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Issues in Crime-Fraud Practice and Procedure: The Tobacco Litigation Experience

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ISSUES IN "CRIME-FRAUD" PRACTICE AND PROCEDURE: THE TOBACCO LITIGATION EXPERIENCE*

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I. INTRODUCTION 188
II. THE IMPORTANCE OF THE CRIME-FRAUD EXCEPTION IN TOBACCO LITIGATION 190
A. *What the Tobacco Industry Documents Reveal* 191
B. *The Attorneys' General Most Effective Tool* 193
III. THE POLICY BEHIND THE CRIME-FRAUD EXCEPTION 194
A. *The Scope of the Privilege* 194
B. *The Policies of the Privilege* 196
C. *Professional Concerns* 197
D. *The Scope of the Exception* 198
IV. SORTING OUT THE CRIME-FRAUD PROCEDURE 199
A. *The* Zolin *Showing* 199
B. In Camera *Inspection and the Prima Facie Standard* 202
1. *The Controversy* 202
2. *An Explanation* 205
C. *The Inevitable Appeals* 208
V. RED HERRINGS IN CRIME-FRAUD 209
A. *Where's the Fraud?* 209
B. *The "In Furtherance" Standard* 211
C. *The Post-Hoc Spin* 212
VI. CONCLUSION 212

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I. INTRODUCTION

A majority of jurisdictions in the United States recognize the crime-fraud exception to the attorney-client privilege.[1] The crime-fraud exception prevents abuse of the attorney-client privilege. The exception has various formulations,[2] but it can be stated as follows: No privilege exists where the services of the lawyer are sought or obtained to enable or aid the client in planning to commit or committing what the client knew or reasonably should have known is a crime or a fraud.

The basic principles underlying the exception seem simple enough; however, complex issues arise when an attorney attempts to invoke the crime-fraud exception against a resisting party. Both the exception and the privilege are based on common law and the rules of evidence which may vary from state to state.[3] Additionally, the inherent ambiguities that exist within the crime-fraud doctrine have unfortunately, but not unexpectedly, given rise to differing judicial interpretations. As a result, the standards and procedures applied to the exception may differ depending on the jurisdiction. Over the past two decades, the trend has been toward more uniformity,[4] but areas of differing judicial policy still exist. The areas most in need of uniformity and clarity are: (1) what procedure should courts use to determine whether the exception applies; (2) what type of communication is susceptible to the exception; and (3) what elements must be presented to invoke the exception. In the recent litigation war against tobacco, the true battles have been fought in these three trenches.[5]

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1. *See* Christine Hatfield, Comment, *The Privilege Doctrines—Are They Just Another Discovery Tool Utilized by the Tobacco Industry to Conceal Damaging Information?*, 16 PACE L. REV., 525, 552 n.180 (1996).

2. Some states have codified the rule in their respective rules of evidence. *See* KAN. CIV. PROC. CODE ANN. § 60-426 (West 1965) ("[Lawyer-client] privileges shall not extend (1) to a communication if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the legal service was sought or obtained in order to enable or aid in the commission or planning of a crime or a tort . . . ."); CAL. EVID. CODE § 956 (West 1995) ("There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud."). Other states, such as South Carolina, have adopted the exception as part of the common law. *See* State v. Doster, 276 S.C. 647, 651, 284 S.E.2d 218, 221 (1981) ("The privilege does not extend to communications in furtherance of criminal tortious or fraudulent conduct.").

3. *See supra* note 2.

4. *See* 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 (1986).

5. Although technically beyond the scope of this article, but because claims of work-product protection are often brought in conjunction with claims of attorney-client privilege, one should note that the courts have found the crime-fraud exception equally applicable to the work-product doctrine. *See In re* Grand Jury Proceedings, 102 F.3d 748, 751 (4th Cir. 1996) ("[T]he crime-fraud exception applies in the work-product context.") (citing *In re* Grand Jury Proceedings, 33 F.3d 342, 348 (4th Cir. 1994)); *In re* Grand Jury Proceedings, 33 F.3d at 349 ("[W]e have explicitly recognized a crime-fraud exception to the opinion work product doctrine."); *In re* International Sys. & Controls Corp. Sec. Litig., 693 F.2d 1235, 1242 (5th Cir. 1982) ("When the case being prepared involves the client's ongoing fraud . . . we see no reason to afford the client the benefit of [the work product] doctrine. It is only the

The central issue underlying the application of the crime-fraud exception is the breadth of its scope. Some commentators assert that the interests to be balanced are those between the sanctity of the privilege and the administration of justice.[6] Some courts fear that applying the exception broadly will allow challenges to more easily overcome claims of privilege and thus encroach on the time-honored protection for clients seeking legal counsel.[7] The arguments for a narrow application of the crime-fraud exception, which increases protection for communications between the attorney and client, are almost always based in policy. The weakness with such arguments is that the policies which underpin the privilege support a broad scope and application of the crime-fraud exception.

In recent years, documents revealing the outrageous misconduct of the tobacco industry have come to light. These documents show the tobacco industry's decades-long course of misconduct, formulated and carried out with the aid of its lawyers, to hide from and misrepresent to the public information relating to the health hazards of cigarettes.[8] The revelations within the documents indicate what an unchecked corporation is capable of doing. For more than forty years, the tobacco industry avoided the discovery of its nefarious activities by hiding behind discovery abuse practices[9] and ill-founded claims of privilege.[10] Only by defections within its own ranks has the tobacco industry's deception been revealed to the public. This

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'rightful interests' of the client that the work product doctrine was designed to protect.") (citing *In re* Special Sept. 1978 Grand Jury, 640 F.2d 49, 63 (7th Cir. 1980)).

6. *See* Fried, *supra* note 4, at 490-99.

7. *See* Laser Indus., Ltd. v. Reliant Techs., Inc., 167 F.R.D. 417, 424 (N.D. Cal. 1996).

8. *See generally* STANTON A. GLANTZ ET AL., THE CIGARETTE PAPERS (1996).

9. *See* Thayer v. Liggett & Myers Tobacco Co., No. 5314 (W.D. Mich. 1970) (unpublished opinion) (providing an in-depth discussion of how the evasive discovery abuse tactics of the tobacco industry frustrated the plaintiff's ability to obtain a fair trial); Order Imposing Sanctions Upon the American Tobacco Co. and Brown & Williamson Tobacco Co. as Successor by Merger to the American Tobacco Co., Minnesota v. Philip Morris Inc., No. C1-94-8565 (Minn. Dist. Ct. Dec. 30, 1997) (imposing sanctions of $100,000 per day for failure to comply with discovery orders).

10. The lack of foundation to the tobacco industry's claims of privilege is perhaps best evidenced by the ever-increasing string of judicial decisions finding sets of tobacco industry documents simply not privileged in the first instance. *See, e.g.*, Burton v. R.J. Reynolds Tobacco Co., 170 F.R.D. 481 (D. Kan. 1997) (finding 32 of 33 documents failed to meet the prerequisites for applicability of privilege); Florida v. American Tobacco Co., No. CL 95-1466 AH (Fla. Cir. Ct. Feb. 28, 1997) (finding 50 Brown and Williams documents not privileged); August 1, 1997, Report and Recommendation, Florida v. American Tobacco Co., No. CL 95-1466 AH (finding 281 of 358 tobacco industry "youth programs" documents not privileged); Order with Respect to Non-Liggett Defendants' Objections to the Special Master's Report Dated Sept. 10, 1997, Minnesota v. Philip Morris Inc., No. C1-94-8565 (visited Jan. 28, 1998) <http//:STIC.neu.edu/MN/0105519disclose.htm> (finding claims of privilege improper for 5 of 14 industry-defined categories of Liggett documents); June 27, 1997 Order, Sackman v. Liggett Group, Inc., No. CV 93-4166 (N.J.) (finding 305 special project documents not privileged). Indeed, litigants in tobacco litigation are beginning to view the tobacco industry's exceedingly large number of claims of privilege to be a fraud. By claiming privilege to such large numbers of documents, the tobacco industry counts on courts to shy away from privilege challengers' wholesale requests for review. Privilege challengers face the unfair task of designating small subsets of documents for review from cryptic and incomplete tobacco industry privilege logs.

is sad commentary on the tobacco industry, but it also implicates the attorney-client privilege and the potential for abuse of the legal system. Disclosure of the industry's and its lawyers' past and ongoing conduct serves as a prime example of the need for broad application of the crime-fraud exception to protect the public from misuse of privilege rules.

This article will explore the issues at the heart of the crime-fraud exception as they have arisen in the context of tobacco litigation. It will define the procedures for determining whether the exception applies to particular communications, the elements of the exception, the burden of proof for such a determination, and the party who bears the ultimate burden. The article will also discuss the apparent ambiguities within the crime-fraud exception that a party inevitably will face when challenging an unfounded and illicit claim of the attorney-client privilege.

II. THE IMPORTANCE OF THE CRIME-FRAUD EXCEPTION IN TOBACCO LITIGATION

The legal war against the tobacco industry began more than forty years ago.[11] During this time, the tobacco industry has used the rules of evidence and procedure in various ways to frustrate and delay most of the legal claims it faced in furtherance of an industry-wide plaintiff-strangulation strategy.[12] As a result, the tobacco industry enjoyed virtual immunity from liability until recently.

At the beginning of this decade, the public gained insight into the tobacco industry's clandestine operations that the industry had successfully concealed behind a seemingly infallible curtain of secrecy since the war on tobacco began.[13] In 1994, Merrell Williams, a whistle-blowing paralegal at one of the tobacco industry's law firms, provided a glimpse behind that curtain.[14] The discovery of the Brown and Williamson Tobacco Company documents revealed the industry's systematic abuse of the attorney-client and work-product privileges. The most damaging blow to the tobacco industry occurred when the Liggett Group broke ranks and settled with the state Attorneys General. The release of the groupings of the Liggett Settlement Documents has offered further corroborating evidence of this

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11. For an in-depth analysis of the history of tobacco litigation, see Robert L. Rabin, Essay, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853 (1992). For a brief discussion, see Tucker S. Player, Note, *After the Fall: The Cigarette Papers, the Global Settlement, and the Future of Tobacco Litigation*, 49 S.C. L. Rev. 311 (1998).

12. *See* Hatfield, *supra* note 1, at 558-59, 561-88; Rabin, *supra* note 11, at 855-76.

13. In 1988, the first documents concerning the special projects division of the Council for Tobacco Research were discovered in *Cipollone v. Liggett Group, Inc.*, 683 F. Supp. 1487 (D.N.J. 1988) and *Haines v. Liggett Group, Inc.*, 140 F.R.D. 681 (D.N.J.), *vacated*, 975 F.2d 81 (3d Cir. 1992). The *Haines* case contains Judge Sarokin's landmark opinion in which he declared the tobacco industry the "king of concealment." *Haines*, 140 F.R.D. at 683.

14. Mr. Williams copied over 10,000 pages of tobacco industry documents and turned them over to Professor Stanton Glantz, a leader in the anti-smoking movement. GLANTZ ET AL., *supra* note 8, at 6.

systematic abuse that was one of the primary reasons for the industry's litigation success in the past.[15]

A. What the Tobacco Industry Documents Reveal

During the early 1950s, the tobacco industry faced several scientific studies that pointed to cigarettes as a cause of disease.[16] In response to these studies and the surrounding public concern, the tobacco industry issued the "Frank Statement to Cigarette Smokers."[17] The Frank Statement marked the genesis of the tobacco industry's fraudulent and deceitful course of conduct toward the American public, public health officials, and government regulators. The Frank Statement read, in part:

> We accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business.... We believe the products we make are not injurious to health.... We also have and always will cooperate with those whose tasks it is to safeguard the public health.... Many people have asked us what we are doing to meet the public's concern aroused by the recent reports. Here is the answer:
>
> > 1. We are pledging aid and assistance to the research effort into all phases of tobacco use and health. This joint financial aid will of course be in addition to what is already being contributed by individual companies.[18]

Anyone reading the pledges of the Frank Statement could have reasonably believed not only that the tobacco industry was not knowingly manufacturing and marketing a dangerous product, but also that the tobacco industry was committed to manufacturing a *safe* product. Moreover, a person could have reasonably believed that the tobacco industry intended to address the health concerns surrounding its products in an open and forthright manner. Considering the internal tobacco documents now at issue, nothing could be further from the truth. In fact, these documents show that the tobacco industry knew to a reasonable degree of scientific certainty as early as 1953 that cigarettes cause cancer[19] and internally acknowledged as early as 1963 that nicotine is addictive.[20] Nonetheless, in the

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15. For an excellent, in-depth analysis of this abuse, see Hatfield, *supra* note 1, at 590-604.

16. *See, e.g.*, Ernest L. Wynder & Evarts A. Graham, *Tobacco Smoking as a Possible Etiologic Factor in Bronchiogenic Carcinoma: A Study of Six Hundred and Eighty-Four Proved Cases*, 143 JAMA 329, 329 (1950).

17. *See* GLANTZ ET AL., *supra* note 8, at 139.

18. *See id.*

19. *Id.*

20. *Id.* at 100.

days, months, and years following the issuance of the Frank Statement, the tobacco industry renewed and bolstered its pledges of concern for health and safety.

The fraudulent workings of the tobacco industry do not involve simply lying to the public about the true state of its knowledge concerning the health dangers of cigarettes, though that would be bad enough. Rather, the tobacco industry—together with its "lawyers"—has engaged in decades of fraud and conspiracy to (1) affirmatively create doubt and controversy in the public's mind regarding the health dangers of cigarettes, (2) to misuse scientific research for its own ends rather than the *pro bono publico* ends solemnly promised in the Frank Statement, (3) to control the course of science and scientists investigating smoking and health issues, and (4) to create unfounded bases for claims of privilege and protection as shields against discovery.

The tobacco industry continues to promote and maintain the appearance of controversy over the negative health effects caused by cigarette smoke with full knowledge that such controversy is nonexistent in light of the overwhelming majority of scientific research.[21] The documents reveal that the purpose for the creation and maintenance of this illusory controversy is to give smokers a "psychological crutch" to rest upon to justify their decisions to smoke.[22]

The primary tool used to bolster the pledges of the Frank Statement has been the Tobacco Industry Research Center (TIRC), now known as the Council for Tobacco Research (CTR).[23] Though the publicly stated purpose of the TIRC/CTR was to conduct independent research concerning the health effects of cigarettes, the true purpose has been to create any scintilla of evidence that would facially justify the industry's position that cigarettes are not a health hazard.[24] The TIRC/CTR has been a public relations ploy controlled entirely by the industry. This ploy allows the industry to maintain the appearance of a controversy over the health effects of cigarettes. As a result, the tobacco industry still denies that cigarettes are addictive or cause disease,[25] a position in direct conflict with the information contained in the industry's own documents.

The tobacco industry's most egregious activities concern its alleged targeting of children and manipulation of nicotine.[26] These activities are quasi-criminal at the

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21. *Id.* at 139.

22. Affidavit of Professor John P. Freeman, Florida v. American Tobacco Co., No. CL 95-1466 AH, at 28 n.9 (Fla. Cir. Ct. 1997).

23. *See* GLANTZ ET AL., *supra* note 8, at 32. The Special Projects division of the CTR was the evidentiary focus of *Haines v. Liggett Group, Inc.*, 140 F.R.D. 681, 688-89 (D.N.J. 1992) and *Cipollone v. Liggett Group, Inc.*, 683 F. Supp. 1487, 1491 (D.N.J. 1988).

24. *See* GLANTZ ET AL., *supra* note 8, at 44-46.

25. *Id.* at 26, 40, 114.

26. *See Liggett Documents* (visited Jan. 18, 1998) <http://STIC.neu.edu/index2.html> (Memorandum from K.E. Cohn *Development of Cigarette with Increased Smoke PH*) (Sept. 7, 1977).

very least. Increasing evidence is coming to light that shows the tobacco companies intentionally directed advertising at underage consumers.[27]

B. The Attorneys' General Most Effective Tool

Demonstrating a strategically orchestrated pattern of fraud and concealment, the internal documents of the tobacco industry support numerous causes of action against the tobacco industry and are the keys to success in the current theater of tobacco litigation. Given such importance, these documents must be both discoverable and admissible in trial, and the most intense legal maneuvering between the tobacco industry and the Attorneys General has concerned these documents. Within this arena, the crime-fraud exception has become a highly important and effective weapon in the Attorneys' General arsenal.

In conjunction with the industry's elaborate scheme of fraud and concealment is the infusion of industry lawyers to control nearly every aspect of the industry's research and public relations activities concerning the health effects of cigarettes.[28] The tobacco industry argues that attorney involvement created a facial claim of both attorney-client privilege and work-product protection applicable to virtually all of the contested documents. The industry has relied on these claims of privilege to contest the production and admissibility of any industry document at trial. However, Attorneys General have challenged these facial claims of privilege and have argued that the industry manufactured privilege.[29] Regardless of how a court handles the industry's facial claims of privilege, the insidious nature of the documents often gives rise to the crime-fraud exception—the trump card to asserted claims of the attorney-client privilege and work-product protection. Even if the industry can satisfy all of the requirements for a facial claim of privilege, a court will not protect the communication if the crime-fraud exception applies. Predictably, the crime-fraud exception has been a central issue in tobacco litigation.

Through the course of legal wrangling over the exception, the tobacco industry's misuse of the legal precedents concerning the crime-fraud exception has exposed perceived grey areas in the crime-fraud doctrine. Yet, the crime-fraud exception needs a more definitive statement of what it is and how a court should

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27. *See id.*; *R.J. Reynolds Called 18-Year-Olds 'Critical' to Cigarettes' Success*, WALL ST. J., July 11, 1996, at B6; John Swartz, *Tobacco Firm Found to Have Targeted Young*, THE BOSTON GLOBE, Oct. 4, 1995, at A8; *see also* Penn Adver. of Baltimore, Inc. v. Baltimore, 63 F.3d 1318, 1321 (4th Cir. 1995) (discussing Baltimore City Council findings and support for Ordinance 307 that tobacco industry affirmatively targeted minors with advertising), *vacated*, Penn Adver. of Baltimore, Inc. v. Schmoke, 116 S. Ct. 2575, *judgment reinstated and modified*, Penn Adver. of Baltimore, Inc. v. Baltimore, 101 F.3d 332 (4th Cir. 1996), *cert. denied*, Penn Adver. of Baltimore, Inc. v. Schmoke, 117 S. Ct. 1569 (1997).

28. *See* Hatfield, *supra* note 1, *passim*.

29. The issues surrounding the tobacco industry's attempts to manufacture privilege by incorporating lawyers into standard business and public relations activities are thoroughly discussed in Hatfield, *supra* note 1, at *passim*.

determine its applicability. By examining the policies behind both the exception and the respective privileges, as well as some of the more widely accepted judicial precedents, one can derive a clear understanding of the crime-fraud doctrine.

III. THE POLICY BEHIND THE CRIME-FRAUD EXCEPTION

In the annals of jurisprudence, the oldest and most universally established protection of confidential communication is the attorney-client privilege.[30] This privilege lies at the very heart of the American legal profession, and its policies promote public confidence in the profession and the fair administration of justice. However, this privilege is not absolute. Well-established exceptions to the privilege attempt to mitigate illogical results and to further the policies upon which the privilege itself rests. The crime-fraud doctrine is such an exception.

The justification for the crime-fraud exception is firmly rooted in social and judicial policy. The basic theory is that clients should not be able to use legal advice to perpetrate or plan ongoing or future unlawful activity and then use the privilege as a shield from disclosure.[31] Though the exception is simple and straightforward at its foundation, the exact scope of the crime-fraud exception has been disputed. An examination of the specific policies supporting the crime-fraud exception leads one to the inescapable conclusion that the exception's scope should be broad and encompass those activities beyond the technical definition of "crimes" and "frauds." The first policy purports that any such communication between an attorney and client does not satisfy the requirements for the privilege to apply.[32] A second policy is that broad application of the crime-fraud exception protects the privilege from abuse.[33] A third policy recognizes the duty of lawyers as officers of the court and requires lawyers to operate within the bounds of the law.[34] Though one may use any of these policies to justify the exception, a combination solidifies the appropriate role of the exception in modern jurisprudence.

A. The Scope of the Privilege

For the attorney-client privilege to provide protection, the communication must take place in confidence between an attorney and a client for the purposes of obtaining or of seeking legal assistance. In situations where this communication deals with unlawful conduct, either in progress or contemplation, the communication falls outside the realm of the attorney-client privilege. Even if the attorney is "innocent," when a client intends to use a communication with the

30. EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 2 (3d ed. 1997).
31. *Id.* at 1-3.
32. *See infra* Part III.A.
33. *See infra* Part III.B.
34. *See infra* Part III.C.

attorney to aid unlawful conduct, the client has stepped beyond the bounds of the definition of "client" for purposes of the attorney-client privilege.[35] This rationale is based somewhat on deterrence. Once the client has overstepped the bounds of seeking legitimate legal services, the privilege rules should deter the client from attempting to obtain illegitimate legal services by stripping away the protection of the privilege.[36]

The proper attorney-client relationship cannot exist when communications are intended to aid unlawful activity.[37] In a similar context, a privilege against disclosure of juror deliberations is not absolute where the juror relationship is tainted by dishonesty in voir dire that surely would have disqualified the juror. In the seminal case of *Clark v. United States*[38] involving the privilege of juror communication, Justice Cardozo explained:

> The privilege takes as its postulate a genuine relation, honestly created and honestly maintained. If that condition is not satisfied, if the relation is merely a sham and a pretense, the juror may not invoke a relation dishonestly assumed as a cover and cloak for the concealment of the truth.[39]

Cardozo later analogized this policy to the attorney-client privilege, stating that "[t]he [attorney-client] privilege takes flight if the relation is abused."[40] Thus no legitimate attorney-client relationship can exist once the focus or intent of the communication turns to unlawful activity.

Justice Cardozo is not alone in his recognition that privilege cannot apply to an illegitimate relationship between attorney and client. *Wigmore on Evidence* begins its discussion of the crime-fraud exception with the following passage:

> It has been agreed from the beginning that the privilege cannot avail to protect the client in concerting with the attorney a crime or other evil enterprise. This is for the logically sufficient reason that no such enterprise falls within the just scope of the relation between legal adviser and client.[41]

Additionally, the English courts used this same rationale in the 1884 decision of *Queen v. Cox*.[42] An even earlier case in the United States stated: "The privileged

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35. JOHN WILLIAM GERGACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE ¶ 4.01[3][b] (1987).
36. *Id.*
37. *See id.*, ¶ 4.01[3][a].
38. 289 U.S. 1 (1933).
39. *Id.* at 14.
40. *Id.* at 15.
41. 8 WIGMORE ON EVIDENCE § 2298 (John T. McNaughton rev. 1961).
42. 14 L.R. 153 (Q.B. 1884).

relation of attorney and client can only exist for lawful and honest purposes."[43] Clearly this policy is firmly embedded in American jurisprudence.

B. The Policies of the Privilege

Numerous policies support the attorney-client privilege.[44] One frequently cited policy is that the privilege is a "necessity, in the interest and administration of justice."[45] For our justice system to function properly, a client must be able to confide in a legal advisor all of the words and actions without fearing repercussions from such disclosure. Yet when justice is thwarted by this protection, the policy no longer justifies secrecy. Thus any conduct which is intended to hinder the proper administration of justice will destroy the privilege.[46] Because we are concerned with the proper administration of justice, "it would be a perversion of the privilege to extend it to the client who seeks advice to aid him in carrying out an illegal or fraudulent scheme."[47]

At the core of the policies supporting the attorney-client privilege and the crime-fraud exception is the delicate balance between the society's interests in full disclosure of evidence and the client's private interests in protecting confidential communications with the attorney.[48] This balance is commonly characterized as a Utilitarian philosophy, in which the social advantage of the policy is determined.[49] For a privilege to be recognized, the injury to the individual client must outweigh the benefits of a proper disposition of the controversy through disclosure of all relevant evidence.[50] If the communication is intended for illegitimate purposes, then the client's interests should not be protected by privilege.

Numerous courts have expounded on this balancing process. For instance, in *Clark v. United States*, Justice Cardozo reasoned that once the interests of the client turn illegitimate, "[i]t must yield to the overmastering need, so vital in our polity, of preserving trial by jury in its purity against the inroads of corruption."[51] Other courts have discussed how the balance between the privacy and public policy interests shifts once the intentions turn illegitimate.[52] At this point, the client's

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43. Coveney v. Tannahill, 1 Hill 33, 35, 41 (N.Y. Sup. Ct. 1841), *quoted in* WIGMORE ON EVIDENCE, *supra* note 41, § 2298, at 577.

44. For an in-depth analysis of the attorney-client privilege, see Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061 (1978).

45. Hunt v. Blackburn, 128 U.S. 464, 470 (1888).

46. 81 AM. JUR. 2D *Witnesses* § 394 (1992).

47. MCCORMICK ON EVIDENCE § 95 (John William Strong ed., 4th ed. 1992).

48. GERGACZ, *supra* note 35, ¶ 4.01[3][d].

49. WIGMORE ON EVIDENCE, *supra* note 41, § 2285.

50. *Id.*

51. Clark v. United States, 289 U.S. 1, 16 (1933).

52. *See, e.g.*, Law Offices of Bernard D. Morley, P.C. v. MacFarlane, 647 P.2d 1215, 1220 (Colo. 1982) (en banc) (explaining that the privacy policies underlying the privilege must subside when communication between an attorney and a client involves the commission of criminal acts).

interest, and thus the privilege, must give way to public policy and the proper administration of justice.[53]

C. *Professional Concerns*

Wigmore on Evidence notes that supporting and utilizing the exception has significant implications for the legal profession. By allowing the privilege to stand in the way of disclosure of illegitimate communications, the attorney "bring[s] discredit upon the legal profession" and betrays the "public confidence which alone justifies the privilege."[54] This policy may seem at odds with the privilege, as it is a privilege for the client. Yet, the implications for the profession are obvious.

An attorney has a duty to the client to provide the best legal representation possible within the boundaries of the law. An attorney also has a duty of honesty and candor as an officer of the court. Giving advice or assistance that would aid or enable the planning of unlawful conduct is beyond the scope of the attorney's job and professional duty.[55] Thus when a communication is intended to aid any unlawful conduct, the attorney cannot be acting in a professional capacity, and the communication does not meet the requirements for application of the privilege.[56] In this type of situation, the "[a]dvice given for those purposes would not be a professional service but participation in a conspiracy."[57]

Considering the goal of maintaining the integrity of the legal profession, the ABA Model Rules of Professional Conduct governs an attorney's proper representation of a client.[58] Though Rule 1.6 provides stringent requirements on disclosure of client communications, the Model Rules as a whole concern the broader perspective of the attorney's role in the justice system and in society. The preamble to the Model Rules describes an attorney as "an officer of the legal system and a public citizen having special responsibility for the quality of justice."[59] Specifying that the Model Rules requires a "lawyer's conduct [to] conform to the requirements of the law," the preamble dictates that "[a] lawyer should use the law's procedures only for legitimate purposes."[60] As a citizen, a "lawyer should seek improvement of the law, the administration of justice and the quality of service

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53. *See, e.g., In re* Grand Jury Proceedings, 641 F.2d 199, 203 (5th Cir. Unit A Mar. 1981) ("If there is a prima facie showing that the professional relationship was intended to further a criminal enterprise, the privilege does not exist.") (citing United States v. Hodge & Zweig, 548 F.2d 1347, 1354 (9th Cir. 1977)); Caldwell v. District Court, 644 P.2d 26, 31 (Colo. 1982) (noting that the scope of the privilege is not absolute and must be limited where "communications between a client and his attorney are made for the purpose of aiding the commission of a future crime or a present continuing crime").

54. WIGMORE ON EVIDENCE, *supra* note 41, § 2299.

55. GERGACZ, *supra* note 35, ¶ 4.01[1], [3][a].

56. *Id.* ¶ 4.01[3][a].

57. MCCORMICK ON EVIDENCE, *supra* note 47, § 95.

58. MODEL RULES OF PROFESSIONAL CONDUCT (1997).

59. *Id.* pmbl. at 5.

60. *Id.*

rendered by the legal profession."[61] One may have difficulty contemplating how a lawyer can allow the legal advice given to thwart the proper administration of justice, but it is the client who destroys the privilege through criminal or fraudulent action.

D. The Scope of the Exception

A point of contention among courts is the exact scope of the crime-fraud exception. The controversy lies in the type of conduct which will invoke the exception and whether it must satisfy the technical requirements of a "crime" or a "fraud." Some courts have held that in order to apply the exception, the conduct must satisfy statutorily or judicially recognized elements of a particular crime or fraud.[62] The tobacco industry has argued that this narrow view should confine the use of the crime-fraud exception in tobacco litigation.[63] The policy behind this narrow construction seems to be a fear of creating a chilling effect on attorney-client communications.[64] Yet, other courts have rejected this possibility.[65] In *Clark v. United States*, Justice Cardozo dismissed this fear by stating: "The chance that now and then there may be found some timid soul who will take counsel of his fears and give way to their repressive power is too remote and shadowy to shape the course of justice."[66]

More significantly, some scholars argue that the narrow view of the exception's scope directly conflicts with the exception's underlying policies because it ignores the purpose of the exception.[67] *Wigmore on Evidence* states: "Yet it is difficult to see how any moral line can properly be drawn at that crude boundary [of technical definitions of crime and fraud], or how the law can protect a deliberate plan to defy the law and oust another person of his rights, whatever the precise nature of those rights may be."[68]

Most courts use a broad application of the exception.[69] The unconscionable practices of corporate America, which gave rise to mass torts litigation such as asbestos, Dalkon Shield, and tobacco, seem to serve as a catalyst for the broad construction. Indeed, the exception is named somewhat inappropriately as courts throughout the country have found that both law and policy require application of the exception beyond those circumstances where the technical definition of crime

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61. *Id.*

62. *See, e.g.*, Union Carbide Corp. v. Dow Chem. Co., 619 F. Supp. 1036, 1051 (D. Del. 1985); Research Corp. v. Gourmet's Delight Mushroom Co., 560 F. Supp. 811, 820 (E.D. Pa. 1983).

63. *See* GERGACZ, *supra* note 35, ¶ 4.01[4][a].

64. *See id.*

65. *See* Garner v. Wolfinbarger, 430 F.2d 1093, 1102-03 (5th Cir. 1970).

66. Clark v. United States, 289 U.S. 1, 16 (1933).

67. GERGACZ, *supra* note 35, ¶ 4.01[4][a].

68. WIGMORE ON EVIDENCE, *supra* note 41, § 2298, at 577.

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

or fraud is met.[70] The policies underlying both the privilege and the exception demand that deceitful conduct, including activities beyond the scope of criminal or common law fraud, such as abuse of the attorney-client relationship, not be protected from disclosure.[71] This view of the exception's application is not expansive; as one court put it: "'Acts constituting fraud are as broad and as varied as the human mind can invent.'"[72]

Though defendants may argue that the attorney-client privilege is a sacred institution that should only be encroached upon in the most egregious of circumstances, the policies underlying the crime-fraud exception clearly dictate a broad construction of the exception which should extend to all forms of misconduct.

IV. SORTING OUT THE CRIME-FRAUD PROCEDURE

In the current tobacco litigation, the key issues between the parties are in the context of the crime-fraud exception: what procedure the court should follow, what the burden of proof is, and who carries this burden. Courts do not universally agree on a single specific procedure or burden of proof. The Supreme Court recognized the confusion concerning the specifics of the crime-fraud exception, but declined an opportunity to resolve that confusion.[73] The result appears to be a loosely connected framework where the details become muddled in seemingly inconsistent judicial interpretations. Although the crime-fraud exception appears unsettled, the cases present a clear picture in which both practical and policy considerations are satisfied.

A. The Zolin *Showing*

Prior to the 1989 landmark case of *United States v. Zolin*,[74] considerable controversy existed among the circuits about what evidence courts could consider

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70. *See, e.g.*, Sandberg v. Virginia Bankshares, Inc., 979 F.2d 332, 353-54 (4th Cir. 1992) (finding that "improprieties, breaches of fiduciary duties, and violations of securities laws" are sufficient to deny application of the attorney-client privilege); *In re* Sealed Case, 754 F.2d 395, 399 (D.C. Cir. 1985) (extending the exception to "crime, fraud or other misconduct"); Cooksey v. Hilton Int'l Co., 863 F. Supp. 150, 151 (S.D.N.Y. 1994) (applying the exception to "intentional torts moored in fraud"); Central Constr. Co. v. Home Indem. Co., 794 P.2d 595, 598 (Alaska 1990) ("'Public Policy demands that the "fraud" exception to the attorney-client privilege . . . be given the broadest interpretation.'" (quoting *In re* Callan, 300 A.2d 868, 877 (N.J. Super. Ct. Ch. Div. 1973))); State v. Doster, 276 S.C. 647, 651, 284 S.E.2d 218, 220 (1981) (noting the "widely recognized rule that the privilege does not extend to communications in furtherance of criminal, tortious or fraudulent conduct"); Volcanic Gardens Mgmt. Co. v. Paxson, 847 S.W.2d 343, 347 (Tex. Ct. App. 1993) (refusing to limit the application of the exception only in cases of common law or criminal fraud).

71. *See* International Tel. & Tel. Corp. v. United Tel. Co., 60 F.R.D. 177, 180 (M.D. Fla. 1973).

72. *Central Constr. Co.*, 794 P.2d at 598 (quoting *In re* Callan, 300 A.2d 868, 877 (N.J. Super. Ct. Ch. Div. 1973)).

73. United States v. Zolin, 491 U.S. 554, 563 n.7 (1989).

74. 491 U.S. 554 (1989).

to determine whether the crime-fraud exception applied to allegedly privileged communications.[75] The *Zolin* rule was rather simple: A court can consider "any relevant evidence, lawfully obtained, that has not been adjudicated to be privileged."[76] Thus, because the Court recognized that the communication itself is often the best evidence of its true nature,[77] a claim of privilege regarding the communication in contention does not immunize it from the court's consideration.[78]

From this analytical basis, the Court determined that *in camera* review of the communications in contention is an appropriate, and often necessary, tool for adjudicating the privilege challenge.[79] Inspection of the documents at issue may be made after the privilege challenger makes a threshold showing. The threshold showing is "'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."[80] Once the challenger meets this threshold requirement, the intrusion upon the attorney-client privilege is minimal and does not destroy the privilege, if it in fact exists.[81] The trial judge may implement such inspection. *Zolin*'s threshold requirement is not stringent and primarily discourages fishing expeditions by opposing parties into confidential attorney-client communications;[82] however, some foundation in fact must justify any intrusion into the privilege.[83]

Despite the *Zolin* Court's specific definition of the threshold standard, the tobacco industry consistently argues for a higher burden on the privilege challenger. The tobacco industry ignores that the "'decision to engage in *in camera* review implicates a much more lenient standard of proof than the determination to apply the crime/fraud exception.'"[84]

In re Grand Jury Investigation[85] articulates the most probing and thoughtful analysis of the *Zolin* standard. In its analysis, the Ninth Circuit noted that *in camera* review is appropriate where such review may reveal evidence to establish the

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75. *See id.* at 563 n.7.

76. *Id.* at 575.

77. *Id.* at 573.

78. *See id.* at 574 n.12.

79. *Id.* at 574.

80. *See Zolin*, 491 U.S. at 572 (quoting Caldwell v. District Court, 644 P.2d 26, 33 (Colo. 1982)) (citation omitted).

81. *See id.* After the challenger makes the threshold showing, the trial judge has discretion to allow *in camera* inspection. Factors which a court may consider in deciding to proceed with *in camera* inspection after the threshold is met include: the amount of material to be reviewed; the relevancy of the material to the merits of the case at the bar; and the likelihood that *in camera* review will produce evidence in favor of applying the crime-fraud exception. *Id.*

82. *See id.*

83. *See id.*

84. Haines v. Liggett Group Inc., 975 F.2d 81, 96 (3d Cir. 1992) (quoting Haines v. Liggett Group Inc., 140 F.R.D. 681, 690 (D.N.J. 1992)); *see In re* Grand Jury Subpoena, 31 F.3d 826, 830 (9th Cir. 1994); *In re* Grand Jury Investigation, 974 F.2d 1068, 1072-73 (9th Cir. 1992).

85. 974 F.2d 1068 (9th Cir. 1992).

applicability of the exception.[86] While confirming that the *Zolin* threshold analysis requires some speculation,[87] the court properly clarifies the nature of the threshold factual showing required by *Zolin* as a reasonable person's good faith belief. The analysis does not require a showing that the exception actually applies, but merely that it "'*may* reveal evidence to establish the claim that the . . . exception applies.'"[88] The difference between these two standards "results in a considerably lower threshold for conducting *in camera* review."[89] In short, the *Zolin* threshold standard balances the policies and rationales behind both the privilege and the exception to arrive at a common ground.[90]

To establish the threshold requirement, a privilege challenger can use only that evidence not formally adjudicated to be privileged.[91] Additionally, only the challenger may present evidence for establishing the preliminary threshold.[92] As a result, establishing the threshold in subsequent cases concerning the same or similar communications is easier. The court can consider rulings of other courts concerning the applicability of the crime-fraud exception to the same documents in question.[93] Obviously, any prior holding of the exception's applicability to a particular group of communications should satisfy the minimal threshold burden with respect to the same documents in another case. Otherwise, a court would have to find that the prior determination was devoid of reason or made in bad faith.[94]

In addition to its explicit approval of *in camera* inspection of contested communications, *Zolin* offered guidance for the proper procedure courts should follow in determining whether the exception applies. Though the Court refused to

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86. *Id.* at 1073.

87. *Id.* ("The *Zolin* threshold is designed to prevent 'groundless fishing expeditions,' not to prevent all speculation by the district court." (quoting *United States v. Zolin*, 491 U.S. 554, 571 (1989))).

88. *Id.* (quoting *Zolin*, 491 U.S. at 572) (emphasis added).

89. *Id.*

90. *Id.* at 1072 ("The *Zolin* threshold is set sufficiently low to discourage abuse of privilege and to ensure that mere assertions of the attorney-client privilege will not become sacrosanct.").

91. *See Zolin*, 491 U.S. at 574.

92. *See In re* Grand Jury Subpoena, 31 F.3d 826, 829 (9th Cir. 1994) (finding that the court need not consider countervailing evidence during the *Zolin* threshold showing); Haines v. Liggett Group Inc., 975 F.2d 81, 96 (3d Cir. 1992) ("For *in camera* inspection, it would be sufficient for the district court, in its discretion, to consider only the presentation made by the party challenging the privilege.").

93. *See, e.g., In re* A.H. Robins Co., 107 F.R.D. 2, 10 (D. Kan. 1985) (taking judicial notice of the existence, rather than the contents, of a report procured by another court where the report served in an "advisory and evidentiary capacity").

94. As the tobacco litigation is proceeding contemporaneously in a number of different courts, plaintiff attorneys have attempted to use unprivileged documents in other jurisdictions to meet the *Zolin* showing. The tobacco industry has opposed this use, arguing that the presiding court cannot consider the documents during the *Zolin* analysis because they are privileged. The industry's argument fails because it misunderstands and misconstrues *Zolin*. The *Zolin* Court specifically found this argument to be exempt from a *Zolin* analysis—the materials must be adjudicated to be privileged, not merely claimed to be privileged. The Court will not presume that the materials are privileged simply because a party claims privilege. *Zolin*, 491 U.S. at 566-67. Therefore, documents adjudicated not to be privileged in other jurisdictions may be examined by the presiding court in its *Zolin* analysis. *Id.* at 574.

resolve all questions concerning the crime-fraud exception, when considered with other courts' decisions, *Zolin* provides at least a framework for courts to determine when the exception applies.

B. In Camera *Inspection and the Prima Facie Standard*

1. The Controversy

If the presiding court decides not to inspect the contested communication *in camera*, the inquiry ends, and the communications are adjudicated to be privileged in that proceeding.[95] If a court decides to inspect the communications *in camera*, the court considers the communications, along with the preliminary threshold evidence, to determine if the crime-fraud exception applies. This stage of the analysis creates the most controversy in tobacco litigation. The primary issue becomes the burden of proof. Courts have consistently held that to invoke the exception, the privilege challenger must show only prima facie evidence[96] or probable cause[97] that the communication is sufficiently related to a crime or fraud. While courts define the necessary type of evidence in varying language, the substantive definition remains the same.[98] Prima facie evidence is most commonly defined as "evidence which, if believed by the fact-finder, would be sufficient to support a finding that the elements of the crime-fraud exception were met."[99] Significantly, the party challenging the privilege "does not have to establish probable cause of fraud through independent evidence; rather, the court may make such determination based on the *in camera* review of documents."[100]

The central source of confusion is the lack of a definitive codified rule governing procedure. The tobacco industry argues that Federal Rule of Evidence

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

96. *Haines*, 975 F.2d at 95.

97. *See In re* John Doe Corp., 675 F.2d 482, 491 n.7 (2d Cir. 1982).

98. *Compare In re* International Sys. & Controls Corp. Sec. Litig., 693 F.2d 1235, 1242 (5th Cir. 1982) (defining "prima facie case" as "[evidence s]uch as will suffice until contradicted and overcome by other evidence" (quoting BLACK'S LAW DICTIONARY 1353 (rev. 4th ed. 1968))) *with In re* Antitrust Grand Jury, 805 F.2d 155, 166 (6th Cir. 1986) (requiring a privilege challenger to establish a prima facie case by showing that a "'prudent person ha[s] a reasonable basis to suspect the perpetration of a crime or fraud'" (quoting *In re* Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983, 731 F.2d 1032, 1039 (2d Cir. 1984))). Though both standards are different to some degree, the difference is irrelevant with respect to the burden on the privilege challenger. If the evidence is sufficient to apply the crime-fraud exception, regardless of any contradictory evidence presented by the privilege claimant, then the opposing party has satisfied its burden of proof.

99. *Haines*, 975 F.2d at 95-96.

100. Sackman v. Liggett Group, Inc., 920 F. Supp. 357, 368 (E.D.N.Y. 1996).

104(a)[101] governs the procedure.[102] Yet with one exception,[103] courts have not addressed Rule 104(a) in their discussions of the crime-fraud procedure.[104]

Subsections (a) and (b) of Rule 104 require the presiding judge to decide preliminary issues of fact to determine if privilege exists.[105] The language of Rule 104(a) suggests that the rule should govern some aspect of the crime-fraud procedure because the rule relates to a court's determination of privilege. The Supreme Court's decision in *Zolin* implies, if not directly recognizes, that Rule 104(a) applies to this determination.[106] Yet, courts have been reluctant to qualify the crime-fraud procedure under Rule 104(a) regardless of this apparent logical relation.

Two possible reasons may explain this nearly uniform lack of reliance on Rule 104(a). First, Rule 104(a) states that in making a preliminary determination of fact, the court "is not bound by the rules of evidence except those with respect to privileges."[107] The rule of evidence concerning privileges requires that the determination of privilege 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."[108] Construing these rules together, courts may understand that they exempt determinations of privilege from the normal practice in determining preliminary issues of fact. Thus, common law developments on issues of privilege, rather than procedures established under Rule 104(a), would bind a court. This is important considering the tobacco industry's primary purpose in attempting to establish the applicability of Rule 104(a).

The *Bourjaily* opinion and the tobacco industry's interpretation of that decision provides the second explanation for courts' refusal to discuss Rule 104(a) in the crime-fraud context. The tobacco industry relies on *Bourjaily v. United States*[109] to argue that Rule 104(a) requires the privilege challenger to show *by a preponderance of the evidence* that the crime-fraud exception applies to a contested communication.[110] This allocation of the burden directly conflicts with the established common law procedure which requires only a prima facie showing to justify application of the crime-fraud exception.

The *Bourjaily* Court discussed Rule 104(a) in terms of admissibility of evidence at trial. In contrast, the procedure for determining the existence of privilege and the related applicability of the crime-fraud exception concerns only the discovery of the

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101. FED. R. EVID. 104(a).

102. *See* American Tobacco Co. v. Florida, 697 So. 2d 1249, 1253 (Fla. Dist. Ct. App. 1997).

103. *See* Laser Indus., Ltd. v. Reliant Techs., Inc., 167 F.R.D. 417, 438 (N.D. Cal. 1996).

104. *See, e.g., American Tobacco*, 697 So. 2d at 1249.

105. FED. R. EVID. 104(a), (b).

106. *See* United States v. Zolin, 491 U.S. 554, 565-68 (1989) (discussing whether Rule 104(a) prevents *in camera* review of a contested communication in a crime-fraud determination).

107. FED. R. EVID. 104(a).

108. FED. R. EVID. 501.

109. 483 U.S. 171 (1987).

110. *Id.* at 175-76; *see* American Tobacco Co. v. Florida, 697 So. 2d 1249, 1253-54 (Fla. Dist. Ct. App. 1997).

communication and not its admissibility at trial.[111] Although the determination of privilege and the admissibility of evidence at trial are separate issues addressed under Rule 104(a),[112] a court will not necessarily conduct two separate determinations of privilege, one for discovery and another for admission of the documents at trial. Rather, the privilege determination made for discovery purposes is a final decision with respect to the privileged status of the documents. The determination of admissibility at trial concerns only traditional evidentiary issues such as relevancy, hearsay, and the like. Therefore, *Bourjaily* does not explicitly govern the crime-fraud procedure; it governs only whether documents deemed not privileged are admissible at trial. Because *Bourjaily* has no direct application to the privilege determination, and because a distinguished body of law concerning the crime-fraud procedure exists, a court has little reason to address Rule 104(a) in a crime-fraud procedural decision. Clearly, courts rely on Rule 501's common law route rather than Rule 104(a) for the specifics of the crime-fraud procedure.

Two courts have addressed Rule 104(a)'s applicability to the crime-fraud procedure.[113] In *Laser Industries, Ltd. v. Reliant Technologies, Inc.* the courts held that Rule 104(a) governed the crime-fraud procedure and required the party opposing the privilege to prove by a preponderance of the evidence that the exception applied to a particular communication.[114] Yet, the *Laser Industries* court blatantly ignored both the policies underlying the exception and the inherent disadvantages that a privilege challenger faces.[115] In fact, no other court has cited *Laser Industries* with approval or applied a similar requirement in deciding the exception's applicability.

In contrast, the *American Tobacco* court held that *Bourjaily*'s requirement of a preponderance standard does not apply to the crime-fraud exception.[116] The tobacco industry argued that Florida law, which is almost identical to Rule 104(a), requires a privilege challenger to prove the exception's existence by a preponderance of the evidence.[117] While finding that the preponderance standard conflicted with the bulk of judicial precedent that required only a prima facie showing, the court admitted that evidence is usually weighed under a less than the preponderance standard.[118] At first glance, this admission may seemingly create a

111. *See Bourjaily*, 483 U.S. at 175-76.

112. *See* FED. R. EVID. 104(a).

113. *See* Laser Indus., Ltd. v. Reliant Techs., Inc., 167 F.R.D. 417 (N.D. Cal. 1996); *American Tobacco Co.*, 697 So. 2d 1249.

114. *See Laser Indus.*, 167 F.R.D. at 437-38.

115. *Id.* at 423-25 (citing the importance of the attorney-client privilege but not addressing the policy considerations discussed *supra* in Part III); *see also In re* Feldberg, 862 F.2d 622, (7th Cir. 1988) (recognizing the fundamental disadvantage the privilege challenger faces due to its unfamiliarity with the disputed communication).

116. *See American Tobacco*, 697 So. 2d at 1254-56.

117. *Id.* at 1253.

118. *Id.* at 1256.

dichotomy; however, a closer look at the crime-fraud procedure shows that the *American Tobacco* court used the correct analysis, requiring only prima facie proof.

Importantly, both the *Laser Industries* and *American Tobacco* courts followed the rule established in *Haines v. Liggett Group Inc.*[119] and *In re Feldberg*[120] that the claiming party is allowed to present rebuttal evidence upon a prima facie showing that the crime-fraud exception applied. The *Haines-Feldberg* line of decisions hold that, in the interest of fairness, a court should not deny the recognition of privilege without allowing the privilege claimant to explain or rebut the evidence of the crime-fraud exception.[121] Allowing rebuttal evidence would seem to alleviate the implication of unfairness hinted at in *Zolin*.[122] As the *American Tobacco* court correctly recognized, allowing rebuttal evidence implicates use of a weighing process to determine whether the crime-fraud exception applies. If the parties present a court with prima facie evidence for exception and rebuttal evidence for recognition of the privilege, then the court must weigh the evidence to make a ruling. Responding to the need for a weighing test, the *Laser Industries* court interpreted *Bourjaily* and Rule 104(a) to require a privilege challenger to meet the preponderance standard.[123] However, the conflict between *Bourjaily* and the established common law crime-fraud procedure requiring only a prima facie showing caused the *American Tobacco* court to reject Rule 104(a).[124] These inconsistencies give rise to much confusion among courts attempting to make a crime-fraud determination.

2. *An Explanation*

One explanation of the crime-fraud procedure reconciles *American Tobacco* and *Bourjaily* and accounts for the uniform lack of recognition of *Laser Industries* through examination of (1) the policies underlying both the privilege and the exception,[125] (2) the existing body of precedent concerning the crime-fraud exception, and (3) the fundamental fairness implicit in civil litigation.

Considering the explicit language in Rule 104(a) and the implications of *Zolin*, some aspect of the crime-fraud procedural determination seemingly falls within the

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119. 975 F.2d 81, 97 (3d Cir. 1992).

120. 862 F.2d 622, 626 (7th Cir. 1988).

121. *See id.*; *Haines*, 975 F.2d at 97.

122. *See* United States v. Zolin, 491 U.S. 554, 563 n.7 (noting two law review articles which criticized certain courts' automatic invocation of the crime-fraud exception upon a prima facie showing). The cases which applied this automatic invocation of the exception were in the criminal grand jury context and did not deal with the use of the communications at trial against the claiming party. *See, e.g., In re* Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983, 731 F.2d 1032 (2d Cir. 1984)

123. *See* Laser Indus., Ltd. v. Reliant Techs., Inc., 167 F.R.D. 417, 430 (N.D. Cal. 1996). For a discussion of *Bourjaily*, see *supra* notes 117-21 and accompanying text.

124. *American Tobacco*, 697 So. 2d at 1253-56.

125. *See supra* Part III.

purview of Rule 104(a). Significantly, Rule 104(a) governs "the existence of a privilege" and not the existence of an exception.[126] If Rule 104(a) does indeed govern the crime-fraud procedure—clearly not the rule in the overwhelming majority of jurisdictions—then the tobacco industry and *Laser Industries* mischaracterizes Rule 104(a) as requiring that the *party opposing the privilege* prove by a preponderance of evidence that the exception applies. If courts find that Rule 104(a) does govern the crime-fraud procedure and a privilege challenger makes a prima facie showing that the exception applies, then the *privilege claimant* must show by a preponderance of the evidence that the exception is inapplicable.

When a party claims the privilege, that party carries the burden of only a prima facie showing that the communication satisfies the technical requirements of the privilege.[127] The privilege challenger then must present evidence to overcome the initial evidence presented by the claiming party. If this rebuttal evidence is insufficient to defeat the claiming party's initial evidence, the court should grant the claiming party a preliminary recognition of privilege—properly characterized as a facial grant of privilege.

At this point, the privilege claimant is allowed a presumption against exceptions to the privilege. In other words, the privilege claimant is not required to disprove all possible exceptions to the privilege. This presumption temporarily shifts the burden to the privilege challenger to invoke an exception to the privilege. For the court to require further proof from the privilege claimant against a particular exception, the privilege challenger must present evidence which sufficiently invokes an exception to the privilege.[128]

Adjudication of the crime-fraud exception is separate from the facial determination of privilege. The gravamen of the crime-fraud exception is the client's abuse of confidential communication for misconduct.[129] Even if a claimant meets the technical requirements of privilege, the crime-fraud exception prevents the recognition of such privilege. Therefore, to successfully invoke the exception, the privilege challenger need not overcome evidence previously presented by the privilege claimant. The privilege challenger need only overcome the presumption against the exception, thereby shifting the burden back to the privilege claimant to disprove the exception.[130] Courts have held that a prima facie showing is sufficient to require such further proof by the privilege claimant.[131]

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126. FED. R. EVID. 104(a).

127. *See* Upjohn Co. v. United States, 449 U.S. 383, 393-94, 401 (1981).

128. The reason for this presumption is obvious. Requiring both courts and privilege claimants to present speculative proof against all possible exceptions to the privilege would be tremendously burdensome.

129. Establishing a specific subjective intent on the client's part to commit misconduct is not required; rather, a court should apply an objective test. *See supra* note 2 and accompanying text.

130. *See In re* Feldberg, 862 F.2d 622, 625-26 (7th Cir. 1988) ("The question here is not whether the evidence supports a verdict but whether it calls for inquiry.").

131. *See supra* note 98 (defining "prima facie case").

The policies of our legal system support the prima facie standard. First, the privilege claimant is attempting to depart from the normal procedures of discovery by obtaining protection for certain communications. The law disfavors such departure, because it presents "'an obstacle to the investigation of the truth.'"[132] Thus, claims of privilege should be "'strictly confined within the narrowest possible limits.'"[133] Second, the burden of establishing the privilege lies with the privilege claimant.[134] Invoking the crime-fraud exception annuls the privilege.[135] If the exception applies, the privilege cannot exist.[136] Therefore, if the challenger shows prima facie evidence of the crime-fraud exception, then the privilege claimant has not established the privilege. Third, the privilege challenger has not been exposed to the questionable communications. Placing the burden of proof on the party which has limited, if any, access to the communications does not promote the interests of justice and fair play. Requiring the party with superior access to and familiarity with the communications to justify the application of the privilege is more rational.[137]

In summary, the crime-fraud procedure is a part of the privilege determination. If the privilege challenger presents sufficient evidence to overcome the presumption against exceptions, the privilege claimant must explain why the exception does not apply. The tobacco industry's argument for placing a preponderance burden on the privilege challenger is an attempt to bifurcate the privilege determination procedure under the Federal Rules of Evidence. Other than the isolated court in *Laser Industries*, no support for such a separation exists.[138] If Rule 104(a) governs the determination of privilege, then it also governs the invocation of the crime-fraud exception.

Under this explanation, if Rule 104(a) does in fact govern the crime-fraud procedure, the ultimate burden cannot lie with the privilege challenger. If a court must conduct the weighing process as recognized by *American Tobacco* court, the privilege claimant bears the preponderance burden. While in tune with the spirit and language of *Bourjaily*,[139] this burden allocation is also proper in the context of the crime-fraud procedure.

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132. NLRB v. Harvey, 349 F.2d 900, 907 (4th Cir. 1965) (quoting WIGMORE ON EVIDENCE, *supra* note 41, § 2292).

133. *Id.*

134. *See* Upjohn Co. v. United States, 449 U.S. 383, 393-94 (1981).

135. *See supra* Part III (discussing the policy behind both the exception and the privilege).

136. The Supreme Court recognized this fact in *United States v. Zolin*, 491 U.S. 554 (1989). The Court stated: "We see no basis for holding that the tapes [claimed to be privileged] in this case must be deemed privileged under Rule 104(a) while the question of crime or fraud remains open." *Id.* at 568.

137. *See In re* Feldberg, 862 F.2d 622, 626 (7th. Cir. 1988).

138. For a discussion of *Laser Industries, Ltd. v. Reliant Technologies, Inc.*, 167 F.R.D. 417 (N.D. Cal. 1996), see *supra* notes 114-23 and accompanying text.

139. *See supra* Part IV.A (discussing the threshold requirement set forth by *United States v. Zolin*, 491 U.S. 554 (1989)).

The best explanation for Rule 104(a)'s applicability is very simple. Rule 104(a) simply places the determination of privilege in the hands of the court rather than a jury. The exact procedure for this determination is governed not by *Bourjaily*, but by common law principles established in courts over the years. The only true burden that the privilege challenger faces is the initial *Zolin* threshold showing.[140] Once the challenger meets this threshold and the court reviews the disputed communications *in camera*, the privilege claimant must substantiate its claim of privilege. If the privilege claimant is unable to dispel any and all reasonable questions concerning the legitimacy of its claim, the claim should fail.

C. The Inevitable Appeals

If the court finds sufficient evidence to invoke the crime-fraud exception, and the privilege claimant's rebuttal evidence is insufficient, then the court orders the privilege claimant to turn over the contested communications to the privilege challenger through either document production or deposition.[141] At this point, the privilege claimant can be expected to appeal the court's decision. A denial of privilege cannot be appealed as of right; however, the privilege claimant may be granted a permissible appeal under federal law or a related state statutory provision.[142] For example, in federal court, the trial court must certify the issue for interlocutory appeal, and the appellate court may allow the appeal.[143] To receive an interlocutory appeal, a district court judge must state in writing that three elements are satisfied: (1) the matter to be appealed involves a "controlling question of law;" (2) a "substantial ground for difference of opinion" concerning the matter exists; and (3) an appeal may "materially advance" the litigation towards a conclusion.[144] In addition, if the party requesting the interlocutory appeal will suffer irreparable harm that cannot be rectified through final appeal, then the court of appeals may grant the order.[145] State provisions generally include the same or similar requirements.[146]

The reasons that courts frequently grant certification relate directly to the three factors discussed above. Because the tobacco industry claims privilege to nearly all its documents related to the litigated issues, the discovery of the documents is a controlling issue. Without those documents, the Attorneys General will have a more difficult time presenting viable claims against the tobacco industry. Conversely, if the courts ultimately order the industry to produce the documents, the

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140. *See supra* Part IV.A (discussing the threshold requirement set forth by *Zolin*).
141. *See Zolin*, 491 U.S. at 572.
142. *See* 28 U.S.C. § 1292 (as amended 1996).
143. *See id.* § 1292(b).
144. *Id.*
145. *Id.*; see *In re* San Juan Star Co., 662 F.2d 108, 112-13 (1st Cir. 1981).
146. *See, e.g.*, Blank v. Mukamal, 556 So. 2d 54, 54 (Fla. Dist. Ct. App. 1990) (per curiam) (granting certiorari to produce privileged information protected by attorney-client privilege).

tobacco industry is more likely to offer a settlement, thereby substantially advancing the litigation.[147] Considering the apparent controversy that the tobacco industry has created over the exact procedure and burden of proof in determining application of the exception, the tobacco industry has argued successfully that the issue should be certified to the appellate courts. Predictably, the tobacco industry also has argued that it will suffer irreparable harm if they are not granted an immediate appeal. Though this argument generally has merit,[148] privilege does not exist for a large number of the tobacco documents. For instance, the Merrell Williams documents and certain Liggett documents are within the public domain. The seal of secrecy, the central focus of the irreparable harm factor, has been broken because the opposing party has access to the documents in question, thereby destroying the need for an immediate appeal.[149]

Though the tobacco industry has created an apparent controversy over the technical labels attached to many aspects of the crime-fraud procedure, most courts follow substantially similar procedures. Once a court recognizes the lack of any real controversy, an essential element of certification is eliminated. Provided the correct process is followed, courts should not have a reason to grant certification of this issue.[150]

V. RED HERRINGS IN CRIME-FRAUD

In the current tobacco litigation, the tobacco industry has confused the issues in crime-fraud procedure. Although loosely based on the language of certain courts, these arguments have little merit. Properly armed with a firm understanding of the policies underlying the exception and the procedure applied by the courts, privilege challengers can easily dispel these arguments.

A. Where's the Fraud?

The most frequently used argument against invoking the exception is that the challenger did not show a specific and identifiable crime or fraud. In other words, the privilege claimant will argue that the challenger must allege misconduct constituting either a crime or *actionable* fraud as defined under the law of the

147. After the ruling in *American Tobacco Co. v. Florida*, 697 So. 2d 1249 (Fla. Dist. Ct. App. 1997), the tobacco industry expeditiously settled the Attorney General's lawsuit.

148. *See, e.g.*, Riano v. Heritage Corp. of S. Fla., 665 So. 2d 1142, 1143 (Fla. Dist. Ct. App. 1996) ("A non-final order that is not appealable . . . is reviewable by petition for certiorari only where it . . . cause[es] material injury . . . that would be irreparable by way of appeal at the conclusion of the case.").

149. *See id.* at 1144.

150. *See* BarclaysAmerican Corp. v. Kane, 746 F.2d 653, 655 (10th Cir. 1984) (denying petitioner's writ of mandamus seeking to vacate the district court's order which denied the petitioner attorney-client privilege and work-product protection).

jurisdiction.[151] However, only a few courts utilize a narrow scope of the exception that requires such a rigorous standard for invoking the crime-fraud procedure.[152]

Policy concerns,[153] as well as factors that call for abstention from requiring proof of technical elements,[154] support broad construction of the crime-fraud exception. Courts have defined the conduct which invokes the crime-fraud exception quite broadly.[155] Requiring proof of each element of a specific and recognized crime or fraud would cut against the substantial weight of authority.

Under the tobacco industry's argument concerning the opposing party's burden of proof, a trial would not be necessary to adjudicate the misconduct after such a crime-fraud determination is made. According to the industry, the opposing party can invoke the crime-fraud exception only by proving all the elements of an actionable crime or fraud by a preponderance of the evidence. If the privilege claimant carries this burden, a jury trial would only determine whether the jury agrees with the judge. In this light, one can readily see that this characterization of the crime-fraud procedure is fundamentally flawed in its reasoning. In particular, an almost identical situation involving the concealment of health hazards arose in the Dalkon Shield litigation.[156] A.H. Robins, the manufacturer of the Dalkon Shield,

> failed to adequately test the Dalkon Shield before marketing it; attempted to develop . . . evidence which misrepresented the nature, quality, safety and efficacy of the Dalkon Shield; ignored the mounting evidence against the Dalkon Shield; . . . relied upon invalid studies in an effort to refute . . . dangers . . . caused by the Dalkon Shield; and attempted, with the assistance of counsel, to devise strategies to cover up [its] responsibilities and lessen its liability with respect to the Dalkon Shield.[157]

This behavior is nearly identical to that of the tobacco industry. The courts in the Dalkon Shield litigation applied the crime-fraud exception to all documents

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151. *See* Brief of Petitioner at 21-22, American Tobacco Co. v. Florida, 697 So. 2d 1249 (Fla. Dist. Ct. App. 1997) (No. 97-1405).

152. *See supra* notes 62-72 and accompanying text.

153. *See supra* Part III.

154. *See, e.g., In re* Sealed Case, 754 F.2d 395, 402 n.7 (D.C. Cir. 1985) (refusing to require proof of each element for fear that the process would result in a "mini-trial"); *In re* Sealed Case, 676 F.2d 793, 814 (D.C. Cir. 1982) (discussing the impossibility of a true adversarial proceeding where only one party is privy to contested communications).

155. *See, e.g., Sealed Case*, 754 F.2d at 399 ("crime, fraud or other misconduct"); *Sealed Case*, 676 F.2d at 807 ("manipulation of the truth-seeking process"); Central Constr. Co. v. Home Indemn. Co., 794 P.2d 595, 598 (Alaska 1990) ("*bad faith breach* of a duty" or "deception and deceit in any form").

156. *See In re* A.H. Robins Co., 107 F.R.D. 2 (D. Kan. 1985).

157. *Id.* at 14-15.

pertaining to A.H. Robins's concealment.[158] Thus, the exception clearly applies to any industry's pattern of concealment.

B. The "In Furtherance" Standard

Courts often use the phrase "in furtherance" to describe the level of relatedness between a communication and misconduct to invoke the crime-fraud exception.[159] Some courts have held that the communication must be in furtherance of the misconduct.[160] This phrase has caused much confusion among the courts and has been used consistently by the tobacco industry. The tobacco industry claims that the in-furtherance standard requires a finding that the communication procured or directly advanced the misconduct.[161] A close examination of the standard as courts interpret it reveals a much less stringent burden.

Clearly, the relationship between the communication and the misconduct must be more than a "'mere coincidence in time,'"[162] and the communication must, at the very least, be "relevant evidence" of the misconduct.[163] In addition, the communication must be "sufficiently related" to the misconduct to invoke the crime-fraud exception.[164] This relationship requirement "should not be interpreted restrictively";[165] rather, it must take into account that the opposing party does not have access to the communications, thus precluding a truly adversarial presentation.[166]

In re Grand Jury Proceedings[167] presents an excellent discussion of what the in-furtherance standard requires. In that case, the court stated the well-recognized premise that the central focus of the relatedness determination is the client's intent in obtaining legal advice.[168] The in-furtherance standard is sufficiently satisfied if the advice advanced or was intended to advance the misconduct.[169] Actual furtherance of the misconduct is not necessary; only the intent to further misconduct

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158. *See id.* at 8-16.

159. *See, e.g., In re* Richard Roe, Inc., 68 F.3d 38, 41 (2d Cir. 1995) (requiring the communications to be "in furtherance" of committing a crime or fraud); *In re* Antitrust Grand Jury, 805 F.2d 155, 164 (6th Cir. 1986) (requiring the privilege challenger to "establish some relationship between the communication . . . and the *prima facie* violation").

160. *See, e.g., Richard Roe*, 68 F.3d at 40.

161. *See* Brief of Petitioner at 25, American Tobacco Co. v. Florida, No. 95-1466 (Fla. Dist. Ct. App. 1997).

162. *See In re* Sealed Case, 754 F.2d 395, 402 (D.C. Cir. 1985).

163. *See Richard Roe*, 68 F.3d at 40.

164. *See In re* Grand Jury Investigation, 842 F.2d 1223, 1227 (11th Cir. 1987); *In re* International Sys. & Controls Corp. Sec. Litig., 693 F.2d 1235, 1243 (5th Cir. 1982) ("reasonably relate"); *In re* A.H. Robins Co., 107 F.R.D. 2, 15 (D. Kan. 1985) ("close relationship").

165. *Grand Jury Investigation*, 842 F.2d at 1227.

166. *See In re* Feldberg, 862 F.2d 622, 626 (7th Cir. 1988).

167. 87 F.3d 377 (9th Cir. 1996).

168. *Id.* at 381.

169. *See id.*

is required to meet the standard.[170] If the communication is ineffective to further misconduct, or even if it hinders completing the misconduct, a court will still find that the communication is not privileged.[171]

The following hypothetical illustrates how the furtherance standard is applied:

> A man informs his attorney that he wants to kill his wife, but does not wish to face the death penalty if convicted. He then asks his attorney which state may provide a great "vacation" spot, allowing him to murder his wife while avoiding the ultimate punishment. The attorney provides the requested information, and the client leaves the office.

This hypothetical illustrates that the conversation should not be privileged regardless of whether the client travels to a state without the death penalty to kill his wife, if he kills his wife in their home, *or if he does nothing at all.* Under the tobacco industry's argument, the client would have had to travel to the appropriate state *and* killed his wife to invoke the crime-fraud exception. Simply stated, no rational basis for such a requirement exists.

C. The Post-Hoc Spin

After a challenger presents sufficient prima facie evidence to call for further inquiry into the existence of a privilege, the *Haines-Feldberg* rule allows the claiming party to explain or rebut the evidence.[172] In the current tobacco litigation, the tobacco industry has tried to distort the true nature of the documents. The industry has presented rather innovative explanations of what the documents actually relate. Plaintiffs call this explanation the "post-hoc spin."

When a privilege claimant presents such distortions at the rebuttal stage, particularly through ex parte submission, the court must be cautioned. A court should, and normally does, allow the privilege challenger to controvert the claimant's rebuttal in order to place the disputed communications within the correct context. This explanation of the crime-fraud procedure contemplates allowing the privilege challenger an opportunity to present a rebuttal argument without resistance from the courts.

VI. CONCLUSION

The procedure for invoking the crime-fraud exception to a claim of privilege is a complex and intricate process which enjoys little uniformity in the courts. However, a close examination of the leading cases and policies underlying the

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170. *See id.* at 382.
171. *Id.*
172. *See supra* notes 119-22 and accompanying text.

exception reveals a rational and worthy procedure which all courts can follow. Courts need some type of unanimity to avoid conflicting rulings in the area of multi-state mass torts. This article has presented an explanation of the procedure which comports with the current practice and philosophy of the majority of courts nationwide.

Courts should broadly construe and apply the exception to prevent the type of insidious behavior which results from blind adherence to an absolute attorney-client privilege. No better example illustrates this abuse of our legal protections than the tobacco industry. Once the crime-fraud exception is used for its intended purpose—to deter *any* misconduct and prevent protection for such misconduct under the guise of privilege—the legal profession and the judicial process will more closely achieve its quest for truth and justice.