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## §5.22 Crime-Fraud Exception

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## §5.22 Crime-Fraud Exception

Although the attorney-client privilege shields a client's confidential statements to an attorney relating to past misconduct, statements seeking the services of the attorney with respect to ongoing or future crimes or frauds are not privileged.<sup>1</sup> The exception extends even to crimes of a relatively minor nature.<sup>2</sup> Some authority favors an even broader exception encompassing communications about ongoing or future conduct that is tortious, whether or not involving crime or fraud.<sup>3</sup>

The rationale for this exception is that clients are not entitled to use lawyers to help them in pursuing unlawful or fraudulent objectives.<sup>4</sup> If the privilege were to cloak such activity, the result would be loss of public confidence and corruption of the profession. Moreover, when an attorney's services are knowingly used to further a crime or fraud, such activity hardly qualifies as "professional legal services," an essential element of the privilege.<sup>5</sup> If a client intends to use the attorney's services to violate legal obligations rather than comply with the law or vindicate legally arguable positions, there is no social interest in protecting confidentiality. The future crime-fraud exception thus marks the boundaries of proper advocacy and ensures an appropriate balance between the duty to a client and the broader interests of society.<sup>6</sup>

### Two-part test

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§5.22 1. *In re Antitrust Grand Jury*, 805 F.2d 155, 162 (6th Cir. 1986) (reasons for privilege are "completely eviscerated when a client consults an attorney not for advice on past misconduct, but for legal assistance in carrying out a contemplated or ongoing crime or fraud"). *See also* Restatement (Third) of the Law Governing Lawyers §82.

2. *United States v. Friedman*, 445 F.2d 1076, 1085-1086 (9th Cir. 1971) (crime-fraud exception applies to unlawful possession of grand jury transcript), *cert. denied sub nom. Jacobs v. United States*, 404 U.S. 958.

3. *See Commodity Futures Trading Commn. v. Weintraub*, 471 U.S. 343, 354 (1985) (citing authorities holding that privilege "does not shield the disclosure of communications relating to the planning or commission of ongoing fraud, crimes, and ordinary torts"); *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985) (describing exception as applicable to "crime, fraud, or other misconduct").

4. *See Clark v. United States*, 289 U.S. 1, 15 (1933) (privilege "takes flight if the relation is abused," and client who consults attorney for advice that "will serve him in the commission of a fraud" has no protection and "must let the truth be told").

5. *See* §5.11, *supra*.

6. *See generally* Fried, Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds, 64 N.C. L. Rev. 443 (1986); Silbert, The Crime-Fraud Exception to the Attorney-Client Privilege and Work Product Doctrine, the Lawyer's Obligations of Disclosure, and the Lawyer's Response to Accusation of Wrongful Conduct, 23 Am. Crim. L. Rev. 351 (1986).

The determination whether the crime-fraud exception applies has been held to involve a two-part test:

First, there must be a prima facie showing that the client was engaged in criminal or fraudulent conduct when he sought the advice of counsel, that he was planning such conduct when he sought the advice of counsel, or that he committed a crime or fraud subsequent to receiving the benefit of counsel's advice. Second, there must be a showing that the attorney's assistance was obtained in furtherance of the criminal or fraudulent activity or was closely related to it.<sup>7</sup>

The client must know or reasonably be expected to know that the conduct would be criminal or fraudulent,<sup>8</sup> although the attorney need not be aware of the client's unlawful purpose.<sup>9</sup> Nor is it necessary that the attorney actually assist the illegality in any way.<sup>10</sup> The exception does not apply if the client innocently inquires about a course of conduct she had no reason to know was unlawful.<sup>11</sup> Nor does it apply even if the client later engages in such conduct pursuant to counsel's

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7. *In re Grand Jury Investigation (Schroeder)*, 842 F.2d 1223, 1226 (11th Cir. 1987). *See also In re Grand Jury Subpoena*, 745 F.3d 681, 693 (3d Cir. 2014) (rejecting relaxed "related to" standard; to be "in furtherance" of crime or fraud, attorney's advice must advance or client must intend advice to advance his criminal or fraudulent purpose).

8. *See Chaudhry v. Gallerizzo*, 174 F.3d 394, 403-404 (4th Cir. 1999) (party asserting the crime-fraud exception must make a prima facie showing that (1) client was engaged in or planning criminal or fraudulent scheme when he sought advice of counsel to further the scheme and (2) documents containing privileged materials bear close relationship to client's existing or future scheme to commit crime or fraud), *cert. denied*, 528 U.S. 891 (1999); *Unlimited, Inc. v. Video Shack, Inc.*, 661 F. Supp. 1482, 1487 (N.D. Ill. 1987) (no privilege where there was sufficient evidence to support conclusion that client "either knew or recklessly disregarded that his wiretapping activities were illegal").

9. *In re Grand Jury Investigation*, 445 F.3d 266, 275-276 (3d Cir. 2006) (exception applied to conversations between attorney and client where client could have been engaged in obstruction of justice, and attorney discussed material subject to government subpoena, which let client destroy evidence; did not matter whether attorney knew client's intent); *United States v. Chen*, 99 F.3d 1495, 1503-1504 (9th Cir. 1996) (exception applies even where lawyer "in the dark" about client's illegal purpose).

10. *In re Grand Jury*, 705 F.3d 133, 157 (3d Cir. 2012) (citations omitted) (crime-fraud exception may apply even when the attorney is not "implicated in the crime or fraud" and does not have knowledge of the alleged scheme; "[a]ll that is necessary is that the client misuse or intend to misuse the attorney's advice in furtherance of an improper purpose"); *In re Grand Jury Proceedings*, 87 F.3d 377, 381 (9th Cir. 1996) (exception applies even if attorney takes no affirmative step that furthers crime; communication can be "in furtherance" even if it turns out not to help or even hinders client's completion of a crime).

11. *United States v. Doe*, 429 F.3d 450, 453, 454 (3d Cir. 2005) (privilege is not lost if client innocently proposes course of conduct and is advised by counsel that it is illegal); *In re Grand Jury Proceedings*, 87 F.3d 377, 381 (9th Cir. 1996) (not enough for government to show "sneaking suspicion" that client was intending to engage in crime when consulting attorney, because such a low threshold could discourage would-be clients from consulting attorney about legitimate legal dilemmas).

erroneous advice that it was lawful.<sup>12</sup> While some courts require that the unlawful intent be formulated at the time the client solicits the lawyer's advice,<sup>13</sup> other courts focus on the client's intent when consultation is concluded and whether the client was dissuaded from engaging in illegal conduct.<sup>14</sup>

Under the better view, the exception applies to communications about a future crime or fraud that never occurs, provided the client knew of the illegality and intended to use the attorney's advice or services in connection with the crime or fraud.<sup>15</sup> The crime or fraud need not be one committed by the client to be within the exception.<sup>16</sup> The exception applies even in a proceeding other than one arising out of the particular crime or fraud that was the subject of the communication.<sup>17</sup>

## Examples

The future crime-fraud exception applies to plans to assert a false claim,<sup>18</sup> commit fraud against

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12. *See* ACN, proposed-but-rejected FRE 503(d)(1) (requiring that client "knew or reasonably should have known of the criminal or fraudulent nature of the act is designed to protect the client who is erroneously advised" that proposed action is legal).

13. *See, e.g.,* *In re Grand Jury Subpoena*, 745 F.3d 681, 691 (3d Cir. 2014) (for crime-fraud exception to apply, client must be committing or intending to commit crime or fraud when she consults the attorney; exception "does not apply where the client forms the intent to engage in criminal or fraudulent activity after the consultation").

14. *United States v. Ballard*, 779 F.2d 287, 292 (5th Cir. 1986) (client filed fraudulent bankruptcy petition through services of second attorney after first attorney told him to list recently sold real property; communications between client and first attorney were not privileged), *cert. denied*, 475 U.S. 1109. *See also* Restatement (Third) of the Law Governing Lawyers §82 cmt. c (noting that some courts require a finding that the client's intent was formed at the time of consultation, but that others "apply the exception despite the absence of proof that the client intended to commit the illegal act at the time" of the consultation).

15. *In re Grand Jury Proceedings*, 87 F.3d 377, 381 (9th Cir. 1996) (crime-fraud exception does not require completed crime). *Contra* *In re Sealed Case*, 107 F.3d 46, 49 (D.C. Cir. 1997) (client must have carried out crime or fraud).

16. *See Matter of Doe*, 551 F.2d 899, 900-902 (2d Cir. 1977) (client informed attorney of scheme by others to bribe a juror; attorney advised client to have nothing to do with it; communications held not privileged because future crime potentially benefiting client and to which he might be a participant falls within the crime-fraud exception). *See also* proposed-but-rejected FRE 503(d)(1) (exception applies where services of lawyer were "sought or obtained to enable or aid *anyone* to commit" a crime or fraud) (emphasis added).

17. *In re Berkley & Co., Inc.*, 629 F.2d 548, 554-555 (8th Cir. 1980) (exception also applies where communication is sought in proceeding unrelated to subject of crime or fraud).

18. *Whetstone v. Olson*, 46 Wash. App. 308, 732 P.2d 159, 162 (1986) (fabrication of sexual harassment claim).

a public agency,<sup>19</sup> kill a witness,<sup>20</sup> bribe a juror,<sup>21</sup> fabricate evidence or commit perjury,<sup>22</sup> conceal or destroy evidence,<sup>23</sup> file fraudulent documents,<sup>24</sup> and other illegal behavior.<sup>25</sup>

### **Ongoing criminal conduct**

The line between past and future (or ongoing) criminal conduct is often hard to draw.<sup>26</sup> Deciding which communication is protected and which is part of an ongoing fraud is particularly hard in organized economic ventures regulated by complex criminal statutes where a client's conduct may be a mix of legitimate and criminal behavior. The most that can be expected of linedrawing in these areas is that courts will somehow be able to decide that one element "outweighs" the other and allow protection or require disclosure accordingly, and there is little doubt that courts will tend to err in requiring disclosure rather than protecting confidences.

Clearly the future crime-fraud exception applies even if disclosure is sought after the contemplated conduct has occurred, so long as the communication itself looked to future acts.<sup>27</sup>

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19. *Natta v. Zletz*, 418 F.2d 633, 636 (7th Cir. 1969) (fraud on patent office).

20. *United States v. Lentz*, 524 F.3d 501, 518-519 (4th Cir. 2008) (defendant's communications in phone call to attorney from prison were not privileged; they sought advice about murder-for-hire scheme to kill witnesses, hence fit crime/fraud exception).

21. *Matter of Doe*, 551 F.2d 899, 902 (2d Cir. 1977).

22. *United States v. Gordon-Nikkar*, 518 F.2d 972, 975 (5th Cir. 1975) (plan to commit perjury).

23. *See United States v. Davis*, 1 F.3d 606, 609 (7th Cir. 1993) (fraudulent noncompliance with grand jury subpoena); *United States v. Sutton*, 732 F.2d 1483, 1494 (10th Cir. 1984) (privilege does not apply to client's statement that he intended to destroy records sought by government), *cert. denied*, 469 U.S. 1157.

24. *United States v. Ballard*, 779 F.2d 287, 291-293 (5th Cir. 1986) (defendant was advised by his first attorney of need to disclose certain transfers in bankruptcy proceeding; defendant then sought services of a second lawyer who filed petition without making required disclosures), *cert. denied*, 475 U.S. 1109.

25. *See, e.g., United States v. Gorski*, 807 F.3d 451, 461 (1st Cir. 2015) (exception applied where defendant retained law firm to restructure company in order to misrepresent its true ownership and obtain government contracts); *United States v. Albertelli*, 687 F.3d 439, 450 (1st Cir. 2012) (communications with attorney evincing intent to use arson to deprive owners of income to facilitate acquisition of restaurant).

26. *See, e.g., In re Grand Jury Proceedings (Pavlick)*, 680 F.2d 1026, 1028-1029 (5th Cir. 1982) (identity of client paying legal fees of another falls within the crime-fraud exception where such payment is being made under agreement that is part of ongoing criminal conspiracy). *See generally* Stuart, *Child Abuse Reporting: A Challenge to Attorney-Client Confidentiality*, 1 *Geo. J. Legal Ethics* 243, 253 (1987) ("The crime of child abuse is both a continuing and a future crime, as well as a past crime").

27. *State v. Phelps*, 24 Or. App. 329, 545 P.2d 901, 903 (1976) (future crime exception applicable where defendant

The exception removes from the privilege only communications that relate to the crime or fraud, not all prior communications between the lawyer and client.<sup>28</sup>

The exception applies even where the plan for the future crime or fraud originated with the attorney,<sup>29</sup> although under the better view the client must ultimately know and share the purpose of the wrongful conduct.<sup>30</sup> Contemporaneous illegal conduct involving the client and attorney such as joint use of drugs does not by itself establish that the attorney-client communications were for the purposes of committing an ongoing crime or fraud.<sup>31</sup>

### **Establishing the crime-fraud exception**

The party seeking production of the allegedly privileged material has the burden of proving that the exception applies.<sup>32</sup> Although some courts once required the exception to be proved by “independent evidence,”<sup>33</sup> the Supreme Court held in *United States v. Zolin* that the allegedly privileged material can be examined and considered by the trial judge *in camera*.<sup>34</sup> Thus a

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told first attorney he intended to call witnesses to fabricate defense claiming that someone else was driving; on receiving assurances that perjured testimony would not be used, attorney withdrew; defendant retained another attorney who successfully defended by using false testimony; client was subsequently prosecuted for perjury; held, testimony of the first attorney is admissible at the perjury trial).

28. *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 90 F.R.D. 21, 30 (N.D. Ill. 1980) (“the ongoing fraud exception lifts the attorney-client privilege only with respect to documents relevant to the fraudulent conduct”).

29. *See White v. American Airlines, Inc.*, 915 F.2d 1414, 1423-1424 (10th Cir. 1990) (in preparing employee for deposition, corporate attorney advised him to “forget” certain information; such advice is within exception); *In re A. H. Robins Co., Inc.*, 107 F.R.D. 2, 9-15 (D. Kan. 1985) (corporation and counsel allegedly conspired to conceal dangerous defects in IUD manufactured by client).

30. Some courts apply what might be more aptly viewed as an “attorney misconduct” exception, where the privilege is vitiated even where the unlawful intent is solely that of the attorney. *See, e.g., In re Impounded Case (Law Firm)*, 879 F.2d 1211, 1213-1214 (3d Cir. 1989) (exception applies to defeat privilege, even where “pertinent alleged criminality is solely that of the law firm”; court finds no interest served by permitting attorney to assert “an innocent client’s privilege with respect to documents tending to show criminal activity by the lawyer”).

31. *United States v. Fortna*, 796 F.2d 724, 729-731 (5th Cir. 1986) (use of cocaine by attorney with client does not establish that communications were in furtherance of illegal activities), *cert. denied*, 479 U.S. 950.

32. *In re Chevron Corp.*, 633 F.3d 153, 166-167 (3d Cir. 2011) (party asserting crime-fraud exception must make prima facie showing that client was committing fraud or crime or intended to, and attorney-client communications were in furtherance of alleged crime or fraud).

33. *See, e.g., United States v. Shewfelt*, 455 F.2d 836, 840 (9th Cir. 1972), *cert. denied*, 406 U.S. 944.

34. *United States v. Zolin*, 491 U.S. 554, 566-568 (1989) (FRE 104(a), which generally bars consideration of privileged evidence when court makes preliminary findings, does not prevent *in camera* review; until applicability

communication can be found within the exception based on the content of the communication itself.<sup>35</sup> Indeed, modern cases hold that a trial court must conduct *in camera* review of otherwise privileged documents before deciding which ones should be produced under the crime-fraud exception.<sup>36</sup>

## Factual basis

Review of the allegedly privileged material is available, however, only after the party seeking the evidence has shown 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.”<sup>37</sup> In making the threshold showing necessary for *in camera* review, a party may offer any relevant evidence that has been “lawfully obtained” and that has not already been adjudicated to be privileged.<sup>38</sup>

The necessary threshold showing for *in camera* review may be made *ex parte*,<sup>39</sup> but may also be made in an adversarial proceeding.<sup>40</sup> The court may defer *in camera* review until additional

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of crime-fraud exception is resolved, there is “no basis” for regarding the contested evidence as privileged).

35. See *In re Grand Jury Investigation*, 810 F.3d 1110, 1113 (9th Cir. 2016) (trial courts may find a prima facie case of crime-fraud “either by examining privileged material *in camera* or by examining independent, non-privileged evidence”). Although *Zolin* clearly approves *in camera* review of documents, it is less clear whether the trial judge may require the attorney or client to testify on the record to the substance of communications between them in this context, even during *in camera* proceedings. Doing so would create evidence of the substance of the communication that did not exist before although the difficulty might be handled by sealing the record in the event the privilege claim is ultimately sustained and barring use of what is disclosed. See *In re Grand Jury Subpoena*, 745 F.3d 681, 688-689 (3d Cir. 2014) (*Zolin* standard applies to *in camera* oral examination of attorney notwithstanding danger of inaccuracy in “probing the memory of an attorney regarding past communications” because “would-be criminals could use the differing standards to avoid proper application of the crime-fraud exception” if a heightened standard applied to communications “never chronicled”).

36. See, e.g., *In re Grand Jury Investigation*, 810 F.3d 1110, 1114 (9th Cir. 2016) (remanding for *in camera* review to determine which communications were made in furtherance of intended illegality; agreeing with sister circuits mandating *in camera* review to determine the proper scope of a crime-fraud production order).

37. *Zolin*, *supra* note 34, at 572 (quoting *Caldwell v. District Court*, 644 P.2d 26, 33 (Colo. 1982)). See also *United States v. Gorski*, 807 F.3d 451, 460 n.3 (1st Cir. 2015) (standard for *in camera* review is “very relaxed” and requires lesser showing than that needed ultimately to pierce privilege).

38. *Zolin*, *supra* note 34, at 575.

39. *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 96-97 (3d Cir. 1992) (for *in camera* inspection, trial court has discretion “to consider only the presentation made by the party challenging the privilege”).

40. *United States v. Boender*, 649 F.3d 650 (7th Cir. 2011) (*Zolin* did not mandate exclusion of one or both parties from the *in camera* review of potentially privileged evidence; trial court has discretion to allow adversarial hearing

evidence in support of the crime-fraud exception is produced, and the decision whether to undertake *in camera* review is discretionary with the trial court.<sup>41</sup>

A judicial decision to conduct *in camera* review is less of an intrusion on the attorney-client privilege than ultimate recognition of the crime-fraud exception. For this reason, courts sometimes allow *ex parte* determination of the crime-fraud exception in grand jury proceedings.<sup>42</sup> However, prior to trial or other public disclosure of privileged material based on recognition of the crime-fraud exception, the party invoking the privilege should normally be allowed to be heard.<sup>43</sup> Moreover, steps should be taken to preserve the confidentiality of the material until all avenues of appeal are exhausted.<sup>44</sup>

## Quantum of evidence

A question not answered by *Zolin* is the quantum of evidence ultimately required to vitiate the privilege on grounds of crime or fraud.<sup>45</sup> The traditional rule is that the party seeking the evidence must make only a *prima facie* showing of the applicability of the exception.<sup>46</sup> Courts have

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on whether crime-fraud exception applies).

41. *Zolin*, *supra* note 34, at 572 (court should consider facts and circumstances, including volume of materials to be reviewed, the relative importance of the alleged privileged information, and “the likelihood that the evidence produced through *in camera* review, together with other available evidence then before the court, will establish that the crime-fraud exception does apply”).

42. *See, e.g.*, *In re Grand Jury Subpoena*, 745 F.3d 681, 690 (3d Cir. 2014) (district court did not abuse discretion in excluding intervenors from *in camera* interview of attorney to determine application of crime-fraud exception in grand jury proceedings); *In re Grand Jury Subpoenas*, 144 F.3d 653, 660-661 (10th Cir. 1998) (showing of foundation for crime-fraud exception can be made *ex parte* and court is not required to conduct “minihearing” or allow rebuttal evidence).

43. *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 96-97 (3d Cir. 1992) (due process requires that party asserting privilege “be given the opportunity to be heard, by evidence and argument, at the hearing seeking an exception to the privilege,” although court notes that a different rule may be appropriate in the grand jury context); *United States v. Under Seal (In re Grand Jury Proceedings)*, 33 F.3d 342, 352 (4th Cir. 1994) (crime-fraud exception contemplates possibility that “party asserting the privilege may respond with evidence to explain why vitiating party’s evidence is not persuasive”).

44. *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 97 (3d Cir. 1992) (after crime-fraud exception is found to apply, allegedly privileged matter should “be kept under seal or appropriate court-imposed privacy procedures until all avenues of appeal are exhausted”).

45. 491 U.S. at 563 (“[W]e need not decide the quantum of proof necessary ultimately to establish the applicability of the crime-fraud exception.”).

46. *See Clark v. United States*, 289 U.S. 1, 14 (1933); *In re Grand Jury Proceedings*, 802 F.3d 57, 65-66 (1st Cir. 2015) (requiring a *prima facie* showing).

generally held the required showing to be satisfied by evidence sufficient to support a finding of wrongdoing<sup>47</sup> although other formulations have also been articulated.<sup>48</sup> The prima facie standard originated in cases where the exception was established by independent evidence without *in camera* inspection of the contested material. In cases where that material has been examined *in camera* by the trial judge, a preponderance standard should normally be imposed, at least in cases where the crime or fraud, if any exists, is likely to be revealed by the documents or communications themselves.<sup>49</sup> Courts are increasingly recognizing, at least in civil cases, that the party seeking to preserve the privilege should be allowed to respond.<sup>50</sup>

### **Relationship with other doctrines**

The crime-fraud exception to the attorney-client privilege has a complex relationship with other legal doctrines. There is also an exception to the attorney's ethical duty of confidentiality that covers at least some future crimes or frauds.<sup>51</sup> Each exception has an independent sphere of operation.<sup>52</sup> If the client's communication fits the exception to the privilege, the attorney can be

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47. *In re Grand Jury Subpoena*, 419 F.3d 329, 336-337 (5th Cir. 2005) (for prima facie showing, party invoking exception must produce evidence that "will suffice until contradicted and overcome by other evidence," meaning enough to support a finding if contrary evidence is disregarded; allegations in pleading insufficient); *United States v. Gorski*, 807 F.3d 451, 459 (1st Cir. 2015) (requiring a prima facie showing to remove privilege, which can be met by something less than a "more likely than not" standard; reasonable basis sufficient).

48. *United States v. Davis*, 1 F.3d 606, 610 (7th Cir. 1993) (all that is needed is something "to give color to the charge" of crime or fraud, and "[w]hether pale or rich or vivid, there is indubitably color here"); *In re Grand Jury Subpoenas*, 144 F.3d 653, 660 (10th Cir. 1998) (reviewing standards adopted by various courts).

49. *In re Napster, Inc. Copyright Litig.*, 479 F.3d 1078 (9th Cir. 2007) (where court has examined allegedly privileged documents, information seeker has burden of establishing crime-fraud exception by preponderance of evidence, not merely by prima facie standard; privilege holder has right to introduce countervailing evidence).

50. *United States v. BDO Seidman, LLP*, 492 F.3d 806, 818 (7th Cir. 2007) (information seeker has initial burden of production to show that exception has foundation in fact; burden then shifts to privilege claimant to provide explanation).

51. Compare ABA Model Rule of Professional Conduct 1.6(b) (lawyer may reveal confidential information "to the extent the lawyer reasonably believes necessary" (1) "to prevent reasonably certain death or substantial bodily harm" (2) "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another") with ABA Model Code of Professional Responsibility DR 4-101(C) (lawyer may reveal "intention of his client to commit a crime and the information necessary to prevent the crime").

52. See generally Fried, *Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds*, 64 N.C. L. Rev. 443, 490 (1986) (finding "a profound theoretical tension between the view of the attorney-client relationship implicit in the modern law of privilege and the view of the relationship

compelled to make judicial disclosure of the communication, but the ethical duty may continue to forbid disclosure to others.<sup>53</sup>

Helping a client in an unlawful scheme may make the attorney liable as an accessory.<sup>54</sup> The lawyer may also have civil liability for providing legal assistance to client conduct that is fraudulent or otherwise unlawful.<sup>55</sup> An attorney could also face civil liability for failure to disclose certain types of unlawful conduct by a client to regulatory authorities.<sup>56</sup> She might conceivably face liability for failing to warn prospective victims if the client makes credible threats of assault or destruction, although the only prominent authority that points in this direction is a famous California case imposing liability in the very different setting of psychiatric counseling.<sup>57</sup>

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that underlies the ethical duty of confidentiality”).

53. *See* Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 *Iowa L. Rev.* 1091 (1985); Callan & David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System*, 29 *Rutgers L. Rev.* 332, 362-365 (1976).

54. *Matter of Aloï*, 141 A.D.2d 270, 534 N.Y.S.2d 49 (1988) (attorney convicted of being an accessory after the fact for knowingly assisting client to avoid apprehension); *State ex rel. Oklahoma Bar Assn. v. Harlton*, 669 P.2d 774, 777 (Okla. 1983) (attorney convicted as accessory and suspended from bar for concealing gun on behalf of client).

55. *See, e.g., Meyerhofer v. Empire Fire & Marine Ins. Co.*, 497 F.2d 1190, 1192-1193 (2d Cir. 1974) (attorney sued along with client for securities violations), *cert. denied*, 419 U.S. 998.

56. *See generally* Myers, *The Attorney-Client Relationship and the Code of Professional Responsibility: Suggested Attorney Liability for Breach of Duty to Disclose Fraud to the Securities and Exchange Commission*, 44 *Fordham L. Rev.* 1113, 1138-1142 (1976).

57. *Tarasoff v. Regents of Univ. of California*, 131 Cal. Rptr. 14, 17 Cal. 3d 425, 450, 551 P.2d 334, 353 (1976) (upholding cause of action against psychotherapists who failed to warn potential murder victim of threats made by a patient). *But see* Restatement (Third) of the Law Governing Lawyers §56 (lawyer subject to liability to a client or nonclient “when a nonlawyer would be in similar circumstances”).