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DEMYSTIFYING THE CRIME-FRAUD EXCEPTION

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Introduction

Early in our legal careers, we learn the elements of establishing the sacrosanct attorney-client privilege. The privilege protects from disclosure (1) a communication (2) between an attorney and existing or prospective client (3) made in confidence (4) for the purpose of seeking, obtaining, or providing legal advice from disclosure. This privilege "exists—and has been a cornerstone of our legal system for nearly 500 years—because the interests protected and secured by the promise of confidentiality are not merely significant; they are quintessentially imperative. Safeguarding the privilege is important—indeed compelling—because the consequences of disclosure are far from inconsequential. Once information has been disclosed, loss of confidentiality is irreversible." *Paxton v. City of Dallas*, 509 S.W.3d 247, 261 (Tex. 2017). It is "the oldest and most venerated of the common law privileges of confidential communications." *United States v. Edwards*, 3030 F.3d 606, 618 (5th Cir. 2002). As "the most sacred of all legally recognized privileges," "its preservation is essential to the just and orderly operation of our legal system." *United States v. Bauer*, 132 F.3d 504, 510 (9th Cir. 1997).

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In practice, litigators can sometimes abuse the privilege to frustrate the discovery of sensitive or inconvenient facts. The importance of protecting the privilege makes it an easy and tempting tool for mischief. It is all too common that whole email chains or meeting notes covering non-privileged business discussions are withheld for privilege merely because an attorney was copied on the communication or present in the meeting. Inadequate privilege logging makes it difficult to discern such privilege abuses; an attentive litigant can be sucked into a quagmire of discovery fights to obtain documents that should never have been withheld in the first place.

There is another form of privilege abuse that gets comparatively little attention and is of an entirely different character—using the shield of privilege to perpetrate illegal or fraudulent conduct. The attorney-client privilege only protects licit communications. One exception strips privilege from otherwise privileged communications entirely: the crime-fraud exception. This exception is not *waiver*. Rather, it vitiates privilege. When it applies, it is as if the privilege never existed.

"[I]t has long been recognized that 'an open door may tempt a saint.'" *Therasense, Inc. v. Becton, Dickinson & Co.*, 649 F.3d 1276, 1306 (Fed. Cir. 2011) (Bryson, J. dissenting). Attorneys are not exempt from this maxim. Due to the nature of privilege, with attorney communicants, establishing that an attorney participated in a crime or fraud can, knowingly or unknowingly, can be exceeding difficult to prove. But that does not mean it cannot be done. Indeed, the case law in federal and Texas courts show that in some respects, such as scope, the crime-fraud privilege is not as strict as one may think.

What Is the Purpose of the Crime-Fraud Exception?

The foundation of the attorney-client privilege is "the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." *Trammel v. United States*, 445 U.S. 40, 51 (1980). "[T]he privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981). "At the same time it withdraws what might otherwise be relevant evidence and it acts as an 'obstacle to the investigation of the truth'" *U.S. v. Dyer*, 722 F.2d 174, 177 (5th Cir. 1983) (quoting 8 J. Wigmore, Evidence § 2291 (McNaughton rev. 1961)).

The crime-fraud exception exists to accommodate these competing interests. "Where a client seeks to use an attorney to further a continuing or future crime or fraud the broader public interest in the administration of justice is being frustrated, not promoted." *Dyer*, 772 F.2d at 177.

Texas courts state the purpose of the exception somewhat differently. By keeping client communications confidential pursuant to the attorney–client privilege, the attorney whose client intends to commit the misrepresentation or concealment is complicit in concealing the truth about the misrepresentation or concealment from its victim. *In re Tex. Health Res.*, 472 S.W.3d 895, 905–06 (Tex. App.—Dallas 2015, orig. proceeding). In such a situation, the attorney's silence affirmatively aids the client in committing the misrepresentation or concealment; thus, the attorney–client privilege does not extend to such communications. *In re Gen. Agents Ins. Co. of Am., Inc.*, 224 S.W.3d 806, 820 (Tex. App.—Houston [14th Dist.] 2007, orig. proceeding).

When Does the Crime Fraud Exception Apply?

Under both federal and Texas law, the crime-fraud doctrine can apply to work product as well as privileged communications. *In re Burlington N., Inc.*, 822 F.2d 518, 524–25 (5th Cir.1987) (citing, amongst others, *In re Int'l Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1242 (5th Cir. 1982)); Tex. R. Civ. P. 192.5I(5).

In federal courts, the crime-fraud exception has developed through case law. Under the exception, communications between an attorney and client in furtherance of the commission of a crime or fraud will not be protected from disclosure under the law. *In re Grand Jury Subpoena*, 419 F.3d 329, 335 (5th Cir. 2005). The exception only covers ongoing or future misconduct. Communications between an attorney and his/her client relating to past incidents of criminal or fraudulent conduct remain fully protected by the attorney-client privilege.

Federal courts recognize that past misconduct sometimes bleeds into present or future misconduct. In these situations, disclosure may be favored. For example, the *In re Grand Jury Investigation*, 842 F.2d 1223, 1227 (11th Cir. 1987) court concluded that information the taxpayer had transmitted to his attorney for purpose of committing tax fraud was not privileged. This applied to disclosure of the taxpayer's income sources, which could reveal past criminal activity unrelated to his failure to report income. *Id.* The court explained the crime-fraud exception reached all communications "made in connection with legal assistance related to ongoing or intended criminal or fraudulent activity," "regardless of their content." *Id.* at 1227.

Texas, in contrast, has incorporated the crime-fraud exception into its evidentiary rules. The crime-fraud exception to privilege renders the privilege inapplicable "if the lawyer's services were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud." Tex. R. Evid. 503(d)(1).

What is the Proof Required?

Invocation of the crime-fraud exception does not require definitive proof of a crime or fraud. There need only be *prima facie* evidence that "has some foundation in fact." *Clark v. United States*, 289 U.S. 1, 15 (1933).

Prima facie in the context of the crime-fraud exception means establishing a *prima facie* case of a crime or fraud without affording the party asserting the privilege a chance to rebut the showing. *See United States v. Zolin*, 491 U.S. 554, 565 n.7 (1989). Most circuits applying *Clark*, including the Fifth Circuit, have concluded that the quantum of evidence needed to support a *prima facie* crime-fraud is evidence sufficient to support a verdict in favor of the party arguing for the exception. *See, e.g.*, *In re International Systems and Controls Corp. Securities Litigation*, 693 F.2d 1235, 1242 (5th Cir. 1982) ("[E]vidence that will suffice until contradicted by other evidence."); United States v. Chen, 99 F.3d 1495, 1503 (9th Cir. 1996) (similar); *but see Matter of Feldberg*, 862 F.2d 622 (7th Cir. 1985) ("*prima facie* evidence" did not mean sufficient evidence "to support a verdict in favor of the person making the claim" but evidence sufficient "to require the adverse party, the one with superior access to the evidence and in the best position to explain things, to come forward with [an] explanation").[1]

Successfully invoking the crime-fraud exception from the outset is difficult. The very documents needed to show a crime or fraud on a *prima facie* basis are often the very documents being withheld. Evidence may be insufficient to show a *prima facie* fraud, but sufficient to show that one might reasonably believe that an *in camera* review would fill the gap.

In *Zolin*, the Supreme Court addressed that question. It held that to trigger in an *in camera* review, the party asserting the crime-fraud exception need not show a *prima facie* case. Rather, for an *in camera* review, the showing must be a "a factual basis adequate to support a good faith belief by a reasonable person" that an *in camera* review may reveal evidence to establish the claim that the exception applies. *Zolin*, 491 U.S. at 572. From there, the district court has discretion to determine whether an *in camera* review is warranted. Little limits the district court in making this determination, except that "materials that have been determined to be privileged may not be considered in making the preliminary determination of the existence of a privilege."

Although difficult to prove, the crime-fraud exception can arise in different types of cases and fact pattern. In a securities fraud litigation, for example, the crime-fraud exception might apply to work product materials if an attorney participated in the filing of false SEC documents and continued that course of conduct. *See, e.g.*, *In re Rospatch Securities Litigation*, 1991 WL 574963 (W.D. Mich. 1991). The doctrine can apply in cases involving fraudulently procured patents or sham patent litigation. *See, e.g.*, *Chandler v. Phoenix Servs.*, 2020 WL 487503, at *4-6 (N.D. Tex. Jan. 30, 2020).

In Texas, a party asserting this exception to the privilege must show: (1) a *prima facie* case of the contemplated crime or fraud; and (2) a nexus between the communications at issue and the crime or fraud. *Granada Corp. v. First Court of Appeals*, 844 S.W.2d 223, 227 (Tex.1992); *In re USA Waste Mgmt. Res., L.L.C.*, 387 S.W.3d 92, 98 (Tex. App.—Houston [14th Dist.] 2012, orig. proceeding [mand. denied]). Mere allegations of fraud are insufficient. *Id.*

"A prima facie showing is sufficient if it sets forth evidence that, if believed by a trier of fact, would establish the elements of a fraud or crime that 'was ongoing or about to be committed when the document was prepared.' " *In re Gen. Agents Ins. Co. of Am., Inc.*, 224 S.W.3d 806, 819 (Tex. App.—Houston [14th Dist.] 2007, orig. proceeding) (quoting *Coats v. Ruiz*, 198 S.W.3d 863, 876 (Tex. App.—Dallas 2006, no pet.)). This *prima facie* requirement is met when the proponent offers evidence establishing the elements of fraud and that the fraud was ongoing, or about to be committed, when the document was prepared. *In re Small*, 346 S.W.3d at 666. The fraud alleged to have occurred must have happened at or during the time the document was prepared, and the document must have been created as part of perpetrating the fraud. *Id.*

What is a Crime or Fraud (or Tort)?

In federal courts, the precise scope of the crime/fraud exception remains an open question. Most courts hold it to be narrow and reserved for "egregious abuses of the protections that the privilege affords." *In re Grand Jury Investig.*, 399 F.3d 527, 535 (2d Cir. 2005). But egregious abuses do not *stop* at crimes and frauds. Other types of misconduct, such as spoliation or litigation misconduct, can sometimes qualify. Thus, the exception is *narrow* yet *flexible*.

The D.C. Circuit defined the scope of the exception in *In re Sealed Case*, 676 F.2d 793, 812 (D.C.Cir.1982) to be include communications made in furtherance of a crime, fraud, "or other type of misconduct fundamentally inconsistent with the basic premises of the adversary system." Other courts have used similar catch-all language to include attorney misconduct. In *Rambus, Inc. v. Infineon Techs. AG*, 222 F.R.D. 280, 289 (E.D. Va. 2004), for example, the district court concluded that spoliation vitiated the crime-fraud exception. *See also, e.g.*, *International Tel. & Tel. Corp. v. United Tel. Co. of Fla.*, 60 F.R.D. 177, 180 (M.D. Fla. 1973) (surveying cases and concluding that crime/fraud exception applies "not only where fraud or crime is involved, but also where there are other substantial abuses of the attorney-client relationship").

Importantly, alleged wrongdoing sounds in tort over a crime or fraud does not necessarily defeat a crime-fraud claim, at least in federal court. In *Cooksey v. Hilton Int'l Co.*, 863 F. Supp. 150, 151 (S.D.N.Y. 1994), for example, the court opined that that "intentional torts moored in fraud can trigger the crime-fraud exception." In *Koch v. Specialized Care Servs., Inc.*, 437 F. Supp. 2d 362, 376 (D. Md. 2005), the court explained that the crime-fraud exception to be in play with *prima facie* proof that defendants had conspired with their in-house counsel to fabricate a story and deprive the plaintiff of the full value of his stock. This was so even though the plaintiff had pleaded a tortious interference claim. The Maryland federal court concluded, applying state law, that "courts focus on the conduct alleged, not the labels given it." One well-reasoned opinion in the Southern District of New York described the applicability of the crime-fraud exception to tort-based misconduct as follows: The "attorney-client privilege does not protect communications in furtherance of an intentional tort that undermines the adversary system itself." *Madanes v. Madanes*, 199 F.R.D. 135, 149 (S.D.N.Y. 2001)

In Texas, the scope of the crime-fraud exception law may be less flexible but is not entirely inflexible. Some courts specifically refer to "actionable fraud" in connection with the exception. *See Volcanic Gardens Mgmt. Co. v. Paxson*, 847 S.W.2d 343, 347 (Tex. App.—El Paso 1993, no pet.) (discussing *Freeman v. Bianchi*, 820 S.W.2d 853, 861 (Tex. App.—Houston [1st Dist.] 1991, orig. proceeding), mand. denied sub nom, *Granada Corp.*, 844 S.W.2d 223). Others, such as the *Volcanic Gardens* court, do not construe the "fraud" aspect of the crime-fraud exception to be so limited. "Fraud" includes "the commission and/or attempted commission of fraud on the court or on a third person, as well as common law fraud and criminal fraud." *Id.* at 348. Under this slightly broader view, the crime-fraud exception can come into play any time a client or prospective client seeks attorney assistance to make a false statement or statements of material fact or law to a third person or the court for personal advantage. *Id. See also Koch*, 437 F. Supp. 2d

at 376 (construing *Volcanic Gardens* as holding that Texas crime-fraud rule is broader than actionable fraud).

How Far Does the Exception Reach?

Circuits subtly vary in language in describing how close the relation must be. In some, the privilege is vitiated if the communication bears some degree of close relation to the underlying misconduct. *In re Grand Jury Subpoena*, 419 F.3d 329, 346 (5th Cir. 2005) ("reasonably relate[s] to" the commission of misconduct); *see also In re Grand Jury Proc.*, 87 F.3d 377, 382–83 (9th Cir. 1996) ("in furtherance of and sufficiently related to" misconduct); *Pritchard–Keang Nam Corp. v. Jaworski*, 751 F.2d 277, 283 (8th Cir. 1984) ("closely related"). Other Circuits use language that appears to demand more. *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; ... they must actually have been made with an intent to further an unlawful act."); *Haines v. Liggett Grp. Inc.*, 975 F.2d 81, 90 (3d Cir. 1992) ("The advice must relate to future illicit conduct by the client; it is the causa pro causa, the advice that leads to the deed."); *In re Richard Roe, Inc.*, 68 F.3d 38, 40 (2d Cir. 1995) ("[T]he exception applies only when the court determines that the client communication or attorney work product in question was itself in furtherance of the crime or fraud.").

In Texas, in addition to *prima facie* showing, the party asserting the crime-fraud exception must show that a nexus exists between the privileged documents and the alleged fraud. *Granada Corp.*, 844 S.W.2d at 227; *In re Seigel*, 198 S.W.3d 21, 28 (Tex. App.-El Paso 2006, orig. proceeding [mandamus denied]). This nexus must be established for each privileged document. *In re Seigel*, 198 S.W.3d at 28. Mere allegations of a connection between the alleged fraud and the document will not suffice. *In re Small*, 346 at 667.

Conclusion.

Although the law is far from clear and varies by Circuit and state, one item remains true across the board: it is a mistake to think that the crime-fraud exception is inflexible and can only apply to actionable criminal or fraudulent conduct. Courts disagree on the details, but generally conclude that doctrine is flexible enough so that the attorney-client privilege is not perverted. Accordingly, in all cases, courts strive to align the attorney-client privilege and crime-fraud exceptions with their animating purposes: protecting the communications of individuals seeking candid legal advice for past wrongdoings while removing the shield when legal advice is sought to perpetrate a current or future wrongdoing.

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[1] The Seventh Circuit has expressly rejected rethinking the *Matter of Feldberg* approach. *See United States v. BDO Seidman, LLP,* 492 F.3d 806, 819 (7th Cir. 2007) ("We expressly have rejected that approach.").