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White Collar Crime and the Crime-Fraud Exception to the Attorney-Client Privilege

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White Collar Crime and the Crime-Fraud Exception to the Attorney-Client Privilege

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Topic Overview

The attorney-client privilege makes communications between an attorney and client confidential where the client seeks legal advice outside the presence of any third parties. The purpose of this privilege is to encourage a client to fully disclose all information to his or her lawyer. The privilege belongs to the client and can be waived at any time.

One notable exception to this privilege is the crime-fraud exception, which applies where the client intends to consult with a lawyer in furtherance of a crime or fraud. For the purposes of asserting this exception, it doesn't matter whether a crime or fraud actually occurred, nor does it matter whether the attorney even knew about it. The entire inquiry focuses on the client's intent when he or she sought the legal advice.

White collar criminal cases, which almost always involve a fraudulent scheme or transfer of money, tend to create situations where the crime-fraud exception can apply. This is because a client, in this case a criminal defendant, can attempt to cover up financial transactions or use an attorney to find loopholes for illegal activity. Also, most white collar criminal defendants are accused of fraud and many of these defendants will continue to carry out that fraud as part of their defense, making otherwise privileged information available to the public under the crime-fraud exception.

This guide will look at the crime-fraud exception in the context of federal white collar crimes:

- RICO
- Money Laundering
- Mail/Wire Fraud
- Tax Evasion
- Perjury & Obstruction of Justice
- Forfeiture

About the Author

Shane McKeen graduated from the Georgia State University College of Law in May 2011.

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Disclaimer

This research guide is a starting point for a law student or an attorney to research the crime-fraud exception to the attorney-client privilege in the context of white collar criminal cases. This is a very active area of federal law, and it is imperative to Shepardize or KeyCite all cases and statutes before relying on them. This guide should not be considered as legal advice or as a legal opinion on any specific facts or circumstances. If you need further assistance in researching this topic or have specific legal questions, please contact a reference librarian in the Georgia State University College of Law library or consult an attorney.

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Secondary Sources

Law Reviews

Fried, David J., [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)

- This article traces the history of the crime-fraud exception; discusses the varying rationales advanced in its favor at different periods; and reviews how the exception has been expanded, both procedurally and substantively. The crime-fraud exception is compared and contrasted with the attorney's ethical obligation or privilege to expose a client's wrongdoing in general. The article concludes that the exception has been abused and distorted, above all in the service of federal prosecutors, to the point where the attorney-client privilege has been seriously eroded.
- Despite its age, this article is still useful since most of the federal white collar criminal statutes have not changed in the time being. The author makes a convincing argument that the expansion of federal criminal law to include more regulatory and administrative violations has greatly extended the reach of the crime-fraud exception. This is shown through cases and hypothetical examples (i.e. compelling an attorney to testify about legal advice given regarding a legitimate business investments which, unbeknownst to the attorney, were allegedly made with racketeering proceeds in violation of RICO).

Bricker, Cary, [Revisiting the Crime-Fraud Exception to the Attorney-Client Privilege: A Proposal to Remedy the Disparity in Protections for Civil and Criminal Privilege Holders](#), 82 Temp. L. Rev. 149 (2009)

- This article looks at circuit court holdings that address the crime-fraud exception to the attorney-client privilege and analyzes the differential treatment conferred on civil versus criminal privilege holders. Namely, criminal privilege holders rarely learn the allegations of crime or fraud or have the opportunity to rebut them. However, all federal courts concur that denying these protections in a criminal case does not constitute a due process violation, on the ground that grand jury investigations are investigative rather than adversarial, and also due to the importance of safeguarding grand jury secrecy.

DiBiagio, Thomas M., [Federal Criminal Law and the Crime-Fraud Exception: Disclosure of Privileged Conversations and Documents Should Not Be Compelled Without the Government's Factual Foundation Being Tested by the Crucible of Meaningful Adve](#), 62 Md. L. Rev. 1, (2003)

- This article explains how the crime-fraud exception is used and argues for the proposition that if the government seeks to compel the disclosure of privileged materials and elects to rely on evidence obtained by the grand jury, the courts should disclose the government's evidence, disregard it, or impose a presumption against the application of the crime-fraud exception.

[The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations A Report Prepared by the American College of Trial Lawyers](#), 41 Duq. L. Rev. 307 (2003)

- In addition to focusing on the privilege in general, this article looks at the increased reliance by federal prosecutors on the crime-fraud exception and points out the potential for abuse and misuse under the current case law.

American Law Reports

Buckman, Deborah F., [Crime-Fraud Exception to Work Product Privilege in Federal Courts](#), 178 A.L.R. Fed. 87 (Originally published in 2002)

- This A.L.R. covers the attorney work-product privilege, which is closely related to the attorney client privilege. The most notable difference is that the work-product privilege belongs to both the attorney and the client.
- The work product privilege, codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure, provides that when a court orders discovery of "documents and tangible things ... prepared in anticipation of litigation," the court is required to "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney ... concerning the litigation."
- § 15 provides a synopsis of case law where the crime fraud exception applies, including holdings in the context of mail fraud, obstruction of justice, and perjury.
- This secondary source is a good quick starting point, provides a brief outline of the law, and is regularly updated with new cases.

Journals

Auburn K. Daily & S. Britta Thornquist, [Has the Exception Outgrown the Privilege?: Exploring the Application of the Crime-Fraud Exception to the Attorney-Client Privilege](#), 16 Geo. J. Legal Ethics 583 (2003)

- This article is focused on the uncertainties surrounding the requirements for invoking the crime-fraud exception and whether this has the potential to cause damage to the attorney-client privilege.

- The author begins by laying out the process for asserting the exception, how some courts have expanded it, and areas where lower courts disagree.
- One concern raised is in the context of white-collar criminal investigations, in which prosecutors are faced with new temptations to make the examination of attorneys an integral part of their investigations (often through the use of the grand jury subpoena power).
- Although some courts are attempting to narrow the exception, there will be uncertainty as long as courts do not have a uniform standard for the evidentiary requirements needed to successfully assert the crime-fraud exception.

Legal Encyclopedias

American Jurisprudence

81 Am. Jur. 2d Witnesses § 377

- The attorney-client privilege does not apply when legal representation is secured in the furtherance of intended, or present, continuing illegality. However, good faith consultations with attorneys by clients who are uncertain about the legal implications of a proposed course of action are entitled to the protection of the attorney-client privilege, even if that action should later be held improper.
- This source gives a quick overview of the crime-fraud exception and also includes a short cumulative supplement with cases and examples.

Corpus Juris Secundum

98 C.J.S. Witnesses § 336

- Generally, communications made by a client to his or her attorney before or during the commission of a crime or fraud, for purposes of being guided or assisted in its commission, are not privileged.
- This source also gives a concise overview of the exception, including an explanation of the quantum of proof required to assert it. A cumulative supplement is included as well.

Books and Treatises

1 White Collar Crime § 5:4 (2d ed.)

- "The major exception to the attorney-client privilege is the crime-fraud exception. A communication will not be privileged if it was made in furtherance of a crime or fraud. Similarly, this exception may also apply to the work-product privilege. Communications are in furtherance of a crime or fraud if they were made for the purpose of obtaining aid for future criminal acts. It is the client's intention regarding the communication that is controlling. Whether or not the attorney was aware that the communication was in furtherance of a crime is immaterial. It is also unnecessary for the communication or consultation to actually further any illicit conduct."
- "The party contesting the privilege must provide evidence that is sufficient to support a reasonable belief that an in camera review would disclose that the communications were in furtherance of the fraud. Once that burden is met, the court has discretion as to whether or not to conduct such in camera review. If the crime-fraud exception is found to apply, it does not cover all communications made in the course of the attorney-client relationship, but is limited to those communications and documents made in furtherance of a crime or fraud."
- "An attorney may assert the work product privilege with regard to opinion work product even if the client has used the attorney's services to commit a crime or perpetrate a fraud, so long as the attorney was unaware that the client was doing so. The court reasoned that an attorney's independent assertion of his work product privilege stands on a very different footing than the crime-fraud exception because the attorney's privilege is based on the attorney's interest in protecting his opinions and thought processes from disclosure. This [work-product protection] is a protection that benefits all of the attorney's clients because it accords the attorney a measure of privacy within which he can candidly compose his thoughts."

5 Bromberg & Lowenfels on Securities Fraud § 12:36 (2d ed.)

- "The attorney-client privilege and the related work product privilege are important protections to investigatees and their companies. They may conceal violations. They may also protect against shareholder suits based on claims different from criminal violations. It is not surprising when the Justice Department tries to override these privileges by granting immunity and compelling testimony."

Case Law

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Primary Sources

Attorney-Client Privilege

Upjohn v. United States, [449 U.S. 383](#), 388 (1981)

"The purpose of the attorney-client privilege is "to promote full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice."

Trammel v. United States, [445 U.S. 40](#), 51 (1980)

"The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reason's for seeking representation if the professional mission is to be carried out."

It is now well established in the Eleventh Circuit that the party asserting the attorney-client privilege must establish the following;

- (1) that he or she is or sought to become a client
- (2) the person to whom the communication was made is a member of a bar or his subordinate and was made in connection with his duties as a lawyer
- (3) the communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, and for the purpose of securing primarily either an opinion on law, legal services, or assistance in some legal proceeding and not for the purpose of committing a crime or tort
- (4) the privilege has must have been claimed and not waived by the client.

United States v. Noriega, [917 F.2d 1543](#), 1550 (11th Cir. 1990) (citing *United States v. Kelly*, [569 F.2d 928](#), 938 (5th Cir. 1978))

Obstruction cases

United States v. Laurins, [857 F.2d 529](#) (9th Cir. 1988)

- The defendant in this case was convicted for obstruction of justice and challenged on appeal the admission of testimony by his former attorney under the crime-fraud exception
- The court found that obstruction of justice was an offense serious enough to defeat the attorney-client privilege and that all the government needed to show was evidence that if believed by the jury would establish the elements of an ongoing violation
- The defendant argued that these notes were outside the exception to the privilege and involved "legitimate defense planning by an attorney for consultation by a client concerned about alleged past wrongdoing." The conversations in question revealed misrepresentations by the defendant, and were covered by the exception because they related to his attempt to obstruct justice by concealing the whereabouts of certain records.

Tax Evasion cases

United States v. Schussel, 291 F. App'x. 336 (1st Cir. 2008)

- Accused of evading taxes, the defendant argued that the court improperly admitted faxes sent to his attorney providing information needed to respond to IRS inquiries or document requests. The court held that these communications fell within the crime-fraud exception because the defendant was providing his attorney with incorrect tax information in furtherance of his fraud.
- Even though the defendant had not yet been found guilty of any wrongdoing, the crime-fraud exception still applies. The court only needed reasonable cause or a sufficient factual predicate to pierce the privilege as to the documents in question.

Online Resources

All federal statutes can be found at the Cornell law Institute while most federal cases and all Supreme Court cases mentioned in this guide can be accessed through Google Scholar. Both sites are free.

Federal Appendix and other select unreported cases can be accessed through West or Lexis Nexis, both of which require a subscription. However, these cases can also be found in print, probably. Just ask your local law librarian!

Federal Statutes

[18 U.S.C.A. § 1962](#) - Prohibited activities under RICO

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in

or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

[18 U.S.C.A. 1963 - Criminal penalties \(forfeiture under RICO\)](#)

[18 U.S.C.A. § 1956 - Money Laundering](#)

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity--

(A)(i) with the intent to promote the carrying on of specified unlawful activity; or

(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or

(B) knowing that the transaction is designed in whole or in part--

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than \$500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both. For purposes of this paragraph, a financial transaction shall be considered to be one involving the proceeds of specified unlawful activity if it is part of a set of parallel or dependent transactions, any one of which involves the proceeds of specified unlawful activity, and all of which are part of a single plan or arrangement.

(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States--

(A) with the intent to promote the carrying on of specified unlawful activity; or

(B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part--

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than \$500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer whichever is greater, or imprisonment for not more than twenty years, or both. For the purpose of the offense described in subparagraph (B), the defendant's knowledge may be established by proof that a law enforcement officer represented the matter specified in subparagraph (B) as true, and the defendant's subsequent statements or actions indicate that the defendant believed such representations to be true.

(3) Whoever, with the intent--

(A) to promote the carrying on of specified unlawful activity;

(B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or

(C) to avoid a transaction reporting requirement under State or Federal law,

conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph and paragraph (2), the term "represented" means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

[18 U.S.C.A. 1341 - Mail Fraud](#)

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, or affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

[18 U.S.C.A. 1343 - Wire Fraud](#)

[18 U.S.C.A. 1346 - Honest Services Fraud](#)

[18 U.S.C.A. 981 - Civil Forfeiture](#), [18 U.S.C.A. 982 - Criminal Forfeiture](#)

[18 U.S.C.A. 1503 - Obstruction of Justice](#)

[18 U.S.C.A. 1623 - Perjury](#)

[26 U.S.C. 7201 - Tax Evasion](#)

RICO cases

United States v. Aucoin, [964 F.2d 1492](#) (5th Cir. 1992)

- The defendant here was convicted under the RICO statute for operating a large scale gambling and bookmaking operation.
- His counsel knew participation in illegal activity and desire to continue these activities, orchestrated a plan to obtain gambling enterprise documents critically necessary to its continued operation and then assisted in the execution of this plan.
- Unlike many attorneys who are completely in the dark when their client lies and commits fraud, the attorney here knew everything. Because of this, the conversations between the attorney and the defendant were clearly not privileged and the court had no qualms about applying the crim-fraud exception.

Mail Fraud and Wire Fraud Cases

United States v. Reeder, [170 F.3d 93](#) (1st Cir. 1999)

- The defendant was convicted of five counts of wire fraud by essentially making false insurance transactions. A prior conversation with his attorney discussing how to handle or possibly cover up his transactions was admitted by the court under the crime-fraud exception.
- The defendant contended that the exception does not apply because he merely sought advice on how to solve problem in a particular manner. Unpersuaded, the court explains that while simply asking whether something is illegal is a privileged communication, asking your attorney to help in a cover up is a communication in furtherance of a crime or fraud.
- Although the attorney in this case blatantly refused to help cover up the fraud on the insurance companies, the mere fact that the defendant sought advice on how to cover up an illegal act was enough to admit the entire conversation under the crime-fraud exception.

Crime-Fraud Exception

- In camera review may be used to determine whether allegedly privileged attorney-client communications fall within the crime-fraud exception.
- However, before a district court may engage in in camera review at the request of the party opposing the privilege, that party must present evidence sufficient to support a reasonable belief that in camera review may yield evidence that establishes the exception's applicability.
- The threshold showing to obtain in camera review may be met by using any relevant evidence, lawfully obtained, that has not been adjudicated to be privileged.

United States v. Zolin, [491 U.S. 554](#), 574-75, (1989)

The Eleventh Circuit uses a two-part test to determine whether the crime-fraud exception applies:

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

Cox v. Adm'r U.S. Steel & Carnegie, [17 F.3d 1386](#), 1416 (11th Cir. 1994)

Forfeiture cases

United States v. \$1.5 Million Letter of Credit as a Substitute Res for Seized Bank Accounts, 1992 WL 204357 (S.D.N.Y. 1992)

- The defendant in this case was being sued by the government for violating import regulations. The defense asserted that two legal memoranda, which suggested methods of covering up their illegal activity, were protected by the attorney-client privilege. In response to the government, the defense asserted that the crime/fraud exception is limited to instances in which the client requests advice on how to perpetrate a fraud or crime, and does not extend to situations in which the attorney, unbidden by the client, offers such advice.
- The court here disagreed with this narrow interpretation. As a policy matter, the intended effect of the crime-fraud exception is to prevent attorneys from legal advisors into instruments of wrongdoing. Accordingly, courts have regularly held that the exception may apply where only the attorney is accused of making statements for an unlawful purpose.

Money Laundering cases

United States v. Saccoccia, [898 F. Supp. 53](#) (D.R.I. 1995)

- The defendants in this case were convicted of money laundering and racketeering activities and argued that attorney fee information was privileged. However, for the privilege to apply, the fee info must amount to or reveal confidential communications regarding advice sought from the attorney. The mere fact that this information may incriminate the defendants further by providing evidence of unexplained wealth that could have been derived from criminal activity isn't enough to invoke the attorney-client privilege.
- "...to the extent the defendants are suggesting that the fee information is confidential because the amounts paid were derived from the money laundering activities about which they consulted counsel, their claim of privilege would be defeated by the crime/fraud exception. Such payments would constitute continued laundering of illicitly-derived proceeds."
- The attorneys in this case were unable to argue that revealing fee information would incriminate them for receiving illegal proceeds as legal fees, which amounts to money laundering. The court here reasoned that simply asserting the privilege implies that the attorneys had no reason to believe that fees paid to them were derived from criminal activity.

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Associations and Interest Groups

White Collar Crime Committee

- This group is a branch of the Criminal Justice section of the American bar Association devoted solely to white collar crime and currently has 1203 members.
- This Committee explores practice problems relating to such issues as health care fraud, work place crimes, and criminal sentencing guidelines for organizations. Develops policy and sponsors annual CLE programs on white collar crime, health care fraud, gaming, qui tam enforcement/civil False Claims Act, and money laundering. Subcommittees on Antitrust, Bank and Insurance Fraud, Corporate Criminal Liability, Environmental, Ethics, Federal Criminal Rules, Forfeiture, Government Procurement, Health Care, Money Laundering, Securities, Sentencing Guidelines, Tax Enforcement, and Public Corruption.
- Regional groups meet in New York, California, Southeast, Florida, Illinois, and Texas.
- [WCCC Home Page](#)

U.S. Attorney's Office, Economic Crime Section

- This section prosecutes a wide variety of fraud-related offenses that cause economic harm to the government (such as counterfeiting, health care, tax and benefits fraud), financial institutions and businesses (such as corporate fraud, intellectual property fraud, computer fraud, bank fraud and mortgage fraud), and private individuals (such as identity theft, ponzi schemes and investment fraud).
- [Web Site for the Northern District of Georgia](#)

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