693 (3d Cir. 2014).

proper application of the crime-fraud exception to the attorney–client privilege.

A. Applying the Zolin *Standard to Witness Testimony*

Judge Fisher wrote the opinion for the court and began his analysis by determining whether the *Zolin* standard should be adopted in regard to *in camera* review of unrecorded oral communications.[100] First, the Third Circuit opinion noted that since the Supreme Court did not exclude oral examinations from the scope of the holding in *Zolin*, applying the standard in the case of oral testimony was not unreasonable.[101] In analyzing this issue, Judge Fisher next raised three concerns, mentioned by the Supreme Court, that had to be weighed before allowing an *in camera* review: "erosion of the privilege that is aimed at fostering disclosure between attorney and client, due process implications, and additional burdens on the district courts."[102] An additional concern was raised by Intervenors and considered by the Court: "The malleability of witness recollections."[103]

Judge Fisher addressed the concern for deterioration of the attorney–client privilege by simply stating: "[A] district court's examination of a witness does no more to erode the protection than examination of written or recorded communications."[104] Although seemingly conclusory, Judge Fisher then emphasized that an equal standard for documents and witness testimony encourages "equal accountability," whether the communications are spoken or recorded.[105] Throughout this preliminary analysis, Judge Fisher stressed the undesirable consequences of imposing a separate, higher standard for oral testimony.[106] If a higher standard were required for witness examinations, parties might be encouraged to thwart the crime-fraud exception by purposefully keeping all communications undocumented in order to benefit from the higher burden of proof.[107] Noting that witness examination placed an increased burden on the district courts, Judge Fisher reasoned that

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100. *Id.* at 688.

101. *Id.* (citing *Zolin*, 491 U.S. at 574).

102. *Id.* (citing *Zolin*, 491 U.S. at 571).

103. *Id.* at 688. Intervenors argued, "due to key differences between documented materials and the oral examination of an attorney, the latter should be subject to a more stringent standard than that announced for the former in *Zolin*." *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 688–89.

107. *Id.*

the cost of the burden did not outweigh the need for an accessible method to prove the crime-fraud exception.[108] Excluding unmemorialized oral communications from *in camera* review would greatly encumber the opposing party's ability to establish the crime-fraud exception.[109] This reasoning falls in line with the general understanding that the attorney–client privilege should be construed narrowly to preserve the truth seeking process of the courts and prevent the exclusion of relevant information.[110]

Judge Fisher quickly dismissed any due process concerns, stating simply that "a district court can properly be entrusted to consider the due process interests and circumstances in each case, and use its discretion to fashion a proper procedure for the *in camera* examination."[111] Following this dismissal, Judge Fisher agreed with Intervenors that issues of "inaccuracy and untrustworthiness" arise where undocumented communications are concerned, but concluded that those issues do not outweigh the dangerous possibility that a higher standard of proof might allow evasion of the crime-fraud exception.[112] Judge Fisher stated that the problems with oral testimony are counteracted by the fact that the attorney in this case will be "under oath and face questions from a judge rather than an adversary."[113] He further concluded that district courts would be able to question an attorney–witness in a manner that "ensures that the attorney accurately recounts the communications with the client."[114]

After finding that the standard in *Zolin* also applied when determining whether to conduct an *in camera* review of witness testimony, the Third Circuit next decided that the Government's Ex Parte Affidavit satisfied the standard because it contained information from the FBI investigation of Corporation and Bank and Attorney's statement that he was consulted about the project.[115] Thus, the Ex Parte Affidavit met the lower standard required to warrant an *in camera* review by creating "a factual basis to support a good faith belief that *in camera* examination of Attorney might reveal evidence establishing the applicability of the crime-fraud exception . . . ."[116]

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108. *Id.* at 689.
109. *See id.*
110. *See* Greenwald, *supra* note 30, at 898.
111. *In re Grand Jury Subpoena*, 745 F.3d at 688.
112. *Id.* at 689.
113. *Id.*
114. *Id.*
115. *Id.* at 689–90.
116. *Id.*

B. Procedural Application of In Camera *Review*

Judge Fisher subsequently examined the procedural choices exercised by the district court in applying the *in camera* review in the context of a grand jury investigation.[117] During the preliminary determination that the *Zolin* standard would also be applied to oral testimony, the opinion only briefly mentioned due process concerns by stating that "a district court can properly be entrusted to consider the due process interests and circumstances in each case, and use its discretion to fashion a proper procedure for the in camera examination."[118] In *In re Grand Jury Subpoena*, Judge Fisher determined that it was within the district court's discretion—and therefore, presumably not violating any substantial rights—to exclude Intervenors from the *in camera* interview and to decline to release a transcript or summary of the interview.[119]

Judge Fisher's main argument focused on the need to preserve grand jury secrecy.[120] He acknowledged that, in this case, the secrecy concerns were minimized because the corresponding case in the United Kingdom gave Intervenors an idea of the nature of the grand jury proceeding in the United States.[121] Nevertheless, there was still a substantial amount of information yet unknown to the Intervenors, and "if [the Intervenors] were privy to the *in camera* examination, they could preview not only Attorney's grand jury testimony, but also evidence already submitted to the grand jury, as reflected in the Government's questions, and the Government's eventual trial evidence and strategy."[122] Thus, as there was high probability that many grand jury secrets would be exposed by allowing Intervenors to have access to the *in camera* review results, the Third Circuit held that withholding the information was proper under the circumstances.[123]

C. Application of the Crime-Fraud Exception

Finally, Judge Fisher reviewed the district court's ultimate conclusion that the crime-fraud exception applied to terminate the attorney–client privilege in regard to the communications in

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117. *Id.* at 690.
118. *Id.* at 688–690.
119. *Id.* at 690.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* at 690–91.

question.[124] Acknowledging that this situation presented a close case, the court affirmed that the crime-fraud exception in the Third Circuit applied "[w]here there [was] a reasonable basis to suspect that the privilege holder was committing or intending to commit a crime or fraud and that the attorney–client communications or attorney work product were used in furtherance of the alleged crime or fraud."[125]

Under this two-pronged approach, the court first determined whether the facts could imply that Client had the requisite intent.[126] As other courts of appeal have clarified, the intent to commit a crime or fraud must exist at the time that the client consulted the attorney.[127] At oral arguments, Judge Ambro explained the required timing of intent by posing a hypothetical situation in which the crime-fraud exception did not apply to waive the attorney–client privilege because the advice was given a year before the client decided to use it to further a crime.[128] In the case at hand, Client stated to Attorney that he planned to make a payment to Banker to ensure the project's progression and continued to assert this plan after Attorney advised him against it. [129] Judge Fisher inferred from these facts that "Client had already considered the advisability of making the payment, and determined that it was in his best interest to do so."[130] He further mentioned that Client made the payment in the same month that the Bank approved the financing, implying that Client had already planned the payment when Attorney was consulted.[131] From this evidence, Judge Fisher concluded that the district court was within its discretion in deciding that Client intended to commit the crime when he consulted Attorney.[132]

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124. *Id.* at 691.

125. *Id.* (quoting ABC Corp., 705 F.3d 133; 153 (3d Cir. 2012)).

126. *Id.* at 692–93.

127. *Id.* at 691.

128. *Id.* at 692.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* The Third Circuit did not address Client's continued assertions that the payment was legal, which may have implied that he was not *intending* to commit a crime or fraud. However, one may argue that Client's position as the president of a large corporation implied that he reasonably should have known that the action was illegal. The Third Circuit used similar reasoning in a 2005 decision concluding that it was "implausible that an experienced government agent like [the defendant] would not know that the proposed investment was a crime." United States v. Doe, 429 F.3d 450, 455 (3d Cir. 2005). Therefore, this would satisfy the requisite intent according to at least some other circuits. *See* RICE ET AL., *supra* note 71, at § 8:6.

Judge Fisher next determined that the district court was also within its discretion in determining the advice could have been used "in furtherance" of the criminal act.[133] An attorney's sole action of giving his or her opinion on the legality of an action does not, in itself, break the attorney–client privilege because it cannot be used "in furtherance" of a crime.[134] Rather, the advice must "give direction" to the crime or be misused for a fraudulent purpose.[135] Here, Attorney advised Client that he should not make the payment to Banker because such payment might conflict with the law under the FCPA, and he also gave Client further information on the types of conduct that might violate the FCPA.[136] Judge Fisher explained that Attorney's specific question about whether the Bank was a government entity or whether the Banker was a government employee "would have informed Client that the governmental connection was key to violating the FCPA."[137] Because this information could have reasonably led Client to the idea of rerouting the money through Banker's sister to evade detection of the transaction, Judge Fisher concluded that it was not an abuse of discretion to infer that Client could have used Attorney's advice to achieve illegal ends.[138]

V. IMPLICATIONS OF *IN RE GRAND JURY SUBPOENA*

Even though only a few circuits have ruled on whether the *Zolin* standard applies when determining whether to conduct *in camera* review of privileged oral testimony,[139] this holding is unlikely to create much controversy concerning the use of *in camera* review to determine the crime-fraud exception. Because the Supreme Court in *Zolin* already approved *in camera* review of privileged documents to determine the crime-fraud exception, it seems intuitive that the same standard must also apply to witness testimony. This is because, as Judge Fisher's opinion noted, a higher standard could potentially allow "would-be criminals [to] use the differing standards to avoid the proper application of the crime-fraud exception."[140] The

133. *In re Grand Jury Subpoena*, 745 F.3d at 693.

134. *See id.*

135. *Id.* at 692–93.

136. *Id.* at 693.

137. *Id.*

138. *Id.*

139. *Id.* at 689 (citing *In re* John Doe, Inc., 13 F.3d 633, 637 (2d Cir. 1994)) (finding that a district court's *in camera* examination of an attorney after a threshold *Zolin* showing was made comported with due process).

140. *Id.* at 688.

utilitarian goals of the privilege and its exception will likely compel courts to agree that oral testimony should be included under the *Zolin* standard or risk the consequences resulting from its exclusion.[141]

In analyzing the procedural choices of the district court in applying the *in camera* review, the Third Circuit does not address an additional argument for denying the release of the *in camera* testimony: the Supreme Court's ruling that grand jury proceedings should not be impeded by "minitrials and preliminary showings" that would "frustrate the public's interest in the fair and expeditious administration of the criminal laws."[142] If a court in this case were to allow Intervenors access to the *in camera* testimony, Intervenors might then argue for the right to rebut or challenge that evidence. Besides revealing grand jury secrets, allowing such "minitrials" to occur in the form of back and forth rebuttals in grand jury proceedings would violate the goal of smoothly progressing grand jury investigations.[143] Therefore, this Supreme Court precedent further reinforces a judge's ability to restrict an opposing party's access to evidence supporting *in camera* review to determine the crime-fraud exception in the context of a grand jury proceeding. Other circuits have also held that, in the context of grand jury proceedings, denying the opposing party a chance to rebut evidence of the ultimate showing of the crime-fraud exception is not a violation of due process.[144] Even if the Supreme Court eventually chose to clarify the circuit court's differing approaches on the right to rebuttal, secrecy concerns and the need to avoid "minitrials" would likely exclude grand jury cases, such as this, from the application of such a rule.[145] It is possible, therefore, that the Third Circuit's ruling on use of *in camera* review and its procedures in this case could endure a future Supreme Court interpretation on the issue.

The final determination that the crime-fraud exception applies may be the most influential of the holdings in this Third Circuit case. Typically, circuit courts use a similar two-prong analysis in

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141. *See id.*

142. United States v. Dionisio, 410 U.S. 1, 17 (1973).

143. *Id.*

144. *See* Pennsylvania Attorney, 223 F.3d 213, 219 (3d Cir. 2000) (citing Iowa Attorney, 187 F.3d 996, 998 (8th Cir. 1999); Jane Roe, 144 F.3d 653, 662 (10th Cir. 1998); *In re John Doe, Inc.*, 13 F.3d at 635; Thursday Special, 33 F.3d 342, 353 (4th Cir. 1994); John Doe, 867 F.2d 539, 540–41 (9th Cir. 1989); Special September, 640 F.2d 49, 57 (7th Cir. 1980)).

145. *See Pennsylvania Attorney*, 223 F.3d at 215; *Jane Roe*, 144 F.3d at 662–663; *In re John Doe, Inc.*, 13 F.3d at 636.

their application of the crime fraud exception.[146] The first prong concerns the client's intent at the time that the consultation occurred, and the second prong involves the client's actual use of the advice to commit or continue a crime or fraud.[147] Although the overall standard of proof required under the prima facie requirement may vary, many circuits use a similar "reasonable basis" test to determine whether the crime-fraud exception applies to lift the attorney–client privilege.[148] Because of these similarities in application, the scope of this Third Circuit decision is likely to influence crime-fraud exception analyses in courts outside of its own jurisdictional limits.

If widely applied, the Third Circuit's analysis of the second prong may have detrimental effects on a client's ability to openly communicate with her attorney.[149] The opinion explains a situation where one attorney advises a client that an action is illegal, and the client then solicits advice from a second attorney who advises that the action is legal.[150] In that case, both consultations remain privileged.[151] Judge Fisher then attempts to distinguish the example from the case at hand by showing that, in addition to providing a mere opinion on the illegality of the action, Attorney also provided "information about the types of conduct that violate the law."[152] But, if the attorney–client privilege can be waived simply because an attorney provides a thorough explanation of the law or how *not* to violate the law, clients may be reluctant to consult counsel in the first place and attorneys may be dissuaded from explaining their advice.[153] Even if a court determines that a client was violating the

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146. *In re* Grand Jury Proceedings, 609 F.3d 909, 912–13 (8th Cir. 2010); United States v. Lentz, 524 F.3d 501, 524–25 (4th Cir. 2008); *In re* Napster, Inc. Copyright Litig., 479 F.3d 1078, 1090 (9th Cir. 2007); *In re* Grand Jury Investigation, 445 F.3d 266, 274 (3rd Cir. 2006); Louisiana Attorney, 419 F.3d 329, 336–37 (5th Cir. 2005); United States v. Martin, 278 F.3d 988, 1001 (9th Cir. 2002); United States v. Jacobs 117 F.3d 82, 87 (2d Cir. 1997).

147. *See supra* note 146; *see also* JONES AT AL., *supra* note 67.

148. *See* ABC Corp., 705 F.3d 133, 152 (3d Cir. 2012) (citing Massachusetts Attorney, 417 F.3d 18, 23 & n.4 (1st Cir. 2005); United States v. Jacobs, 117 F.3d 82, 87 (2d Cir. 1997); United States v. Collis, 128 F.3d 313, 321 (6th Cir. 1997); *In re* Grand Jury Proceedings, 87 F.3d 377, 381 (9th Cir. 1996)).

149. Mark A. Srere & Kristin Robinson, *Attorney–client Privilege in FCPA Investigation Nullified Based on Crime-fraud Exception*, LEXOLOGY (Feb. 25, 2014), http://www.lexology.com (search "Srere" in author's name category; then select article).

150. *In re* Grand Jury Subpoena, 745 F.3d 681, 693 (3d Cir. 2014).

151. *Id.*

152. *Id.*

153. Srere & Robinson, *supra* note 149; *see also* Lathrop B. Nelson, III, *Third*

law, it should be "conscious of the fact that the violation may have been at the margins and do[es] not reflect a client's intention of using the lawyer's services for illegal purposes."[154] To disregard this possibility would penalize "clients who consult with lawyers to comply with the law, while still legally pushing the line of legality and circumventing undesired restrictions."[155]

Although many articles analyzing *In re Grand Jury Subpoena* focus on the Third Circuit's choice to extend the *Zolin* standard to apply to *in camera* examinations of witness testimony,[156] this case highlights a larger concern about the lack of certainty surrounding the limits of the attorney–client privilege in the federal courts. The confusion concerning the prima facie standard has led to varying burdens of proof in the circuit courts and, in turn, an unpredictable federal application of the attorney–client privilege and the crime-fraud exception.[157] The existing disparities among the circuits in the application of the privilege and its exceptions have been attributed both to the Supreme Court's failure to issue clarifying decisions and the legislature's refusal to codify the privilege.[158] Continuing divergence in the application throughout the circuits could lead to choice of law issues, increased litigation, and weakened trust in the privilege itself.[159] For example, if a subpoena for witness testimony is issued outside a forum's jurisdiction, there may be conflict over which standard of proof applies to waive the privilege under the crime-fraud exception.[160] Since attorneys and clients cannot be certain when and to what extent the privilege and its exceptions may apply, clients may be deterred from seeking consultation due to

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Circuit OK's In Camera Interview of Lawyer to Establish Crime-fraud Exception, WHITE COLLAR ALERT (Feb. 17, 2014), http://whitecollarblog.mmwr.com/2014/02/17/third-circuit-oks-in-camera-interview-of-lawyer-to-establish-crime-fraud-exception/.

154. RICE ET AL., *supra* note 71, at § 8:6 (citing Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 90 F.R.D. 21, 30 (N.D. Ill. 1980)).

155. *Id.*

156. *See* William Jordan, *Circuit Court Adopts Standard Governing In Camera Examinations of Attorneys for Purposes of Crime-Fraud Exception To Attorney–Client Privilege*, 39 No. 3 PROF. LIABILITY REP. 19 (Mar. 2014); *Third Circuit Adopts Standard for In Camera Examination of Witness Regarding Crime-fraud Privilege Exception*, PRAC. L. LITIG., Feb. 18, 2014, *available at* WL 5-557-8866.

157. *See* RICE ET AL., *supra* note 71, at § 8:6.

158. Glynn, *supra* note 44, at 94 ("A lack of attention on the part of both Congress and the Supreme Court has left unaddressed widely diverging applications of the law of privilege and resultant substantial uncertainty.").

159. *Id.* at 120–32; *see* RICE ET AL., *supra* note 71, at § 8:6.

160. *See* Steven Bradford, *Conflict of Laws and the Attorney–Client Privilege: A Territorial Solution*, 52 U. PITT. L. REV. 909, 912–13 (1991).

the fear that it will not remain protected.[161] This unpredictability leaves close cases, such as this one, vulnerable to the crime-fraud exception and endangers the overall purpose of the privilege: encouraging open communication between clients and attorneys.[162]

VI. CONCLUSION

As the attorney–client privilege has continued to develop through federal common law, the Supreme Court has not provided specific guidelines for its application or its exceptions.[163] Accordingly, circuit courts have been left to determine the contours of the privilege and the crime-fraud exception, often reaching different conclusions.[164] In this decision, the Third Circuit reasonably concludes that the Supreme Court's standard in *Zolin* applies when determining whether a district court may conduct an *in camera* review of privileged witness testimony.[165] This is not a far leap from *Zolin*'s holding and is required in order to prevent nefarious parties from using a higher standard to their advantage where oral communications are concerned.[166] The Third Circuit further concluded that the need for grand jury secrecy justified withholding the evidence used to establish the need for *in camera* review, and the review itself, from the opponents of the crime-fraud exception.[167] Overall, the court's final approval of the application of the crime-fraud exception may carry the most weight. Until the Supreme Court chooses to clarify the burden of proof necessary to establish the crime-fraud exception, close cases such as *In re Grand Jury Subpoena* may continue to favor parties seeking the crime-fraud exception, slowly diminishing the protections long ensured by this historical privilege.

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161. *See* RICE ET AL., *supra* note 71, at § 8:6.

162. *Id.*

163. *See* Glynn, *supra* note 44, at 87–88.

164. *See* United States v. Zolin, 491 U.S. 554, 563 n.7 (1989). *See generally* Greenwald, *supra* note 30, at 898.

165. *In re* Grand Jury Subpoena, 745 F.3d 681, 688 (3d Cir. 2014).

166. *Id.*

167. *Id.* at 690.