Federal Criminal Law and the Crime-fraud Exception: Disclosure of Privileged Conversations and Documents Should Not Be Compelled Without the Government's Factual Foundation Being Tested by the Crucible of Meaningful Adversarial Testing

Thomas M. DiBiagio
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THOMAS M. DIBIAGIO*

INTRODUCTION

The attorney-client and work-product privileges protect against the disclosure to the government of privileged conversations and documents prepared in connection with legal representation of corporations and individuals accused of being involved in criminal activity. There is an exception to this protection. These privileges do not protect against the disclosure of privileged conversations or documents that were intended to further a crime or cover up criminal activity. When a client uses an attorney in such a manner, the federal courts will apply the crime-fraud exception and compel disclosure.

During the course of a criminal investigation, the government may uncover evidence indicating that a target has used an attorney to further a crime or cover up criminal activity. The source of this evidence typically arises from documentary evidence and statements from cooperating witnesses. This evidence may include testimony before the grand jury and documents produced in response to grand jury subpoenas. The government may rely on this grand jury evidence

* United States Attorney for the District of Maryland. The view and opinions expressed in this Article are solely those of the author and do not reflect those of the Department of Justice. The author wishes to thank Tonya Kelly for her editorial assistance.
seeking to apply the crime-fraud exception and compel the disclosure of privileged conversations and documents prepared in connection with the target’s legal representation.

The federal courts have universally held that, in order to preserve the secrecy of ongoing grand jury proceedings, the government is not required to disclose the portion of its submission that reflects evidence obtained by the grand jury. Typically, the centerpiece of the government’s submission is drawn from evidence obtained by the grand jury. The practical result is that the factual foundation is not disclosed, and in turn, not subject to the crucible of meaningful adversarial testing. Consequently, the district court is left to make a critical determination that may result in the disclosure or taking of otherwise privileged materials by relying on an incomplete or inaccurate factual foundation.

In order for the crime-fraud exception to apply, there must be a factual foundation sufficient to establish that a client used an attorney to further a crime or cover up criminal activity. However, the current practice does not adequately test the government’s factual foundation to support the application of the crime-fraud exception and subsequent compelled disclosure or taking of the privileged conversations and documents. This practice undermines the proper functioning of the adversarial system. Furthermore, the defendant’s due process rights under the Fifth Amendment militate heavily in favor of subjecting the government’s factual foundation for the crime-fraud exception to meaningful attack by the defendant. The need to maintain the secrecy of the grand jury proceedings should yield to preserving the proper function of the adversarial process. Accordingly, if the government seeks to compel the disclosure of privileged materials and elects to rely on evidence obtained by the grand jury, the courts should disclose the government’s evidence, disregard it, or impose a presumption against the application of the crime-fraud exception.

I. EVIDENTIARY PRIVILEGES

A. Attorney-Client Privilege

The attorney-client privilege protects confidential conversations and documents relating to the legal representation of a client. The purpose of this privilege is to promote full disclosure between an at-

torney and a client that, in turn, results in informed legal advice. Conversations and documents are protected under the attorney-client privilege when: (1) the subject matter involves legal advice; (2) the legal advice is sought from a licensed attorney; and (3) the parties intend the conversations and documents to be confidential. The attorney-client privilege is waived when the privileged information is disclosed to a third party.

B. Attorney Work-Product Privilege

The work-product doctrine is broader than the attorney-client privilege because the former can be asserted by both the client and the attorney while the attorney-client privilege can be claimed only by the client. Furthermore, the attorney work-product privilege shields any notes or memoranda prepared by an attorney that reflect his legal theories, research, opinions, or conclusions relating to his legal representation of the client. Opinion work product benefits from an almost absolute protection that is only rarely defeated. Additionally, the work-product privilege protects against the compelled disclosure of facts developed by the attorney in connection with his representation of the client. In general, work product may only be compelled "upon a showing of both a substantial need and an inability to secure the substantial equivalent of the materials by alternate means without undue hardship."

5. In re Grand Jury Proceedings, 604 F.2d 798, 801 (3d Cir. 1979). Hereinafter, the "work-product doctrine" may also be referred to as the "work-product privilege."
6. See Hickman v. Taylor, 329 U.S. 495, 511 (1947) (adopting the work-product privilege to deter the development of "[i]nefficiency, unfairness and sharp practices [in litigation that] would inevitably develop" if a court compelled the disclosure of such information); In re Grand Jury Subpoena, 274 F.3d 563, 574 (1st Cir. 2001) (providing that "[t]he work product rule protects work done by an attorney in anticipation of, or during, litigation from disclosure to the opposing party"). The work-product privilege originated at common law, but Federal Rule of Civil Procedure 26(b)(3) now controls. In re Grand Jury Subpoena, 220 F.3d 406, 408 (5th Cir. 2000).
9. Chaudhry, 174 F.3d at 403 (quoting In re Grand Jury Proceedings, 33 F.3d at 348).
C. Joint-Defense Privilege

The joint-defense privilege, also called the common-interest doctrine, precludes the disclosure of confidential conversations and documents between two or more clients and their attorneys where they are involved in a joint-defense effort. In order to assert the privilege, a party must demonstrate: "(1) that the communications were made in the course of a joint defense effort; (2) the statements were designed to further the effort; and (3) the privilege has not been waived." While the joint-defense privilege on its own does not warrant any protection, it does operate as a caveat to the general rule that the attorney-client privilege is relinquished when third parties become privy to privileged information. Thus, the exception permits parties to share information that is pertinent to their joint defense, so that they can benefit from full enjoyment of joint representation without concern that the attorney-client privilege will be waived.

D. Act of Production Privilege

The Fifth Amendment right against self-incrimination protects an individual from compulsory testimony and the production of personal records that might tend to incriminate him. Accordingly, an individual may assert his Fifth Amendment right to decline to produce documents, the contents of which are not privileged, where the act of production is itself: (1) compelled; (2) testimonial; and (3) incriminating. The Fifth Amendment privilege, however, does not protect a corporation from being compelled to produce documents in response to a grand jury subpoena on the grounds that the documents

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11. In re Sealed Case, 29 F.3d at 719; see also In re Grand Jury Subpoena, 274 F.3d 563, 572 (1st Cir. 2001).
13. In re Grand Jury Subpoena, 274 F.3d at 573. "A client who is part of a joint defense arrangement, however, is entitled to waive the privilege for his own statements, and his co-defendants cannot preclude him from doing so." Agnello, 135 F. Supp. 2d at 383. However, a defendant may not directly or indirectly reveal the privileged communications of other participants. Id.
14. Bellis v. United States, 417 U.S. 85, 89-90 (1974). The "historic function" of the right against self-incrimination has been to protect a "natural individual from compulsory incrimination through his own testimony or personal records." Id. (quoting United States v. White, 332 U.S. 694, 701 (1944)).
15. Id.
would incriminate the corporation. Thus, businesses and corporations are required to turn over all documents that are not privileged—including incriminating documents.

Likewise, under the "collective entity rule," officers and employees of the corporation cannot assert a personal Fifth Amendment right nor decline to produce corporate documents in their possession on the grounds that the documents would tend to be incriminating. The reason for this is that official records and documents of an organization held by an employee in his representative capacity are not personal, and thus cannot be the subject of the personal privilege against self-incrimination. Although a current employee is not entitled to raise the Fifth Amendment as a shield against producing documents, a mitigating evidentiary privilege exists to reduce the risk that the individual will incriminate himself in the course of producing such documents. Accordingly, the government is precluded from using the compelled evidence against the individual.

The issue that has remained unclear, until recently, was whether former employees had the right under the Fifth Amendment to decline to produce corporate documents in response to a grand jury subpoena. The circuit courts of appeals are divided on this issue. The Court of Appeals for the Eleventh Circuit and the Court of Appeals for the District of Columbia have held that former employees do not have such a right. Recently, however, the Court of Appeals for the Second Circuit affirmed the right of former officers and directors to assert their Fifth Amendment act of production privilege to avoid the compulsion of corporate documents in their possession. In the case of *In re Three Grand Jury Subpoenas Duces Tecum,* the Government initiated a grand jury investigation of a corporation and its employees for

17. Id.
18. Id. at 108-09.
19. See, e.g., *Bellis,* 417 U.S. at 90 (reasoning that "[s]ince no artificial organization may utilize a personal privilege against compulsory self-incrimination, . . . it follows that an individual acting in his official capacity on behalf of the organization may likewise not take advantage of his personal privilege").
21. Id. at 118.
22. See *In re Grand Jury Subpoena Dated Nov. 12, 1991,* 957 F.2d 807, 813 (11th Cir. 1992) (per curiam) (holding that former employees do not have a Fifth Amendment right to decline to produce corporate documents in response to a grand jury subpoena regardless of the former employees' reasons for obtaining the documents); *In re Sealed Case (Government Records),* 950 F.2d 736, 740-41 (D.C. Cir. 1991) (explaining that the Fifth Amendment will not shield an employee from producing documents that contain both personal and corporate information).
23. 191 F.3d 173 (2d Cir. 1999).
the alleged falsification of its records and misapplication of corporate funds.\textsuperscript{24} During the course of the investigation, the corporation pled guilty to falsifying its records and agreed to cooperate with the Government’s investigation of individual employees.\textsuperscript{25}

Also during the course of the investigation, the Government issued grand jury subpoenas requiring the corporation to produce documents.\textsuperscript{26} After the subpoenas were issued and served, three employees terminated their employment with the corporation.\textsuperscript{27} Two of the three employees entered into a severance agreement, agreeing to cooperate with the corporation and with any investigation that followed.\textsuperscript{28} Upon learning that these employees had retained documents responsive to the grand jury subpoena, the Government served grand jury subpoenas on these employees in their individual capacities. These three employees asserted their Fifth Amendment privilege and refused to comply with the requests.\textsuperscript{29} The Government moved to compel production and asserted that the former employees remained corporate custodians of those documents after they left the corporation.\textsuperscript{30} The district court denied the Government’s motion and the Government appealed.\textsuperscript{31}

The Court of Appeals for the Second Circuit affirmed the lower court’s decision and held that former employees of a corporation, who have corporate documents in their possession, may assert a Fifth Amendment privilege to refuse to respond to a grand jury subpoena demanding those documents on the ground that the act of producing the documents would be both testimonial and incriminating.\textsuperscript{32} The court recognized that although the contents of voluntarily prepared records are not protected by the Fifth Amendment right against compelled production, a person, in an act of producing a document, may communicate information apart from its contents.\textsuperscript{33} As a consequence, the communication may amount to compelled testimony and should be protected.\textsuperscript{34}

\begin{itemize}
\item \textsuperscript{24} \textit{Id.} at 174.
\item \textsuperscript{25} \textit{Id.}
\item \textsuperscript{26} \textit{Id.} at 175.
\item \textsuperscript{27} \textit{Id.}
\item \textsuperscript{28} \textit{Id.}
\item \textsuperscript{29} \textit{Id.}
\item \textsuperscript{30} \textit{Id.} at 176.
\item \textsuperscript{31} \textit{Id.}
\item \textsuperscript{32} See \textit{id.} at 183-84.
\item \textsuperscript{33} \textit{Id.} at 178.
\item \textsuperscript{34} \textit{Id.}
\end{itemize}
The Second Circuit further held that once an officer or employee leaves the company's employ, he no longer acts as a corporate representative but functions in an individual capacity.\(^{35}\) The court reasoned that once the employment relationship terminates, the former employee is no longer an agent of the corporation and is not a custodian of the corporate records.\(^{36}\) Therefore, the Fifth Amendment protects an ex-employee from the disclosure of any records within his possession since he would only be acting in his own capacity.\(^{37}\)

II. CRIME-FRAUD EXCEPTION

The attorney-client, work-product, and joint-defense privileges do not protect conversations and documents intended to further a crime or cover up criminal activity.\(^{38}\) Under the crime-fraud exception, the federal courts will compel the disclosure of privileged conversations or documents prepared to further a crime or cover up criminal activity.\(^{39}\) As a consequence, when a lawyer is consulted, not with respect to past wrongdoing, but rather for assistance in furthering criminal activity, the privileges no longer apply and a grand jury may compel testimony regarding privileged conversations and the production of legal memoranda.\(^{40}\)

The rationale for the crime-fraud exception is essentially the same whether it is invoked against the attorney-client privilege or

\(^{35}\) Id. at 181.

\(^{36}\) Id.

\(^{37}\) Id.

\(^{38}\) United States v. Zolin, 491 U.S. 554, 562 (1989). The Zolin Court stated:

The attorney-client privilege is not without its costs . . . . [It] must necessarily protect the confidences of wrongdoers, but the reason for that protection—the centrality of open client and attorney communication to the proper functioning of our adversary system of justice—ces[es] to operate at a certain point, namely, where the desired advice refers not to prior wrongdoing, but to future wrongdoing. Id. at 562-63 (citing 8 J. WIGMORE, EVIDENCE § 2298, at 573 (McNaughton rev. 1961) (internal quotation marks omitted)). Furthermore, the Court found that the purpose of the crime-fraud exception is to ensure that the shield of secrecy does not apply to communications made to perpetuate the commission of a crime. Id. at 563; see also In re BankAmerica Corp. Sec. Litig., 270 F.3d 639, 641 (8th Cir. 2001) (asserting that "the privilege protecting attorney-client communications does not outweigh society's interest in full disclosure when legal advice is sought for the purpose of furthering the client's on-going or future wrongdoing"), cert. denied sub nom. Desmond v. BankAmerica Corp., 122 S. Ct. 1437 (2002).

\(^{39}\) See Zolin, 491 U.S. at 563 (describing the crime-fraud exception); see also United States v. Rakes, 136 F.3d 1, 4 (1st Cir. 1998) (asserting that "the attorney-client privilege is forfeited . . . where the client [seeks] the services of [his] lawyer to enable or aid the client to commit what the client knew or reasonably should have known to be a crime or fraud").

\(^{40}\) In re Grand Jury Proceedings, 604 F.2d 798, 802 (3d Cir. 1979) (concluding that the crime-fraud exception permits the disclosure to the grand jury of material protected by the work-product privilege).
work-product protection. In either case, a client has no legitimate interest in seeking legal advice to further a crime or conceal criminal activity. Moreover, the attorney's knowledge of the client's fraud does not control whether the crime-fraud exception vitiates the attorney-client and work-product privileges. The central factor that determines the applicability of the crime-fraud exception is whether the client used the attorney to further a crime or cover up criminal activity.

The circuit courts of appeals have adopted various, yet similar, requirements with respect to the elements necessary to sustain the applicability of the crime-fraud exception. Typically, to invoke the crime-fraud exception, the government must establish, by clear and convincing evidence or probable cause, the following two elements: (1) that the client target was committing or intended to commit a crime; and (2) that the client target's attorney was used to further that crime, or conceal the criminal activity. The Courts of Appeals for the Second, Third, and Fourth Circuits follow this two-part test for the application of the crime-fraud exception. If both of these elements

41. Id.
42. See id. (noting that privileges tend to hinder the truth-seeking function of a court; therefore, they should be narrowly construed). In contrast to the attorney-client privilege, work-product protection applies to both the client and the attorney, either of whom may assert it. In re Grand Jury Proceedings, 43 F.3d 966, 972 (5th Cir. 1994) (per curiam). Consequently, an innocent attorney (i.e., one who was not aware of the client's illegal activities) may invoke work-product protection even if a prima facie case of crime or fraud has been made as to the client. Id. n.5; see also In re Special Sept. 1978 Grand Jury Proceedings, 640 F.2d 49, 63 (7th Cir. 1980) (finding that when an attorney asserts the work-product privilege, factual information communicated to the attorney must be disclosed, but opinion work-product may be withheld). Therefore, a potential difference exists in the application of the crime-fraud exception to the attorney-client privilege and work-product protection. For example, even if the crime-fraud exception prevents the client from asserting the attorney-client and work-product privileges, the attorney could still enjoy work-product protection, so long as the attorney is unaware of the client's crime or fraud. In re Grand Jury Proceedings, 43 F.3d at 972.
43. In re Grand Jury Proceedings, 43 F.3d at 972.
45. E.g., In re Grand Jury Subpoena, 223 F.3d 213, 217 (3d Cir. 2000).
46. See In re Impounded, 241 F.3d 308, 316 (3d Cir. 2001) (embracing the two-part test to invoke the crime-fraud exception); United States v. Jacobs, 117 F.3d 82, 87 (2d Cir. 1997) ("A party wishing to invoke the crime-fraud exception must demonstrate that there is a factual basis for a showing of probable cause to believe that a fraud or crime has been committed and that the communications in question were in furtherance of the fraud or crime."); In re Grand Jury Proceedings, 102 F.3d at 751-52 (4th Cir. 1996) (finding that an attorney's unwitting assistance in covering up a criminal or fraudulent activity still allowed for the invocation of the crime-fraud exception where the two elements had been satisfied).

The Court of Appeals for the District of Columbia requires the government to prove: (1) that "the client made or received the otherwise privileged communication with the
are satisfied with respect to a subpoenaed document or testimony, the government may compel the production of that document or testimony.\textsuperscript{47} The Fifth Circuit has held that the government must establish two elements to invoke the crime-fraud exception.\textsuperscript{48} First, there must be a prima facie showing of a violation "sufficiently serious" to defeat the privilege.\textsuperscript{49} Second, there must be "some valid relationship between the [documents] under subpoena and the \textit{prima facie} violation."\textsuperscript{50} If both of these elements are satisfied with respect to a subpoenaed document or testimony, the government may compel the production of that document or testimony.\textsuperscript{51}

The Court of Appeals for the Tenth Circuit has held that to invoke the crime-fraud exception, the party challenging the protection must proffer prima facie evidence that the charge of attorney participation in the criminal or fraudulent conduct is grounded in fact.\textsuperscript{52} The evidence presented must demonstrate that the client was engaged in or planned to engage in a crime or fraud when it sought the relief of an attorney, whose assistance was procured in furtherance of the criminal or fraudulent behavior or was closely connected to it.\textsuperscript{53}

\section*{III. Case Law Application of the Crime-Fraud Exception}

\subsection*{A. Introduction}

A defendant has a right to a fair opportunity to defend against a charged offense.\textsuperscript{54} In its most basic form, this means that in order to adequately safeguard liberty interests, due process requires that the government's submission "encounter and survive the crucible of meaningful adversarial testing" before privileged conversations are re-

\textsuperscript{47} In re Sealed Case, 223 F.3d 775, 778 (D.C. Cir. 2000) (internal quotation marks omitted); In re Sealed Case, 107 F.3d 46, 49 (D.C. Cir. 1997).
\textsuperscript{48} See In re International Systems & Controls Corp. Sec. Litig., 693 F.2d 1235, 1242 (5th Cir. 1982).
\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} Id. at 1242-43. The Court of Appeals for the Fifth Circuit also held in \textit{In re International Systems & Controls Corp.}, that proof of specific intent of the client to further a crime or fraud with the assistance of an attorney is necessary to establish a prima facie case. \textit{Id.} at 1243.
\textsuperscript{52} In re Grand Jury Subpoenas, 144 F.3d 653, 658 (10th Cir. 1998).
\textsuperscript{53} Id.
\textsuperscript{54} See Montana v. Egelhoff, 518 U.S. 37, 63 (1996) (O'Connor, J., dissenting) (stating that "[d]ue process demands that a criminal defendant be afforded a fair opportunity to defend against the State's accusations").
revealed or a legal memorandum disclosed. But the critical question remains whether this principle applies to the investigative phase.

Typically, criminal investigations are initially targeted at individuals and corporations. During the course of an investigation, however, the government may uncover evidence implicating the involvement of an attorney in the crime or in covering up the criminal activity. This evidence may indicate that an attorney directly participated in the criminal activity or that the target used the attorney to cover up the crime and obstruct the investigation. This evidence typically arises from statements of cooperating witnesses and from documents. Such evidence may include testimony before the grand jury and documents obtained as a result of grand jury subpoenas.

In response to this evidence, the government may seek to broaden the scope of its criminal inquiry to include the attorney as a target, subject, or witness. The government may serve a subpoena requiring the attorney to testify before the grand jury regarding protected attorney-client communications. The government may also serve a grand jury subpoena on the attorney and his law firm requiring the attorney or law firm to produce all legal memoranda prepared by the attorney in connection with his representation. The prosecutor may believe that these privileged materials either implicate the client in criminal activity or supply the “last link” in an existing chain of incriminating evidence likely to lead to the client’s indictment.

In a criminal investigation involving an individual, the government is precluded by the Fifth Amendment from compelling the tar-

55. Id. at 66 (quoting Crane v. Kentucky, 476 U.S. 683, 690-91 (1986)); see also infra notes 183-185 and accompanying text (describing the procedural due process requirements).
56. See, e.g., United States v. Reeder, 170 F.3d 93, 105-06 (1st Cir. 1999) (describing an attorney’s testimony at trial that led to his client’s indictment).
57. See, e.g., In re Grand Jury Subpoenas, 144 F.3d at 656-57 (considering a case in which both privileged documents and testimony were validly sought by a grand jury).
58. The United States Attorneys Manual allows the Assistant Attorney General for the Criminal Division to issue grand jury or trial subpoenas to attorneys for information relating to the representation of a client. United States Attorneys’ Manual tit. 9-13.410(A).
59. The standard for admitting otherwise privileged documents at trial under the crime-fraud exception is “a prima facie showing that the attorney’s assistance sought was in furtherance of a crime or fraud.” Reeder, 170 F.3d at 106; see also United States v. Neal, 27 F.3d 1035, 1048 (5th Cir. 1994) (requiring that the government make a prima facie showing that the client hired the attorney to advance criminal conduct in order to invoke the crime-fraud exception to the attorney-client privilege); United States v. Davis, 1 F.3d 606, 609 (7th Cir. 1993) (applying the prima facie standard to admit privileged testimony at trial, but stating that the party trying to use the exception need not present the level of evidence required to win the point in litigation); United States v. Horvath, 731 F.2d 557, 562 (8th Cir. 1984) (applying a prima facie standard to allow evidence that legal advice had been obtained in furtherance of illegal activity).
get to testify before the grand jury, but the Fifth Amendment does not preclude the government from seeking to compel the target's attorney to testify before the grand jury. The Fifth Amendment does protect against the compelled production of personal papers. However, the government is not precluded by the Fifth Amendment from seeking to compel the production of business records, including an attorney's legal memoranda. The attorney-client and work-product privileges, however, do prohibit the government from compelling an attorney to testify and produce legal memoranda. As a consequence, if the target's attorney refuses to testify or produce documents pursuant to the attorney-client and work-product privileges, the government may seek to apply the crime-fraud exception to compel disclosure.

In a criminal investigation involving a corporate target, the Fifth Amendment does not afford the same protections. The government is not precluded by the Fifth Amendment from compelling the production of legal memoranda from the corporate target, or testimony from the corporate target's employees or attorneys. However, the attorney-client, work-product, joint-defense, and act of production

60. See supra text accompanying notes 14-15. The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Fifth Amendment applies only when an accused individual is compelled to make a testimonial communication that is incriminating. Fisher v. United States, 425 U.S. 391, 408 (1976).

61. "There is no constitutional right not to be incriminated by the testimony of another. . . . The privilege against self-incrimination is solely for the benefit of the witness and is purely a personal privilege of the witness, not for the protection of other parties." In re Grand Jury Subpoenas, 144 F.3d at 663 (quoting United States v. Skolek, 474 F.2d 582, 584 (10th Cir. 1973) (per curiam) (citations omitted)). The Fifth Amendment prohibits the government from making an individual incriminate himself or herself, but it does protect information solely because of its private nature. Id.

62. See Bellis v. United States, 417 U.S. 85, 91 (1974) ("We have recognized that the Fifth Amendment [protection] . . . includes an individual's papers and effects," as well as compelled oral testimony). Because the act of complying with a government subpoena may be testimonial of the existence, possession, or authenticity of the thing produced, such a production may implicate Fifth Amendment rights. Fisher, 425 U.S. at 410-11 (holding that the act of producing tax documents prepared by an accountant would not involve incriminating testimony because the documents belonged to the accountant and the government knew that the documents existed).


64. See supra text accompanying notes 1-9 (describing the protections that the attorney-client and attorney work-product privileges offer).

65. See supra Part II (describing the crime-fraud exception, generally).

privileges may preclude the government from compelling testimony and the production of documents.

In an attempt to obtain information, the government will initially seek the disclosure of protected conversations and documents pursuant to a grand jury subpoena. If the target or the target's attorney refuses to comply and relies on the attorney-client or work-product privilege for protection, the government may seek to apply the crime-fraud exception to compel testimony and the production of legal memoranda. If the government's submission relies on grand jury materials, that portion of the government's submission will be submitted ex parte. In response to a motion seeking disclosure of an ex parte submission, the courts have universally held that, in order to preserve the secrecy of ongoing grand jury proceedings, the government is not required to disclose grand jury evidence relied on by the government in support of the application of the crime-fraud exception. Thus, the target and the target's attorney are denied a fair opportunity to inspect and rebut the government's submission and must respond without knowing the factual foundation relied on by the government. Moreover, the district court is forced to make a fact intensive determination based on an untested record.

B. Case Law

In United States v. Zolin, the Supreme Court established the threshold showing required prior to a court's in camera review of allegedly privileged documents. The Court held:

Before engaging in [an] in camera review [of privileged documents] to determine the applicability of the crime-fraud exception, the judge should require a showing of a factual basis adequate to support a good faith belief . . . that in camera review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.

67. See United States Attorneys' Manual tit. 9-13.410(B) (describing the recommended strategy for compelling disclosure). However, the United States Attorneys' Manual instructs Department of Justice attorneys to first make "all reasonable attempts" to acquire the information before resorting to a subpoena. Id.
69. E.g., In re Grand Jury Subpoena as to C97-216, 187 F.3d 996, 998 (8th Cir. 1999).
70. See id.
72. Id. at 572.
73. Id. (internal quotation marks omitted).
The Supreme Court provided the content, but not the contours, regarding the nature of the government's initial ex parte submission. The circuit courts of appeals, however, have universally held that in order to preserve the secrecy of ongoing grand jury proceedings, the government is not required to disclose grand jury evidence relied on in support of the government's application of the crime-fraud exception.74

In the case of In re Grand Jury Subpoena as to C97-216,75 the target was initially charged with a drug trafficking offense.76 The court subsequently dismissed the indictment due to the unavailability of two anticipated witnesses.77 The Government thereafter commenced a grand jury investigation regarding the target's role in the witnesses' disappearances. The Government subpoenaed the attorney who had represented the target in connection with the initial charge to testify before the grand jury.78 The attorney in response filed a motion to quash the subpoena based on the attorney-client privilege. The Government moved to apply the crime-fraud exception and compel the testimony.79 In support of its motion, the Government delivered to the court a sealed ex parte affidavit and attachments. The district court granted the Government's motion and found that although there was no evidence of wrongdoing by the attorney, there was clear and convincing evidence that the target had used the attorney to further his criminal activity.80

The target appealed and argued that the district court's reliance on the ex parte affidavit violated his due process rights because he was precluded from challenging the Government's assertion.81 The Court of Appeals for the Eighth Circuit rejected this argument, maintaining the holdings of numerous courts of appeals allowing a court to consider the Government's ex parte evidence in order to maintain the privacy of ongoing grand jury proceedings, thus rejecting the appellant's due process argument.82

74. See, e.g., In re Grand Jury Subpoena as to C97-216, 187 F.3d at 998 (discussing recent cases requiring only that the government make an in camera submission to assess the crime-fraud exception, and not an adversarial hearing).
75. Id. at 996.
76. Id. at 997.
77. Id.
78. Id.
79. Id.
80. Id.
81. Id. at 997-98.
82. Id. at 998. In order to support this proposition, the court cited In re Grand Jury Proceedings, Thursday Special Grand Jury September Term, 1991, 33 F.3d 342, 350-53 (4th Cir. 1994); In re John Doe, Inc., 13 F.3d 633, 636 (2d Cir. 1994); In re Antitrust Grand Jury, 805
In the investigation known as *In re Grand Jury Proceedings, Thursday Special Grand Jury September Term, 1991,*\(^{83}\) the Government initiated a grand jury investigation of two corporations.\(^{84}\) One of the target corporations was served with a subpoena.\(^{85}\) While the target corporation offered some responsive documents, it failed to produce certain responsive documents asserting attorney-client and work-product privileges.\(^{86}\) The target corporation’s law firm was then served with grand jury subpoenas.\(^{87}\) The target corporation instructed the law firm not to produce any documents based on the attorney-client and work-product privileges.\(^{88}\) In response, the Government filed a motion to compel compliance and argued that any privilege was abrogated because the target corporation had used the law firm to further its criminal conduct.\(^{89}\) In support of the application of the crime-fraud exception, the Government provided the court with an ex parte submission that primarily consisted of grand jury documents and testimony. The target was denied access to the submission.\(^{90}\) The district court granted the Government’s motion to compel and the target corporation appealed.\(^{91}\)

On appeal, the target corporation argued that the district court denied it its due process rights by failing to disclose the Government’s submission and prohibiting it an opportunity to refute the allegations.\(^{92}\) The Court of Appeals for the Fourth Circuit disagreed and affirmed the district court’s ruling. The appellate court first held that the Government had met its evidentiary burden of establishing a prima facie case that the client used the law firm to further a criminal scheme and that the testimony sought was highly relevant to the ongoing investigation before the grand jury. The court next held that in camera proceedings were appropriate to protect the ongoing investigation.\(^{93}\)

\(^{83}\) 33 F.3d 342 (4th Cir. 1994).
\(^{84}\) Id. at 344.
\(^{85}\) Id.
\(^{86}\) Id.
\(^{87}\) Id. at 344-45.
\(^{88}\) Id. at 345.
\(^{89}\) Id.
\(^{90}\) Id.
\(^{91}\) Id.
\(^{92}\) Id. at 349.
\(^{93}\) Id. at 352-53 (quoting *In re Grand Jury Subpoena, 884 F.2d 124, 126 (4th Cir. 1989)*).
In *In re John Doe, Inc.*, the attorney for the target received a subpoena to testify before the grand jury regarding confidential conversations with the target. The attorney refused to comply; thus, the Government sought an order applying the crime-fraud exception and compelling the testimony. In support of the order, the Government provided the district court with an ex parte affidavit of an FBI agent. This submission set out the factual basis for the application of the crime-fraud exception.

The target and the target's attorney objected to the ex parte submission and requested that the district court disclose the contents of the FBI affidavit. Because of the need to preserve grand jury secrecy, the district court denied the request. The district court then reviewed the Government's submission and concluded that the crime-fraud exception should be applied and the target's attorney should be questioned.

The target and the target's attorney appealed and argued, *inter alia*, that the district court's failure to disclose the Government's submission was fundamentally unfair. The target and the target's attorney also argued that the inability to inspect and rebut the evidentiary submission also violated their due process rights. The Second Circuit rejected this argument and affirmed the lower court's ruling. The appellate court held that the necessity of preserving the secrecy of the grand jury proceeding precluded the disclosure of the Government's submission. However, the court noted that an in camera submission "deprive[s] one party to a proceeding of a full opportunity to be heard on an issue, and its use is justified only by a compelling interest." However, the court noted that an in camera submission is appropriate when it is the only way to resolve a dispute without compromising necessary grand jury secrecy. The court did, however, recognize as an exception to the rule that in certain circum-

94. 13 F.3d 633 (2d Cir. 1994).
95. Id. at 635.
96. Id.
97. Id.
98. See id.
99. Id.
100. Id.
101. Id. at 636-37.
102. Id.
103. Id. at 638.
104. Id. at 637.
105. Id. at 636 (quoting *In re John Doe Corp.*, 675 F.2d 482, 490 (2d Cir. 1982) (internal quotation marks omitted)).
106. Id.
stances a legitimate need for adversarial examination may arise in which the judge may permit limited access to the Government's submission. \textsuperscript{107}

In \textit{In re Grand Jury Subpoena}, \textsuperscript{108} the Court of Appeals for the Third Circuit considered a target corporation that was the subject of a two-year federal investigation regarding possible tax and fraud violations. \textsuperscript{109} The attorney representing the target for more than a year in connection with the investigation was subpoenaed before the grand jury as a witness. The subpoena required the attorney to testify and produce documents. \textsuperscript{110} The attorney moved to quash the grand jury subpoena, arguing that the disclosure of responsive testimony and documents would compromise privileged attorney-client and work-product matters. The attorney also claimed that his client's Sixth Amendment right to counsel would be violated by the compelled testimony because the testimony would bar the attorney from the presentation. \textsuperscript{111}

The court permitted the client target to intervene and the client target asserted the same arguments. \textsuperscript{112} The Government, which had previously provided the attorney with an affidavit that generally outlined the subject matter of the grand jury investigation, submitted a second affidavit. The Government provided the second affidavit exclusively to the district court to establish the applicability of the crime-fraud exception. This affidavit detailed the subject matter of the grand jury investigation along with documents and testimony obtained during the investigation. \textsuperscript{113} The target client and the attorney requested a copy of this second affidavit. They argued that without access, they could not effectively respond to the Government's attempt to establish the crime-fraud exception. \textsuperscript{114} After a hearing, the district court denied the motion and directed the attorney to testify. \textsuperscript{115}

The district court found that the second affidavit: (1) adequately described the grand jury investigation; (2) adequately showed that the attorney's testimony would be relevant to this investigation; (3) adequately set forth the basis for invocation of the crime-fraud exception;

\begin{itemize}
  \item \textsuperscript{107} \textit{Id.}
  \item \textsuperscript{108} 223 F.3d 213 (3d Cir. 2000).
  \item \textsuperscript{109} \textit{Id.} at 215.
  \item \textsuperscript{110} \textit{Id.}
  \item \textsuperscript{111} \textit{Id.}
  \item \textsuperscript{112} \textit{Id.}
  \item \textsuperscript{113} \textit{Id.}
  \item \textsuperscript{114} \textit{Id.}
  \item \textsuperscript{115} \textit{Id.}
\end{itemize}
and (4) did not indicate that the testimony was sought for an improper purpose. The court further found that the disclosure of the second affidavit would compromise the secrecy of the investigation.

The target corporation appealed and argued that it was "unfair and inequitable" for the district court to apply the crime-fraud exception without affording it a fair opportunity to rebut the Government's allegations. The Court of Appeals for the Third Circuit rejected the target corporation's argument and affirmed. The court reasoned that investigative proceedings are not adversarial, and thus the determination as to whether to apply the crime-fraud exception could be "adjudicated" based solely on the undisclosed allegations set forth in the government's factual submission.

The Third Circuit articulated the following reasons for protecting grand jury secrecy:

1. To prevent the escape of those whose indictment may be contemplated;
2. To insure the utmost freedom to the grand jury in its deliberations;
3. To prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at trial;
4. To encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes;
5. To protect [the] innocent [from the stigma of a grand jury investigation].

The Court of Appeals for the Third Circuit then concluded that the need for secrecy in the grand jury compelled the rejection of the attorney's claim to disclose the affidavit. The court, however, did recognize the need to test the factual foundation of the Government's submission, but was satisfied that the district courts would "vigorously test the factual and legal bases for any subpoena." In response to the attorney's Sixth Amendment right to counsel argument, the court held that the target corporation could not claim that its right to effec-

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116. Id.
117. Id. at 217.
118. Id. at 220.
119. Id. at 216. The court explained that "[t]he grand jury may generally 'compel the production of evidence or testimony of witnesses . . . unrestrained by the technical[,] procedural[,] and evidentiary rules governing the conduct of criminal trials.'" Id. (quoting United States v. Calandra, 414 U.S. 338, 343 (1974)).
120. Id. at 218 (quoting United States v. John Doe, Inc. I, 481 U.S. 102, 109 n.5 (1987)).
121. Id. at 219.
122. Id. However, the court did not state how such vigorous testing would take place absent a response from the opposing party.
tive assistance of counsel was infringed because that right does not attach until criminal proceedings are initiated.\textsuperscript{123}

In \textit{In re Grand Jury Subpoena},\textsuperscript{124} the target corporation was issued a federal grand jury subpoena in connection with an investigation of possible violations of the Clean Air Act.\textsuperscript{125} In response, the corporation unintentionally released a legal memorandum, drafted in-house, implicating in-house counsel in an attempt to cover up the alleged criminal activity.\textsuperscript{126} The target corporation and its in-house counsel sought the return of the memorandum but the Government refused.\textsuperscript{127} The district court denied a motion for return of the memorandum.\textsuperscript{128}

Based on the content of the disclosed legal memorandum, the Government moved for production of all documents prepared in the course of a corporate environmental compliance investigation. The documents were produced directly to the district court.\textsuperscript{129} After reviewing the documents in camera, the district court found that the documents were protected by the attorney-client privilege and assumed that they were protected by the work-product privilege.\textsuperscript{130} The Government argued that the documents in question revealed that the target corporation used its in-house counsel to conceal from state and federal regulators the extent of its noncompliance with the environmental regulations.\textsuperscript{131} The district court agreed and held that the crime-fraud exception applied. The corporation was then ordered to turn over the documents in its possession to the Government.\textsuperscript{132} The target corporation refused.\textsuperscript{133}

The district court then held the corporation in contempt and imposed a fine.\textsuperscript{134} Both the district court and the Court of Appeals for the Fifth Circuit refused to stay the fine pending appeal. The corpo-

\begin{itemize}
  \item 123. \textit{Id.} at 220.
  \item 124. \textit{Id.} at 406 (5th Cir. 2000).
  \item 125. \textit{Id.} at 407.
  \item 126. \textit{See id.} (finding that the Government, in response to receiving the memorandum, moved for the production of over two-hundred documents prepared by the target's counsel "during the course of a corporate environmental compliance investigation").
  \item 127. \textit{Id.}
  \item 128. \textit{Id.}
  \item 129. \textit{Id.}
  \item 130. \textit{Id.}
  \item 131. \textit{See id.} (finding that the memorandum gave sufficient evidence to over two-hundred other documents implicating the target).
  \item 132. \textit{Id.}
  \item 133. \textit{Id.} at 407-08.
  \item 134. \textit{Id.} at 408. The court fined the corporation a penalty of $200,000 per diem, beginning the subsequent day. \textit{Id.}
\end{itemize}
ration was forced to produce the documents. The district court refused the in-house counsel’s motion to issue an order returning the documents to him in order to gain an appealable contempt order. The in-house lawyer subsequently appealed. After the corporation produced the documents, the grand jury issued subpoenas compelling two outside consultants, retained by the target corporation to assist in its environmental compliance investigation, to testify to their interactions with in-house counsel. The in-house counsel and the corporation moved to quash the subpoenas. The district court denied the motion to quash, and reiterated the court’s prior crime-fraud analysis. The target corporation and in-house counsel appealed.

On appeal, the in-house counsel argued that he had a legally valid interest in preserving the confidentiality of the documents independent of the corporation’s interest. The Court of Appeals for the Fifth Circuit stated that, as a general rule, the scope of the work-product privilege extends to an in-house counsel. However, in this case, because the documents were prepared for the intended use and benefit of others within the corporation and were not prepared for the exclusive benefit and use of the in-house counsel, the court held that there was no basis for finding that justice would be compromised if the grand jury allowed the examination of the corporation’s documents. Accordingly, the in-house counsel had no standing to assert the work-product privilege.

The target corporation challenged the district court’s application of the crime-fraud exception to the attorney-client and work-product privileges. In response, the appellate court first recognized that the crime-fraud exception could overcome the privilege where communication or work product was meant to further ongoing or future fraudulent or criminal activity. The Fifth Circuit then recognized that the Government has the initial burden of establishing a prima facie case that the attorney-client relationship was intended to further criminal or fraudulent activity. The court held that while legitimate de-

135. Id.
136. Id.
137. Id.
138. Id. The court stated that “this circuit has held that an innocent attorney may invoke the work-product privilege even if a prima facie case of fraud or criminal activity has been made as to the client.” Id. (citing In re Grand Jury Proceedings, 43 F.3d 966, 972 (5th Cir. 1994)).
139. Id. at 409.
140. Id.
141. Id. at 410.
142. Id. (referencing United States v. Dyer, 722 F.2d 174, 177 (5th Cir. 1983)).
143. Id.
fenses may exist precluding findings of fraud or criminal environmental violations, the possibility of a defense does not establish that the lower court abused its discretion and committed reversible error.\textsuperscript{144}

In \textit{In re Sealed Case},\textsuperscript{145} the federal grand jury subpoenaed the lawyer who served as general counsel for the Republican National Committee (RNC) in connection with an investigation regarding possible violations of the federal election laws and, specifically, the repayment of various loans made to an independent think tank.\textsuperscript{146} The lawyer refused to produce a number of documents claiming that the attorney-client and work-product privileges applied. The Government’s motion to compel the RNC’s compliance was granted by the district court, which held that the privileges were subject to the crime-fraud exception.\textsuperscript{147} The RNC appealed and the Court of Appeals for the District of Columbia reversed.\textsuperscript{148} The Court of Appeals for the District of Columbia held that the crime-fraud exception was inapplicable because the accusations against the RNC were not criminal in nature.\textsuperscript{149} Therefore, there was no underlying crime or fraud to support the application of the exception.\textsuperscript{150}

In \textit{In re Grand Jury Subpoenas},\textsuperscript{151} several hospitals, doctors, and others were the target of an ongoing federal grand jury investigation regarding possible health care fraud violations.\textsuperscript{152} In connection with that investigation, documents were produced to the Government that implicated the use of two attorneys by the hospital and corporate officers to carry out criminal conduct.\textsuperscript{153} As a result, the grand jury issued subpoenas requesting that the two attorneys testify before the grand jury. The attorneys, the hospital, and a corporate officer moved to quash the subpoenas because of the attorney-client and work-product privileges.\textsuperscript{154} In addition, the hospital argued that forcing its attorneys to testify would violate its Sixth Amendment right to counsel.\textsuperscript{155} The Government responded by arguing that the crime-

\begin{flushright}
\textsuperscript{144} Id.
\textsuperscript{145} 223 F.3d 775 (D.C. Cir. 2000).
\textsuperscript{146} Id. at 777.
\textsuperscript{147} Id.
\textsuperscript{148} Id.
\textsuperscript{149} Id. at 779.
\textsuperscript{150} Id.
\textsuperscript{151} 144 F.3d 653 (10th Cir. 1998).
\textsuperscript{152} Id. at 656.
\textsuperscript{153} Id.
\textsuperscript{154} Id.
\textsuperscript{155} Id.
\end{flushright}
fraud exception vitiated the privileges. In support, the Government filed an ex parte statement of the evidence describing the criminal activity allegedly undertaken by the lawyers and the hospital.

The district court found that because the Government had established a prima facie case that the target had engaged in criminal or fraudulent behavior furthered by the assistance of counsel, the crime-fraud exception applied. Accordingly, the trial court denied the motion to quash. The court also refused to permit the targets to view the statement of evidence. The attorneys then appeared before the grand jury but refused to answer any questions. The Government moved to compel and filed additional ex parte evidence with the district court setting forth evidence implicating the attorneys in the criminal activity. The district court again found that the crime-fraud exception applied and granted the Government's motion. The district court granted a stay of the order and the hospital appealed.

The Court of Appeals for the Tenth Circuit affirmed and held that the Government established a prima facie case that: (1) the targets had been engaged in criminal conduct; (2) they engaged the legal services of counsel in furtherance of that criminal conduct; and (3) their attorneys knew of the criminal conduct. The court also rejected the argument that the district court should have disclosed the Government's submission of prima facie evidence. The Court of Appeals for the Tenth Circuit held that the authority of the district court to decide this issue based on ex parte materials is:

grounded in the importance of a properly functioning grand jury . . . . Any holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws. Moreover, the reasons for keeping a tight lid on in camera documents containing grand jury testimony and on evidence

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156. Id. at 656-57.
157. Id. at 657.
158. Id.
159. Id.
160. Id. Each attorney claimed the attorney-client and work-product privileges, as well as the Fifth Amendment privilege against self-incrimination. Id.
161. Id.
162. Id.
163. Id.
164. Id. at 660-61.
165. See id. at 662 (explaining that the court was well within its discretionary powers when it decided not to disclose the government's ex parte evidence).
gathered during criminal investigations are legion and obvious.\textsuperscript{166}

The court also rejected the corporate officer's Fifth Amendment challenge.\textsuperscript{167} The corporate officer claimed that the two target attorneys should have been allowed to assert a Fifth Amendment right against self-incrimination on his behalf.\textsuperscript{168} The court held that there is no constitutional right against incrimination by the testimony of another.\textsuperscript{169} Since the Fifth Amendment protects against compelled self-incrimination, and not the disclosure of private information,\textsuperscript{170} a party is not privileged from external or independent production of evidence.\textsuperscript{171} Therefore, the ultimate question was whether the evidence was obtained through self-incriminating compulsion, as opposed to whether it was private.\textsuperscript{172} The court recognized that under certain circumstances the attorney could not be compelled to produce documents protected by the Fifth Amendment privilege.\textsuperscript{173} The court reasoned that because the information sought was the content of oral statements voluntarily made by the corporate officer, there was no compelled disclosure under the Fifth Amendment.\textsuperscript{174}

In \textit{In re Impounded},\textsuperscript{175} the Government issued several subpoenas calling for the production of documents involving the target's business.\textsuperscript{176} While the target's attorney responded by producing several documents, the Government deemed the response inadequate and requested the production of additional documents.\textsuperscript{177} The attorney replied by representing that several of the requested documents did not exist. The Government followed up its request by advising the attorney that it intended to call him before the grand jury and examine the attorney about the effort made to respond to the subpoena. The attorney then responded by producing some additional documents such as canceled checks and check ledgers.\textsuperscript{178}

\textsuperscript{166} Id. (internal quotation marks omitted).
\textsuperscript{167} Id. at 663.
\textsuperscript{168} Id.
\textsuperscript{169} Id. The court explained, "the privilege against self-incrimination is solely for the benefit of the witness and is purely a personal privilege of the witness, not for the protection of other parties." Id.
\textsuperscript{170} Id. (referencing Fisher v. United States, 425 U.S. 391, 401 (1976)).
\textsuperscript{171} Id. (referencing Fisher, 425 U.S. at 399).
\textsuperscript{172} Id. (referencing Fisher, 425 U.S. at 396).
\textsuperscript{173} Id.
\textsuperscript{174} Id.
\textsuperscript{175} 241 F.3d 308 (3d Cir. 2001).
\textsuperscript{176} Id. at 311.
\textsuperscript{177} Id.
\textsuperscript{178} Id.
The Government issued a second grand jury subpoena for documents relating to the target's business.\textsuperscript{179} The attorney again responded that the documents responsive to the subpoena did not exist. Over the next several months, the Government issued three additional subpoenas calling for the production of documents. In response, the attorney produced a few documents, but again represented that many of the documents responsive to the subpoena did not exist.\textsuperscript{180}

A search warrant was then executed at the target's business and residence.\textsuperscript{181} The search resulted in the discovery of numerous documents responsive to the Government's prior grand jury subpoenas that the attorney had represented did not exist.\textsuperscript{182} In response, the Government subpoenaed the attorney to testify before the grand jury and indicated that it intended to inquire about the effort made to respond to the prior grand jury subpoenas. The attorney invoked the attorney-client privilege and refused to testify. The Government filed a motion to compel testimony claiming that the attorney had obstructed justice and therefore, the crime-fraud exception invalidated any privilege asserted.\textsuperscript{183} The district court denied the Government's motion and summarily ruled that it would be "fundamentally unfair" to compel the attorney to testify.\textsuperscript{184} Accordingly, the Government appealed.\textsuperscript{185}

On appeal, the Government argued that it had submitted sufficient evidence indicating that the target had used the attorney to conceal criminal activity warranting the application of the crime-fraud exception.\textsuperscript{186} The Court of Appeals for the Third Circuit reversed and held that the district court's failure to engage in an analysis of the Government's submission and the application of the crime-fraud exception warranted reversal and remand.\textsuperscript{187} The appellate court instructed the district court to first examine the evidence and determine whether the application of the crime-fraud exception was warranted.\textsuperscript{188} Absent a finding that the target used the attorney to cover up criminal activity, the attorney could legitimately invoke the attor-

\begin{tabular}{l}
\textsuperscript{179} Id. \\
\textsuperscript{180} Id. \\
\textsuperscript{181} Id. at 311-12. \\
\textsuperscript{182} Id. at 312. \\
\textsuperscript{183} Id. \\
\textsuperscript{184} Id. \\
\textsuperscript{185} Id. \\
\textsuperscript{186} Id. at 317. \\
\textsuperscript{187} Id. at 317-18. \\
\textsuperscript{188} Id. \\
\end{tabular}
ney-client privilege in response to the grand jury subpoena. For these reasons, the case was remanded to the district court to determine whether the Government had submitted sufficient evidence of the intent to obstruct justice and determine whether this evidence supported a waiver of the attorney-client privilege.

C. Due Process Requires an Adversary Hearing

In seventeenth-century England, the Court of Star Chamber prepared the evidence for unspecified charges in advance of trial, giving defendants little opportunity to reply or defend. Although not as striking, the present process for applying the crime-fraud exception similarly casts the prosecutor in the role of the architect of the proceeding. The reluctance of the district courts to provide the target and the target’s attorney with the government’s factual foundation relied on by the government to invoke the crime-fraud exception, unfairly lightens the government’s burden of proof and unnecessarily evades the crucible of an adversary proceeding.

The Fifth Amendment includes both procedural and substantive due process requirements. The substantive due process component precludes the government from engaging in conduct that “shocks the conscience,” or “interferes with fundamental rights implicit in the concept of ordered liberty.” Procedural due process requires that a person not be deprived of a protected interest without notice and an opportunity for a hearing "at a meaningful time and in

189. Id. at 318.
190. Id.
191. See Laurence A. Benner, Requiem for Miranda: The Rehnquist Court’s Voluntariness Doctrine in Historical Perspective, 67 Wash. U. L.Q. 59, 76 (1989) (explaining that defendants had only eight days to answer a complaint in writing). In fact, the Court of Star Chamber possessed a particularly oppressive political tool because it had legislative, executive, and judicial powers. Id.
192. The Due Process Clause of the Fifth Amendment provides, “[n]o person shall . . . be deprived of life, liberty or property, without due process of law.” U.S. Const. amend. V.
193. United States v. Salerno, 481 U.S. 739, 746 (1987) (quoting Rochin v. California, 342 U.S. 165, 172 (1952)). Similarly, the Court of Appeals for the First Circuit explained, “substantive due process is violated if either (1) the government actor deprived the plaintiff of an identified interest in life, liberty or property protected by the Fifth Amendment, or (2) the government actor’s conduct ‘shocks the conscience.’” Aversa v. United States, 99 F.3d 1200, 1215 (1st Cir. 1996). The Court of Appeals for the Fourth Circuit provides a slightly different formulation of substantive due process:
To succeed on its substantive due process claim [claimant] must show that (1) it has a liberty or property interest; (2) the state deprived it of this liberty or property interest; and (3) the state’s action “falls so far beyond the outer limits of legitimate governmental action that no process could cure the deficiency.” United States v. Safety-Kleen, Inc., 274 F.3d 846, 862 (4th Cir. 2001) (quoting Sylvia Dev. Corp. v. Calvert County, 48 F.3d 810, 827 (4th Cir. 1995)).
a meaningful manner." To determine the specific dictates required to ensure due process, three factors must be considered:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the . . . administrative burdens that the additional or substitute procedural requirement would entail.

These factors weigh in favor of disclosing the government’s factual foundation and affording a target a fair opportunity to rebut the government’s submission prior to the district court’s determination to apply the crime-fraud exception and compel the disclosure of privileged materials.

1. Private Interest.—The due process protection afforded by the Fifth Amendment extends to fundamental liberty and property interests. The property interest here is straightforward. There should be a legitimate property and liberty interest in maintaining the confidentiality of documents and conversations protected by the attorney-client and work-product privileges.

The Fifth Amendment liberty interest protection extends to “intimate associations.” This protection guarantees an individual the choice of entering an intimate relationship free from undue intrusion by the government. While this protection at a minimum extends to family relationships, whether it extends to other relationships depends on the degree to which the characterization of those relationships resembles characteristics of family relationships. Intimate relationships or associations protected by the Fifth Amendment are

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195. Mathews v. Eldridge, 424 U.S. 319, 335 (1976); see also United States v. Farmer, 274 F.3d 800, 803-04 (4th Cir. 2001) (applying the Mathews due process formula to determine whether the defendant should be afforded an adversary hearing to assess whether he could use his government seized assets to fund his defense); United States v. Michelle’s Lounge, 39 F.3d 684, 697-701 (7th Cir. 1994) (using the Mathews due process test to decide that the claimant must be given an adversary hearing in a civil forfeiture case).
196. See Safety-Kleen, Inc., 274 F.3d at 862.
198. Sanitation & Recycling Indus., Inc., 107 F.3d at 996.
199. Id.
200. Id.
deliberate, exclusive, and selective. Accordingly, the Supreme Court has held that:

[O]nly relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty. . . . Determining the limits of state authority over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments. 201

The attorney-client privilege falls within the "spectrum" of intimate associations deserving of constitutional protection. This confidential relationship is distinguished by its intimacy and selectivity throughout the affiliation. The attorney-client privilege is intended to foster unfettered communication between attorneys and their clients so that the attorney may provide fully informed legal advice and thereby promote broader public interest in the observance of the law and administration of justice. 202 Similarly, the purpose of the work-product privilege is to allow counsel to analyze, prepare, and advocate effectively without "unnecessary intrusion." 203 Accordingly, the Fifth Amendment protection afforded to liberty and property interests should extend to confidential conversations and documents protected by the attorney-client and work-product privileges.

2. Risk of an Erroneous Deprivation.—The application of the crime-fraud exception results in the permanent taking of the privilege. 204 Under the present practice, any question regarding the adequacy of the factual foundation to support the application of the crime-fraud exception arises after the lawyer is compelled to testify and produce legal memoranda. 205 Thus, the failure to subject the government's submission to meaningful adversarial testing prior to disclosure poses a substantial risk of error.

201. Roberts, 468 U.S. at 620. While discussing the spectrum of intimacy, the Court noted, "[w]e need not mark the potentially significant points on this terrain with any precision. We note only that factors that may be relevant include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent." Id.


203. Hickman v. Taylor, 329 U.S. 495, 510-11 (1947); see also supra notes 5-9 and accompanying text (discussing the work-product privilege).

204. See, e.g., United States v. Farmer, 274 F.3d 800, 804-05 (4th Cir. 2001).

205. Id.
A myriad of situations can arise from the government's unilateral assertion of the crime-fraud exception that can undermine the district court's finding. For example, although an attorney's testimony and memoranda may support the government's assertion that a target was involved in criminal activity, the evidence might not support the government's assertion that the target used the attorney to further a crime or cover-up criminal activity. In fact, the evidence may undermine it. For example, one of the witnesses who testified in a grand jury and whose testimony was relied on in the government's submission might have testified falsely. Or, the government may subsequently uncover material evidence that undermines its submission. As a consequence, the inferences and conclusions drawn by the government would have been wrong. Therefore, a sufficient foundation in fact would never have existed to support the application of the crime-fraud exception.

In such a case, the government has caused a permanent and irrevocable taking of the privilege without an adequate factual foundation. As a consequence, all of the privileged conversations and documents that the district court ordered to be produced would be tainted and all of the evidence derived from that would be similarly tainted. The taint of the government's constitutional transgressions could infect every part of the investigation and prosecution of the defendant. There would be no means other than dismissal of the indictment to remedy the due process violation. At that point, the attorney would have been tarred with innuendo and the government's entire prosecution against the target unnecessarily put in jeopardy.

At issue is both the accuracy of the determination to apply the crime-fraud exception and the credibility of the criminal process. Any risk to these interests could have all been avoided by: (1) the government confining the factual foundation in its submission to witness in-
terviews and documents obtained outside the grand jury; or (2) testing the government’s submission and factual foundation by the adversarial process. Accordingly, the process should be recalculated and repositioned from its current state. If the government seeks to apply the crime-fraud exception, breach a privilege, compel the disclosure of privileged conversations and documents, and then elect to rely on grand jury materials, the courts should either disclose the government’s grand jury evidence, disregard it, or apply a presumption against disclosure. The need to maintain the secrecy of the grand jury proceedings should yield to the need to subject the government’s submission to meaningful adversarial testing, prior to compelling the production of privileged testimony and documents.  

3. Government’s Interest and Administrative Burden.—Requiring the disclosure of the government’s submission neither disrupts the government’s power of investigation nor makes the prosecution’s application of the crime-fraud exception so cumbersome as to rarely be worth the effort. Disclosure only affects the timing of the government’s submission and its investigative strategy. Disclosure of the factual foundation simply reinforces the government’s effort to gather the facts and marshal the evidence with incredible industry. If the government does not want to disclose the grand jury evidence, the government is free to rely on evidence obtained outside the grand jury or the prosecution can delay its submission until after the target is indicted. Moreover, the proposed practice would not intrude on the grand jury, create procedural detours or delays, or impede the institutional independence of the grand jury.

Conclusion

A defendant has the right to a fair opportunity to defend against a charged offense. This principle should apply to the investigative phase and the district court’s determination to apply the crime-fraud exception. More precisely, in response to the government’s motion to apply the crime-fraud exception, the only way to afford a target a fair opportunity to defend itself is to require that the government’s unilateral submission and factual foundation encounter and survive

207. In addition, there is no analogy between the government’s unilateral effort to seek a search warrant and to apply the crime-fraud exception. Without a specific inclusion and justification, typically a search warrant does not permit the seizure of privileged documents.

208. See In re Subpoena Duces Tecum, 228 F.3d 341, 348 (4th Cir. 2000) (holding that in a criminal case a subpoena to testify or produce documents before a grand jury commences an adversary process).
the crucible of meaningful adversarial testing. Currently, the government's submission is where the discussion ends, but this is where the discussion should begin. The basic purpose of this proposed change neither compromises nor obstructs grand jury investigations, but rather preserves the integrity of the judicial system and the successful development of the truth. There is a fine line between zealous advocacy and complicity in a crime.²⁰⁹ This fine line compels a special need for adversary examination.

The importance of maintaining secrecy of the grand jury is acknowledged. However, the fairness and integrity of the fact-finding process is of equal concern. The current practice of withholding the disclosure of the core factual assertions set forth in the government's submission impedes that process. Under the present process, there is a risk of erroneous deprivation of the target's interest in the absence of any adversary hearing.

Requiring a meaningful adversary hearing comports with the overriding purpose of the attorney-client and work-product privileges—to encourage proper functioning of the adversarial system. Moreover, the paramount value that our criminal justice system places on protecting privileged conversation and documents should outweigh the government's interest in preserving the secrecy of the grand jury proceedings, an interest that the prosecution has chosen to place in jeopardy. The failure to subject the government's submission to the crucible of meaningful adversarial testing may distort the record, mislead the fact finder, and undermine the central truth-seeking function of the courts. It may also undermine the fairness, integrity, and the public's perception of the criminal process.

²⁰⁹. See United States v. Abbell, 271 F.3d 1286, 1304 (11th Cir. 2001) (per curiam) (reinstating a lawyer's conviction based on complicity with drug trafficking organization).