Fishing Corporate Defendants Out of the Bushes and Into the Sunlight

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How to Defeat Abuse of Privilege And Work Product Claims

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and

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"You like to fish in sunny, open water because you are a Scot and afraid to lose a fly if you cast into the bushes. But the fish are not taking sunbaths. They are under the bushes where it is cool and safe from fishermen like you."

I only supported his charges in defending myself. "I lose flies when I get mixed up in the bushes, I complained."

"What the hell do you care?" he asked. "We don't pay for flies. George is always glad to tie more for us." "Nobody", he said, "has put in a good day's fishing unless he leaves a couple of flies hanging on the bushes. You can't catch fish if you don't dare go where they are."

A River Runs Through It And Other Stories, Norman Maclean[3]

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[3] The University of Chicago Press, Ltd., London, 1976.

The battlefield in litigation against big companies is discovery. In many cases where no real defense exists, the turning point of that battle is the fight over privilege and work product claims. The "discovery wars" result from defendants' efforts to pervert or avoid the rules, confuse the issues, and thereby conceal damaging evidence.[4] Pattern discovery abuse – wherein defendants use a calculated strategy of obfuscation and delay – has long been a problem in "high stakes" litigation involving corporate defendants.[5] Corporations abuse the discovery rules time and time again.

Potent among the deceptions defendants utilize is the improper invocation of privilege. The object is to deprive plaintiff of his or her right to "every man's evidence."[6] The collateral casualty is the sacred concept of attorney client privilege. The collateral damage is not inadvertent: defendants who know their conduct will inevitably lead to injuries and deaths and concomitant lawsuits very deliberately scheme to use the availability of a privilege claim to conceal evidence.

Automakers' and tobacco companies' abuses have shed considerable light on the strategies used by corporate defendants. Every trick has been tried, from involving attorneys in meetings which are not legal in nature, to simply sending a damaging

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[4] The abusive discovery strategy of corporate defendants has been much chronicled. *See*, James E. Butler, Jr.., and Patrick Dawson, *The Bench as Battleground: The Discovery Process is Broke and Only Judges Can Fix/t*, THE VERDICT, 11 (May/June 1992). *See, also*, David Halperin, *Discovery Abuse: How Defendants in Products Liability Lawsuits Hide and Destroy Evidence*, PUBLIC CITIZENS CONGRESS WATCH (July 1997). (The Federal Judicial Center's survey report confirms that cases likely involving corporate parties are the source of many discovery problems and that such abuses are part of a calculated strategy to prevent access to evidence).

[5] *See, Bollard v. Volkswagen of America, Inc.*, 56 FRAT 569 (W.D. Mo. 1971) (noting that automakers have been unusually evasive and loath to make discovery").

[6] "For more than three centuries it has now been recognized as a fundamental maxim that the public ... has a right to every man's evidence." *Jaffee v. Redmond*, 518 U.S. 1, 116 S.Ct. 1923, 1928 (1996) (citation omitted).

document to an attorney after it has been unwittingly created but cannot be destroyed or otherwise "contained." Attorneys are used to manufacture justifications for concealment, rather than consulted for purposes rightfully entitled to confidentiality.[7]

The abuse of privilege and work product claims can - and must - be defeated. It is not an easy task. It requires considerable work and patience. It requires education of the trial judge, who has been taught that privilege and work product claims are sacred. It requires that the court understand that determining whether a privilege or work product claim is valid is *the job of the court*, not the job of the lawyer for the party asserting the claim and attempting to conceal the evidence. It requires that the court's attention be focused on the right issues, in the right order: First, has the privilege and/or work product claim been properly invoked? Usually, the answer is clearly not. Second, if the claim has been properly made, has the claimant provided, to the court and the adversary, that information which the law requires be provided? Usually, the claiming

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[7] The adversary is entitled to receive a privilege log, which provides sufficient information to allow that party to contest the claim, while not vitiating the claim itself. Federal Rule of Civil Procedure 26; *see, also, Bud Antle, Inc. v. Grow-Tech Inc.*, N.D.Cal.1990, 131 F.R.D. 179, 16 U.S.P.Q.2d (1948); *Leach v. Quality Health Services, Inc.*, 162 F.R.D. 499 (1995). The court is entitled to that privilege log, and to the document or fact sought to be concealed, and to *evidence*, submitted *in camera* if need be, to actually *prove* the claim. *See* 6 James W. Moore, *et al.*, *Moore's Federal Practice*, § 26.47[1](Matthew Bender 3d. Ed.)("The burden of asserting and establishing the privilege exists is on the party claiming the privilege [and][a] bald assertion of privilege is insufficient to claim the privilege ...."; *see, also, Walker* v. *State*, 887 P.2d 301 (Okla. Crim. App. 1994).

defendant will not provide that information. Third, has the claim been proved? Usually, the claiming defendant will not even attempt to prove the claim, because it cannot prove the claim as to most documents or facts sought to be protected, and providing some evidence to support some claims as to some documents or facts draws attention to the total lack of evidence proving other claims. Finally, if all the foregoing fail to defeat the abuse of privilege claims, the crime-fraud exception should be examined and, if supportable, invoked.

In short, make the judge make the decision and hold the defendant to the requirements of the law. Practice, patience, and countless battles have taught our firm at least three things about privilege claims: (1) doubt them all, as most are invalid; (2) stick to the law -- require that the claimant satisfy the legal requirements for invoking the claim, revealing enough information so the adversary can contest the claim, and proving the claim with evidence; and (3) independently investigate the subject matter of the case and other similar litigation to gain an understanding of what defendant is trying to hide behind the privilege and work product claims.

The crime-fraud exception is an effective way to expose a defendant's misconduct and to get the documents produced. This article attempts to present lawyers facing such discovery abuse with a primer for asserting the crime-fraud exception. The first part of this article gives an overview of what the crime-fraud exception is and how it is applied across the country. The second part of the article sets out some common sense approaches to both assessing whether or not the crime-fraud exception may apply, and to making allegations of crime-fraud in the right case. The final part of the handout sets out pertinent Federal statutes and ethical rules used to

prove crime-fraud in the discovery context discussed here.

PART I: THE LAW – THE CRIME-FRAUD EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE.

A. Reassessing The Discovery Landscape

Then, since it is natural for man to try to attain power without recovering grace, he whips the line back and forth, making it whistle each way, and sometimes even snapping off the fly from the leader, but the power that was going to transport the little fly across the river somehow gets diverted into building a bird's nest of line, leader, and fly that falls out of the air into the water about ten in front of the fisherman. ... Power comes not from power everywhere, but from knowing where to put it on.[8]

[8] Maclean, *supra*, note 3 at 18.

Overcoming wholesale obfuscation and perversion of the discovery rules is painful. It requires commitment and attention to detail. Ultimately, it requires one to overcome considerable boredom, because the pattern repeats itself, case after case, no matter what lawyers happen to representing the corporate defendant.[9] First, defendant stonewalls discovery, providing nothing, making blanket privilege and work product assertions.[10] Then defendant insists on an onerous, illegitimate, "protective order" before providing any information.[11] Defendant attempts to make that the first issue litigated before the trial court. Then defendant dumps masses of meaningless documents on plaintiffs' counsel, and thereafter protests its uprightness by reference to the sheer volume of its production.

All the while, defendant insists that its search for requested documents and

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[9] Much of the pattern discovery abuse is driven by national, in-house or other "coordinating" counsel working with the corporate defendants. These counsel either aren't admitted in the trial court (*pro hac vice* or otherwise) or, at least, they don't make an appearance in the pending case. National counsel instead hires "local" counsel -- usually well-connected defense firms whose principals are respected leaders of the local bar -- to handle the day-to-day pretrial management of the case, to be the "mouthpiece" for communications with plaintiff's counsel and the court, to appear at depositions and hearings, and, most importantly, "to take the bullet" for defendants if judicial ire is directed at corporate discovery abuse.

[10] Defendants arbitrarily stop discovery until they decide to file a motion for protective order governing document production. Yet, under most civil rules, production is supposed to take place within 30 or 45 days, absent motion and order for extension, agreement for extension, or motion for a protective order. Plaintiffs are put in the dilemma of having to agree to onerous and meritless limitations in the "protective order" as a condition for getting documents due plaintiffs or else accept delay while the matter is litigated. That this is a calculated defense strategy cannot be disputed. *See, e.g.*, Kerry A Kearnedy and Tracey G. Benson, *Preventing Non-Party Access to Discovery Materials in Products Liability Actions: A Defendant's Primer.* DRI CURRENT ISSUES IN LAW AND MEDICINE 36, 37, 41 (No. 4, 1987) ("The purpose of the article is to suggest ways to minimize the chance that documents and other materials produced during discovery will be distributed to or shared with non-parties such as plaintiff's counsel in other jurisdictions or the mass media. ... First, no discovery should be permitted until the issues of protection are resolved. Second, the issue of a protective agreement or order should be forced early n the case to capitalize on plaintiff's eagerness to get started; plaintiff's counsel is likely to be more cooperative at the early stages of the litigation.")

[11] *C.f.*, Kearney and Benson, *supra*, note 25, at 41 (Advising defense counsel to "approach" plaintiff on protective order issues as, if agreement is not reached, counsel will be able "to argue to the court that plaintiff's counsel is being obstinate and not acting in good faith with regard to discovery.")

information continues. The purpose of that "dribbling" approach is to deny plaintiff responsive documents and information at all if possible, or if that fails, until late in the litigation.[12]

Defendants' core strategy is to force plaintiff to take to the court a host of separate issues -- to litigate virtually every request for production, every interrogatory. Required "meet and confer" sessions[13] feature posturing to appear compliant, preceded and followed by a paper trail
of correspondence serving the same purpose. The object is to create a dilemma for plaintiff: either surrender on many issues, or submit a host of issues to the trial court. That sets up one of defendants' ultimate salvations: the court runs out of patience, long before it is called upon to test defendants' abuse of the privilege and work product claims.

Privilege and work product claims are used by defendant as the ultimate "safe harbor" - the bushes under which defendant can hide the big fish. If all else fails, and the trial court compels production, the really damaging information will be harbored there, under the privilege and work product cover. Any plaintiffs' counsel who attempts

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[12] It is for this reason that cooperation with other lawyers who have had similar cases is essential. Only by obtaining, from them, documents and information they obtained from the same defendant, can plaintiffs' counsel hope to keep defendant honest, by being able to prove that defendant has failed to produce responsive information in the case at hand.

[13] *See, e.g.*, Fed. R. Civ. P. 37(a)(2)(A),(B); Mass. Super. Ct. R. 9C.

to cast to that cover risks snagging his line, and his case. The effort is prodigious, the trial courts are reluctant to go there, and success in the trial court generally guarantees a delaying trip to an appellate court. If, and when, finally, plaintiff and the trial court turn to examination of defendants' privilege and work product claims, defendants can be relied upon not to provide the privilege logs generally required by law; not to provide the information required in such a log if a log is provided; not to submit the subject documents and facts to the court *in camera* so that the court, rather than defense counsel, can adjudicate the claims; and not to support the claims with the evidence required by law.

At every stage, defendants knowingly risk determination by the court that defendant has waived the claims -- by making unlawful blanket privilege assertions, by failing to properly invoke the claims, by failing to provide legally required information to plaintiff and/or to the court, or by failing to offer evidence sustaining the claim. "Privilege" enjoys such sacred status in our jurisprudence, however, that courts are usually reluctant to declare a waiver.

If defendant gets away with that gamble, and is ultimately required to adjudicate the claims before the court, the next tactic is to inundate the court, and plaintiff, with privilege and/or work product claims. The privilege log will stretch to dozens of pages, hundreds of documents.[14] Judges taking the time to review all of the claims will find that

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[14] In a recent case handled by our office that ultimately resulted in the largest verdict in Georgia history, defendants removed over five hundred documents from a privilege log of just over 600 documents when faced with review by the court. *See, generally, Six Flags Over Georgia, LP, et al.* v. *Time Warner Entertainment Company, LLC, et al.*, 245 Ga.App. 334, 537 S.E.2d 397 (2000) (*Reconsideration Denied* July 27, 2000) (*Certiorari Denied* Jan. 18, 2001).

it would take a miracle of divine proportion to support defendant's claims.[15]

Of course, the court has other cases to handle, and often the "overload" tactic will succeed: the court will instruct plaintiff that it will not review all documents on the privilege log, and force plaintiffs' counsel to designate those documents which he or she *thinks*, based on the inadequate information in a privilege log, may not be deserving of privilege or work product protection. Even when the court ultimately denies the claim as to particular documents, and even if a delaying appeal is not available to defendant or is unsuccessful, defendant can be counted upon to decline to obey the court's order that the document be produced, instead daring the court to sanction defendant.

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[15] "But I can tell you that I have seen documents that you people told me that were privileged that [are] no more privileged than I'm Jesus." (Taken from transcript of Motions Hearing on privilege issue, *Six Flags*, *supra*, note 14., Hon. James W. Oxendine, Superior Court Gwinnett County, Georgia, presiding.)

This is a matter of simple calculation: defendant may be exposed to many similar cases or face a future full of similar cases. It has a business decision to make: obey the court order and produce the document in this one case, with the risk it would then become available to the public and to litigants in other cases,[16] or elect to accept a sanction, knowing full well that courts have nearly as much aversion to serious sanctions as they do to evaluating privilege claims and denying them.[17]

That must be the goal for any lawyer who seriously intends to require such a defendant to comply with the law and the discovery rules and produce discoverable evidence: put the defendant who would commit such abuses to an election – disclose the evidence, or suffer default. It is an election the defendant knowingly chose for itself; if it won't produce the evidence, it deserves the sanction.

Getting there is not easy. From the outset, the plain meaning of plaintiffs' discovery will be twisted and contorted by defendant. When the court issues orders, the

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[16] *See*, Stephen G. Morrison, *Truth and Consequences: Surviving Discovery in the Age of Full Disclosure*, FOR THE DEFENSE 11, 12 (Sept. 1996) (defendant "must assume that any document it has ever produced can and will find its way to the hands of the opposing attorney"). Mr. Morrison and his firm are regional counsel for General Motors, a corporation which seems to have set the pattern for how automakers respond to discovery in product liability suits. GM's discovery abuse is so habitual that every court should know what can be expected in suits defended by GM. *See, e.g.*, *Oswald v. General Motors Corp.*, No. 95VS0099662 (Fulton County State Ct., Ga., January 7, 1997) (experts struck because of discovery abuses); *Baker*, *supra* note 22 (vehicle found defective for willful noncompliance and delayed compliance of discovery orders); *Coleman v. General Motors Corp.*, No. 88-53419-02 (Cir. Ct. Dade County, Fla., April 12, 1993) (sanctioned for discovery abuse; vacated pursuant to stipulation); *Stump v. General Motors Corp.*, No. 91-C-09 (Dist. Ct. Republic County, Kan., Aug. 17, 1992, May 25, 1993) (sanctioned with court likening GM's conduct to Suzuki's in *Malautea*, *supra* n.1); *Klitsch v. General Motors Corp.*, 1990 WL 192037 (E.D. Pa. 1990) (sanctioned for failure to produce documents); *Noone v. Oldsmobile Div. of General Motors Corp.*, No. 85-68704 (Dist. Ct. Harris Co., Tex., Nov. 21, 1988) (defaulted for discovery abuse); *Sellon v. Smith*, 112 F.R.D. 9 (D. Del. 1986) (sanctioned for narrowly construing requests and improperly invoking privilege); *Sellers v. General Motors Corp.*, 40 Fed. R. Serv.2d 590 (E.D. Pa. 1984) (sanctioned for abuse; new trial granted on defense verdict).

[17] "Too many judges have the same fear of a discovery dispute that a goat does of a butcher knife – they don't want to go near them." United States District Court Judge William R. Wilson, Jr., (Arkansas) as quoted in *Was Rand Right*, *ABA Journal* 98, 99 (May 1997).

plain meaning of the words in those orders will be "interpreted" creatively in a fashion beneficial to defendant, requiring repeated trips to the court for followup orders.[18]

Perhaps the greatest impediment to even reaching this point is the persistent notion among so many judges that the pattern discovery abuse discussed herein "won't happen in my court". That statement or its equivalent has been made in nearly every case in which the authors have experienced wholesale discovery abuse from defendants.

The most likely result for the plaintiff who embarks on this journey to try to wrangle from a recalcitrant defendant evidence which, though discoverable, damages the defendant, is that, like the fisherman trying to catch the big trout under the bushes, he and his case will be snagged somewhere along the way. Often the result of defendants' obstreperousness is that plaintiff, at some point, must make his own election: continue the fight and continue to see trial removed to the more distant future,

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[18] *Malautea v. Suzuki Motor Company, Ltd., et. al*, 987 F.2d. 1536 (1993), affirming *Malautea v. Suzuki Motor Corp.*, 148 F.R.D. 362, 363, 1991 WL 495195, 1 (S.D.Ga. 1991) (The District Court, Chief Judge B. Avant Edenfield, imposed sanctions for discovery abuse upon foreign automobile manufacturer including striking defendants' answers and entering judgment for the plaintiff on the issue of liability where defendants "used a number of techniques to obfuscate the truth" including "refus[ing] to answer general questions, choosing instead to limit the question to a narrower field"); *see, also*, Contempt Order of Judge Donald Molloy, *Phillips, et al v. General Motors Corporation*, United States District Court, District of Montana, Missoula Division, August 11. 2000, CV 98 - 168 - M ("Sanctions will be imposed in this case...". "So that there is no confusion in the minds of GM counsel, this Order means what it says...").

or give up and go with what you've got. That is defendant's object. That is why defendants' most important evidence so regularly "swims under the bushes" afforded by privilege claims.

B. The Crime-Fraud Exception

Sunlight is said to be the best disinfectant.[19] In a civil case against a corporate defendant, that observation by Justice Brandeis sixty-seven years ago is demonstrably, unequivocally true. For Plaintiffs seeking discovery from defendants hiding in the shadows of privilege, the crime-fraud exception brings their machinations to light.

[19] L. Brandeis, *Other People's Money 72* (1933).

It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the "seal of secrecy," between lawyer and client does not extend to communications "made for the purpose of getting legal advice for the commission of a fraud" or crime.[20] Virtually every state and every federal court recognize some form of the crime-fraud exception, although there are areas in which there are differences among the various jurisdictions in the application of the crime-fraud exception, such as the requisite burden of proof, the procedural hurdles the challenging party must overcome to trigger an *in camera* review of documents, or the way in which a particular jurisdiction articulates the nexus required between the communication at issue and the alleged crimes or frauds.

Through the course of legal wrangling over the exception, the automotive industries' misuse of the legal precedents concerning the crime-fraud exception has exposed perceived grey areas in the crime-fraud doctrine. By examining the policies behind both the exception and the respective privileges, as well as some of the more widely accepted judicial precedents, one can derive a clear understanding of the crime-fraud doctrine.

C. The Policies Behind The Crime-Fraud Exception

In the annals of jurisprudence, the oldest and most universally established protection of confidential communication is the attorney-client privilege.[21] This privilege

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[20] *United States* v. *Reeder*, 170 F.3d 93, 106 (1st Cir. 1999) (citing *United States* v. *Zolin*, 491 U.S. 554 (1989)).

[21] Edna Selan Epstein, *The Attorney-Client Privilege and the Work- Product Doctrine* 2 (3d Ed. 1997).

lies at the very heart of the American legal profession, and its policies promote public confidence in the profession and the fair administration of justice. However, this privilege is not absolute. Well-established exceptions to the privilege attempt to mitigate illogical results and to further the policies upon which the privilege itself rests. The crime-fraud doctrine is such an exception.

The justification for the crime-fraud exception is firmly rooted in social and judicial policy. The basic theory is that clients should not be able to use legal advice to perpetrate or plan ongoing or future unlawful activity and then use the privilege as a shield from disclosure.[22] Though the exception is simple and straightforward at its foundation, the exact scope of the crime-fraud exception has been disputed. An examination of the specific policies supporting the crime-fraud exception leads one to the inescapable conclusion that the exception's scope should be broad and encompass those activities beyond the technical definition of "crimes" and "frauds."

D. The Policies Behind the Privilege

Numerous policies support the attorney-client privilege.[23] One frequently cited policy is that the privilege is a "necessity, in the interest and administration of justice."[24] For our justice system to function properly, a client must be able to confide in a legal advisor all of the words and actions without fearing repercussions from such disclosure.

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[22] *Id.* at 1-3.

[23] For an in depth analysis of the attorney-client privilege, *see*, Geoffrey C. Haxard, Jr., *A Historical Perspective on the Attorney-Client Privilege*, 66 Cal. L. Rev. 1061 (1978).

[24] *Hunt* v. *Blackburn*, 128 U.S. 464, 4870 (1888).

An attorney's work product is similarly protected from disclosure, regardless of the source of the underlying information, so long as it reflects the lawyer's "mental impressions," and it is prepared in anticipation of litigation.[25] The work product doctrine has been justified as a necessary protection to encourage effective preparation by lawyers, however, the Supreme Court, in creating this protection, did not go so far as to give it the status of a "privilege."[26] Also, while broader in scope than the attorney-client privilege, it was never as absolute.[27] Yet when justice is thwarted by this protection, the policy no longer justifies secrecy. Thus any conduct which is intended to hinder the proper administration of justice will destroy the privilege.[28]

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[25] *Hickman v. Taylor*, 329 U.S. 495, 509-11 (1947); see also *In re Grand Jury Proceedings*, 43 F.3d 966, 972 (5th Cir. 1994).

[26] *Id.*

[27] *Id.*

[28] 81 Am. Jur. 2d Witnesses § 394 (1992).

At the core of the policies supporting the attorney-client privilege and the crime-fraud exception is the delicate balance between the society's interests in full disclosure of evidence and the client's private interests in protecting confidential communications with the attorney.[29] For a privilege to be recognized, the injury to the individual client must outweigh the benefits of a proper disposition of the controversy through disclosure of all relevant evidence.[30] If the communication is intended for illegitimate purposes, then the client's interests should not be protected by privilege.

Numerous courts have expounded on this balancing process. For instance, in *Clark* v. *United States*, Justice Cardozo reasoned that once the interests of the client turn illegitimate, "(i)t must yield to the overmastering need, so vital in our policy, of preserving trial by jury in its purity against the inroads of corruption."[31] Other courts have discussed how the balance between the privacy and public policy interests shifts once the intentions turn illegitimate.[32] At this point, the client's interest, and thus the privilege, must

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[29] John William Gercaz, *Attorney-Corporate Client Privilege* at 4.01(3)(b) (1987).

[30] *Wigmore on Evidence*, § 2298 (John T. McNaughton rev. 1961).

[31] *Clark* v. *United States*, 289 U.S. 1, 16 (1933).

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

give way to public policy and the proper administration of justice.[33]

E. The Scope of the Exception

[33] *Model Rules of Professional Conduct* (1977).

As corporate defendants have continued to show their willingness to engage in deceit and obstruction, courts throughout the country have found that both law and policy require application of the exception beyond those circumstances where the technical definition of crime or fraud is met.[34] The policies underlying both the privilege and the exception demand that deceitful conduct, including activities beyond the scope of criminal or common law fraud, such as abuse of the attorney-client relationship, not

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

be protected from disclosure.[35] This view of the exception's application is not expansive; as one court put it: "Acts constituting fraud are as broad and as varied as the human mind can invent."[36]

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

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

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

More significantly, some scholars argue that the narrow view of the exception's scope directly conflicts with the exception's underlying policies because it ignores the purpose of the exception.[37] *Wigmore on Evidence* states: "Yet it is difficult to see how any moral line can properly be drawn at that crude boundary (of technical definitions of crime and fraud), or how the law can protect a deliberate plan to defy the law and oust another person of his rights, whatever the precise nature of those rights may be." [38]

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[37] *Gargacz*, *supra*, note 28.

[38] *Wigmore on Evidence*, *supra*, note 29, Sec 2298 at 577.

Most courts use a broad application of the exception.[39] The unconscionable practices of corporate America, which gave rise to mass torts litigation such as asbestos, Dalkon Shield, tobacco, and patently defective automobiles and tires, seems to have served as a catalyst for the broad construction. Indeed, the exception is named somewhat inappropriately as courts throughout the country have found that both law and policy require application of the exception beyond those circumstances where the technical definition of crime or fraud is met.[40] The policies underlying both the privilege and the exception demand that deceitful conduct, including activities beyond the scope of criminal or common law fraud, such as abuse of the attorney-client relationship, not be protected from disclosure.[41] This view of the exception's application is not expansive; as one court put it: "Acts constituting fraud are as broad and as varied

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[39] *See United States* v. *Zolin*, 491 U.S. 554 (1989).

[40] *See, e.g., Sandberg* v. *Virginia Bankshares, Inc.*, 979 F.2d 332-54 (4th Cir. 1992) (finding that "improprieties, breaches of fiduciary duties, and violations of securities laws" are sufficient to deny application of the attorney-client privilege); *In re Sealed Case*, 754 F.2d 395, 3999 (D.C. Cir. 1985) (extending the exception to "crime, fraud or other misconduct"); *Cooksey* v. *Hilton Int'l Co.*, 863 F. Supp 150, 151 (S.D.N.Y. 1994) (applying the exception to "intentional torts moored in fraud"); *Central Constr.Co.* v. *Home Indem. C.*, 794 P.2d 595, 598 (Alaska 1990) ("Public Policy demands that the "fraud" exception to the attorney-client privilege ... be given the broadest interpretation." (quoting *In re Callan*, 300 A.2d 868, 877 (N.J. Suprer. Ct. Ch. Div. 1973)); *State* v. *Doster*, 276 S.C. 647, 651, 284 S.E.2d 218, 220 (1981) (noting the "widely recognized rule that the privilege does not extend to communications in furtherance of criminal, tortuous or fraudulent conduct"); *Volcanix Gardens Mcmt. Co.* v. *Paxson*, 847 S.W.2d 343, 347 (Tex. Ct. App. 1993) (refusing to limit the application of the exception only in cases of common law or criminal fraud).

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

as the human mind can invent."[42]

F. Sorting Out the Crime-Fraud Procedure: The *Zolin* Showing

In the current discovery war with corporate wrongdoers, one of the most effective tools for getting access to damaging documents is the crime-fraud exception. The exception, however, raises many key issues: what procedure the court should follow, what the burden of proof is, and who carries this burden. Courts do not universally agree on a single specific procedure or burden of proof. The Supreme Court recognized the confusion concerning the specifics of the crime- fraud exception, but declined an opportunity to resolve that confusion.[43] The result appears to be a loosely connected framework where the details become muddled in seemingly inconsistent judicial interpretations. Although the crime-fraud exception appears unsettled, the cases present a clear picture in which both practical and policy considerations are satisfied.

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

[43] *United States* v. *Zolin*, 491 U.S. 554, 563 n.7 (1989).

Prior to the 1989 landmark case of *United States* v. *Zolin*, [44] considerable controversy existed among the circuits about what evidence courts could consider to determine whether the crime-fraud exception applied to allegedly privileged communications.[45] The *Zolin* rule was rather simple: A court can consider "any relevant evidence, lawfully obtained, that has not been adjudicated to be privileged."[46] Thus, because the Court recognized that the communication itself is often the best evidence of its true nature,[47] a claim of privilege regarding the communication in contention does not immunize it from the court's consideration.[48]

From this analytical basis, the Court determined that in camera review of the communications in contention is an appropriate, and often necessary, tool for adjudicating the privilege challenge.[49] Inspection of the documents at issue may be made after the privilege challenger makes a threshold showing. The threshold showing is "a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies."[50] Once the challenger meets this threshold requirement, the intrusion upon the attorney-client privilege is minimal and does not

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[44] *Id.*

[45] *See*, *id.* at 563 n.7.

[46] *Id.* at 575.

[47] *Id.* at 573.

[48] *See, id.* at 574 n.12.

[49] *Id.* at 574.

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

destroy the privilege, if it in fact exists.[51] The trial judge may implement such inspection. *Zolin's* threshold requirement is not stringent and primarily discourages fishing expeditions by opposing parties into confidential attorney-client communications;[52] however, some foundation in fact must justify any intrusion into the privilege.[53]

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

[52] *See, id.*

[53] *See, id.*

In re Grand Jury Investigation [54] articulates the most probing and thoughtful analysis of the *Zolin* standard. In its analysis, the Ninth Circuit noted that *in camera* review is appropriate where such review may reveal evidence to establish the applicability of the exception.[55] While confirming that the *Zolin* threshold analysis requires some speculation, [56] the court properly clarified the nature of the threshold factual showing required by *Zolin* as a reasonable person's good faith belief. The analysis does not require a showing that the exception actually applies, but merely that

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[54] 974 F.2d 1068, 1072-73 (9th Cir. 1992). *Haines* v. *Liggett Group Inc.*, 975 F.2d 81, 96 (3d Cir. 1992) (quoting, *Haines* v. *Liggett Group Inc.*, 140 F.R.D. 681, 690 (D.N.J. 1992)); *see In re Grand Jury Subpoena*, 31 F.3d 826, 830 (9th Cir. 1994).

[55] *Id.* at 1073.

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

it ". . . may reveal evidence to establish the claim that the . . . exception applies."[57] The difference between these two standards "results in a considerably lower threshold for conducting *in camera* review."[58] In short, the *Zolin* threshold standard balances the policies and rationales behind both the privilege and the exception to arrive at a common ground.[59]

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[57] *Id.* (quoting, *Zolin*, 491 U.S. at 572) (*emphasis added*).

[58] *Id.*

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

To establish the threshold requirement, a privilege challenger can use only that evidence not formally adjudicated to be privileged.[60] Additionally, only the challenger may present evidence for establishing the preliminary threshold.[61] As a result, establishing the threshold in subsequent cases concerning the same or similar communications is easier. The court can consider rulings of other courts concerning the applicability of the crime-fraud exception to the same documents in question.[62] Obviously, any prior holding of the exception's applicability to a particular group of communications should satisfy the minimal threshold burden with respect to the same documents in another case. Otherwise, a court would have to find that the prior determination was devoid of reason or made in bad faith.[63]

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[60] *See Zolin*, 491 U.S. at 574.

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

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

[63] As our firm has fought the discovery battle with automakers, primarily General Motors Corporation contemporaneously in a number of different courts, we have had success using "unprivileged documents" – *e.g.* documents which have been revealed in other cases and in other jurisdictions to meet the *Zolin* showing. GM has opposed this use, arguing that the presiding court cannot consider the documents during the *Zolin* analysis because they are privileged. The industry's argument fails because it misunderstands and misconstrues *Zolin*. The *Zolin* Court specifically found this argument to be exempt from a *Zolin* analysis–the materials must be adjudicated to be privileged, not merely claimed to be privileged. The Court will not presume that the materials are privileged simply because a party claims privilege. *Zolin*, 491 U.S. at 566- 67. Therefore, documents adjudicated not to be privileged in other jurisdictions may be examined by the presiding court in its *Zolin* analysis. *Id.* at 574.

In addition to its explicit approval of *in camera* inspection of contested communications, *Zolin* offered guidance for the proper procedure courts should follow in determining whether the exception applies. Though the Court refused to resolve all questions concerning the crime-fraud exception, when considered with other courts' decisions, *Zolin* provides at least a framework for courts to determine when the exception applies.

PART II: INSIGHTS INTO ASSESSING WHETHER OR NOT TO ALLEGE CRIME-FRAUD IN A PARTICULAR CASE.

> *By the time he got to me, I had recovered most of the pieces he must have used to figure out what the fish were biting. From the moment he had started fishing upstream his rod was at such a slant and there was so much slack in his line that he must have been fishing with a wet fly and letting it sink. In fact, the slack was such that he must have been letting the fly sink five or six inches. So when I was fishing this hole as I did the last one with a cork-body fly that rides on top of the water I was fighting the last war. My big question by the time he got to me was, are they biting on some aquatic insect in a larval or nymph stage or are they biting on a drowned fly?*
>
> *He gave me a pat on the back and one of George's No. 2 Yellow Hackles with a feather wing. He said "They are feeding on drowned yellow stone flys."*
>
> *I asked him, How did you think that out? He thought back on what had happened like a reporter. He started to answer, shook his head when he found he was wrong, and then started out again. All there is to thinking, he said, is seeing something noticeable which makes you see something you weren't noticing which makes you see something that isn't even visible.*
>
> *I said to my brother, Give me a cigarette and say what you mean.*[64]

The outline below provides an analytical framework for an evaluation of whether or not the crime-fraud exception might apply to a particular set of documents or communications in a civil case:

STEP ONE

- Has the defendant responded to discovery by raising attorney-client privilege and work product objections?
- Are the privilege and work product objections documented on a detailed privilege log which sets forth the basic identifying information for each communication so that the Court and the opposing party may evaluate the claims of protection? Is the privilege log entirely consistent with privilege logs the company has filed in other cases on the same subject?
- Are there identifiable communications on the privilege log that suggest that there were communications about a critical factual issue in the case. For example, in the tobacco litigation, there certainly were communications about whether or not nicotine was addictive and whether the public should be told. In other product liability litigation, is there a discussion about the development of the product, the

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64 Maclean, *supra*,note. 7 at 92.

way in which the company conducts its business, or some other matter pertinent to the case? There ought to be because corporations act by and through their lawyers.

- Evaluate the timing of the communications in light of subsequent representations to courts, juries, or the public about the particular subject in question. For example, if there are communications thirty years ago between an engineer and lawyers relating to the engineer's work, look at what has transpired since that time. Has the engineer testified at all about his or her work? What has he said? This is the starting point for developing an understanding of how the corporation has handled a particular subject. If there is a crime or fraud afoot, the privilege logs may provide some insight.

STEP TWO

- Create a time line of communications noted on the privilege log and compare the time line to the representations the company has made publicly (either to courts, juries, the news, or elsewhere).

- Determine through investigation if there is any available contrary evidence which refutes the representations of the company or otherwise suggests that it cannot be true or that something improper was done.

- Collect all the non-privileged evidence and see how it compares to what has transpired over time.

STEP THREE

- If there is evidence of some wrongdoing, what specifically is the wrongdoing? Did the company itself lie? Did it instruct its employee to lie? Did it make false representations to courts, juries, or the public? Did it hide contrary evidence? Did it perpetuate some crime or fraud?

- Determine whether you can sustain an allegation that specific crimes and frauds were likely committed after the initial communication and that a set of documents reasonably relate to the criminal or fraudulent conduct or scheme. That is a difficult assignment. It is hard to "read between the lines" of a privilege log. It is hard to assemble sufficient information to get a clear picture of what the history of a particular matter is. It is a process that may take *years* to develop to simply make the allegations in the first place, if the evidence is there.

PART III: PERTINENT CRIMINAL STATUTES AND ETHICAL RULES CRIMINAL STATUTES AND ELEMENTS OF CRIMES.

Then an odd thing happened. I saw him. A black back rose and sank in the foam. In fact, I imagined I saw spines on his dorsal fin until I said to myself, "God, he couldn't be so big you could see his fins." I even added, "You wouldn't even have seen the fish in all that foam if you hadn't first thought he would be there." But I couldn't shake the conviction that I had seen the black back of a big fish, because, as someone often forced to think, I know that often I would not see a thing unless I thought of it first.[65]

PERJURY

Perjury Under Federal Law

The federal perjury statute is found at 18 U.S.C. § 1621. It provides as follows:

Whoever --

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes to any material matter which he does not believe to be true; or

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under Section 1746 of Title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true; is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement is made within or without the United States.

"A witness testifying under oath or affirmation violates this statute if she gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory." *United States* v. *Dunnigan*, 507 U.S. 87, 94 (S. Ct. 1993). The requirement of materiality is a matter of law for the district court to determine. *Masinia* v. *United States*, 296 F.2d 871, 874 (8th Cir. 1961). "This federal definition of perjury has remained unchanged in its material

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[65] Maclean, *supra* note 3 at 17.

respects for over a century." *Dunnigan*, 507 U.S. at 94 (S. Ct. 1993). In order to sustain a conviction for perjury, it is generally held that the prosecution must prove two essential elements: (1) that the statements made by the defendant are false; and, (2) that the defendant did not believe the statements to be true. *See, e.g., United States* v. *Nicoletti*, 310 F.2d 359, 362 (7th Cir.) (citing cases), *cert. denied*, *Nicoletti* v. *United States*, 372 U.S. 942 (1963).

It is perjurous for a witness to testify falsely that he "does not recall" with respect to a material issue. *Id.*; *United States* v. *Barnhart*, 889 F.2d 1374, 1379 (5th Cir. 1989), *cert. denied*, *Barnhart* v. *United States*, 494 U.S. 1008 (1990). Circumstantial proof is sufficient to show that defendant in fact recalled or knew about a material matter that he testified he "did not recall." *Nicoletti*, 310 F.2d at 362-63 (citing numerous cases). The Fourth Circuit reasoned in *United States* v. *Beach*,

> *Obviously where the perjury related to the accused's state of mind, such as what he knew or saw or heard, proof can only be made by proof of facts from which the jury will infer that the accused must have known or seen or heard what he denied knowing or seeing or hearing.*

296 F.2d 153, 155 (4th Cir.).

Statements made by a witness in a civil proceeding -- such as those made in an affidavit or in a deposition -- are admissible in a subsequent prosecution for perjury under the statute. *See, Hale* v. *United States*, 406 F.2d 476, 478-79 (10th Cir.), *cert. denied*, 395 U.S. 977 (1969); *United States* v. Manfredi, 789 F. Supp. 961, 962 (N.D. Ind. 1992).

SUBORNATION OF PERJURY

Subornation Of Perjury Under Federal Law

The federal subornation of perjury statute provides as follows:

> Whoever procures another to commit any perjury is guilty of subornation of perjury and shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1622.

To prove that a defendant suborned perjury, the prosecution must show (1) procurement of another; (2) to commit any perjury. *United States* v. *Dell*, 736 F. Supp. 186, 190 (N.D. Ill. 1990). Stated another way: "It is essential to subornation of perjury that the suborner should have known or believed or have had good reason to believe that the testimony given would be false; that he should have known or believed that the witness would testify willfully and corruptly, and with knowledge of the falsity; and that he should have knowingly and willfully induced or procured the witness to give such false testimony." 70 C.J.S. § 54 (Perjury) (1951); *United States* v. *Magana*, 118 F.3d 1173, 1195 (7th Cir. 1997). To support a conviction for subornation of perjury, the underlying perjury itself must be proven. *Doan* v. *United States*, 202 F.2d 674, 678 (9th Cir. 1953). And, although the underlying perjury must be supported by two witness or by one witness and corroborating circumstances, there is no such requirement for the "procurement" or "inducement" element of the subornation offense. *Id.*

PARTICIPATION IN A CONSPIRACY TO COMMIT PERJURY OR TO SUBORN PERJURY

Conspiracy To Commit Or To Suborn Perjury Under Federal Law

Conspiracy to commit or to "produce" perjury are indictable offenses under federal law. Both acts are chargeable under 18 U.S.C. § 371, the conspiracy statute. That statute provides, in pertinent part:

> If two or more person conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 371. Courts have held that both perjury and subornation of perjury are offenses against the United States that fall within the ambit of the conspiracy statute. *See United States* v. *Ashley*, 905 F. Supp. 1146, 1160-62 (E.D.N.Y. 1995). The federal perjury and subornation of perjury statutes are quoted above.

To show a conspiracy to commit perjury or to suborn perjury, it is not necessary to prove the underlying offenses. *Hall* v. *United States*, 78 F.2d 168, 169 (10th Cir. 1935) ("To establish the conspiracy, it was not necessary to prove that the substantive offenses had been committed").

To establish the existence of a conspiracy, the prosecution must prove an agreement between two or more persons to act together in committing an offense and an overt act in furtherance of the conspiracy. *United States* v. *Chorman*, 910 F.2d 102, 109 (4th Cir. 1990). Under the above requirements, it is necessary to show only that the defendant knew of the purpose of the conspiracy and that he took some action indicating his participation. *United States* v. *Laughman*, 618 F.2d 1067, 1075 (4th Cir.), *cert. denied*, *Laughman* v. *United States*, 447 U.S. 925 (1980). "A tacit or mutual understanding between or among conspirators is sufficient to show a conspiratorial agreement." *United States* v. *Reifsteck*, 841 F.2d 701, 704 (6th Cir. 1988).

It is well-settled that a corporation may be found guilty of a conspiracy under § 371. *See*, *e.g.*, *United States* v. *Wise*, 370 U.S. 405 (S. Ct. 1962) (". . . the fiction of the corporate entity, operative to protect officers from contract liability, has never been applied as a shield against criminal prosecutions . . . "); *United States* v. *Hughes Aircraft Co., Inc.*, 20 F.3d 974, 978 (9th Cir.), *Hughes Aircraft Co. Inc.* v. *United States*, 513 U.S. 987 (1994); *United States* v. *Mahar*, 801 F.2d 1477 (6th Cir. 1986); *United States* v. *Peters*, 732 F.2d 1004, 1008 (1st Cir. 1984); *United States* v. *Hartley*, 678 F.2d 961, 971 (11th Cir.), *reh'g denied*, 688 F.2d 852 (1982), *cert. denied*, *Hartley* v. *United States*, 459 U.S. 1170 (1983); *United States* v. *American Grain & Related Indus.*, 763 F.2d 312, 320 (8th Cir. 1985); *Minisohn* v. *United States*, 101 F.2d 477 (3d Cir. 1939). For a corporation to be guilty of a criminal conspiracy under the statute, two or more high ranking or authoritative agents must be shown to have engaged in a criminal conspiracy on behalf of the corporation. *United States* v. *Hugh Chalmers Chevrolet-Toyota, Inc.*, 800 F.2d 737, 738 (8th Cir. 1986).

A corporation may be convicted under § 371 based solely on a conspiracy with its own employees, agents, or officers. *United States* v. *Hartley*, 678 F.2d 961, 971 (11th Cir.), *reh'g denied*, 688 F.2d 852 (1982), *cert. denied*, *Hartley* v. *United States*, 459 U.S. 1170 (1983). Corporate agents may be convicted of conspiracy under similar circumstances. "The actions of two or more agents of a corporation, conspiring together on behalf of a corporation, may lead to conspiracy convictions of the agents (because the corporate veil does not shield them from criminal liability) and of the corporation (because its agents conspired on its behalf)." *United States* v. *Peters*, 732 F.2d 1004, 1007 (1st Cir. 1984).

OBSTRUCTION OF JUSTICE

Obstruction Of Justice Under Federal Law

The federal obstruction of justice statute is found at 18 U.S.C. § 1503, with the following omnibus catch-all provision:

> Whoever corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justices, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

The concealment of documents in a judicial proceeding is considered a "corrupt means of influencing, obstructing, or impeding the due administration of justice." *United States* v. *Rasheed*, 663 F.2d 843, 862 (9th Cir. 1981), *cert. denied sub nom.*, *Phillips* v. *United States*, 454 U.S. 1157 (1982). To prove that a defendant has obstructed justice under the catch-all provisions of the obstruction statute, the government must show that a "person" (1) corruptly or by threats; (2) endeavored; (3) to influence, obstruct, or impeded the due administration of justice. 18 U.S.C. § 1503; *United States* v. *Thomas*, 916 F.2d 647, 651 (11th Cir. 1990).

To show that a defendant acted "corruptly," the prosecution must demonstrate that the act was knowingly and intentionally performed and that "obstruction" was a reasonably foreseeable consequence of the act. *United States* v. *Thomas*, 916 F.2d at 651. The defendant need not have a specific intent to obstruct justice; rather, he must have a corrupt motive for the action he undertakes. *Id.*

The element of "endeavoring" means any attempt to obstruct. *Id.* (*citing Osborn* v. *United States*, 385 U.S. 323, 333 (S. Ct. 1966). It does not require that the defendant was successful in obstructing justice. *Id.*; *United States* v. *Collins*, 875 F. Supp. 398, 400 (E. D. Mich. 1995). The requirement that the defendant "endeavor" dovetails into the final element of the offense; that is, that the defendant did so in order to influence, obstruct, or impeded the due administration of justice. The prosecutor may prove this final element by demonstrating a nexus between the false statements and the obstruction of justice. *In re Michael*, 326 U.S. 224, 227-28 (S. Ct. 1945); *Thomas*, 916 F.2d at 651.

Attorneys with knowledge that their representations or submissions to a government agency are materially false may be found guilty of obstruction under 18 U.S.C. § 1503. *See, United States* v. *Sprecher*, 783 F. Supp. 133, 164 (S.D.N.Y. 1992) (interpreting similar provisions under 18 U.S.C. § 1505); *United States* v. *Cintolo*, 818 F.2d 980 (1st Cir.), *cert. denied*, *Cintolo* v. *United States*, 484 U.S. 913 (1987).

APPLICABLE ETHICS RULES

Model Rules of Professional Conduct

- **Rule 3.3: Candor Toward The Tribunal**

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal;

(2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take the following remedial measures:

(A) when a client has offered false evidence, the lawyer shall promptly call upon the client to rectify the same; if the client refuses or is unable to do so, the lawyer shall promptly reveal its false character to the tribunal;

(B) when a person other than a client has offered false evidence, the lawyer shall promptly reveal its false character to the tribunal.

(b) The duties stated in paragraph (a) are continuing and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6 (confidentiality).

- **Rule 3.4: Fairness to Opposing Party and Counsel**

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

- **Rule 4.1: Truthfulness in Statements to Others**

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

- **Rule 8.4: Misconduct**

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

CONCLUSION

My father was very sure about certain matters pertaining to the universe. To him,

all good things - trout as well as eternal salvation - come by grace and grace comes by art and art does not come easy.[66]

Pattern discovery abuse will remain a problem as long as corporate defendants are allowed to hide behind the shadows of privilege. In short, fish swim where they won't get caught. Thorough and tireless plaintiff's attorneys and courageous judges must continue to do their part to bring them back into the sunlight. The crime-fraud exception is a potent tool to this end.

[66] Maclean, *supra*, note 3 at 4.

The answer to pattern discovery abuse has always been judicial intolerance of such gamesmanship. Justice thus becomes wholly dependent on the courts. The system begins to work when courts consistently and appropriately sanction defendants who refuse to provide discovery.[67] It is beyond fair that an aggrieved plaintiff obtain relief because a defendant will not disclose information which is relevant, if not crucial, to a plaintiff meeting his or her burden of proof.[68]

The procedure for invoking the crime-fraud exception to a claim of privilege is a complex and intricate process which enjoys little uniformity in the courts. However, a close examination of the leading cases and policies underlying the exception reveals a rational and worthy procedure which all courts can follow. Courts need some type of unanimity to avoid conflicting rulings in the area of multi-state mass torts. Lawyers need stamina and perseverance.

But, since trial courts are almost never reversed for failing to impose severe sanctions, the court can safely impose lesser (and ineffective) sanctions, if at all. Some courts are willing to condemn discovery abuse. Sanctions which reflect judicial

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[67] Unfortunately, Courts do not often know the "checkered past" of the discovery-abusers. Pattern abuse also occurs because defendants know plaintiff may have problems of "proof" in providing the court a record of pattern abuses. Defendants are emboldened when they feel that the trial court will not know the full extent of their checkered past. Defendants expect that if they do happen to be caught hiding evidence, a court not fully informed as to their pattern.

[68] Yet, defendants often escape judicial wrath for discovery abuse aimed at concealment of the facts. The reasons are many. A trial court may refuse to sanction harshly a defendant caught hiding evidence out of concern that the court will have to retry the case if its sanction order is not upheld on appeal. *See, e.g., Baker v. General Motors Corp.*, 159 F.R.D. 519 (W.D. Mo. 1994) (GM product found defective as sanction for willful noncompliance and delayed compliance of discovery orders); *aff'd in part, rev'd in part*, 86 F.3d 811 (8th Cir. 1996) (discovery violation warranted lesser sanction); *rev'd on other grounds*, 522 U.S. 222, 118 S.Ct. 657 (1998).

intolerance with pattern abuse help fix the system.[69] Discovery sanctions which seem to offer some measure of punishment (and hopefully deterrence) include:

- default[70]

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[69] David F. Levi and Richard L. Marcus, *Once More into the Breach: More Reforms for the Federal Discovery Rules*, THE JUDGES' JOURNAL, 8, 58-59 (Spring 1998) (noting that certain "bad faith failures to make discovery cannot be addressed by rule language but can only be resolved by individual judges exercising supervision over the discovery process in particular cases"). *See also* Fed. R. Civ. P. 26 advisory committee's note, 1980 amendment ("In the judgment of the Committee abuse can best be prevented by intervention of the court as soon as abuse is threatened").

[70] *See Shahrdar* v. *Global Housing, Inc.*, 983 S.W.2d 230 (Tenn. App. 1998) (default where corporate abuse included ignoring discovery requests and boilerplate objections); *Figgie Int'l, Inc.* v. *Alderman*, 698 So.2d 563 (Fla. App. 3 Dist. 1997) (default where manufacturer destroyed relevant documents, presented false testimony and obstructed discovery); Malautea, *supra*, note 1 (default, fines, fees and costs for discovery abuse).

- issue establishment or preclusion;[71]
- striking experts;[72]
- monetary sanctions;[73] and

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[71] *See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 102 S.Ct. 2099 (1982) (establishment of facts permitting jurisdiction where defendant prevented discovery of such facts). *Cf.*, *Chilcutt v. United States*, 4 F.3d 1313 (5th Cir. 1993) (establishing Government's liability for failure to produce documents).

[72] *See Melendez v. Illinois Bell Telephone Co.*, 79 F.3d 661 (7th Cir. 1996) (barring defense expert for corporate defendant's failure to disclose evidence).

[73] *See Gonzales v. Surgidev Corp.*, 120 N.M. 151, 899 P.2d 594 (1995) (sanction of $151,000 where

- other appropriate penalties.[74]

For sanctions to be effective, courts should focus on the nature of the misconduct and not choose a lesser sanction than that warranted, even if the sanction's legal consequences are great.[75] Though defendants complain that plaintiffs' attacks on discovery abuse has caused an undesirable "criminalization"of discovery,[76] it is indeed

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manufacturer provided false responses and intentionally withheld documents).

[74] *See Wash St. Physicians*, supra, note 35 (remanding for imposition of "appropriate sanctions" for manufacturer hiding "smoking gun" documents by relying on improper scope restrictions and narrow construction of plaintiffs' discovery requests).

[75] *See Insurance Corp.*, *supra*, note 41, 456 U.S. at 709, 102 S.Ct. at 2107-08 ("That a particular legal consequence ... follows from this [sanction] does not in any way affect the appropriateness of the sanction"). *See also Melendez*, *supra*, note 42, at 672 ("we do not require district courts to select the 'least drastic' or 'most reasonable' sanction").

[76] *See, e.g.*, Stephen G. Morrison, *The Criminalization of Pre-Trial Discovery: Dealing with the Hostile Judge Strategically and Ethically*, G-1, G-4-7, DRI DEFENSE PRACTICE SEMINAR, PRODUCTS LIABILITY

criminal to obstruct justice by misleading courts (and plaintiffs).[77]

Courts must participate in policing the ethical breaches which are at the heart of pattern discovery abuse. It is of the utmost importance to justice, the public, and the profession, that effective sanctions begin to have a ripple effect throughout the civil justice system. Ultimately, trial judges who sanction wrongdoers with meaningful punishments, and appellate courts who affirm such exercise of trial court discretion, go a long way towards fixing the discovery system.

SEMINAR (Feb. 9-10, 1995) (criticizing plaintiffs' attorneys for "enthusiastically" promoting the application of "criminal doctrines to deter discovery abuse.")

[77] Both federal and state criminal statutes may be violated by particular discovery abuses, including such prohibitions as those against:

- Perjury (*see, e.g.*, 18 U.S.C. § 1621; O.C.G.A. § 16-10-70);
- Subornation of perjury (*see, e.g.*, 18 U.S.C. § 1622; O.C.G.A. § 16-10-72);
- Conspiracy to commit or suborn perjury (*see, e.g.*, 18 U.S.C. § 371; O.C.G.A. § 16-4-8);
- Obstruction of justice (*see, e.g.*, 18 U.S.C. § 1503);
- Mail and wire fraud (*see, e.g.*, 18 U.S.C. §§ 1341, 1343); and
- RICO violations (*see, e.g.*, 18 U.S.C. §§ 1961 *et seq.*; O.C.G.A. §§ 16-14-1 *et seq.*).

Lawyers must approach pattern discovery abuse with the same intensity, care, and sense for the landscape as the angler facing a big river. They must take stock of their surroundings, rely on both their skill and their wits, and learn how their opponent thinks.[78] Courts must broadly construe and apply the crime-fraud exception to prevent the type of insidious behavior which results from blind adherence to an absolute attorney- client privilege. Once the crime-fraud exception is used for its intended purpose – to deter any misconduct and prevent protection for such misconduct under the guise of privilege – the legal profession and the judicial process will more closely achieve its quest for truth and justice.

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[78] *My father always felt shy when compelled to praise one of his family, and his family always felt shy when he praised them.. My father said, "You are a fine fisherman. My brother said, I'm pretty good with a rod, but I need three more years before I can think like a fish. Remembering that he had caught his limit by switching to Georgie's No. 2 Yellow Hackle with a feather wing, I said without knowing how much I said, You already know how to think like a dead stone fly.* Maclean, supra, note 3 at 101.