THE CRIME-FRAUD EXCEPTION: CRIMINAL PROSECUTION OF A BUSINESS MAY OPEN THE DOOR TO CIVIL LITIGATION

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"The secret must be told in order to see whether it ought to be kept"[1]

I. INTRODUCTION

The purpose of the crime-fraud exception is to assure that the seal of secrecy between lawyer and client does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime. While the white- collar criminal defense bar has been familiar with the crime-fraud exception for decades, the same may not be true for civil litigation attorneys, particularly those who represent business defendants. And, those businesses are even less likely to be familiar with this exception, particularly the smaller and family-owned business without the benefit of a legal department. With aggressive governmental prosecution of businesses, many times followed up by civil lawsuits, familiarity is critical. The successful (and even the unsuccessful) criminal prosecution of a business organization may open the door to civil litigation. And, in some situations, attorneys who previously provided advice and counsel to a business organization may find themselves as co-defendants, along with the business organization, in civil litigation.

Criminal prosecution may give rise to four significant problems for business organizations:

1. The government is entitled to a wide variety of information because the Fifth Amendment's protections are for individuals, not business organizations;[2]

2. Even if Fifth Amendment protection is available, the government may request that the business organization waive its attomey-client privilege and attorney work-product doctrine as part of the government's aggressive approach to business malfeasance;

3. For any documents that still have not been produced, the government may argue that the necessary elements for the attomey-client privilege are absent, and that, therefore, the attomey-client privilege and attorney work-product doctrine do not apply; and,

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[1] Regina v. Cox, 14 Q.B.D. 153, 168 (1884).

[2] However, the privilege has been applied to a small, family partnership. *See, e.g.*, United States v. Slutsky, 352 F. Supp. 1105 (S.D.N.Y. 1972).

4. Even if the attomey-client privilege remains intact, the crime-fraud exception may exclude some or all of the information from the protection ordinarily offered by the attorney work-product doctrine.

A business that breaks the law faces prosecution under a wide variety of laws, from antitrust to water pollution. Indeed, companies and individuals in a wide variety of industries have had to face the wrath of the crime-fraud exception, including:

An automotive vehicle and parts distributor as a result of bribery involving two employees;[3]

The maker of a birth control device;[4]

The tobacco industry;[5]

A church;[6]

The trustee for a pension fund;[7]

An attorney;[8] A juror.[9]

Of the many laws that may give rise to a claim of waiver based on the crime/fraud exception, the Racketeer Influenced Corrupt Organizations Act ("RICO")[10] represents a particularly harsh law that has been applied to a wide variety of situations, both criminal and civil.[11] Businesses prosecuted under the civil aspects of RICO may face numerous additional causes of action available to civil litigation plaintiffs injured as a result of that business's illegal activities. Last, but hardly least, although a conviction under RICO is not a necessary requirement prior to filing a civil RICO lawsuit against a business organization[12] the benefits a prior

[3] *E.g., In re* American Honda Motor Co. Dealer Relations Litig., MDL Case No. 1069, at *1 (D. Md. June 3, 1998).

[4] *E.g.,* In re A.H. Robins Co., 107 F.R.D. 2 (D. Kan. 1985).

[5] *E.g.,* American Tobacco Co. v. Florida, 697 So. 2d 1249 (Fla. Dist. Ct. App. 1997).

[6] *E.g.,* United States v. Zolin 491 U.S. 554 (1989)(involving the Church of Scientology).

[7] *E.g., In re* Grand Jury Proceedings v. John Doe, 162 F.3d 554 (1998).

[8] *See, e.g.*. United States v. King, 536 F. Supp. 253 (C.D. Cal. 1982).

[9] *See, e.g.,* Clark v. United States, 289 U.S. 1 (1933).

[10] 18 U.S.C. §§ 1961-1968 (2006).

[11] *E.g.,* Terrence G. Reed, *The Defense Case for RICO Reforms,* 43 Vand. L. Rev. 691, 700-01 (1990).

[12] Title 18 U.S.C. § 1964(d) states that "[a] final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States."

criminal prosecution of a business organization inure to the plaintiff in civil litigation are breathtaking, whether the prosecution results in a conviction or not.[13] The release of previously confidential information during a criminal prosecution may give rise to civil litigation against a business organization and potentially is likely to be of immense benefit to counsel for the plaintiffs.

Although the government is becoming increasingly aggressive in its approach to the prosecution of business organizations, the government lacks the resources to prosecute all criminal violations. For that reason RICO includes a section that actively encourages civil litigants.[14] Attorneys who represent civil plaintiffs are all too happy to pick up where the government left off. The potential for treble damages under RICO[15] is particularly tempting. Therefore, a business that wishes to avoid serious litigation issues must consider a variety of issues.

II. CRIMINAL PROSECUTION OF BUSINESS ORGANIZATIONS

The government has grown increasingly aggressive in its approach to the criminal prosecution of business organizations, but the process developed in fits and starts.[16] Although the government's most recent pronouncement on the subject is considered somewhat of a retreat, this should provide little comfort.

On August 28, 2008, Department of Justice ("DOJ") Deputy Attorney General Filip issued the latest memorandum that again revised the DOJ's policies.[17] Under the latest policy, a company will receive credit for disclosing facts; prosecutors should not ask for a waiver of the attomey-client privilege or work product doctrine or for the production of materials that are protected by the attomey- client or work product doctrine and are directed not to do so.[18] The new policy also forbids prosecutors from requesting non-factual attomey-client privileged communications and work product, such as legal advice that, under the prior guidelines, was designated as "Category II" information. However, there are two exceptions. When a company or employee asserts the defense of advice-of-counsel,

[13] This includes, but is not limited to, information that is no longer protected by the attomey-client privilege and the attorney work-product doctrine, the lower standard of proof (a preponderance of the evidence) and jury verdicts that do not require unanimity.

[14] Congress mandated that RICO "be liberally construed to effectuate its remedial purposes," leading the Supreme Court to rule that RICO may be applied to legitimate businesses, encouraging private plaintiffs to file civil actions in either federal or state court as well as encouraging those attorneys to seek its harsh remedies. Organized Crime Control Act of 1970, Pub. L. No. 91-452, §904(a), 84 Stat. 942 (1970); See also United States v. Turkette, 452 U.S. 576, 587 (1981).

[15] 18 U.S.C. § 1964(c).

[16] *E.g.*, Richard O. Pany, and Treena Gillespie, *From Law-Breaking Caterpillar to Law-Abiding Butterfly? Can the Department of Justice Force Business to Obey the Law?* 13 J. OF LEGAL STUD. BUS., 89, 91-95 (2007) (discussing Department of Justice memoranda on the subject of criminal prosecution of business organizations).

[17] Prior to that, on July 9, 2008, Deputy Attorney General Mark Filip wrote to Senate Judiciary Committee Chair Patrick Leahy and Ranking Member Arlen Specter to inform them of proposed changes.

[18] Filip Memorandum at 9-28.710.

the defendant must submit a legitimate factual basis in support of the assertion.[19] In addition, the Filip Memorandum notes that communications between a company and attorney that are made in furtherance of a crime or fraud are outside the scope and protection of the attomey-client privilege.[20] Although not noted in the Filip Memorandum, unsurprisingly, the crime-fraud exception may also give rise to a request for material that is covered by the attorney work-product doctrine.

The new policy also forbids prosecutors from considering whether a corporation has advanced attorneys' fees to its employees, officers, or directors when evaluating cooperativeness.[21] There is, however, a limitation and an exception to this rule as well. The limitation to the rule allows a prosecutor to question the representation status of a company and its employees, including how and by whom attorneys' fees are paid, for example, to assess a potential conflict of interest.[22] The exception arises in the area of obstruction of justice, for example, fees advanced on the condition that an employee adhere to a version of the facts that the company and employee know to be false.[23] Other restrictions on the issue of joint defense agreements and disciplining or terminating employees were put in place.[24]

Concerns will no doubt continue. In addition to the various exceptions, the guidelines do not apply to other federal law enforcement agencies or regulatory agencies. Regardless, as corporate malfeasance continues it is likely that the government will be increasingly aggressive in its approach to prosecution. The public may expect it.

Once a business organization finds itself in the government's cross hairs, other significant problems arise. At this point, arguably the most significant concern for a business organization would be the loss of the attomey-client privilege. There are several ways that a business organization may lose the protection of the attomey- client privilege.

[19] *See id.* at 9-28.720(b)(i).

[20] *See id.* at 9-28.720(b)(ii).

[21] *See id.* at 9-28.730.

[22] *See id.* at 9-28.730, 9-28.730 n.6.

[23] *See id.* at 9-28.730.

[24] Prosecutors may no longer consider whether a company has entered into a joint defense agreement when evaluating the issue of cooperation; however, the government may request that a company refrain from disclosing to third parties information provided by the government to avoid, for instance, destruction of evidence or flight of an individual. Filip Memorandum 9-28.730. However, the Filip Memorandum cautions that a business may be "disabled...from providing some relevant facts to the government" that may prevent a business from receiving cooperation credit and recommends that joint defense agreements be crafted to give businesses the "flexibility" to disclose facts. Filip Memorandum 9-28.730. Finally, a prosecutor may no longer consider whether a company disciplined or terminated employees as part of the issue of cooperation. Prosecutors may only consider whether a company has disciplined culpable employees and only for the purpose of evaluating the company's remedial measures or compliance program, although prosecutors should be satisfied that the company's focus is on the integrity and credibility of its remedial and disciplinary measures rather than on the protection of wrongdoers. Filip Memorandum 9-28.900.

III. THE ATTORNEY-CLIENT PRIVILEGE AND ATTORNEY WORK-PRODUCT DOCTRINE

A. The Attorney-Client Privilege

The attomey-client privilege is the oldest of the privileges for confidential communications known to the common law.[25] Although the underlying rationale for the privilege has changed over time, originating as a gentlemen's code of honor,[26] courts have long viewed its central concern as encouraging full and frank communication between attorneys and their clients, thereby promoting broader public interests in the observance of law and the administration of justice.[2]

Although the rationale for the rule is questionable,[2]* the privilege survives. Needless to say, the purpose for the privilege requires that clients be free to make full disclosure to their attorneys of past wrongdoings,[29] in order that the client may obtain the aid of persons having knowledge of the law and skilled in its practice.[30]

Generally, the attomey-client privilege consists of communications between a client and an attorney that are presumed to have been made in confidence and have extensive protection against disclosure. A definition of the privilege generally states that a "confidential" attomey-client communication includes "a legal opinion formed and the advice given by the lawyer in the course of that relationship."[31]

The original definition by Professor Wigmore[32] is much more detailed and states that the privilege applies:

> Where legal advice of any kind is sought;
>
> From a professional legal adviser in his capacity as such;
>
> The communications relating to that purpose;
>
> **Made in confidence;**
>
> By the client;
>
> Are at his instance permanently protected;
>
> From disclosure by himself or by the legal adviser;
>
> Except the privilege be waived.

[25] Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

[26] Kenneth K. Lee, *Attorney-Client Privilege-Dead or Alive?: A Post-Mortem Analysis of Swindler & Berlin v. United States, 118 S. Ct. 2081 (1998),* 22 HARV. J.L. & PUB. POL'Y 735, 735 (1999).

[27] *Upjohn*, 449 U.S. at 389.

[28] *E.g.*, Swidler & Berlin and James Hamilton v. United States,524 U.S. 399,409 n.4 (1998).

[29] *E.g.*, Fisher v. United States, 425 U.S. 391, 403 (1976).

[30] Hunt v. Blackburn, 128 U.S. 464,470 (1888).

[31] 2,022 Ranch v. Superior Court, 113 Cal. App. 4th 1377, 1389 (2004)(quoting CAL. EVID. CODE § 952).

[42] 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 554 (McNaughton rev. 1961).

However, dictum in a commonly cited court case[33] notes that the attomey- client privilege applies only if:

> the asserted holder of the privilege is or sought to become a client;
>
> the person to whom the communication was made is a member of the bar of a court, or his subordinate and in connection with this communication is acting as a lawyer;
>
> the communication relates to a fact of which the attorney was informed by his client without the presence of strangers for the purpose of securing primarily either an opinion on law or legal services or assistance in some legal proceeding, and not for the purpose of committing a crime or tort; and
>
> the privilege has been claimed and not waived by the client.

Professor Wigmore enunciated four common elements to privileges, including the attomey-client privilege:

> The communication must originate in a confidence that it will not be disclosed;
>
> This element of confidentiality is essential to the maintenance of the parties' relation;
>
> The relation must be one which in the community's opinion should be scrupulously fostered; and
>
> The injury that would result from the disclosure of the communication is greater than the benefit gained for the proper disposition of the litigation.[34]

It goes without saying that it is the client, not the attorney that holds the privilege.[35]

The Federal Rules of Evidence state that common law principles govern the rules of privilege, allowing federal courts the flexibility to develop rules of privilege case-by-case.[36] The Ninth Circuit utilized this flexibility to recognize a joint defense privilege[37] for co-defendants, even in situations where litigation is anticipated, as a

[33] United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950).

[34] WIGMORE, *supra* note 32, at 527.

[35] *E.g.*, CAL. EVID. CODE § 954 (West 2009).

[36] Trammel v. United States, 445 U.S. 40 (1980). In *United States* v. *Aramony*, 88 F.3d 1369, 1392 (4th Cir. 1996), the court describes the joint-defense privilege as an expansion of the attomey-client privilege.

[37] However, see *Ryan* v. *Gifford*, Civil Action No. 2213-CC, 2007 Del. Ch. LEXIS 168 where the court granted the plaintiffs motion to compel the production of all material withheld pursuant to the attorney

logical extension of the attomey-client privilege.[38] The federal court's flexibility extends also to the various exceptions to the privilege.[39]

As with other privileges, the attomey-client privilege is not without its costs. Because the privilege has the effect of withholding relevant information from the fact finder, it applies only where necessary to achieve its purpose.[40] And, although the attomey-client privilege must necessarily protect the confidences of wrongdoers, the reason for that protection - open client and attorney communication necessary to the proper functioning of our adversarial system of justice - ceases to operate where the desired advice refers not to prior wrongdoing, but to future wrongdoing.[41]

The disclosure, or consent to disclosure, of a confidential communication by either a business organization or its attorney to a third party who has no interest in maintaining the confidentiality may waive the privilege.[42] Even so, all business organizations (and their attorneys) should be aware that there are rare situations where a court may order a waiver of the privilege, as well as the attorney work- product doctrine.[43]

client privilege, noting that the third parties lacked common interests with the client, thereby "precluding application of the common interest exception to protect the disclosed communications." The court went on to note that the plaintiffs showing of good cause vitiated the privilege. *Id.* at 9.

[38] United States v. Henke, 222 F.3d 633 at 637 (2000). However, in California, for example, privileges are controlled by statutory law. As the court noted in *Roberts* v. *City of Palmdale,* 5 Cal. 4th 363 at 373 (1993), courts may not add to the statutory privileges except as required by state or federal constitutional law, nor may courts imply unwritten exceptions to existing statutory privileges.

[39] E.g, *In re:* Grand Jury Proceedings, 417 F.3d 18, 22 (1st Cir. 2005); United States v. Rakes, 136 F.3d 1, 4 (1st Cir. 1998).

[40] *E.g.,* Fisher v. United States, 425 U.S. 391,403 (1976).

[41] *E.g.,* WIGMORE, *supra* note 32, at 573; *Accord,* Clark v. United States, 289 U.S. 1, 15 (1933).

[42] *E.g.,* CAL. EVID. CODE § 954 (West 2009) allows disclosure to those "who are present to further the interest of the client" as well as those "to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted." Cal. EVID. CODE § 912(d) (West 2009) also states that disclosing a privileged communication in confidence does not waive the privilege when it is reasonably necessary to accomplish the purpose for which the lawyer was consulted. *Accord,* OXY Res. California v. Superior Court, 9 Cal. Rptr. 3rd 621 at 636 (Cal. Ct. App. 2004). Finally, a joint-defense privilege may also preclude the disclosure of confidential communications and documents. In re Sealed Case, 29 F.3d 715, 719 n.5 (D.C. Cir. 1994); United States v. Aramony, 88 F.3d 1369, 1392 (4th Cir. 1996).

[43] The work product doctrine was recognized in *Hickman* v. *Taylor,* 329 U.S. 495, 510-11 (1947), which established a qualified privilege for certain materials prepared by an attorney acting for his client in anticipation of litigation:

> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to

The law is far from clear whether disclosure of material that is covered by the attorney work-product doctrine should also waive the privilege.[44] At least one court has held that the crime-fraud exception of California Evidence Code § 956 does not apply to materials protected by the attorney work-product doctrine and that the delivery of work- product material does not necessarily constitute a waiver of the attorney work-product protection.[45] In so ruling the court noted the different policy rationales between the attomey-client privilege and the attorney work-product doctrine.

B. The Attorney Work-Product Doctrine

The attomey-client privilege exists to protect confidential communications between an attorney and his client. Therefore, "[a]ny voluntary disclosure by the holder of such a privilege is inconsistent with the confidential relationship and thus waives the privilege."[46] This is to be distinguished from the attorney work-product privilege, which exists to promote the adversarial system by safeguarding an attorney's trial preparation from discovery by an opponent. As one court noted,

> The purpose of the work-product doctrine is to protect information against opposing parties, rather than against all others outside a particular confidential relationship, in order to encourage effective trial preparation.... We conclude, then, that while the mere showing of a voluntary disclosure to a third person will generally suffice to show waiver of the attomey-client privilege, it should not suffice in itself for waiver of the work-product privilege.[47]

protect their clients' interests.

Although there is no statutory provision that governs waiver of the attorney work-product doctrine, California courts extend the waiver doctrine to the work-product rule. Wells Fargo Bank v. Superior Court, 990 P.2d 591, 599 (Cal. 2000). For a case where the court ordered a waiver pursuant to the crime- fraud exception, *see, e.g.*, United States v. Billmyer, 57 F.3d 31, 37 31, 37 (1st Cir. 1995). *Accord*, United States v. Josleyn, 206 F.3d 144, 149 (1st Cir. 2000). Although these are criminal cases, there was significant civil litigation that arose out of these cases. The benefits that inured to the plaintiffs in the civil matters, as a result of the waivers, were significant. *In re* American Honda Motor Co. Dealer Relations Litig. MDL Case No. 1069, at 1 (D. Md. June 3, 1998). *See also In re* International Sys. & Controls Corp. Sec. Litig. 693 F.2d 1235, 1242 (5* Cir. 1982); *In re* Grand Jury Proceedings (Doe), 674 F.2d 309, 310 (4th Cir. 1982); *In re* Grand Jury Proceedings (FMC Corp.), 604 F.2d 798, 802 (3d Cir. 1979).

[44] *E.g.*, Medinol, Ltd. v. Boston Scientific Corp., 214 F.R.D. 113, 117 (S.D. N.Y. 2002). The court held that a company waived the work-product privilege when it shared the minutes of an investigating attorney's report with its outside auditor and bluntly noted, "[A]s has become crystal clear in the face of the many accounting scandals that have arisen as of late, in order for auditors to properly do their job, they must not share common interest with the company they audit." *Id.* at 116. *Contra*, Merrill Lynch & Co., Inc. v. Allegheny Energy, Inc. 229 F.R.D. 441 (2004), *rev'd on other grounds*, 500 F.3d 171 (2d Cir. 2007) (holding that the work-product doctrine protection did apply to notes provided to an outside auditor).

[45] BP Alaska Exploration, Inc. v. Superior Court, 199 Cal. App. 3d 1240 (1988) (citing United States v. American Tel. & Tel. Co., 642 F.2d 1285 (D.C. Cir. 1980)).

[46] *BP Alaska*, 199 Cal. App. 3d at 1256 (quoting *American Tel. & Tel.*, 642 F.2d at 1299).

[47] *Id. Accord*, WEIL & BROWN, CALIFORNIA PRACTICE GUIDE: CALIFORNIA CIVIL PROCEDURE BEFORE

While, as one court stated, the attorney work-product doctrine creates a "qualified privilege against discovery of general work product and an absolute privilege against disclosure of writings containing the attorney's impressions, conclusions, opinions or legal theories"[48] the work-product privilege also applies to "writings prepared by an attorney while acting in a nonlitigation capacity."[4<l] And, unlike the attomey-client privilege, the attorney holds the work-product privilege.[50] The attorney work-product doctrine serves the dual purpose of preserving an attorney's creativity in preparing a case, as well as preventing the attorney from taking advantage of the industry and creativity of opposing counsel.

The attomey-client privilege is based on the assumption that the attorney's advice is sought for purposes of compliance with the law. The privilege does not arise, or terminates, when a client seeks assistance to commit a crime or fraud, or, according to the court's definition noted above, a "tort."[51] Indeed the word "fraud" itself would seem to provide sufficient flexibility to allow creative plaintiff attorneys to argue its application to a wide variety of situations.

IV. EVOLUTION OF THE CRIME-FRAUD EXCEPTION

Although the history of the crime-fraud exception goes back hundreds of years[52] its importance is not as dated. And, although *Annesley* is sometimes mentioned as the originating case for the exception, the court actually avoided the issue by finding that an attomey-client relationship did not exist because, "where the client talks to him at large as a friend, and not in the way of his profession, ... the Court is not under the same obligations to guard such secrets, though in the breast of an attorney."[53] It was counsel in *Annesley* arguing that an attorney's obligation to

TRIAL t 8:263.10 (2005). Although a well-reasoned rationale, the treatise relies on an opinion that seems equivocal:

> Normally, disclosure to a litigation adversary would be inconsistent with those policies. But again, because the trial court relied exclusively on inapposite authority, there is no evidence developed in the record by which that court could determine whether work product was here disclosed under circumstances inconsistent with claiming the privilege. There is no detailed description of the nature of the administrative investigation and the various interests each party had at stake during its progress; yet these facts are crucial to determining whether disclosure could reasonably be made with an expectation of confidentiality. The trial court's conclusion that mutual disclosure here constituted waiver rests on no evidentiary basis.

Raytheon Co. v. Superior Court, 208 Cal. App. 3d 683, 689 (1989).

[48] State Comp. Ins. Fund v. Superior Court, 111 Cal. Rptr. 2d 284, 292 (Cal. Ct. App. 2001).

[49] County of Los Angeles v. Superior Court, 98 Cal. Rptr. 2d. 564, 574 (Cal. Ct. App. 2000).

[50] *State Comp. Ins. Fund,* 111 Cal. Rptr. 2d at 292.

[51] *E.g.*, United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950).; Coleman v. American Broadcasting Corp., 106 F.R.D. 201,207-09 (D.D.C. 1985X dictumXinvolving alleged sexual harassment).

[52] *E.g.*, Annesley v. Earl of Anglesea, 17 How. St. Tr. 1139, 1223 (Ex. 1743); WIGMORE, *supra* note 32, at § 2290.

[53] David J. Fried, *Too High a Price for Truth: The Exception to the Attorney Client Privilege for*

disclose information where the attorney was employed for an improper purpose, or planning an action wrong in itself (*malum in se),* as opposed to *malum prohibitum,* should vitiate the privilege.[54] The distinction between *malum in se* and *malum prohibitum* may no longer be valid.[55]

In the first case to establish the modem crime-fraud exception for both criminal and civil wrongs, a court admitted into evidence the testimony of the defendants' attorney.[56] Fortunately for the attorney, he did not conspire with his assumed clients, nor did he know how they planned to use the legal advice that was obtained.[57] Had the attorney advised the client, knowing of the illegality, the advice would be inconsistent with his obligations as an attorney and officer of the court,[58] both of which are necessary for the professional relationship to justify the privilege.[59] Where a client misrepresents his purpose to an attorney, a necessary requirement for the creation of the attomey-client privilege is missing.

For reasons that are obvious, the court did not establish a hard and fast rule for the application of the crime-fraud exception, instead choosing a case-by-case analysis approach. As the *Cox* Court noted, "The secret must be told in order to see whether it ought to be kept."[60]

Currently, to challenge the attomey-client privilege under the crime-fraud exception, courts require the party challenging the privilege to present evidence that:

> the client was engaged in (or was planning) criminal or fraudulent activity when the attomey-client communications took place; and the communications were intended by the client to facilitate or conceal the criminal or fraudulent activity.[61]

Contemplated Crimes and Frauds, 64 N.C. L. Rev. 443, 450 (1986) (quoting *Annesley,* 17 How. St. Tr. at 1239).

[54] Wigmore, *supra* note 32, at 575-77 (discussing *Annesley,* 17 How. St. Tr. at 1229, 1232, 1241-42).

[55] *E.g.,* Fried, *supra* note 53, at 472 (noting in the context of the attomey-client privilege that, "Some acts proscribed by RICO are therefore merely *mala prohibita,* but the crime-fraud exception still applies"). *See also id.* at 470. While Professor Fried notes with disapproval that, "If a client consults an attorney in furtherance of some action prohibited by statute, the privilege is dissolved without any examination of whether the breach is morally reprehensible" such a view promotes an ethical (and legal) compartmentalization that ignores the interests of society, as well as an attorney's obligations as an officer of the court. *Id.*

[56] *E.g.,* Regina v. Cox, 14 Q.B.D. 153 (1884).

[57] *Id.* at 164-65.

[58] *Contra* THE AMERICAN LAWYER'S CODE OF CONDUCT Preface (Discussion Draft 1980)(rejecting the concept that an attorney is an officer of the court and stating, "In the context of the adversary system, it is clear that the lawyer for a private party is and should be an officer of the court only in the sense of serving the court as a zealous, partisan advocate of one side in the case before it"). Such a compartmentalized view of an attorney's ethical duties is unlikely to be accepted by a significant number of judges and should be viewed with exceptional caution.

[59] *Regina* v. *Cox,* 14 Q.B.D. at 168.

[60] *Id.* at 175.

[61] *E.g., In re* Grand Jury Proceedings (Violette), 183 F.3d 71, 79 (1st Cir. 1999); *In re* Grand Jury Proceedings, 417 F.3d 18, 22 (lsl Cir. 2005).

The exception to the privilege reflects the understanding that, in certain circumstances, the privilege must cease to operate as a safeguard on the proper functioning of our adversary system.[62] Extending the waiver to the attorney work- product doctrine[63] is an unsurprising and logical extension of the crime-fraud exception to the attomey-client privilege.

V. THE MODERN CRIME-FRAUD EXCEPTION

With the foregoing in mind, it is obvious that the business organization's intent is critical as to the issue of the attomey-client privilege. However, when it comes to the issue of the attorney work-product doctrine it is arguable that the business organization's intent is irrelevant. Therefore, some courts have applied a two-part test to determine if the crime-fraud exception applies to attorney work- product material:

There must be a prima facie[64] showing of a crime or fraud; and

A relationship between the unlawful scheme and the attorney's work-product.[65]

Although the two-part test applied to determine if there has been a waiver of the attomey-client privilege seems to focus more on the business organization it is unlikely that a judge will view the two tests as significantly different. Indeed, the vagueness of the two tests allows significant flexibility. The United States Supreme Court acknowledged that the phrase "prima facie" itself has caused some confusion.[66] It is not unusual for a court to state that a prima facie showing has been made, while studiously ignoring any attempt to define the standard.[>7] This is not only unsurprising; it reflects historical precedent.[68]

VI. THE PRIMA FACIE TEST

Since the crime-fraud exception was first recognized, courts appear to be loathe (or, more likely, unable) to establish a bright-line standard for its application, and for good reason. For instance, the American Bar Association Model Code of

[62] United States v. Zolin, 491 U.S. 554, 562-63 (1989).

[63] FED. R. CIV. P. 26(b)(3).

[64] This is sometimes referred to as the "Shewfelt" or "independency" test. United States v. Shewfelt, 455 F.2d 836, 840 (9th Cir. 1972). See also United States v. Bob 106 F.2d 37 (2d Cir.1937).

[65] *E.g., In re* Murphy, 560 F.2d 326, 338 (8th Cir. 1977).

[66] *Zolin*, 491 U.S. at 563 n.7.

[67] *E.g., In re* Grand Jury Proceedings 417 F.3d 18, 23 (1st Cir. 2005)("This circuit has previously avoided a calibration of that level....")(referring to the level of proof that meets the prima facie test).

[68] *E.g.,* Locke v. United States, 11 U.S. 339, 348 (1813). In *Locke,* Chief Justice Marshall observed, in the context of a seizure: "[The] term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation . . . . It imports a seizure made under circumstances which warrant suspicion."

Professional Responsibility (1983) EC 7-3 recognizes that "the action of a lawyer may depend on whether he is serving as advocate or adviser . . . . A lawyer may serve simultaneously as both advocate and adviser, but the two roles are essentially different." Thus, while the courts are uniform in requiring a prima facie showing for a challenge to the attorney work-product doctrine, the amount of evidence that is required varies. [69] Some courts may require the use of independent evidence,[70] although such an approach may be diminishing along with a return to the approach used by the Court in *Cox.*[1']

A court is generally required to order an *in camera* inspection before a decision is made regarding the existence, or absence, of a privilege;[72] however, that is not always the case. In certain rare circumstances a court need not have an *in camera* inspection before ordering the disclosure of information.[73] It is after the *in camera* inspection that the requirement of a prima facie showing comes in to play, with the burden of proof on the party seeking to assert the crime-fraud exception, although a judge is likely to have made his decision based upon the *in camera* inspection.[74]

The requirement of a prima facie showing is a particularly imprecise standard that provides little guidance to business organizations, or their attorneys[75] and is subject to different standards in different circuits.[76] The United States Court of Appeals for the First Circuit boldly attempted to harmonize the various standards and stated,

> It is enough to overcome the privilege that there is a reasonable basis to believe that the lawyer's services were used by the client to foster a crime or fraud. The circuits—although divided on

[69] *E.g.,* J. Gergacz, *Attorney-Corporate Client Privilege,* note 94 *infra,* at *[4.02 at 4-11 (noting that "the amount of evidence that will yield a prima facie showing is unclear").

[70] *E.g.* Clark v. United States , 289 U.S. 1, 15 (1933) (noting that the "seal of secrecy is broken" only when "...evidence is supplied") *Accord,* United States v. Shewfelt, 455 F.2d 836, 836 (9lh Cir. 1972).

[71] *E.g.,* United States v. Zolin, 491 U.S. 554, 562-63 (1989). *Accord,* United States v. King, 536 F. Supp 253 (C.D. Cal. 1982) (allowing the government to introduce audio tapes obtained by a wired government informant, of the allegedly privileged communication); Edgar v. United States, 82 F.3d 499,509 (I[st] Cir. 1996).

[72] *E.g., King,* 536 F. Supp 253.

[73] *E.g., Zolin,* 491 U.S. at 568-75.

[74] A v. District Court of Second Judicial District, 550 P.2d 315, 326 (1976). In *Caldwell* v. *District Court in and for City and County of Denver,* 644 P.2d 26, 33 (Colo. 1982), the Supreme Court of Colorado held that a judge should require a showing of facts to support a reasonable good faith belief that the court should hold an *in camera* inspection.

[75] *See, e.g., In re* Grand Jury Proceedings, 417 F.3d 18, 22 (1st Cir 2005) (referring to the phrase as "among the most rubbery of all legal phrases").

[76] The United States Courts of Appeals for the Second, Sixth and Ninth Circuits use a virtual criminal standard referring to a "probable" or "reasonable" cause standard. United States v. Jacobs, 117 F.3d 82,87 (2d Cir. 1997); *In* re Grand Jury Proceedings, 87 F.3d 377,381 (9* Cir. 1996);/n re Antitrust Grand Jury, 805 F.2d 155, 165-66 (6th Cir. 1986). In *Haines v. Liggett Group Inc.,* 975 F.2d 81, 95-96 (3d Cir. 1992), the court required "evidence which, if believed by the fact-fmder, would be sufficient to support a finding that the elements of the crime-fraud exception were met." *Accord, In re* Sealed Case, 754 F.2d 395,399 (D.C. Cir. 1985). The United States Court of Appeals for the Third and D.C. Circuits have described their standard as similar to "probable cause." *Haines,* 975 F.2d at 95; *In re Sealed Case,* 754 F.2d at 399 n.3.

> articulation and on some important practical details—all effectively allow the privilege to be pierced on something less than a mathematical (more likely than not) probability that the client intended to use the attorney in furtherance of a crime or fraud.
>
> This is a compromise based on policy but so is the existence and measure of the privilege itself.[77]

By specifically noting that a mathematical probability is too high, the First Circuit effectively reduced the standard below the criminal "probable cause" standard, itself sometimes translated to "more likely than not." While that standard is appropriate for criminal prosecution, in civil litigation it is arguable that an even lower "preponderance of the evidence" standard is appropriate.

The Supreme Court itself has wrestled with the issue of what constitutes probable cause. In a case involving the probable cause standard necessary for the issuance of a search warrant, the Court emphasized the importance of the totality of the circumstances[78] and noted that probable cause is a fluid concept that turns on the assessment of probabilities in particular factual contexts. Such a concept is

> not readily, or even usefully, reduced to a neat set of legal rules....
>
> As we said in *Adams* v. *Williams*, 407 U.S. 143, 147 (1972): "'Informants' tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and

[77] *In re*\ Grand Jury Proceedings, 417 F.3d 18, 23 (1st Cir. 2005) (footnote omitted).

[78] Illinois v. Gates, 462 U.S. 213, 230-32 (1983)(overruling Aguilar v. Texas, 378 U.S. 108 (1964)), and Spinelli v. United States, 393 U.S. 410 (1969))(establishing a two-pronged test that required (1) revealing the informant's "basis of knowledge" and (2) providing sufficient facts to establish either the informant's "veracity" or the "reliability" of the informant's report). The Court in *Gales*, in overruling the two cases noted,

> This totality-of-the-circumstances approach is far more consistent with our prior treatment of probable cause than is any rigid demand that specific "tests" be satisfied by every informant's tip. Perhaps the central teaching of our decisions bearing on the probable-cause standard is that it is a "practical, nontechnical conception." "In dealing with probable cause, ... as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Our observation in *United States* v. *Cortez*, 449 U.S. 411, 418 (1981), regarding "particularized suspicion," is also applicable to the probable- cause standard: "The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same - and so are law enforcement officers.
>
> Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."

462 U.S. at ___ (citations omitted).

> reliability.' Rigid legal rules are ill-suited to an area of such diversity. 'One simple rule will not cover every situation.'"[79]

The same is true for evidence on the subject of the crime-fraud exception. Regardless, once that evidentiary threshold has been met to a court's satisfaction, the court may order an *in camera* inspection as suggested by the Court in *Zolin.* If the court concludes that the crime-fraud exception does not apply, nothing more need be done. If the court believes that the crime-fraud exception does apply, the burden then shifts to the business organization seeking to assert the privilege.[80]

However, the *Zolin* Court also noted that a lesser evidentiary showing is needed for an *in camera* inspection than what is needed to pierce the privilege and that the decision to have the *in camera* inspection is within the trial court's discretion.[81] The Court in *Zolin* went on to note that a party has met its burden if it presents facts sufficient

> "to support a good-faith belief by a reasonable person" that an "*in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies." Use of the word "may" creates a "very relaxed test and, as only the judge gets this initial access, properly so.[82]

Sound policy reasons exist for a relaxed standard leading to an *in camera* review. The various privileges present a formidable barrier. A standard that is too difficult to meet may allow crime or fraud to go undetected and unpunished. Where the *in camera* inspection demonstrates that the information does not justify an exception to the privilege, any harm to the client or attorney is minimized.

In addition, the procedure also provides protection for both the attorney and the business organization. Because the attomey-client privilege focuses on the intent of the business organization, the crime-fraud exception to the attomey-client privilege requires criminal or fraudulent activity on the part of the client (not the attorney) as well as a focus on the client's intent regarding the attomey-client communications.[83]

[79] *Id* at 231.

[80] Such an approach is consistent with the United States Supreme Court's analysis in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 802-04 (1973) involving Title VII, where the Court noted,

> The complainant in a title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination . . . . The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for respondent's rejection ... but the inquiry must not end here. ... [Respondent must ... be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretextual.

[81] 491 U.S. at 572.

[82] *In re* Grand Jury Proceedings, 417 F.3d 18, 22 (1st Cir 2005).

[83] *Contra In re* Impounded Case (Law firm), 879 F. 2d 1211, 1213-14 (3d Cir. 1989)(holding that the crime-fraud exception may apply even where "pertinent alleged criminality is solely that of the law firm").

VII. THE CRIME-FRAUD EXCEPTION AND BUSINESS ORGANIZATIONS

In a criminal matter the government may seek a waiver of the privilege. A court in a civil matter may also set aside both the attomey-client privilege and work- product doctrine under the crime-fraud exception.[84] However, as previously noted, the crime-fraud exception is not a concern solely for individuals. When a business, or even an employee of a business seeks the advice of counsel and uses it to commit a crime, the crime-fraud exception comes in to play. Thus, if any business or business employee seeks the advice of counsel and uses it to commit a crime the communication is not privileged. Indeed, the crime-fraud exception is not limited to those situations where a client seeks assistance to commit a future crime or fraud, and includes any and all communication to further an ongoing crime or fraud.

Only those communications that further ongoing or future illegal activity are subject to the exception[85] and consultations with an attorney after a crime or fraud has taken place continue to be protected by the privilege, although false statements regarding past acts may be part of an ongoing fraud.[86] As one court noted,

> the [false] statements were not an instance of mere concealment of past wrongdoing, as where a client falsely tells his attorney that he did not commit a past criminal act. Rather, the statements were an inducement to future action in which the [attorneys] would become the defendant's unwitting pawns in playing out the last act of the fraud.[87]

Such an approach would require a waiver of the privilege even where a client is not guilty of wrongdoing and although it is consistent with a waiver of the attorney work-product doctrine, it is inconsistent with the privilege's focus on the client's intent, rather than the attorneys. *Id.*

[84] *See, e.g.*. United States v. Billmyer, 57 F.3d 31, 37 (1st Cir. 1995); *In re* American Honda Motor Co. Dealer Relations Litig., MDL Case No. 1069, at 1 (D. Md. June 3, 1998).

[85] *E.g., In re* Sealed Case (Synanon Church), 754 F.2d 395, 399, 402 (D.C. Cir. 1985); United States v. Friedman, 445 F.2d 1076, 1086 (9th Cir. 1971).

[86] *E.g.,* Alexander v. United States, 138 U.S. 353, 360 (1891).

[87] United States v. Calvert, 523 F.2d 895, 909-10 (8th Cir. 1975)(citation omitted).

Also, as previously noted, it is not just the attomey-client privilege that is at risk. The attorney work-product doctrine, and any joint defense privilege[88] that may exist may also cease to exist.[89] Whether it is the attomey-client privilege or the attorney work-product doctrine, a client has no legitimate interest (and society does have an interest) in legal advice that seeks to further a crime or conceal criminal activity.[90] One court stated that the test is whether the services of an attorney were intended to enable or aid the client to commit what the client knew or reasonably should have known to be a crime or fraud.[91]

A business organization has additional concerns. In a criminal investigation, the government is precluded from compelling an individual who is the subject of the investigation from testifying before a grand jury by the Fifth Amendment protection against self-incrimination.[92] The Fifth Amendment, however, does not preclude the government from seeking to compel an attorney for the suspect business organization from testifying before a grand jury.[93] And, although the Fifth Amendment prevents the compelled production of personal papers,[94] the same protection does not exist for business records, including an attorney's legal memoranda.[95]

Because the Fifth Amendment does not provide the same protection where the criminal investigation involves a business organization, the government may seek to compel the production of legal memoranda from the business organization, or testimony from the business organization's employees and attorneys.[96] And, as previously noted, although the attomey-client privilege and the attorney work- product doctrine prohibit the government from seeking to compel an attorney to testify and produce legal memoranda, the government may attempt to compel disclosure by way of the crime-fraud exception and/or by claiming that the attomey- client privilege does not exist.

VIII. RECOMMENDATIONS FOR ATTORNEYS AND THEIR BUSINESS CLIENTS

Although it is arguable that the greatest concern for an attorney (as well as the client) is the unintentional waiver of the attomey-client privilege or disclosure of

[88] Sometimes referred to as the common-interest doctrine, the privilege protects information, including conversations and documents, where two or more parties are jointly defending a matter. *In re* Sealed Case, 29 F.3d 714, 719 n.5 (D.C. Cir. 1994); United States v. Aramony, 88 F.3d 1369, 1392 (4th Cir. 1996). The privilege requires that: 1. the communications were made in the course of a joint-defense; 2. the statements were intended to further the joint-defense; and 3. the privilege has not been waived. *In re* Sealed Case, 29 F.3d at 719; *In re* Grand Jury Subpoena, 274 F.3d 563, 572 (1st Cir. 2001).

[89] United States v. Zolin, 491 U.S. 554, 562 (1989). *See also In re* BankAmerica Corp. Sec. Litig., 270 F.3d 639, 641 (8th Cir. 2001).

[90] *In re* Grand Jury Proceedings, 604 F.2d 798, 802 (3d Cir. 1979).

[91] United States v. Rakes, 136 F.3d 1,4 (I's* Cir. 1998).

[92] *E.g.,* Beilis v. United States, 417 U.S. 85, 89-90 (1974).

[93] *E.g., In re* Grand Jury Subpoenas, 144 F. 3d 653, 663 (10th Cir. 1998).

[94] *E.g.,* Beilis, 417 U.S. at 91.

[95] *E.g.,* Braswell v. United States, 487 U.S. 99, 102 (1988).

[96] *E.g., id* at 102, 108-09; *Accord,* United States, v. Does, 465 U.S. 605, 612 (1984).

attorney work-product, and for good reason, such a concern is best addressed by scrupulous attention to detail by attorneys.

Beyond that, it is clear that the government is increasingly aggressive in its efforts to prosecute white-collar crime. Indeed, an indictment alone may be the kiss of death for a business organization. The indictment of Arthur Andersen, LLP was such a kiss. Few remember that the company was later acquitted.[97]

If an individual within a business organization is being prosecuted, Fifth Amendment protection against self-incrimination comes into play. The same is generally not true if a business organization is being prosecuted. For a business organization there are additional issues:

> If both the attorney and the client intend to commit a crime or fraud, or continue an ongoing crime or fraud, it is likely that a court will find that there is no attorney-client privilege or attorney work-product doctrine either because the client did not seek legal advice, or because the attorney did not act in the role, or both;[98]

[97] Arthur Andersen, LLP v. United States, 544 U.S. 696, 698 (2005). The Court noted,

> As Enron Corporation's financial difficulties became public in 2001, petitioner Arthur Andersen LLP, Enron's auditor, instructed its employees to destroy documents pursuant to its document retention policy. A jury found that this action made petitioner guilty of violating 18 U.S.C. §§ 1512(b)(2)(A) and (B). These sections make it a crime to "knowingly use intimidation or physical force, threaten, or corruptly persuade another person . . . with intent to . . . cause" that person to "withhold" documents from, or "alter" documents for use in, an "official proceeding." The Court of Appeals for the Fifth Circuit affirmed. We hold that the jury instructions failed to convey properly the elements of a "corrupt persuasion" conviction under §1512(B), and therefore reverse.

Id

[98] *E.g.*, United States v. Josleyn, 206 F.3d 144 , 157 (1st Cir. 2000).

> A memorandum entitled ''For Mr. Amemiya" discussed the problem that there may have been wide spread (sic) bribe taking by Honda auto reps . . . .' The unknown author of the memo, most likely a Lyon & Lyon attorney, spoke of certain corrupt activities as being ''common practice" at the company and said it has long been believed that Honda dealerships are obtained by paying off the right people."

Id. at 157.

> Attorney Roland 'Bud' Smoot was a senior partner at the lawfirm of Lyon & Lyon . ... In 1984, while wearing one of his American Honda-affiliated hats, Smoot hired Emmett Doherty, a private investigator, to look into rumors that Billmyer and his predecessor had received bribes. From Smoot's comments to Doherty, it was evident that Smoot had heard sufficient stories of corruption to warrant investigation. Further, after Doherty made his initial report, Smoot terminated the investigation."

> If the business organization, unbeknownst to the attorney, intends to commit a crime or fraud, or continue an ongoing crime or fraud, it is likely that the crime-fraud exception will come into play as to the attomey-client privilege, but not the attorney work-product doctrine; and
>
> If the attorney, unbeknownst to the business organization, intends to commit a crime or fraud or continue an ongoing crime or fraud, the attomey-client privilege should remain intact, but the attorney work-product doctrine may not exist.

Some commentators have argued that, in a situation involving a business organization intending to commit a crime, or, presumably, continue an ongoing crime, there must be a showing that the business organization knew or reasonably should have known, either before or after it sought legal advice that the contemplated act was illegal." Such a determination cannot be made without the disclosure of material covered by the attomey-client privilege. In addition, if there are questions about the advice given by the attorney to the client, the attorney's work-product is likely to become relevant to the inquiry. At that point, the information disclosed may call into question an attorney's involvement in a criminal enterprise, perhaps endangering the very existence of the attomey-client privilege.

To determine the precise facts of a particular case will require an investigation that includes:

> the business organization's reason for a consultation with an attorney;
>
> the information obtained and/or disclosed by the attorney (which may be covered, at least in part, by the attomey-client privilege and attorney work-product doctrine);

Id. at 156. See also, *In re* American Honda Motor Co., Inc. Dealerships Relations Litigation, 958 F. Supp. 1045, 1056-57 (D.C. Maryland 1997):

> [T]he plaintiffs allege that Lyon &Lyon lawyers went further, counseling witnesses to give evasive or incomplete testimony, for example, by telling them that if they lied on the witness stand "a bolt of lightning wasn't going to come out of the sky and strike (them) dead." Plaintiffs also allege that in response to increasing pressure from the plaintiffs and the court in the *Naull* litigation, Lyon & Lyon and American Honda conducted an investigation of the alleged kickback scheme but intentionally limited that investigation by not interviewing certain key [individuals]. Finally, Lyon & Lyon attorneys allegedly directed American Honda to make false and misleading assertions about the results of the investigation in an evidentiary hearing in the *Naull* case.

[99] *E.g.*, Fried, *supra* note 53.

the attorney's advice (which may be part of the attomey-client privilege as well as attorney work-product); and

the actions of the business organization after receiving the attorney's advice.

In the context of a criminal investigation of a business by the government, it is unlikely that the government's efforts to challenge the existence of at least one privilege will be based strictly on information covered by the attomey-client privilege and/or the attorney work-product doctrine. The government is likely to submit affidavits or declarations as well as transcripts of grand jury testimony. Indeed, it is the affidavits, declarations and transcripts that are likely to give rise to an *in camera* inspection of information relating to the attomey-client privilege and the attorney work-product doctrine.[100] Such information is also likely to be of immense benefit to plaintiffs counsel in civil litigation.

Although commentators have expressed concern about the standard of proof that is required, and courts have struggled to define the standard, a bare allegation should be insufficient to justify even an *in camera* hearing.[101] Indeed, in certain cases the evidence submitted may be so strong that the court may feel no need to hold an *in camera* hearing.[102] In the alternative, a court may order an *in camera* inspection to determine if some of the material falls outside the scope of the exception.[103] The remote possibility also exists that a trial court may be persuaded that the crime-fraud exception was improvidently recognized.[104]

However, once the attomey-client privilege and/or attorney work-product doctrine is successfully challenged, even if the resulting prosecution does not result in a conviction by the government, the material that is released may benefit third parties that may then file civil lawsuits against a business organization and perhaps the attorney as well. The resulting civil litigation will benefit from the absence of the Constitutional protections that exist for criminal defendants, including:

A lower standard of proof in civil litigation (a preponderance of the evidence); and

A jury verdict that need not be unanimous.

[100] *E.g., In re* Grand Jury Proceedings (Vargas) 723 F.2d 1461 (10th Cir. 1983).

[101] In a case involving an allegation of defamation, the court balanced the rights of the plaintiff against the defendant's right of free speech and refused to compel Yahoo! to disclose the identity of a person who allegedly posted defamatory material on a Yahoo! message board. Dendrite International, Inc. v. Doe No. 3, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001).

[102] *E.g., Vargas*, 723 F.2d 1461.

[103] *E.g., id.*

[104] United States v. Dyer, 722 F.2d 174 (5th Cir. 1983).

IX. CONCLUSION

The increasingly aggressive approach to white-collar crime by the government, combined with the crime-fraud exception, serve notice on all business organizations, and their attorneys, that there is little tolerance for behavior that, at one time, might have been seen as merely unethical. Such behavior may now lead not only to civil litigation but criminal prosecution as well. A business organization must carefully choose its employees as well as its attorney. Unsurprisingly, attorneys must also carefully choose their clients. Finally, a business organization that finds itself a co-defendant in a criminal prosecution must carefully consider the wisdom of entering into a joint defense agreement with one or more co-defendants. A joint defense agreement with a co-defendant business that is facing a challenge to otherwise protected information based on the crime-fraud exception may cause significant problems for an otherwise innocent business and its attorney.