**6.7: Exceptions to Privilege & Work Product**

*Hush hush, keep it down now, voices carry.*[[1]](#footnote-0)

*Listen, do you want to know a secret? Do you promise not to tell? Closer. Let me whisper in your ear, say the words you long to hear.*[[2]](#footnote-1)

While the attorney-client privilege and work product doctrine provide strong protection against discovery of the communications and documents they protect, they are both subject to waiver and other exceptions.

The attorney-client privilege belongs to the client, and can be waived by the client. Obviously, a client can intentionally waive the attorney-client privilege. But it is less clear whether a client can unintentionally waive the attorney-client privilege, and if so, when an unintentional waiver will be effective. And it is even less clear whether an attorney or third-party can unintentionally waive the attorney-client privilege.

Typically, a client’s intentional disclosure of a privileged communication to an non-privileged third-party constitutes a waiver of the attorney-client privilege, even if the client didn’t intend to waive the privilege. But what if the client unintentionally disclosed the communication? For example, what if the client misplaced a copy of a privileged communication and a non-privileged third-party found it? Or what if the client disclosed a privileged communication to a non-privileged third-party, under the mistaken belief that the third-party was privileged?

In theory, an attorney cannot waive the attorney-client privilege. But it is unclear whether communications intentionally or unintentionally disclosed to a third-party by an attorney retain the privilege. For example, what if an attorney inadvertently produces a privileged document? Or what if an attorney intentionally discloses a privileged communication to the public? Likewise, it is unclear whether communications obtained and disclosed by a third-party retain the privilege.

In most jurisdictions, inadvertent disclosure does not necessarily destroy the privilege. Specifically, if an attorney inadvertently produces a privileged document, opposing counsel must return or destroy the document, and may not read or otherwise use the document. And even an intentional disclosure by an attorney will not necessarily destroy the privilege. But in some jurisdictions, inadvertent disclosure may destroy the privilege. And if a privileged communication becomes generally known, at some point the privilege is probably constructively waived, irrespective of how the waiver occurred.

In addition, the attorney-client privilege and work product doctrine are subject to the crime-fraud exception, which provides that communications and documents in furtherance of a crime or fraud are not protected. The privilege applies to confidential attorney-client communications about a crime or fraud that has already occurred, in order to enable clients to obtain candid legal advice. But the privilege does not apply to communications in furtherance of a future crime or fraud.

The work product doctrine may be subject to an even broader exception for “attorney misconduct,” which provides that documents are not protected if they are the product of improper behavior on the part of the attorney.

[**Federal Rule of Civil Procedure Rule 26(b): Duty to Disclose**](https://www.law.cornell.edu/rules/frcp/rule_26)

1. Claiming Privilege or Protecting Trial-Preparation Materials.
   1. Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:
      1. expressly make the claim; and
      2. describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.
   2. Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

[**Federal Rule of Evidence 502: Attorney-Client Privilege and Work Product; Limitations on Waiver**](https://www.law.cornell.edu/rules/fre/rule_502)

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

1. Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver. When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:
   1. the waiver is intentional;
   2. the disclosed and undisclosed communications or information concern the same subject matter; and
   3. they ought in fairness to be considered together.
2. Inadvertent Disclosure. When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:
   1. the disclosure is inadvertent;
   2. the holder of the privilege or protection took reasonable steps to prevent disclosure; and
   3. the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).
3. Disclosure Made in a State Proceeding. When the disclosure is made in a state proceeding and is not the subject of a state-court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure:
   1. would not be a waiver under this rule if it had been made in a federal proceeding; or
   2. is not a waiver under the law of the state where the disclosure occurred.
4. Controlling Effect of a Court Order. A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court - in which event the disclosure is also not a waiver in any other federal or state proceeding.
5. Controlling Effect of a Party Agreement. An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.
6. Controlling Effect of This Rule. Notwithstanding Rules 101 and 1101, this rule applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.
7. Definitions. In this rule:
   1. “attorney-client privilege” means the protection that applicable law provides for confidential attorney-client communications; and
   2. “work-product protection” means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

**Inadvertent Waiver**

[***In re Sealed Case*, 877 F. 2d 976 (D.C. Cir. 1989)**](https://scholar.google.com/scholar_case?case=6850301649750482175)

Summary: The IRS investigated a company for tax evasion and subpoenaed documents relevant to the investigation. The company refused to produce certain documents, claiming attorney-client privilege. The government conceded that the attorney-client privilege applied to the documents, but argued that it had been waived. The district court found that the privilege was waived with respect to all of the documents, because they were disclosed to third-parties. The circuit court found that the privilege had been waived for some of the documents, but possibly not all of them.

SILBERMAN, Circuit Judge:

The appellant, “Company,” appeals from a contempt order of the district court. Company refused to comply with a grand jury subpoena insofar as it was directed to six documents that Company claimed were covered by attorney-client privilege. The district court held the privilege was waived as to all six documents. We agree that there was at least a partial waiver of the privilege, but we remand for the district court to further consider the scope of the waiver.

I.

Appellant is a government contractor performing work for the Defense Department on a cost-plus basis. Company and its former chief executive officer are under a grand jury investigation into the possibility of Company’s tax evasion as well as a possible conspiracy to defraud the United States. It is thought CEO may have engineered a scheme whereby he received secret rebates (undeclared personal income to him) from subcontractors while the amounts rebated were included on Company’s books as payments to the subcontractors and thus business expenses.

The grand jury issued a subpoena in June 1988 to Company seeking production of documents relating to certain adjusting entries made to Company's books in the latter part of 1987. Company produced the documents sought, except for six it claimed were protected by the attorney-client privilege. Three of these documents contain notes taken by Company’s former vice president for finance at meetings with attorneys from a law firm retained by Company. The other three are memoranda from that vice president to Company's chief accounting officer transmitting the law firm's legal advice to amend the corporate books to reflect that certain amounts previously reported on its books — and to the IRS — as business expenses be shown as nondeductible income payments to CEO.

The government moved to compel production of all six documents, arguing that the privilege was waived since the documents presumably contained only information that had been or would eventually be reported to the IRS. The district court granted the order, concluding “whatever attorney-client privilege that may have attached to the documents was waived by the filing (or the intention to file) of required forms to the IRS.” Company refused to comply, was held in contempt, and thereafter brought an appeal.

While the appeal was pending, the government learned that one of the memoranda in question had already been disclosed, in January 1988, by the CAO to the Defense Contract Audit Agency during a routine audit of the contractor's travel expenses. The government sought and gained a remand to permit the district court to consider this additional ground for the government's claim of waiver. Appellant claimed on remand that the disclosure of the one document to the DCAA had been inadvertent (“a bureaucratic error”) and offered to prove that through the testimony of its CAO, but only if his testimony were limited to that issue and his Fifth Amendment privilege were not waived. The district court rejected the proffer, reiterated its prior finding that if the privilege existed, it had been waived because the information in the documents was to be publicly reported, and further found that the disclosure of the one document “was a voluntary intentional disclosure” which “constituted a further waiver of the attorney-client privilege not only with respect to the particular document but also as to all related communications.” The district court believed that had the disclosure to DCAA been inadvertent rather than intentional, it would have constituted a waiver (if that were the sole grounds for finding a waiver) only with respect to that document and not the other five.

Prior to the remand hearing it was further revealed that the vice president had entered into a personal immunity agreement with the government in October 1987 and, at that time, given all six of the documents to the government without Company’s authorization. From that, we infer the government continues to seek the documents through subpoena because it is uncertain as to the use that can be made of the copies voluntarily turned over by the vice president. The government asserts that the attorney handling the grand jury proceedings has not been given access to the documents. Nevertheless, Company urged the district court, in the exercise of its supervisory power over grand jury proceedings, to conduct an evidentiary hearing to determine whether the government had engaged in misconduct, which Company apparently thought might justify quashing the subpoena. The district court declined to do so and Company appeals that determination as well.

II.

The government does not dispute that all six documents fall within Company’s attorney-client privilege. It is not argued, for instance, that the memoranda from the vice president to the CAO, communicating the advice given by counsel and directing the adjusting entries be made in accordance with that advice, are outside the privilege. Nor is it claimed that the conversation between the corporate officers and the law firm were not intended to be confidential so that the privilege never attached. Instead, the government relies on two grounds for concluding Company waived the privilege for all six documents.

The government first claims that because the documents provide background “detail” supporting the adjusting bookkeeping entries that have been reported to the IRS, Company has waived its privilege in the documents. The government relies on several cases that have addressed the status of the attorney-client privilege in cases involving disclosure of financial information to the IRS or other third parties. In *United States v. Cote*, the Eighth Circuit held that the act of filing amended IRS returns waived any attorney-client privilege in an attorney-supervised accountant's workpapers, which contained information later transcribed onto the returns. But the Court remanded to the district court to determine whether any of the workpapers contained “unpublished expressions” not part of the data revealed on the tax returns. The Court also recognized that in tax cases, waiver typically is not an issue, because “the privilege is said not to attach to information which the taxpayer intends his attorney to report in the contents of a tax return.”

In that vein, *United States v. (Under Seal)* held that the privilege did not cover documents, including communications between two attorneys relating to a proposed tax ruling for a client, and material supplied by the client concerning commercial transactions upon which the proposed tax ruling would be based. These documents, according to the court, either did not reveal client communications or were not meant to be confidential. The court thus applied its previous holding in *In re Grand Jury Proceedings* that “if a client communicates information to his attorney with the understanding that the information will be revealed to others, that information, as well as the details underlying the data which was to be published, will not enjoy the privilege.” Apparently recognizing the aphorism that “God is in the details,” the court explained in a footnote:

The details underlying the published data are the communications relating the data, the document, if any, to be published containing the data, all preliminary drafts of the document, and any attorney’s notes containing material necessary to the preparation of the documents. Copies of other documents, the contents of which were necessary to the preparation of the published document, will also lose the privilege. But if any of the non-privileged documents contain client communications not directly related to the published data, those communications, if otherwise privileged, must be removed by the reviewing court before the document may be produced.

Although these cases seem to conflate two theories — waiver of an existing privilege and absence of an intent to maintain confidentiality in the first place — we think under either theory the IRS cases are inapposite; the government much too facilely claims that the six documents are merely “details” underlying past or future returns. To be sure, virtually all the material in the documents reflects adjusting entries in Company's books, which have been or will be reported to the IRS.[[3]](#footnote-2) But the crucial significance of the documents — and the apparent reason the government wishes to present them to the grand jury — is that they suggest Company made the adjusting entries on the advice of counsel (after the investigation commenced).

The raison d’etre of the hallowed attorney-client privilege is the protection of a client’s communications to counsel so that persons, including organizations, will be induced to consult counsel when needed. The attorney’s communications (his advice) to the client must also be protected, because otherwise it is rather easy to deduce the client's communications to counsel. The documents sought in this case reveal directly the attorney’s confidential advice, and their disclosure thereby invades the core of the privilege; it permits an inference to be drawn as to the nature of the client's communications with its lawyers, and, perhaps, as to their motivation (e.g., guilty knowledge) for consulting counsel as well.

Even the very existence of an attorney-client relationship, not normally protected, is privileged in the rare case when a “strong possibility exists that disclosure of the information would implicate the client in the very matter for which legal advice was sought in the first case.” We therefore do not think that any portion of the six documents revealing that the adjusting entries were made on the advice of counsel would be disclosable under the government’s primary theory of waiver.

Alternatively, however, the government relies on a waiver caused by the disclosure of one memo to a DCAA auditor, and we think the government is, in this respect, on firmer ground. It will be recalled that Company does not dispute the disclosure but denies its voluntariness, claiming it was inadvertent — “a bureaucratic error.” The district court found otherwise, but we do not think it matters whether the waiver is labeled “voluntary” or “inadvertent” and thus do not find it necessary to consider appellant's claim that the CAO should have been permitted to offer limited testimony on this issue only.

Although the attorney-client privilege is of ancient lineage and continuing importance, the confidentiality of communications covered by the privilege must be jealously guarded by the holder of the privilege lest it be waived. The courts will grant no greater protection to those who assert the privilege than their own precautions warrant. We therefore agree with those courts which have held that the privilege is lost “even if the disclosure is inadvertent.”

Even assuming Company’s disclosure was due to “bureaucratic error,” which we take to be a euphemism that necessarily implies human error, that unfortunate lapse simply reveals that someone in the company and thereby Company itself (since it can only act through its employees) was careless with the confidentiality of its privileged communications. Normally the amount of care taken to ensure confidentiality reflects the importance of that confidentiality to the holder of the privilege. To hold, as we do, that an inadvertent disclosure will waive the privilege imposes a self-governing restraint on the freedom with which organizations such as corporations, unions, and the like label documents related to communications with counsel as privileged. To readily do so creates a greater risk of “inadvertent” disclosure by someone and thereby the danger that the “waiver” will extend to all related matters, perhaps causing grave injury to the organization. But that is as it should be. Otherwise, there is a temptation to seek artificially to expand the content of privileged matter. In other words, if a client wishes to preserve the privilege, it must treat the confidentiality of attorney-client communications like jewels — if not crown jewels. Short of court-compelled disclosure or other equally extraordinary circumstances,[[4]](#footnote-3) we will not distinguish between various degrees of “voluntariness” in waivers of the attorney-client privilege.

Our conclusion that Company’s disclosure of the one memorandum constitutes a waiver still leaves a question as to the scope of the waiver. Appellant would confine the waiver to the one document, but, as we have previously said, a waiver of the privilege in an attorney-client communication extends “to all other communications relating to the same subject matter.” Since such determinations properly depend heavily on the factual context in which the privilege is asserted, we will not disturb a district court’s decision as to the question unless it can be shown the court abused its discretion. In this case, although the district court extended the waiver to all six documents, it did not fully explain why the communications were related. Of course, all six — including the notes of the meeting — stemmed from the same consultation Company had with its law firm. But the “subject matter” of the waiver could, nevertheless, be defined in a number of different ways. Did the district court mean, for instance, to define the “subject matter” as all communications “relating” to the adjustment entries, which — as suggested at oral argument — would permit the individual lawyers and corporate officers present at the meeting to be called before the grand jury to describe their discussions, or perhaps even other communications between Company and its counsel? Or, alternatively, was the waiver limited to those intra-Company communications revealing that Company’s accounting adjustments were made upon the advice of counsel, in which case is it not clear whether the actual notes of the meeting must be disclosed? Given the potential implications of a broad definition of the subject matter of Company’s waiver, we think it appropriate to remand to the district court for further consideration of that issue.

**Further Reading:**

* [Shawn T. Gaither, *The Attorney-Client Privilege: An Analysis of Involuntary Waiver*, 48 Clev. St. L. Rev. 311 (2000)](https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1442&context=clevstlrev)

**The Crime-Fraud Exception**

[***Clark v. United States*, 289 U.S. 1 (1933)**](https://scholar.google.com/scholar_case?case=3772262946627575543)

MR. JUSTICE CARDOZO delivered the opinion of the Court.

There is a privilege protecting communications between attorney and client. The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told. There are early cases apparently to the effect that a mere charge of illegality, not supported by any evidence, will set the confidences free. But this conception of the privilege is without support in later rulings. “It is obvious that it would be absurd to say that the privilege could be got rid of merely by making a charge of fraud.” To drive the privilege away, there must be “something to give colour to the charge;” there must be “prima facie evidence that it has some foundation in fact.” When that evidence is supplied, the seal of secrecy is broken. Nor does the loss of the privilege depend upon the showing of a conspiracy, upon proof that client and attorney are involved in equal guilt. The attorney may be innocent, and still the guilty client must let the truth come out.



Mary Sue & L. Ron Hubbard (~1970)

[***United States v. Zolin*, 491 U.S. 554 (1989)**](https://scholar.google.com/scholar_case?case=11679144390139303000)

**Summary:** In a case against the Church of Scientology (Church), the IRS sought to introduce into evidence tape recordings of meetings between representatives of the Church and its attorney. The IRS claimed that the tapes fell within the crime-fraud exception to the attorney-client privilege and asked the district court to listen to the tapes in camera to determine if the privilege applied. The IRS attempted to provide the court with partial transcripts of the tape recordings that it acquired from a confidential source so that the court could make its determination. The district court refused to listen to the tapes and the court of appeals affirmed by categorically refusing to listen to the tapes or read the transcripts. The IRS appealed.

JUSTICE BLACKMUN delivered the opinion of the Court.

This case arises out of the efforts of the Criminal Investigation Division of the Internal Revenue Service to investigate the tax returns of L. Ron Hubbard, founder of the Church of Scientology for the calendar years 1979 through 1983. We granted certiorari to consider two issues that have divided the Courts of Appeals. The first is whether, when a district court enforces an IRS summons, the court may condition its enforcement order by placing restrictions on the disclosure of the summoned information. The Court of Appeals in this case upheld the restrictions. We affirm its judgment on that issue by an equally divided Court.

The second issue concerns the testimonial privilege for attorney-client communications and, more particularly, the generally recognized exception to that privilege for communications in furtherance of future illegal conduct — the so-called “crime-fraud” exception. The specific question presented is whether the applicability of the crime-fraud exception must be established by “independent evidence” (*i.e.*, without reference to the content of the contested communications themselves), or, alternatively, whether the applicability of that exception can be resolved by an *in camera* inspection of the allegedly privileged material. We reject the “independent evidence” approach and hold that the district court, under circumstances we explore below, and at the behest of the party opposing the claim of privilege, may conduct an *in camera* review of the materials in question. Because the Court of Appeals considered only “independent evidence,” we vacate its judgment on this issue and remand the case for further proceedings.

I

In the course of its investigation, the IRS sought access to 51 documents that had been filed with the Clerk of the Los Angeles County Superior Court in connection with a case entitled *Church of Scientology of California v. Armstrong*. The *Armstrong* litigation involved, among other things, a charge by the Church that one of its former members, Gerald Armstrong, had obtained by unlawful means documentary materials relating to Church activities, including two tapes. Some of the documents sought by the IRS had been filed under seal.

The IRS, by its Special Agent Steven Petersell, served a summons upon the Clerk on October 24, 1984, demanding that he produce the 51 documents. The tapes were among those listed. On November 21, IRS agents were permitted to inspect and copy some of the summoned materials, including the tapes.

On November 27, the Church and Mary Sue Hubbard, who had intervened in *Armstrong*, secured a temporary restraining order from the United States District Court for the Central District of California. The order required the IRS to file with the District Court all materials acquired on November 21 and all reproductions and notes related thereto, pending disposition of the intervenors’ motion for a preliminary injunction to bar IRS use of these materials. By order dated December 10, the District Court returned to the IRS all materials except the tapes and the IRS’ notes reflecting their contents.

On January 18, 1985, the IRS filed in the District Court a petition to enforce its summons. In addition to the tapes, the IRS sought 12 sealed documents the Clerk had refused to produce in response to the IRS summons. The Church and Mary Sue Hubbard intervened to oppose production of the tapes and the sealed documents. Respondents claimed that IRS was not seeking the documents in good faith, and objected on grounds of lack of relevance and attorney-client privilege.

Respondents asserted the privilege as a bar to disclosure of the tapes. The IRS argued, among other things, however, that the tapes fell within the crime-fraud exception to the attorney-client privilege, and urged the District Court to listen to the tapes in the course of making its privilege determination. In addition, the IRS submitted to the court two declarations by Agent Petersell. In the first, Petersell stated his grounds for believing that the tapes were relevant to the investigation. In the second, Petersell offered a description of the tapes’ contents, based on information he received during several interviews. Appended to this declaration — over respondents’ objection — were partial transcripts of the tapes, which the IRS lawfully had obtained from a confidential source.[[5]](#footnote-4) In subsequent briefing, the IRS reiterated its request that the District Court listen to the tapes in camera before making its privilege ruling.

After oral argument and an evidentiary hearing, the District Court rejected respondents’ claim of bad faith. The court ordered production of 5 of the 12 documents and specified: “The documents delivered hereunder shall not be delivered to any other government agency by the IRS unless criminal tax prosecution is sought or an Order of Court is obtained.”

Turning to the tapes, the District Court ruled that respondents had demonstrated that they contain confidential attorney-client communications, that the privilege had not been waived, and that “the ‘fraud-crime’ exception to the attorney-client privilege does not apply. The quoted excerpts tend to show or admit past fraud but there is no clear indication that future fraud or crime is being planned.” On this basis, the court held that the Clerk “need not produce its copy of the tapes pursuant to the summons.” The District Court denied the IRS’ motion for reconsideration, rejecting the IRS’ renewed request that the court listen to the tapes in toto. “While this was at one time discussed with counsel, thereafter Mr. Petersell’s declaration was submitted, and no one suggested that this was an inadequate basis on which to determine the attorney-client privilege question.”

Respondents appealed to the Court of Appeals for the Ninth Circuit, and the IRS cross-appealed on two relevant grounds. First, the IRS claimed that the District Court abused its discretion by placing conditions on the IRS’ future use of the subpoenaed information. The Court of Appeals disagreed, holding: “A district court may, when appropriate, condition enforcement of a summons on the IRS’ agreeing to abide by disclosure restrictions.”

Second, the IRS contended that the District Court erred in rejecting the application of the crime-fraud exception to the tapes. In particular, the IRS argued that the District Court incorrectly held that the IRS had abandoned its request for in camera review of the tapes, and that the court should have listened to the tapes before ruling that the crime-fraud exception was inapplicable. Respondents contended, in contrast, that the District Court erred in the opposite direction: they argued that it was error for the court to rely on the partial transcripts, because “in this Circuit, a party cannot rely on the communications themselves — whether by listening to the tapes or reviewing excerpts or transcripts of them — to bear its burden to invoke the exception but must bear the burden by independent evidence.”

The panel of the Court of Appeals agreed with respondents that, under *Shewfelt*, “the Government’s evidence of crime or fraud must come from sources independent of the attorney-client communications recorded on the tapes,” thereby implicitly holding that even if the IRS had properly preserved its demand for in camera review, the District Court would have been without power to grant it. The Court of Appeals then reviewed “the Government's independent evidence.” That review appears to have excluded the partial transcripts, and thus the Court of Appeals implicitly agreed with respondents that it was improper for the District Court to have considered even the partial transcripts. On the basis of its review of the “independent evidence,” the Court of Appeals affirmed the District Court's determination that the IRS had failed to establish the applicability of the crime-fraud exception.

II

This Court is evenly divided with respect to the issue of the power of a district court to place restrictions upon the dissemination by the IRS of information obtained through a § 7604 subpoena-enforcement action. We therefore affirm the judgment of the Court of Appeals insofar as it upheld the District Court’s conditional-enforcement order.

III

Questions of privilege that arise in the course of the adjudication of federal rights are “governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.” We have recognized the attorney-client privilege under federal law, as “the oldest of the privileges for confidential communications known to the common law.” Although the underlying rationale for the privilege has changed over time, courts long have viewed its central concern as one “to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” That purpose, of course, requires that clients be free to “make full disclosure to their attorneys” of past wrongdoings, in order that the client may obtain “the aid of persons having knowledge of the law and skilled in its practice.”

The attorney-client privilege is not without its costs. “Since the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose.” The attorney-client privilege 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 — “ceases to operate at a certain point, namely, where the desired advice refers not to prior wrongdoing, but to future wrongdoing.” It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the “seal of secrecy,” between lawyer and client does not extend to communications “made for the purpose of getting advice for the commission of a fraud” or crime.

The District Court and the Court of Appeals found that the tapes at issue in this case recorded attorney-client communications and that the privilege had not been waived when the tapes were inadvertently given to Armstrong. These findings are not at issue here. Thus, the remaining obstacle to respondents’ successful assertion of the privilege is the Government’s contention that the recorded attorney-client communications were made in furtherance of a future crime or fraud.

A variety of questions may arise when a party raises the crime-fraud exception. The parties to this case have not been in complete agreement as to which of these questions are presented here. In an effort to clarify the matter, we observe, first, that we need not decide the quantum of proof necessary ultimately to establish the applicability of the crime-fraud exception. Rather, we are concerned here with the type of evidence that may be used to make that ultimate showing. Within that general area of inquiry, the initial question in this case is whether a district court, at the request of the party opposing the privilege, may review the allegedly privileged communications *in camera* to determine whether the crime-fraud exception applies. If such *in camera* review is permitted, the second question we must consider is whether some threshold evidentiary showing is needed before the district court may undertake the requested review. Finally, if a threshold showing is required, we must consider the type of evidence the opposing party may use to meet it: *i.e.*, in this case, whether the partial transcripts the IRS possessed may be used for that purpose.

A

We consider first the question whether a district court may ever honor the request of the party opposing the privilege to conduct an in camera review of allegedly privileged communications to determine whether those communications fall within the crime-fraud exception. We conclude that no express provision of the Federal Rules of Evidence bars such use of in camera review, and that it would be unwise to prohibit it in all instances as a matter of federal common law.

(1)

At first blush, two provisions of the Federal Rules of Evidence would appear to be relevant. Rule 104(a) provides: “Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court. In making its determination it is not bound by the rules of evidence except those with respect to privileges.” Rule 1101(c) provides: “The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.” Taken together, these Rules might be read to establish that in a summons-enforcement proceeding, attorney-client communications cannot be considered by the district court in making its crime-fraud ruling: to do otherwise, under this view, would be to make the crime-fraud determination without due regard to the existence of the privilege.

Even those scholars who support this reading of Rule 104(a) acknowledge that it leads to an absurd result.

Because the judge must honor claims of privilege made during his preliminary fact determinations, many exceptions to the rules of privilege will become “dead letters,” since the preliminary facts that give rise to these exceptions can never be proved. For example, an exception to the attorney-client privilege provides that there is no privilege if the communication was made to enable anyone to commit a crime or fraud. There is virtually no way in which the exception can ever be proved, save by compelling disclosure of the contents of the communication; Rule 104(a) provides that this cannot be done.

We find this Draconian interpretation of Rule 104(a) inconsistent with the Rule’s plain language. The Rule does not provide by its terms that all materials as to which a “claim of privilege” is made must be excluded from consideration. In that critical respect, the language of Rule 104(a) is markedly different from the comparable California evidence rule, which provides that “the presiding officer may not require disclosure of information claimed to be privileged under this division in order to rule on the claim of privilege.” There is no reason to read Rule 104(a) as if its text were identical to that of the California rule.

Nor does it make sense to us to assume, as respondents have throughout this litigation, that once the attorney-client nature of the contested communications is established, those communications must be treated as presumptively privileged for evidentiary purposes until the privilege is “defeated” or “stripped away” by proof that the communications took place in the course of planning future crime or fraud. Although some language in *Clark* might be read as supporting this view, respondents acknowledged at oral argument that no prior holding of this Court requires the imposition of a strict progression of proof in crime-fraud cases.

We see no basis for holding that the tapes in this case must be deemed privileged under Rule 104(a) while the question of crime or fraud remains open. Indeed, respondents concede that “if the proponent of the privilege is able to sustain its burden only by submitting the communications to the court” for *in camera* review, the court is not required to avert its eyes (or close its ears) once it concludes that the communication would be privileged, if the court found the crime-fraud exception inapplicable. Rather, respondents acknowledge that the court may “then consider the same communications to determine if the opponent of the privilege has established that the crime-fraud exception applies.” Were the tapes truly deemed privileged under Rule 104(a) at the moment the trial court concludes they contain potentially privileged attorney-client communications, district courts would be required to draw precisely the counterintuitive distinction that respondents wisely reject. We thus shall not adopt a reading of Rule 104(a) that would treat the contested communications as “privileged” for purposes of the Rule, and we shall not interpret Rule 104(a) as categorically prohibiting the party opposing the privilege on crime-fraud grounds from relying on the results of an in camera review of the communications.

(2)

Having determined that Rule 104(a) does not prohibit the *in camera* review sought by the IRS, we must address the question as a matter of the federal common law of privileges. We conclude that a complete prohibition against opponents’ use of *in camera* review to establish the applicability of the crime-fraud exception is inconsistent with the policies underlying the privilege.

We begin our analysis by recognizing that disclosure of allegedly privileged materials to the district court for purposes of determining the merits of a claim of privilege does not have the legal effect of terminating the privilege. Indeed, this Court has approved the practice of requiring parties who seek to avoid disclosure of documents to make the documents available for in camera inspection, and the practice is well established in the federal courts. Respondents do not dispute this point: they acknowledge that they would have been free to request *in camera* review to establish the fact that the tapes involved attorney-client communications, had they been unable to muster independent evidence to serve that purpose.

Once it is clear that *in camera* review does not destroy the privileged nature of the contested communications, the question of the propriety of that review turns on whether the policies underlying the privilege and its exceptions are better fostered by permitting such review or by prohibiting it. In our view, the costs of imposing an absolute bar to consideration of the communications *in camera* for purpose of establishing the crime-fraud exception are intolerably high.

“No matter how light the burden of proof which confronts the party claiming the exception, there are many blatant abuses of privilege which cannot be substantiated by extrinsic evidence. This is particularly true of situations in which an alleged illegal proposal is made in the context of a relationship which has an apparent legitimate end.” A per se rule that the communications in question may never be considered creates, we feel, too great an impediment to the proper functioning of the adversary process. This view is consistent with current trends in the law.

B

We turn to the question whether in camera review at the behest of the party asserting the crime-fraud exception is always permissible, or, in contrast, whether the party seeking in camera review must make some threshold showing that such review is appropriate. In addressing this question, we attend to the detrimental effect, if any, of in camera review on the policies underlying the privilege and on the orderly administration of justice in our courts. We conclude that some such showing must be made.

Our endorsement of the practice of testing proponents’ privilege claims through *in camera* review of the allegedly privileged documents has not been without reservation. This Court noted that “examination of the evidence, even by the judge alone, in chambers” might in some cases “jeopardize the security which the privilege is meant to protect.” Analogizing to claims of Fifth Amendment privilege, it observed more generally: “Too much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect, while a complete abandonment of judicial control would lead to intolerable abuses.”

The Court recognized that some compromise must be reached. In *Reynolds*, it declined to “go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case.” We think that much the same result is in order here.

A blanket rule allowing *in camera* review as a tool for determining the applicability of the crime-fraud exception, as *Reynolds* suggests, would place the policy of protecting open and legitimate disclosure between attorneys and clients at undue risk. There is also reason to be concerned about the possible due process implications of routine use of *in camera* proceedings. Finally, we cannot ignore the burdens in camera review places upon the district courts, which may well be required to evaluate large evidentiary records without open adversarial guidance by the parties.

There is no reason to permit opponents of the privilege to engage in groundless fishing expeditions, with the district courts as their unwitting (and perhaps unwilling) agents. Courts of Appeals have suggested that *in camera* review is available to evaluate claims of crime or fraud only “when justified” or “in appropriate cases.” Indeed, the Government conceded at oral argument (albeit reluctantly) that a district court would be mistaken if it reviewed documents in camera solely because “the government begged it” to do so, “with no reason to suspect crime or fraud.” We agree.

In fashioning a standard for determining when *in camera* review is appropriate, we begin with the observation that “*in camera* inspection is a smaller intrusion upon the confidentiality of the attorney-client relationship than is public disclosure.” We therefore conclude that a lesser evidentiary showing is needed to trigger in camera review than is required ultimately to overcome the privilege. Ibid. The threshold we set, in other words, need not be a stringent one.

We think that the following standard strikes the correct balance. Before engaging in in camera review 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 by a reasonable person” that in camera review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.

Once that showing is made, the decision whether to engage in *in camera* review rests in the sound discretion of the district court. The court should make that decision in light of the facts and circumstances of the particular case, including, among other things, the volume of materials the district court has been asked to review, the relative importance to the case 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. The district court is also free to defer its *in camera* review if it concludes that additional evidence in support of the crime-fraud exception may be available that is not allegedly privileged, and that production of the additional evidence will not unduly disrupt or delay the proceedings.

C

The question remains as to what kind of evidence a district court may consider in determining whether it has the discretion to undertake an *in camera* review of an allegedly privileged communication at the behest of the party opposing the privilege. Here, the issue is whether the partial transcripts may be used by the IRS in support of its request for *in camera* review of the tapes.

The answer to that question, in the first instance, must be found in Rule 104(a), which establishes that materials that have been determined to be privileged may not be considered in making the preliminary determination of the existence of a privilege. Neither the District Court nor the Court of Appeals made factual findings as to the privileged nature of the partial transcripts, so we cannot determine on this record whether Rule 104(a) would bar their consideration.

Assuming for the moment, however, that no rule of privilege bars the IRS’s use of the partial transcripts, we fail to see what purpose would be served by excluding the transcripts from the District Court’s consideration. There can be little doubt that partial transcripts, or other evidence directly but incompletely reflecting the content of the contested communications, generally will be strong evidence of the subject matter of the communications themselves. Permitting district courts to consider this type of evidence would aid them substantially in rapidly and reliably determining whether *in camera* review is appropriate.

Respondents suggest only one serious countervailing consideration. In their view, a rule that would allow an opponent of the privilege to rely on such material would encourage litigants to elicit confidential information from disaffected employees or others who have access to the information. We think that deterring the aggressive pursuit of relevant information from third-party sources is not sufficiently central to the policies of the attorney-client privilege to require us to adopt the exclusionary rule urged by respondents. We conclude that the party opposing the privilege may use any nonprivileged evidence in support of its request for in camera review, even if its evidence is not “independent” of the contested communications as the Court of Appeals uses that term.[[6]](#footnote-5)

D

In sum, we conclude that a rigid independent evidence requirement does not comport with “reason and experience,” and we decline to adopt it as part of the developing federal common law of evidentiary privileges. We hold that *in camera* review may be used to determine whether allegedly privileged attorney-client communications fall within the crime-fraud exception. We further hold, however, that before a district court may engage in in camera review at the request of the party opposing the privilege, that party must present evidence sufficient to support a reasonable belief that in camera review may yield evidence that establishes the exception’s applicability. Finally, we hold that the threshold showing to obtain *in camera* review may be met by using any relevant evidence, lawfully obtained, that has not been adjudicated to be privileged.

Because the Court of Appeals employed a rigid independent-evidence requirement which categorically excluded the partial transcripts and the tapes themselves from consideration, we vacate its judgment on this issue and remand the case for further proceedings consistent with this opinion. On remand, the Court of Appeals should consider whether the District Court's refusal to listen to the tapes in toto was justified by the manner in which the IRS presented and preserved its request for *in camera* review. In the event the Court of Appeals holds that the IRS’s demand for review was properly preserved, the Court of Appeals should then determine, or remand the case to the District Court to determine in the first instance, whether the IRS has presented a sufficient evidentiary basis for *in camera* review, and whether, if so, it is appropriate for the District Court, in its discretion, to grant such review.



L. Ron Hubbard with audiotape recorders

# [**Blumenthal v. Kimber Mfg., 265 Conn. 1 (2003)**](https://scholar.google.com/scholar_case?case=9274702153686712994)

**Summary:** The Attorney General of Connecticut opened an antitrust investigation and sent Kimber a subpoena. While Kimber produced some documents, it refused to produce one email. Exceptions to the attorney-client privilege should be made only when the reason for disclosure outweighs the potential chilling of essential communications. The burden of proof is on the party seeking to pierce the privilege. The crime fraud exception applies only after a determination by the trial court “that there is probable cause to believe that a crime or fraud has been attempted or committed and that the communication was in furtherance thereof.” Probable cause requires that a prudent person have a reasonable basis to suspect the perpetration or attempted perpetration of a crime or fraud and that the communication was in furtherance thereof.

Katz, J.

The petitioner, Richard Blumenthal, the attorney general of the state of Connecticut, appealsfrom the decision of the trial court denying his application for an order requiring the respondents, Kimber Manufacturing, Inc., a firearms manufacturer with its principal place of business in Yonkers, New York, and Leslie Edelman, Kimber’s president, to comply with the petitioner’s discovery request for a certain document sent from one Kimber employee to an attorney and three other Kimber employees. The petitioner contends that the trial court improperly determined that: (1) the communication was protected by the attorney-client privilege; and (2) the communication was not otherwise subject to disclosure under the crime-fraud exception to that privilege. We conclude that the trial court properly determined that the document was protected by the attorney-client privilege and that the petitioner did not meet his burden of establishing that the crime-fraud exception applies to exclude the document from protection under the privilege. Accordingly, we affirm the decision of the trial court.

The record discloses the following relevant facts. On March 17, 2000, Smith and Wesson Corporation (Smith & Wesson), a firearms manufacturer located in Springfield, Massachusetts, entered into an agreement with representatives of various federal, state and local governmental agencies (agreement). The agreement was an attempt to settle both pending and threatened litigation by these governmental agencies against various firearms manufacturers. The agreement required Smith & Wesson, as well as all other potential signatories to the agreement, to engage in certain practices, opposed by most of the firearms industry, regarding the manufacturing, sale and marketing of firearms. At the time of the proceeding before the trial court, Smith & Wesson was the only firearms manufacturer to have signed the agreement.

On May 2, 2000, based on his suspicion of the respondents' participation in a retaliatory economic boycott against Smith & Wesson, the petitioner issued to the respondents interrogatories and a subpoena duces tecum, pursuant to the petitioner's investigatory authority under General Statutes § 35-42, seeking documents “as to any matter relevant to any alleged violation of the Connecticut Antitrust Act”; and specifically any documents related to Smith & Wesson. On May 31, 2000, the respondents submitted responses, and thereafter submitted supplemental responses on July 20 and December 28, 2000. Unsatisfied with the respondents' disclosure, on March 20, 2001, the petitioner filed with the trial court an application for compliance. Thereafter, the respondents submitted five additional supplemental responses, leading to a total disclosure of approximately 577 pages of documents. After negotiation between the parties as to outstanding documents sought, the hearing on the petitioner's application for compliance was reduced to one issue — a claim of attorney-client privilege on a document sent via electronic mail (e-mail) by Dwight Van Brunt, a Kimber employee, to Edelman, Denis Schusterman, another Kimber employee, and Jerry S. Goldman, an attorney in private practice. The e-mail also was copied to Ryan Busse, another Kimber employee. The e-mail expressly referred to the Smith & Wesson agreement, and the firearms industry's initial reaction to it.

In response to a joint motion for entry of consent order, the trial court directed the respondents to submit the e-mail to the court for an in camera determination of the privilege issue. The parties submitted to the court a joint stipulation of facts, setting forth the factual and procedural background of the matter. At a hearing on the consent order, following a joint request, the trial court sealed the record.

Goldman, one of the parties to whom the e-mail had been sent, appeared as counsel on behalf of the respondents. Goldman represented to the court that, because the agreement arose out of a series of lawsuits that all named John Doe as a defendant in the complaints, potential firearms manufacturer defendants, like Kimber, needed to evaluate the agreement and the firearms industry's reaction to the agreement in order to plan an effective legal strategy of their own. Goldman also provided the court with the corporate titles of each of the e-mail recipients, which identified them as senior Kimber officers. Goldman contended that, because the reactions of others in the firearms industry to the agreement — such as whether to sign similar agreements or litigate — would inform Kimber's legal decision making, Kimber's management needed to keep track of these developments and communicate them to him, as Kimber's counsel.

The petitioner contended that the e-mail was not subject to the attorney-client privilege because it was not marked as confidential and did not request legal advice; rather, according to the petitioner, the subject matter of the e-mail concerned ongoing business developments. The petitioner also contended that the respondents had presented no evidence that litigation had been filed or even threatened against Kimber, nor any evidence of the existence of “John Doe” defendants in such litigation. The petitioner further claimed that, because reference to the e-mail itself did not indicate that it satisfied the requirements of the attorney-client privilege, and because the respondents did not produce any evidence beyond the e-mail and the stipulated facts, the respondents had failed to satisfy their burden of proof to invoke the privilege. Furthermore, the petitioner argued that, even if the trial court were to infer that the e-mail had been a request for legal advice, and therefore privileged, it would be subject to disclosure under the crime-fraud exception to the privilege.

On September 10, 2001, the same day as the consent order hearing, the trial court issued an order stating that the e-mail was subject to a valid claim of attorney-client privilege. On January 30, 2002, in response to the petitioner's motion for articulation, the trial court issued a memorandum of decision setting forth the reasons for its decision. Specifically, the trial court set forth and applied the four part test that we articulated in *Shew v. Freedom of Information Commission,* for determining whether the attorney-client privilege applies to protect communications between corporate employees and attorneys retained by the corporation. The court determined that, under the test, the e-mail qualified for protection from disclosure. Additionally, the court concluded that the crime-fraud exception did not apply because the e-mail “is a patent update of firearms litigation developments and does not advocate any criminal or illegal activity.” This appeal followed.

I

We turn to the petitioner’s claim that, even if we were to assume that the privilege generally applied, the trial court improperly determined that the e-mail was not subject to disclosure under the crime-fraud exception to the attorney-client privilege. Specifically, the petitioner contends that other documents submitted as exhibits to the trial court provide probable cause to believe that the respondents engaged in an unlawful boycott of Smith & Wesson and that the e-mail was in direct furtherance of the boycott. We conclude that the trial court properly concluded that the e-mail did not fall under the crime-fraud exception.

As an initial matter, we note that “exceptions to the attorney-client privilege should be made only when the reason for disclosure outweighs the potential chilling of essential communications.” The crime-fraud exception to the attorney-client privilege, therefore, is a limited one, and the burden of proof is on the party seeking to pierce the privilege. We also recognize, however, “that since the attorney-client privilege has the effect of withholding relevant information from the fact-finder, it applies only where necessary to achieve its purpose.” In *Olson* v. *Accessory Controls & Equipment Corp.,* we set forth the proper inquiry for determining when the crime-fraud exception extinguishes the attorney-client privilege. The exception applies only after a determination by the trial court “that there is probable cause to believe that a crime or fraud has been attempted or committed and that the communication was in furtherance thereof.”

Probable cause “requires that a prudent person have a reasonable basis to suspect the perpetration or attempted perpetration of a crime or fraud, and that the communication was in furtherance thereof.” “The appropriate inquiry under the probable cause standard targets the client’s intent in obtaining legal advice; only if there is probable cause to believe that the client intended to perpetrate a crime or fraud does the exception properly come to bear.” We have explained that, “without reference to intent, the attorney-client privilege would be pierced whenever probable cause could be made that an illegal act occurred after the client conferred with an attorney — even if the consultation was part of a good-faith attempt to follow the law. Good-faith consultations with attorneys by clients who are uncertain about the legal implications of a proposed course of action however are entitled to the protection of the privilege, even if that action should later be held improper.”

We note that, in the present case, the trial court did not determine specifically whether the petitioner had met this probable cause requirement. Even if we were to assume, however, that there was probable cause to believe that the respondents had committed or intended to commit a crime by engaging in an economic boycott in violation of antitrust law, we nevertheless conclude that the petitioner failed to meet his burden of proof.

In addition to probable cause, the crime-fraud exception is limited by a second requirement that the communication sought in discovery was made in furtherance of that unlawful act. “The crime-fraud exception does not apply simply because privileged communications would provide an adversary with evidence of a crime or fraud. Mere relevance is insufficient; there must be a showing that the communications at issue were made with an intent to further an unlawful act.”

Our analysis as to the “in furtherance” requirement is informed largely by our reasoning in part I of this opinion. As we previously stated, the trial court reasonably could have found that the e-mail concerned matters involving the agreement by a major firearms manufacturer seeking to avoid litigation, and how that agreement, along with the litigation that gave rise to it, similarly might affect the respondents. Moreover, the e-mail reveals nothing that suggests an intent to break the law. Indeed, we agree with the trial court's determination that the critical statements at issue are “not words of advocacy, but, rather, statements of fact or impression.” Furthermore, to the extent that the e-mail refers to any action, it is the actions of others, and not of the respondents; it neither advocates that Kimber take any action of its own, nor that others take a particular action. The evidence does not support a conclusion that the respondents sent the e-mail with the intent to further a fraud or crime. Rather, as the trial court reasonably concluded, it was intended to keep Goldman informed so that he could provide them with sound legal advice. Accordingly, the injury that would inure to the relationship of Kimber and its attorneys by disclosure of the e-mail is greater than the benefit that would be gained by its disclosure to the petitioner.

Therefore, we conclude that the trial court properly concluded that the e-mail is not subject to disclosure under the crime-fraud exception to the attorney-client privilege.

**Attorney Misconduct & the Work Product Doctrine**

[***Moody v. Internal Revenue Service*, 654 F. 2d 795 (D.C. Cir. 1981)**](https://scholar.google.com/scholar_case?case=9680538376689031133)

WALD, Circuit Judge:

This action is an appeal from a judgment of the district court upholding the Internal Revenue Service’s refusal to disclose documents pertinent to appellant’s Freedom of Information Act requests. Appellant Shearn Moody, Jr. filed three requests pursuant to the FOIA, asking for the release of all records in the IRS’s possession regarding Moody, several business and charitable entities in which he had interests, and “Project Southwest.” The IRS released many documents pertinent to these requests, but withheld approximately 150 documents or portions of documents. After an *in camera* examination of a sample of thirty-five of the challenged withholdings, the district court upheld the IRS’s claims of exemptions with respect to all except portions of four documents.

The appellant promptly challenged every aspect of the trial court’s decision, seeking before this court both reversal of the findings of applicability of FOIA exemptions to particular documents and a remand on the issues of segregability and the propriety of an award of attorney’s fees. The bulk of appellant’s arguments on appeal were explicitly, and we feel correctly, dealt with in the district court's admirably comprehensive nineteen page opinion. However, we find two issues deserve additional consideration, and remand the case to the district court for this purpose.

DOCUMENT 19 AND THE WORK PRODUCT EXEMPTION

Exemption 5 of the FOIA permits non-disclosure of:

Inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

Among the civil litigation privileges incorporated into the FOIA by this section is the attorney work product privilege.

The work product privilege, “distinct from and broader than the attorney-client privilege,” exempts from discovery documents prepared by an attorney in contemplation of litigation. Document 19, which the trial court held non-disclosable as attorney work product, seems to fall within this class. It details a meeting held between an IRS lawyer and the federal district judge presiding over the receivership of W. L. Moody & Sons, Banker, regarding the enforcement of a summons served on E. O. Buck, the bank’s receiver. Prepared as a memorandum to the file by the participating IRS attorney, Document 19 predates by two days the filing of a petition to enforce the summons.

Appellant contends, however, that the work product doctrine does not cover Document 19 because it is the fruit of impermissible legal conduct. According to appellant, the purposeful exclusion of opposing counsel from the meeting violated the court’s rules and the American Bar Association's ethical standards. Moody argues that it would be a perversion of the work product doctrine, designed “to encourage effective legal representation within the framework of the adversary system,” to allow it to be used to “cover up” activities destructive of that system.

We agree that, at least in some circumstances, a lawyer’s unprofessional behavior may vitiate the work product privilege. We therefore remand this case to the district court so that it may determine in the first instance whether such circumstances exist in this case, and more fundamentally, whether the actions of the IRS attorney in fact violated professional standards.

The work product privilege creates a zone of privacy within which a lawyer can prepare his case free of adversarial scrutiny. From its inception, however, the courts have stressed that the privilege is “not to protect any interest of the attorney, who is no more entitled to privacy or protection than any other person, but to protect the adversary trial process itself.” Some protection of lawyers’ “heretofore inviolate” thoughts was deemed necessary to avoid an incentive to develop “unfair and sharp practices for the giving of legal advice and in the preparation of cases for trial,” as the development of such practices would “poorly serve the interests of the clients and the cause of justice.”

It would indeed be perverse, as appellant contends, to allow a lawyer to claim an evidentiary privilege to prevent disclosure of work product generated by those very activities the privilege was meant to prevent. Non-disclosure would then[[7]](#footnote-6) provide an incentive for, rather than against, the disfavored practices. The integrity of the adversary process is not furthered by protecting a lawyer who steps outside his role as “an officer of the court working for the advancement of justice while faithfully protecting the rightful interests of his clients.” An attorney should not be able to exploit the privilege for ends outside of and antithetical to the adversary system any more than a client who attempts to use the privilege to advance criminal or fraudulent ends.

However, the conclusion that an attorney has no right to object to the disclosure of work product made possible by his misconduct does not necessarily mean that the work product privilege is inapplicable to such documents. Unlike the attorney-client privilege, which exists solely for the benefit of the client, and can be asserted and waived exclusively by him, the work product privilege creates a legally protectable interest in non-disclosure in two parties: lawyer and client. Just as “an invasion of the attorney’s necessary privacy may not be justified by the misfortune of representing a fraudulent client,” the client's interest in preventing disclosures about his case may survive the misfortune of his representation by an unscrupulous attorney. A court must look to all the circumstances of the case, including the availability of alternate disciplinary procedures,[[8]](#footnote-7) to decide whether the policy favoring disclosure outweighs the client's legitimate interest[[9]](#footnote-8) in secrecy. No court should order disclosure under the FOIA or in discovery if the disclosure would traumatize the adversary process more than the underlying legal misbehavior.

We have attempted to outline in our footnotes to this opinion some of the factors we would take into consideration when balancing the policy favoring disclosure against that favoring continued secrecy. However, each case obviously presents new permutations and combinations of fact patterns, all of which must be taken into account when reaching a decision. For this reason, the trial court, which is both familiar with the case and in a position to gather any evidence deemed necessary to a reasoned decision, is best equipped to weigh the balance.

We therefore remand this case for reconsideration of the withholdings from Document 19 in light of our *Neufeld* decision, for an evaluation of the attorney’s conduct and, if it is found in violation of professional standards, a determination of whether his breach of professional standards vitiated the work product privilege otherwise attributable to Document 19. If the documents released as a result of the proceedings on remand are sufficient for a court to conclude appellant substantially prevailed in his FOIA action, he will then become eligible for an award of attorney’s fees.

[***Haigh v. Matsushita Elec. Corp. of America*, 676 F. Supp. 1332 (E.D. Va. 1987)**](https://scholar.google.com/scholar_case?case=447055615984339280)

SPENCER, District Judge.

Plaintiff Richard Haigh, a Virginia citizen, was employed by defendant Matsushita Electric Corporation of America from October 17, 1974 through January 27, 1987. He is fifty-seven years old, and is Jewish. Plaintiff Norma Haigh, a Virginia citizen, is Haigh’s wife.

Defendant Panasonic is a Delaware corporation.

The Second Amended Complaint, which is currently before the Court, is sixty-eight pages long, and contains a plethora of allegations. In brief, Haigh states that he was a salesman for Panasonic who handled the accounts of Best Products and Circuit City. Haigh claims that during his tenure business with these two outfits skyrocketed. In December 1986, Haigh was told that the Best Products and Circuit City accounts were being taken away from him and given to defendant Weber. Haigh also claims he was told his salary would be cut, along with his earnable bonuses. Additionally, he was told that he would be reassigned from his Richmond, Virginia location to the Panasonic accounts in western Virginia. Haigh claims he argued that the reassignment was unlawful, and requested to be told the legitimate business reason for the action. In response, defendants Willner and Adamyk allegedly proposed that the Richmond accounts of Thalhimers, Miller & Rhoads, Robert’s Leasing, and Dominion Pottery be added to Haigh’s new territory. Haigh also asserts that these two defendants sought a complete release for all of Panasonic’s actions to date.

In due course, by letter dated January 27, 1987, Haigh stated that his reassignment was unacceptable, and claimed that Panasonic had constructively terminated his employment. Since that time, Haigh claims to have vigorously sought employment without success.

Defendants move for an order compelling discovery of certain tape recordings, and awarding expenses in connection thereto. The facts underlying the motion are as follows. Defendants made the usual request for production of documents in August 1987. Subsequently, during Haigh’s deposition on October 21, 1987, he admitted that he had taped conversations with fifty-eight individuals. The tapes were made without the knowledge of these individuals, at Haigh’s own initiative, and absent directives from Haigh’s attorneys. Upon learning of their existence, defendants asked for the tapes. Plaintiffs turned over three tapes, which contained conversations with named defendants. Plaintiffs also surrendered a list of the names of the individuals who were on the recordings.

Defendants now seek the production of all the recordings. Plaintiffs argue that the tapes come within the work product privilege in that they were prepared in anticipation of litigation. Specifically, plaintiffs state that Haigh consulted legal counsel in December 1986, evidently fearing that defendants were trying to push him out of the company. Haigh considered himself constructively terminated in late January 1987. On March 12, 1987, he filed an EEOC complaint. He states that between February 1987 and October 1987, he made the tape recordings. He delivered the cassette tapes to counsel for the plaintiffs within a day or two following each conversation, and the contents of such tapes were reviewed by counsel and used by counsel to prepare the Complaint and discovery requests.

This matter came before the Court on defendants’ November 2, 1987 motion. The motion was briefed by the parties, and oral argument was held on November 13, 1987, at which time the Court directed counsel to submit additional memoranda addressed to the question whether the work product privilege had been vitiated. The parties have filed their memoranda, and the motion is now ripe for decision. Although several issues are raised by the parties, only two need to be addressed by this Court.

Issue I — Are the tapes protected by the work product privilege?

Issue II — If the answer to the question in Issue I is yes, is the privilege vitiated in this case?

Issue I

Federal Rule of Civil Procedure 26(b)(3) addresses the work product privilege. Basically, in order for the privilege to be applicable, the material must be (1) documents or tangible things, (2) prepared in anticipation of litigation or for trial, and (3) prepared by or for another party or by or for that other party's representative. Additionally, the question whether the material was prepared in anticipation of litigation does not turn on whether a suit had already been filed.

In arguing that the work product privilege does not apply here, defendants make the following statement: “The tapes were made by a party to this action and apparently do not contain the thoughts and impressions of plaintiff's counsel, who was not involved in the conversations, and, therefore, cannot be considered attorneys' work product under the most liberal interpretation of that doctrine.”

Defendants are living in the past, and are presenting a pre-1970 argument. “The 1970 amendment to Fed. R. Civ. P. 26 extends the work product protection to documents and things prepared for litigation or trial by or for the adverse party himself or his agent. Prior to the amendment some cases have held that documents of this kind were not within the immunity.”

Moreover, in an identical situation, the United States District Court for the Southern District of New York held that a party's surreptitiously obtained tape recordings are protected under Fed. R. Civ. P. 26(b)(3), assuming that the statements were obtained and recorded in anticipation of litigation or in preparation for trial.

Based upon the facts and arguments as now appearing before the Court, the Court is of the opinion that the work product privilege would apply to the tape recordings, and production would be denied unless the Court became convinced that defendants had a substantial need for the recordings and were unable to obtain their equivalent without undue hardship.

Issue II

The Court need not delve into questions of “substantial need,” “undue hardship,” or “substantial equivalent.” The Court holds that the work product privilege has, in this case, been vitiated.

In recent years, courts have come to recognize that “in some circumstances, a lawyer’s unprofessional behavior may vitiate the work product privilege.”

The *Moody* opinion was discussed by the Eleventh Circuit in *Parrott v. Wilson*. There, plaintiff’s attorney had clandestinely taped telephone conversations with two witnesses. Defendants moved to compel production of the recordings, and plaintiff objected on the ground that the tapes were work product under Fed. R. Civ. P. 26(b)(3). It is helpful to quote in length from that opinion.

The *Moody* court reasoned that the purpose of the work product privilege is to protect the integrity of the adversary process; therefore, it would be improper to allow an attorney to exploit the privilege for ends that are antithetical to that process. In the instant case, the record clearly demonstrates that counsel for the appellant clandestinely recorded conversations with witnesses. While this practice violates no law, the Code of Professional Conduct imposes a higher standard than mere legality. The American Bar Association’s Committee on Ethics and Professional Responsibility has ruled that the recording of conversations of witnesses without their consent is unethical.

We are mindful of the client's interest in protecting against the disclosure of work product. However, we are unable to say that the disclosure in this case “traumatized the adversary process more than the underlying legal misbehavior.” The only discernible effect of the disclosure was that the depositions of Sharp and Godfrey commenced with the playing of the taped conversations. We thus hold that whatever work product privilege might have existed was vitiated by counsel's clandestine recording of conversations with witnesses.

Carrying the question a step further, one court has recognized the potential difficulties of the situation in which an attorney directs his client to engage in behavior that would be improper for the attorney. It is apparent to this Court that such a course of action on the part of an attorney would clearly be improper.

In the instant situation, counsel for plaintiffs did not direct Haigh to undertake the clandestine recordings. As represented to this Court, he clearly initiated such conduct on his own, and he, of course, is not bound by the ethical strictures which bind his counsel.

This does not end the question, however. The Court is troubled by language contained in plaintiff's memorandum in response to the motion to compel.

Haigh began a concerted effort to interview persons throughout the United States who may have relevant information relating to his legal claims. Between February 1987 and October 1987, Haigh has telephoned approximately fifty-eight such persons and, in most instances, tape recorded the conversations. The cassette tapes were delivered to counsel for the plaintiffs within a day or two following each such conversation and the contents of such tapes reviewed by counsel. In many instances, the information obtained during such telephone conversations was used by plaintiffs’ counsel to prepare the initial complaint, the first amended and restated complaint, and the second amended and restated complaint filed in this action. Counsel also used such information to prepare other discovery requests.

While counsel did not tell Haigh to initiate or continue taping conversations, the old adage “actions speak louder than words” comes to mind. Indeed, Haigh and his attorneys fell into a pattern of conduct whereby Haigh would tape conversations and almost immediately turn the tapes over to counsel for their use. This pattern of conduct continued over a period of approximately nine months, and included the taping of fifty-eight conversations.

The Court would not be so troubled if it were faced with the situation where a party, in his exuberance over pending litigation, pursued such a course of conduct and delivered a handful of tapes to his counsel. In that situation, the lawyer’s conduct could fairly be described as simple acquiescence in the situation created by the client’s exuberance. There is a point, however, where acquiescence ceases to be passive and noncommittal, and becomes active encouragement and affirmative support. There is, and can be, no bright line to determine when this point is reached. Instead, the circumstances of each case must be viewed in their totality in an attempt to get a fix on that point. Here, the Court is certain that that point has been crossed. As such, the Court holds that the work product privilege has been vitiated.

The ruling today should not be taken as an indictment of counsel’s ethics or professionalism. To be sure, the law on this point is in an infant, perhaps even fetal, state. The Court in no way assumes or believes that counsel's intent was to run afoul of ethical strictures.

Additionally, it should be noted that this ruling may be interpreted by some as punishment for Haigh’s retention of counsel. Indeed, if Haigh were proceeding pro se, the privilege would not be vitiated. However, an attorney’s clients may not reap the benefits of the attorney’s expertise in a vacuum-like state. Rather, the client must realize that the attorney is bound by a Code of Professional Responsibility, and, when he retains the attorney, he also retains the responsibilities imposed on that attorney.

**Questions:**

**Further Reading:**

* [G. Michael Halfenger, *The Attorney Misconduct Exception to the Work Product Doctrine*, 58 U. Chi. L. Rev. 1079 (1991)](https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=4735&context=uclrev)
* [David J. 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)](https://scholarship.law.unc.edu/nclr/vol64/iss3/1/?utm_source=scholarship.law.unc.edu%2Fnclr%2Fvol64%2Fiss3%2F1&utm_medium=PDF&utm_campaign=PDFCoverPages)
* [Michele DeStefano Beardslee, *Taking the Business Out of Work Product*, 79 Fordham L. Rev. 1869 (2011)](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1760563)

1. ‘Til Tuesday, *Voices Carry*, Voices Carry (1985). [↑](#footnote-ref-0)
2. The Beatles, *Do You Want to Know a Secret*, Please Please Me (1963). [↑](#footnote-ref-1)
3. If the information has not yet been disclosed, it is hard to think of Company’s action as a waiver. Rather, data that Company intends to report is never privileged in the first place. [↑](#footnote-ref-2)
4. We do not face here any claim that the information was acquired by a third party despite all possible precautions, in which case there might be no waiver at all. [↑](#footnote-ref-3)
5. The IRS denied that the transcripts were made using tapes obtained from the Superior Court or from any other illicit source. Agent Petersell declared: “The partial transcripts were not prepared by the United States from the tapes in the custody of the Superior Court for Los Angeles County, California, nor from copies of the tape now in the custody of the Clerk of this Court. The transcripts were obtained from a confidential source by another Special Agent prior to the issuance of this summons. The source was not a party to *Church of Scientology v. Armstrong*, nor an attorney for any party in that proceeding.” As the District Court made no finding of illegality, we assume for present purposes that the transcripts were legally obtained. [↑](#footnote-ref-4)
6. In addition, we conclude that evidence that is not “independent” of the contents of allegedly privileged communications — like the partial transcripts in this case — may be used not only in the pursuit of in camera review, but also may provide the evidentiary basis for the ultimate showing that the crime-fraud exception applies. We see little to distinguish these two uses: in both circumstances, if the evidence has not itself been determined to be privileged, its exclusion does not serve the policies which underlie the attorney-client privilege. [↑](#footnote-ref-5)
7. We stress that in this case, appellee has admitted engaging in the conduct which forms the basis of the charge of unprofessional conduct. We are therefore not dealing with a situation where disclosure is sought for the purpose of determining whether such misbehavior has in fact occurred. The latter case involves an entirely different problem — an exception which threatens to swallow the rule — than is presented in this case. [↑](#footnote-ref-6)
8. Lawyers, of course, are always subject to disciplinary proceedings, if not criminal or civil malpractice sanctions, for malfeasance in the conduct of their legal affairs. Thus, disclosure is not the sole available remedy for a breach of a professional duty, and may in fact bear so little relationship to the underlying breach as to be inappropriate as a remedy. In this case, of course, if a violation of legal standards occurred, it lay in the attorney's exclusion of the opposing party and his counsel from a meeting; disclosure of what went on at that meeting to that opponent, the appellant in this FOIA action, would therefore seem an appropriate remedy. [↑](#footnote-ref-7)
9. A client's interest in non-disclosure would be illegitimate, of course, if he knowingly instigated or participated in the conduct which constituted the breach of duty. In some cases, the extent to which a client should be allowed to benefit from unprofessionally obtained information may also be questioned; such benefits, in some cases, may not be deemed a “legitimate” secrecy interest. [↑](#footnote-ref-8)