Article

No Privilege to Pollute: Expanding the Crime-Fraud Exception to the Attorney-Client Privilege

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INTRODUCTION

Recent years have a seen a dramatic increase in the media's coverage of the crime-fraud exception to the attorney-client privilege.[1] This exception, which unveils attorney-client communication in certain cases involving crime or civil fraud, has played a conspicuous role in investigations of alleged political corruption by Donald Trump and Paul Manafort, among others.[2] The crime-fraud exception also

1. A search of Westlaw's "News" database found that there were three times more stories mentioning the crime-fraud exception during the last two years than in any prior two-year period. As one commentator noted, "[t]he world is awash in 'hot takes'" on the use of the crime-fraud exception in the investigation of President Donald Trump and his attorney Michael Cohen. Paul Rosenzweig, *Michael Cohen, the Attorney-Client Privilege, and the Crime-Fraud Exception*, BROOKINGS: FIXGOV (Apr. 10, 2018), https://www.brookings.edu/blog/fixgov/2018/04/10/michael-cohen-the-attorney-client-privilege-and-the-crime-fraud-exception [https://perma.cc/SBC7-9R9A].

2. Philip Bump, *What Michael Cohen Can, Can't and Probably Won't Talk About While He's on Capitol Hill*, WASH. POST (Feb. 26, 2019), https://www.washingtonpost.com/politics/2019/02/26/what-michael-cohen-can-cant-likely-wont-talk-about

factored significantly in a high-profile prosecution of Paul Ceglia for attempting to defraud Facebook founder Mark Zuckerberg.[3] Attorneys discussed the crime-fraud exception in connection with other cases involving allegations of sex crimes by Harvey Weinstein and Jeffrey Epstein.[4] As the crime-fraud exception has become more prominent,[5] some observers have expressed alarm that the exception could turn a suspect's own lawyer into a source of incriminating information; other commentators have cheered the resourcefulness of investigators who managed to sneak behind enemy lines.[6]

-while-hes-capitol-hill [https://perma.cc/MR6H-643T]; Michael Krauss, *Mueller, Manafort and Attorney-Client Privilege*, JURIST (Nov. 16, 2017, 4:53 PM), https://www.jurist.org/commentary/2017/11/mueller-manafort-and-attorney-client-privilege [https://perma.cc/K5L3-X4NG]. Indeed, one could argue that the crime-fraud exception was crucial for Cohen to provide the cooperation that led to the U.S. Supreme Court's landmark ruling in *Trump v. Vance*, No. 19-635 (July 9, 2020) (holding that the Constitution does not categorically bar state prosecutors from serving a subpoena on a sitting U.S. president). Manhattan District Attorney Cyrus Vance served a subpoena on Trump to obtain records about hush-money payments and insurance fraud that Cohen was able to discuss with investigators because the crime-fraud exception overcame the attorney-client privilege. *See* William K. Rashbaum & Benjamin Weiser, *D.A. Is Investigating Trump and His Company Over Fraud, Filing Suggests*, N.Y. TIMES (Aug. 3, 2020), https://www.nytimes.com/2020/08/03/nyregion/donald-trump-taxes-cyrus-vance.html [https://perma.cc/U2HK-Y7UP].

3. United States v. Ceglia, No. 12-CR-876, 2015 WL 1499194, at *3–10 (S.D.N.Y. Mar. 30, 2015).

4. Lynne Bernabei & Kristen Sinisi, *The Legal Case Against Weinstein's Suppression Efforts*, LAW360.COM (Jan. 16, 2018, 12:38 PM), https://www.law360.com/articles/1001920/the-legal-case-against-weinstein-s-suppression-efforts [https://perma.cc/5UB3-MBKX]; Jerry Lambe, *Brutal Rebuke of Deutsche Bank Raises Serious Questions About One of Jeffrey Epstein's Lawyers*, LAW & CRIME (July 7, 2020, 7:04 PM), https://lawandcrime.com/high-profile/brutal-rebuke-of-deutsche-bank-raises-serious-questions-about-one-of-jeffrey-epsteins-lawyers [https://perma.cc/F2PA-DRJ4] (noting potential application of crime-fraud exception to statements by Epstein's attorney in furtherance of crime or fraud).

5. *E.g.*, Fritz Riesmeyer & Emily Crane, *Tips for Addressing Crime-Fraud Exception to the Attorney-Client Privilege in Civil Cases*, A.B.A.: PRAC. POINTS (June 24, 2018), https://www.americanbar.org/groups/litigation/committees/business-torts-unfair-competition/practice/2018/tips-for-addressing-crime-fraud-exception-to-attorney-client-privilege-in-civil-cases [https://perma.cc/WMT3-7TK9] ("Trial counsel is increasingly called upon to address an exception to the attorney-client privilege known as the crime-fraud exception."). The Tax Division of the U.S. Department of Justice has suggested that it will begin raising the crime-fraud exception more frequently and at earlier stages of its enforcement actions. Daniel G. Strickland, *Tackling the Tax Division's New Crime-Fraud Strategy*, MARTINDALE (Oct. 2, 2019), https://www.martindale.com/legal-news/article_eversheds-sutherland-us-llp_2520885.htm.

6. After FBI agents raided the law office of Trump's attorney, the President tweeted his exasperation: "Attorney-client privilege is dead!" Without missing a beat, former U.S. Attorney Preet Bharara (whom Trump had fired) tweeted this response: "Long live the crime-fraud exception." Terence Cullen, *Attorney-Client Privilege Isn't*

While the *effect* of the crime-fraud exception has drawn great interest from the media, scant attention has focused on the *scope* of the exception. The current version of the exception, in most jurisdictions, applies to attorney-client communication in furtherance of any crime (including a misdemeanor) or noncriminal fraud.[7] The exception usually does not apply to any category of civil law violation other than fraud.[8] There has been virtually no criticism of the assumption that fraud should be the sole civil law violation abrogating the attorney-client privilege. The rationale that elevates civil fraud to the same tier as crime could, at least in theory, apply with equal cogency to other categories of civil violations that are comparably urgent, and that rely on the involvement of attorneys to facilitate wrongdoing. If the attorney-client privilege is too "costly" for society in the case of a civil fraud, the cost could certainly be unbearably high with other types of civil lawbreaking as well. The time has come to consider enlarging the scope of the crime-fraud exception to encompass a wider range of civil law violations.

This Article argues that the exception should extend to certain violations of civil environmental law. Attorney-client communication designed to further the knowing emission of hazardous pollutants does not deserve the same protection as attorney-client communication for legitimate purposes. There should be no privilege to pollute. Instead of shielding communication in which lawyer and client make plans to flout environmental regulations, the evidence rules should expose such communication and permit its use in court.

Put differently, the value of the crime-fraud exception should extend equally to attorneys who are not prosecutors.[9] Environmental plaintiffs' counsel function as "private attorneys general" in many contexts,[10] so they should have equal access to the tools used by

Dead—Even If Trump Says It Is, N.Y. DAILY NEWS (Apr. 10, 2018, 11:58 AM), https://www.nydailynews.com/news/politics/attorney-client-privilege-isn-dead-trump-article-1.3925805 [https://perma.cc/7DTR-CQRG].

7. Stacy Kochanowski, Comment, *Attorney-Client Privilege: Expanding the Crime-Fraud Exception to Intentional Torts*, 67 BUFF. L. REV. 1213, 1244–58 (2019).

8. *Infra* Part I.D.

9. To be sure, current law does not give prosecutors a monopoly over the use of the crime-fraud exception. This exception is theoretically available to all attorneys—including criminal defense attorneys, civil plaintiffs' attorneys, and civil defense attorneys—who might seek to invoke it. As a practical matter, though, the exception is much more useful to prosecutors due to the narrow scope of its language and the tendency of judges to prefer application of the exception in criminal cases. For a more detailed discussion of this disparity, see Part II.C, *infra.*

10. Daniel M. Steinway, *Plaintiff's Strategy*, 14 BUS. & COM. LITIG. FED. CTS. § 151:2 (4th ed. 2019) ("In fact, most of the federal environmental laws specifically authorize

government attorneys to overcome defendants' misuse of privilege. After all, the applicability of the crime-fraud exception depends on the conduct of the privilege holder, not the identity of the opponent.[11] Given that the purpose of the crime-fraud exception is to sanction wrongdoing by the privilege holder, why should it matter whether a prosecutor or private attorney invokes the exception?

This Article's proposed expansion of the crime-fraud exception would bring several benefits. By increasing plaintiffs' access to valuable evidence, the new rule would improve the likelihood that plaintiffs could recover damages and win injunctive relief in civil suits against polluters.[12] The broader exception to the attorney-client privilege would also create a deterrent to the future use of legal services in order to violate civil environmental laws. Another salutary effect of this Article's proposal would be to reduce the dependence of environmental plaintiffs on prosecutors to pierce the attorney-client privilege asserted by polluters; the independence of civil plaintiffs' counsel is increasingly urgent at a time when the federal government files fewer environmental prosecutions per year than it has since the 1980s.[13] Finally, this Article's proposal would help align the exceptions to the attorney-client privilege with the exceptions to the ethical duty of confidentiality, allowing whistleblowers a chance to make a difference in court.

private parties to act as 'private attorneys general' to compel government action and/or require that regulated entities fully comply with applicable environmental requirements.").

11. CHRISTOPHER MUELLER, LAIRD KIRKPATRICK & LIESA RICHTER, EVIDENCE § 5.22 (6th ed. 2018) (noting that when a court adjudicates a claim where the crime-fraud exception overcomes the attorney-client privilege, the court's focus is on the conduct of the client seeking to assert the privilege).

12. *See generally* Eustace de Saint Phalle & Andrew Clay, *Prying Attorneys from Their Deceptive Clients*, PLAINTIFF (Dec. 2010), https://www.plaintiffmagazine.com/recent-issues/item/prying-attorneys-from-their-deceptive-clients [https://perma.cc/F3N3-GY9Q] (explaining that crime-fraud exception is potentially very valuable to plaintiffs in civil cases).

13. Ellen Knickmeyer, *EPA Prosecutions of Polluters Approach Quarter-Century Lows*, PBS: NEWSHOUR (Nov. 21, 2019, 2:04 PM), https://www.pbs.org/newshour/nation/epa-prosecutions-of-polluters-approach-quarter-century-lows [https://perma.cc/W7PT-GTA8]; Nicholas Iovino, *Environmental Prosecutions Drop to Lowest Level in Decades*, COURTHOUSE NEWS (Oct. 29, 2019), https://www.courthousenews.com/environmental-prosecutions-drop-to-lowest-level-in-decades [https://perma.cc/6AJ3-RVHW]; John Bowden, *EPA Referrals for Criminal Prosecution Lowest Since 1988*, HILL (Jan. 15, 2019, 8:36 AM), https://thehill.com/policy/energy-environment/425361-epa-referrals-for-criminal-prosecution-lowest-since-1988-report [https://perma.cc/5P8J-MM2T].

The analysis in this Article proceeds in four steps. Part I provides background, exploring the theory and practical application of the crime-fraud exception, as well as its interrelationship with the ethical obligation to preserve client confidences. Part II presents a model statute expanding the crime-fraud exception to include a new category of disqualifying conduct—the attempted use of attorney-client communication to further a knowing emission of a listed pollutant—and explains how the reform could address some of the challenges currently limiting the efficacy of the crime-fraud exception. Part III discusses the practical benefits of the proposed reform. Finally, Part IV lists foreseeable objections to this Article's proposal, and attempts to respond to those objections.

I. THE CURRENT CRIME-FRAUD EXCEPTION: THEORY AND PRACTICE

When a party invokes the attorney-client privilege to prevent disclosure of certain information, the crime-fraud exception provides the opponent with a means of overcoming the privilege. This Part focuses on the theoretical basis and practical operation of the crime-fraud exception. After reviewing a few noteworthy cases in which courts recognized the crime-fraud exception, this Part analyzes the limited application of the exception to civil law violations. Attention is also given to the interrelationship between the exception to the privilege and exceptions to attorneys' ethical duties of confidentiality. This Part sets the stage for the next Part's discussion of a proposal to expand the crime-fraud exception to cover knowing emission of a listed pollutant.

A. CONCEPTUAL UNDERPINNINGS

Any analysis of the crime-fraud exception must begin with an examination of the attorney-client privilege. Recognized in all federal and state courts throughout the U.S., the attorney-client privilege prevents the compelled disclosure of confidential communication between attorney and client where the purpose of such communication was to provide or obtain legal services.[14] The privilege thwarts an

14. John Henry Wigmore set forth the classic formulation of the attorney-client privilege in this sentence: "(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived." 5 JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 21–22 (2d ed. 1923). For a thorough discussion of the attorney-client privilege, see 2 EDWARD J. IMWINKELRIED, THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGE (Richard D. Friedman ed., 3d ed. 2020). States have

outsider's efforts to question either attorney or client about their private communication, or to demand production of documents or recordings in which such communication appears.[15] If an opponent has obtained information as to which a party may still claim a valid privilege, the court must not admit that information into evidence.[16]

Commentators have noted that the attorney-client privilege brings several advantages to clients and attorneys. First and foremost, it allows forthright communication between lawyer and client.[17] Such candor enables lawyers to serve their clients better, anticipating possible vulnerabilities and preparing for pitfalls that might otherwise have surprised the lawyers. Lawyers with full information can best apprise clients of all the options available, and clients will then be in the best position to make decisions in their true interests. In the context of initial consultations, the attorney-client privilege allows lawyer and client to share information and thereby assess whether they would be a good match; without such a safe haven, mismatches could be more common and could harm the interests of both lawyers and clients. While some commentators have questioned whether strict confidentiality is necessary or sufficient to foster candor in lawyer-client communication,[18] there is widespread agreement about the social utility of the privilege in establishing a safe haven for communication about the representation.[19]

The attorney-client privilege helps clients maintain their privacy.[20] This consideration could be important to clients for whom some aspects of a pending matter might be embarrassing if widely known. Whether or not the subject matter of a case is sensitive, a client might desire freedom to talk without inhibition to an attorney

generally codified the attorney-client privilege. For a recent state-by-state comparison of state code provisions on this subject, see a student comment by Stacy Kochanowski, *supra* note 7. By contrast, the Federal Rules of Evidence have few provisions relating to privilege law. The framers of the Federal Rules preferred that federal common law establish privilege rules, except in diversity actions when state privilege rules could apply. FED. R. EVID. 501.

15. IMWINKELRIED, *supra* note 14, § 6.6.

16. *Id.* § 6.2.2.

17. *Id*. § 5.1.1.

18. Deborah Rhode and the co-authors of her textbook explain that even without strict confidentiality, some clients would still have an incentive to speak candidly with lawyers. On the other hand, some clients withhold information for various reasons even when the privilege is enforced strictly. DEBORAH L. RHODE, DAVID LUBAN, SCOTT L. CUMMINGS & NORA FREEMAN ENGSTROM, LEGAL ETHICS 271–72 (7th ed. 2016). *See generally* IMWINKELRIED, *supra* note 14, § 5.2.2.

19. IMWINKELRIED, *supra* note 14, § 1.1.

20. *Id.*

concerning a possible course of action that might seem greedy or cowardly to outsiders. To be sure, the secrecy of communication with one's attorney is not a constitutional right for most clients; only the accused in a criminal case may make a plausible argument that maintaining confidentiality of communication with his attorney implicates his Fourth, Fifth and/or Sixth Amendment rights, and even then it is well settled that misconduct can forfeit certain constitutional protections.[21] Privacy is indeed valuable to clients, but that value lacks a constitutional dimension for most clients, so it can be weighed against competing policy priorities.

The attorney-client privilege also benefits lawyers in ways that may not always be consistent with the public interest. The privilege allows lawyers to "cover their tracks" to some degree and avoid accountability for dubious conduct.[22] The privilege also allows lawyers to offer clients a refuge from government surveillance and other prying by outsiders; this respite can be quite valuable, depending on the sensitivity of each individual client, and is one of the reasons why lawyers are able to command high fees.[23]

Virtually all jurisdictions that recognize the attorney-client privilege also allow a "crime-fraud exception" to that privilege.[24] The basic idea is that lawyers and clients should not be able to use the privilege as a means through which to commit certain categories of illegal activity.[25] The exception applies to all crimes—ranging from

21. *See generally* IMWINKELRIED, *supra* note 14, § 11.4.2.

22. To be sure, the code provisions and ethical rules requiring the confidentiality of information held by attorneys usually include exceptions for situations in which lawyers' services are at issue, such as when clients file malpractice claims or bring ethics complaints. *E.g.*, IMWINKELRIED, *supra* note 14, § 6.12.4 (describing the acts and omissions that effect a waiver by the holder of the privilege); MODEL RULES OF PRO. CONDUCT r. 1.6(b)(5) (AM. BAR ASS'N 2020) [hereinafter MRPC] (providing that lawyers may disclose otherwise confidential information when clients have put that information at issue, e.g., by filing claims that lawyers engaged in misconduct). But these exceptions are of little avail if lawyers' misconduct does not come to light in the first instance, or if the client lacks the ability to recognize misconduct. The attorney-client privilege decreases the likelihood that anyone other than the client will perceive certain categories of wrongdoing by lawyers, and this measure of inscrutability decreases lawyers' accountability.

23. Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 5–6 (1998) (noting that lawyers' ability to sell confidentiality to clients allows lawyers to charge higher fees than other professionals and drives up the cost of litigation).

24. Kochanowski, *supra* note 7, at 1244 (setting forth all states' different versions of the crime-fraud exception in an appendix). Most states have codified the crime-fraud exception, but some states rely on common law as the authority for this exception. *Id.* at 1224 n.63.

25. MUELLER ET AL., *supra* note 11.

misdemeanors[26] to felonies—and to noncriminal activity that meets statutory or common-law definitions of fraud.[27] As a practical matter, it is usually only an ongoing or future crime or fraud that can vitiate the privilege, because the client must intend to enlist the attorney's services in order to facilitate the unlawful conduct.[28] Past crimes or frauds would almost never meet this definition—unless, perhaps, the client seeks to enlist the attorney's aid in covering up the crime or fraud at issue.[29]

There are at least three rationales for the crime-fraud exception. The first is utilitarian. Jeremy Bentham, the most famous proponent of cost-benefit analysis, inveighed against the "pernicious" cost imposed on society by the attorney-client privilege in certain instances because the privilege can sometimes subvert the truth-seeking process in a way that outweighs its scant utility.[30] While Bentham quarreled with applying the attorney-client privilege in a range of contexts, the one in which his critique is most cogent involves a client's misuse of a lawyer's services to commit a crime while the client simultaneously insists that his interaction with his attorney be subject to the strictest secrecy.[31] Society would be much too vulnerable if attorneys

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26. *Id.* ("The exception extends even to crimes of a relatively minor nature."); *e.g.*, Lytle v. Mathew, 89 N.E.3d 199, 205 n.1 (Ohio Ct. App. 2017) (applying crime-fraud exception to misdemeanor offense); Micron Tech., Inc. v. Rambus, Inc., 645 F.3d 1311, 1330–31 (Fed. Cir. 2011) (applying crime-fraud exception to misdemeanor offense); *In re* 3dfx Interactive, Inc., 347 B.R. 386, 389–94 (Bankr. N.D. Cal. 2006) (holding that misdemeanor offense could be sufficient to trigger crime-fraud exception), *vacated on other grounds*, No. C 06-MC-80195, slip op., 2006 WL 3734297, at *8 (N.D. Cal. Dec. 15, 2006) (determining that facts were insufficient in this case, but not disputing that a misdemeanor offense could provide basis for crime-fraud exception); *see* United States v. Friedman, 445 F.2d 1076, 1085–86 (9th Cir. 1971) (applying crime-fraud exception to unlawful possession of grand jury transcript, which is a relatively minor offense).

27. MUELLER ET AL., *supra* note 11.

28. *Id.*

29. As Wigmore stated, the rationale for protecting attorney-client communication "ceas[es] to operate at a certain point, namely, where the desired advice refers *not to prior wrongdoing*, but to *future wrongdoing*." JOHN H. WIGMORE, WIGMORE ON EVIDENCE: EVIDENCE IN TRIALS AT COMMON LAW § 2298 (4th ed. 2020).

30. JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM 441 (John Bowring ed., 1843) (exclusion of probative evidence showing guilt is "one of the most pernicious and most irrational notions that ever found its way into the human mind").

31. Bentham even believed that a client's confession of a crime to an attorney, even without requesting that the attorney assist in the ongoing or future commission of that crime, should be beyond the scope of the attorney-client privilege—a position that extends far beyond the scope of the modern crime-fraud exception. *Id.* at 473–75 ("To what object is the whole system of penal law directed, if it not be that no man shall have it in his power to flatter himself with the hope of safety, in the event of his

could become assistant criminals shielded from any accountability.[32] In such instances, the cost to the public interest would greatly exceed any benefit arising from more forthright attorney-client communication. The U.S. Supreme Court has embraced this logic in exempting from the attorney-client privilege instances in which the client seeks the attorney's help to commit an ongoing or future crime or fraud.[33] "The attorney-client privilege is not without its costs," wrote the Court; these costs become unjustifiable when the attorney's advice enables "future wrongdoing."[34]

The second rationale underlying the crime-fraud exception is equitable. A party with unclean hands should not benefit from certain legal protections. By engaging in purposeful misconduct that is antithetical to the values of the legal system, a party can thereby forfeit a protection that the legal system ordinarily affords. Examples abound in the law of evidence, including the rule that forbids parties from using the privilege against self-incrimination as both a sword and a shield,[35] and the rule of forfeiture, which denies confrontation rights to the party who purposely procured the absence of a hearsay declarant.[36] The Supreme Court has explained the equitable justification for the crime-fraud exception to the attorney-client privilege:

engaging in the commission of an act which the law, on account of its supposed mischievousness, has thought to prohibit?").

32. *See* MUELLER ET AL., *supra* note 11 ("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.").

33. United States v. Zolin, 491 U.S. 554, 562–63 (1989) ("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*." (internal citations omitted)).

34. *Id.*

35. *E.g.*, Harris v. New York, 401 U.S. 222, 226 (1971) (holding that the accused could not prevent admission of his un-Mirandized confession to police when he himself testified in a manner that contradicted that statement; the accused forfeited his right to exclude the confession, because "[t]he shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances").

36. Giles v. California, 554 U.S. 353, 359–60 (2008) (acknowledging that the doctrine of forfeiture by wrongdoing could extinguish the right of the accused to confront the accuser against whom he directed his misconduct, though the Court did not find sufficient facts in the instant case to warrant application of the doctrine); FED. R. EVID.

> 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.[37]

No less a privacy advocate than the legal director of the ACLU has emphatically endorsed the equitable argument for the crime-fraud exception:

> The ACLU is the nation's premier defender of privacy, and we've long maintained that the right of every American to speak freely to his or her attorney is essential to the legal system . . . [W]e are second to none in defending [the attorney-client privilege]—often for people with whom we fundamentally disagree. But we also believe in the rule of law as an essential foundation for civil liberties and civil rights. And perhaps the first principle of the rule of law is that no one—not even the president, let alone his lawyer—is above the law. And no one, not even the president, can exploit the attorney-client privilege to engage in crime or fraud. The attorney-client privilege has always included a "crime-fraud exception," which provides that if you are using the attorney-client relationship to perpetrate a crime, there is no privilege.[38]

There is also a third justification for the crime-fraud exception: an attorney who assists in a violation of the law is abdicating his or her professional role. Such an attorney no longer merits the title "officer of the court." Thus, the attorney-client privilege, which covers communication by an attorney acting in a professional capacity, has no application to attorney-client communication in furtherance of a legal violation. As explained in a leading treatise, "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."[39] This rationale also applies when a client seeks to use an attorney's services for improper purposes, but the attorney does not consent to the client's proposal: the client still has the mindset necessary to trigger the crime-fraud exception because the client has asked the attorney to deviate from the professional role that the attorney-client privilege protects.[40]

804(b)(6) (extending same principle of forfeiture by wrongdoing as a rationale for denying hearsay objection to wrongdoer).

37. Clark v. United States, 289 U.S. 1, 15 (1933).

38. David Cole, *The Crime-Fraud Exception in the Michael Cohen Case*, ACLU (Apr. 10, 2018, 6:15 AM), https://www.aclu.org/blog/executive-branch/crime-fraud-exception-michael-cohen-case?page=15 [https://perma.cc/X3VP-MCYD].

39. MUELLER ET AL., *supra* note 11.

40. *See id.*

B. REQUIREMENTS FOR APPLICATION

As a practical matter, application of the crime-fraud exception tends to be difficult and rare because both attorney and client are usually reluctant to share information that would prove the predicates for the exception. Recognizing this difficulty, the Supreme Court and other appellate courts have developed a fairly well-defined body of case law to guide trial courts in determining whether to apply the crime-fraud exception.

Parties invoking the crime-fraud exception must prove two elements. First, they must show the client intended to commit a crime or fraud at the time of the client's communication with the lawyer.[41] This test focuses on the client's intent, rather than the lawyer's, because the client is the holder of the privilege. As the intended beneficiary of the privilege, the client is the one whose wrongful conduct could effect a forfeiture of the privilege. There is no need for the attorney to have any blameworthy intent for the crime-fraud exception to apply. Courts and commentators agree that a culpable client who approaches an innocent attorney could have the requisite mental state to support application of the crime-fraud exception, even though there was never a "meeting of the minds" between client and attorney to carry out the crime or fraudulent scheme.[42]

The second requirement is that the client must intend to enlist the services of the attorney in order to accomplish the crime or fraud.[43] It is not sufficient for the client and the attorney merely to discuss criminal or fraudulent activity that the client plans to commit independently from the attorney.[44] The crime-fraud exception protects against perversion of the lawyer-client relationship, so activity by the client without any attempt to involve the lawyer will not trigger the exception.[45] One implication of this requirement that the client seek to rely on the lawyer's services is that the client's past commission of a crime or fraud is virtually never enough to support application of the privilege,[46] unless perhaps the client seeks help from the attorney to hide fruits of the crime or otherwise hinder the investigation of the crime by police.

Evidence concerning these two elements is not easy for opponents of the privilege to gather, but at least the quantum of required

41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. WIGMORE, *supra* note 29.

proof is low. The party seeking to overcome the privilege need only make a prima facie showing that both of the requisite elements are present.[47] Several jurisdictions have equated a prima facie showing with the amount of proof necessary to establish probable cause.[48] The judge, not the jury, determines whether the showing is adequate.[49] In making this determination, the judge may consider all sorts of evidence, including evidence that the jury would not be able to hear, such as hearsay.[50] However, the judge may not consider information or materials already found to be privileged.[51] The low standard of proof required for the crime-fraud exception has drawn criticism from

47. The prima facie standard for the quantum of proof originated in Clark v. United States, 289 U.S. 1, 14 (1933). *See, e.g.*, *In re* Grand Jury Proc., 802 F.3d 57, 65–66 (1st Cir. 2015) (applying the prima facie standard to assess whether the quantum of proof was adequate to support the crime-fraud exception); *cf.* Micron Tech., Inc. v. Rambus Inc., 645 F.3d 1311, 1330 (Fed. Cir. 2011) (indicating that, for purposes of employing the crime-fraud exception, "making a prima facie showing is 'not a particularly heavy' burden" (quoting *In re* Grand Jury Investigation, 445 F.3d 266, 274–75 (3d Cir. 2006))); Avnet, Inc. v. Motio, Inc., No. 12-CV-0-2100, 2015 WL 5474435, at *4 (N.D. Ill. Sept. 16, 2015) (same).

48. *E.g.*, *In re* 2015–2016 Jefferson Cnty. Grand Jury, 410 P.3d 53, 59–62 (Colo. 2018) ("The party seeking to defeat the privilege must demonstrate probable cause to believe that a crime or fraud was being attempted or committed and that the communication was made in furtherance of the crime or fraud."); Olson v. Accessory Controls & Equip. Corp., 757 A.2d 14, 31 (Conn. 2000) (applying the probable cause standard); *In re* Antitrust Grand Jury, 805 F.2d 155, 165–66 (6th Cir. 1986) ("We are persuaded by the Second Circuit's [probable cause standard] and adopt it as our evidentiary standard of a prima facie showing."); *In re* Richard Roe, Inc., 68 F.3d 38, 40 (2d Cir. 1995) ("[A] party seeking to invoke the crime-fraud exception must at least demonstrate that there is probable cause to believe that a crime or fraud has been attempted or committed and that the communications were in furtherance thereof." (citing *In re* John Doe, Inc., 13 F.3d 633, 637 (2d Cir. 1994))). Other jurisdictions have adopted a standard of "reasonable cause" that is very similar to the probable cause test. *E.g.*, *In re* Grand Jury Proc., 417 F.3d 18, 23 (1st Cir. 2005) (explaining that the reasonable cause standard requires a "reasonable basis to believe that the lawyer's services were used by the client to foster a crime or fraud" in order to overcome the privilege); United States v. Martin, 278 F.3d 988, 1001 (9th Cir. 2002) ("The [crime-fraud] exception applies only when there is 'reasonable cause to believe that the attorney's services were utilized in furtherance of the ongoing unlawful scheme.'" (quoting *In re* Grand Jury Proc., 87 F.3d 377, 381 (9th Cir. 1996))); *In re* Grand Jury, 705 F.3d 133, 153 (3d Cir. 2012) ("Where there is a reasonable basis to suspect that the privilege holder was committing or intending to commit a crime or fraud and that the attorney-client communications or attorney work product were used in furtherance of the alleged crime or fraud, this is enough to break the privilege.").

49. FED. R. EVID. 104(a) and its state analogs.

50. *Id.*

51. *Id.*

staunch defenders of the attorney-client privilege.[52] But advocates of the crime-fraud exception respond to this criticism by pointing out that low standards of proof are commonly used for evidentiary rulings.[53] Moreover, the party defending the privilege usually "holds the cards" that could prove crime or fraud, so a standard of proof favorable to the opponent of the privilege seems reasonable given the asymmetry in the parties' access to information.

It is impossible to offer an exhaustive list of all types of evidence that could support the invocation of the crime-fraud exception. For the most part, the evidence falls into three categories. First, sometimes the opponent is able to find documents, recordings, or third-party witnesses that can prove the involvement of both attorney and client in a crime or fraud.[54] Second, in some cases either the attorney or the client decides to cooperate with the opponent (e.g., when an attorney facing prosecution "flips" on a client under a grant of immunity).[55] Finally, in other cases it is possible for the opponent simply to cite circumstantial evidence supporting the inference that attorney-client communication facilitated criminal or fraudulent activity.[56]

One additional option for proving the facts necessary to support the crime-fraud exception is to request an *in camera* hearing.[57] In such a hearing, the court reviews documents or witness testimony as to

52. *E.g.*, Auburn K. Daily & S. Britta Thornquist, *Has the Exception Outgrown the Privilege?: Exploring the Application of the Crime-Fraud Exception to the Attorney-Client Privilege*, 16 GEO. J. LEGAL ETHICS, 583, 587–88, 590–92 (2003) (criticizing the low standard of proof used by some courts to determine whether the crime-fraud exception could overcome the attorney-client privilege).

53. FED. R. EVID. 104(a) and its state analogs.

54. *See* United States v. Zolin, 491 U.S. 554, 563 (1989) (concerning issues of privilege when the personal secretary of a suspect in a criminal investigation inadvertently provided recordings to a third party from whom the government investigators were able to obtain the recordings); *In re* Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 180 F. Supp. 3d 273, 281–84 (S.D.N.Y. 2016) (holding that an opponent was able to overcome a claim of attorney-client privilege by relying on the crime-fraud exception after emails containing allegedly privileged material were inadvertently shared).

55. President Donald Trump's personal attorney, Michael Cohen, ardently defended the President and invoked the attorney-client privilege to shield certain documents and information from outsiders' view, but when Cohen himself was under investigation, he became much more cooperative and forthright with investigators. Rosenzweig, *supra* note 1; Bump, *supra* note 2.

56. 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, 472–79 (1986) (noting that courts sometimes dissolve the attorney-client privilege based on circumstantial evidence indicating that the client sought advice from an attorney before committing a criminal or fraudulent act).

57. Daily & Thornquist, *supra* note 52, at 589–92.

which a party has asserted the attorney-client privilege, but the court does not show that evidence to the party seeking to pierce the privilege.[58] In *United States v. Zolin*, the Supreme Court provided guidance regarding the *in camera* review procedure.[59] The Court held that Federal Rule of Evidence 104, which generally prohibits a judge from considering privileged information at any stage of litigation, does not foreclose *in camera* review of allegedly privileged materials or testimony.[60] Furthermore, the Court decided that the opponent of the privilege need not offer evidence of crime or fraud that is wholly independent of the materials under *in camera* review.[61] The party requesting *in camera* must, at a minimum, show 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."[62] In any event, assuming that the court does grant *in camera* review, the crime-fraud exception will not defeat the attorney-client privilege unless the party raising the exception has made a prima facie case that the opponent sought to enlist the attorney's services in committing a crime or fraud, though some courts impose a stricter standard.[63]

The crime or fraud at issue need not have succeeded for the exception to be available.[64] The client need only have approached the attorney with the intent to get help attempting a crime or fraud.[65] The attorney's actual willingness to help is not the *sine qua non* for judicial enforcement of the exception; the client's intent is dispositive, not the attorney's response.[66] An attempt by the client to involve the attorney is enough—just as an attempt to commit a crime could be subject to prosecution even if the would-be criminal never manages to bring the scheme to fruition.

The crime-fraud exception will not apply to a good-faith conversation in which a client merely asks the attorney whether certain conduct is illegal or fraudulent.[67] Attorneys may tell clients what the

58. *Id.*
59. *Zolin*, 491 U.S. at 554.
60. *Id.* at 563–68.
61. *Id.* at 573–74.
62. *Id.* at 572 (internal citations and quotation marks omitted).
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*; *see also* MRPC, *supra* note 22, at r. 1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of

boundaries of the law are without forfeiting the privilege.[68] However, if a client tries to involve the attorney in committing a crime or fraud, the exception will overcome the attorney-client privilege.[69]

C. NOTORIOUS RECENT EXAMPLES

A number of examples illustrate the value of the crime-fraud exception. While the notoriety of the parties is atypical, these examples otherwise represent fairly straightforward applications of current law.

Perhaps the best-known use of the crime-fraud exception occurred during investigations of alleged misconduct by the president. Special Counsel Robert Mueller successfully invoked the crime-fraud exception in order to search the office of President Donald Trump's personal attorney Michael Cohen; a court authorized this search upon a preliminary showing that Cohen had assisted Trump in paying his alleged paramour, Stormy Daniels, to keep silent about the affair during Trump's presidential campaign.[70] When Trump later faced impeachment on the ground that he had withheld military aid to Ukraine until its leaders cooperated in the investigation of Trump's political rival and his son, commentators believed that a congressional subpoena of Trump's personal attorney Rudy Giuliani could have overcome an objection asserting the attorney-client privilege, because the crime-fraud exception might possibly have applied to such communication.[71] Decades earlier, when Independent Counsel Kenneth Starr

conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.").

68. MRPC, *supra* note 22, at r. 1.2(d).

69. MUELLER ET AL., *supra* note 11.

70. *See, e.g.*, Philip Bump, *To Search Michael Cohen's Home and Office, the FBI Had to Clear a Higher-Than-Normal Bar*, WASH. POST (Apr. 9, 2018), https://www.washingtonpost.com/news/politics/wp/2018/04/09/to-search-michael-cohens-home-and-office-the-fbi-had-to-clear-a-higher-than-normal-bar [https://perma.cc/9E9Q-JW2Z] (featuring Professor Robert Weisberg of Stanford Law School explaining how the crime-fraud exception allowed judicial authorization of the search of Michael Cohen's office to find evidence that he had assisted Trump with payoffs to Daniels); Bump, *supra* note 2 (discussing how the crime-fraud exception also created an opportunity for Cohen to testify before Congress about his otherwise confidential dealings with Trump).

71. Professor Ellen Yaroshefsky of Hofstra Law School opined that the crime-fraud exception might possibly apply to Giuliani's congressional testimony if he had assisted Trump with crimes such as extortion or campaign finance violations. Deanna Paul, *Can Giuliani Invoke Attorney-Client Privilege to Avoid Congressional Testimony?*, WASH. POST (Oct. 3, 2019, 2:29 PM), https://www.washingtonpost.com/politics/2019/10/03/can-rudy-giuliani-invoke-attorney-client-privilege-avoid-congressional-testimony [https://perma.cc/EX9F-SHKX]. Professor David Sklansky of Stanford Law

was investigating President Bill Clinton's involvement in an affair with intern Monica Lewinsky, a court approved the use of the crime-fraud exception to defeat a claim that Lewinsky's communication with her personal attorney was privileged; the court determined that she had forfeited the privilege when she tried to enlist her attorney's aid in providing false sworn testimony about the affair.[72]

The crime-fraud exception has also facilitated prosecutions of prominent campaign officials. Paul Manafort and Rick Gates, both of whom worked on Donald Trump's campaign for president in 2016, were prosecuted and convicted of various criminal offenses, some of which related to their campaign activities.[73] Prosecutors obtained a court order to compel grand jury testimony by the attorney representing both Manafort and Gates.[74] The basis for the order was that the defendants had utilized the attorney's services in connection with their criminal schemes.[75]

High-profile prosecutions of financial crimes have relied on the crime-fraud exception. In a prosecution of Paul Ceglia for attempting

School also pointed to the crime-fraud exception as a possible problem for Giuliani if he raised an objection under the attorney-client privilege. Bob Egelko, *Stanford Law Expert Shoots Down Impeachment Assertions by Trump, Graham, Giuliani*, S.F. CHRON. (Oct. 8, 2019, 3:15 PM), https://www.sfchronicle.com/nation/article/Stanford-law-expert-shoots-down-impeachment-14501946.php [https://perma.cc/P36X-LQBV]. In addition to the crime-fraud exception, a number of other circumstances would undermine Giuliani's reliance on the attorney-client privilege, including the fact that he arguably was not acting in his capacity as Trump's lawyer, and much of the communication at issue was with third parties rather than with his client. Professor Sklansky summed up his view of the evidentiary arguments made by Giuliani and the Trump defense team: "evidence law got mangled." Egelko, *supra.*

72. *In re* Grand Jury Subpoena to Carter, No. 98-068(NHJ) 1998 U.S. Dist. LEXIS 19497, at *4–6 (D.D.C. Apr. 28, 1998) (holding that Monica Lewinsky's communications with her attorney were admissible under the crime-fraud exception because she sought legal assistance in connection with falsely swearing that she did not have sex with Bill Clinton, and that proof that her attorney knew of the lie was not necessary for exception to apply), *aff'd in part and rev'd in part sub nom. In re* Sealed Case, 162 F.3d 670 (D.C. Cir. 1998).

73. *See* Krauss, *supra* note 2; Sharon LaFraniere, *Paul Manafort, Trump's Former Campaign Chairman, Guilty of Eight Counts*, N.Y. TIMES (Aug. 21, 2018), https://www.nytimes.com/2018/08/21/us/politics/paul-manafort-trial-verdict.html [https://perma.cc/4MMV-ZNH5]; Sharon LaFraniere, *Rick Gates, Ex-Trump Aide and Key Witness for Mueller, Is Sentenced to 45 Days in Jail*, N.Y. TIMES (Dec. 17. 2019), https://www.nytimes.com/2019/12/17/us/politics/rick-gates-sentencing.html [https://perma.cc/829B-HKAM].

74. Chief Judge Beryl Howell of the U.S. District Court for the District of Columbia issued an order compelling the attorney for both Paul Manafort and Rick Gates to testify before the grand jury in connection with the criminal investigation of these clients. *In re* Grand Jury Investigation, No. 17-2336, 2017 WL 4898143 (D.D.C. Oct. 2, 2017).

75. *Id.*; Krauss, *supra* note 2*.*

to defraud Facebook founder Mark Zuckerberg, prosecutors used the crime-fraud exception to obtain attorney-client communication providing evidence of Ceglia's ruse.[76] Similarly, in the prosecution of New York investor Morris Zukerman for tax evasion, the prosecution was able to call the defendant's attorney as a witness because the defendant had instructed his attorney to assist in making misrepresentations to the IRS, which forfeited the protections of the attorney-client privilege.[77]

The crime-fraud exception might possibly apply in two infamous cases involving allegations of sex crimes. According to some accounts, disgraced film mogul Harvey Weinstein might have utilized his legal counsel to make arrangements for witness tampering and suppression of reports concerning the defendant's sexual impropriety.[78] Such misuse of the attorney-client relationship could possibly support the application of the crime-fraud exception.[79] Accusations of deceitful and illegal conduct by attorneys have also arisen in connection with the sexual exploitation case involving now-deceased financier Jeffrey Epstein, and at least one attorney is raising the crime-fraud exception to challenge the opponent's claims of privilege.[80]

Virtually all of the foregoing cases involved crimes or alleged crimes, but there is at least one prominent example of a civil suit that successfully utilized the crime-fraud exception without any claim of criminal activity. In the 1990s, the state of Minnesota sued various companies that produced and marketed tobacco products.[81] Like many other plaintiffs bringing such suits in the past, Minnesota had difficulty obtaining internal documents in which the defendants'

76. United States v. Ceglia, No. 12-CR-876, 2015 WL 1499194, at *3–10 (S.D.N.Y. Mar. 30, 2015).

77. Peter Henning, *When Lawyers Testify Against a Client*, N.Y. TIMES (June 13, 2016), https://www.nytimes.com/2016/06/14/business/dealbook/when-lawyers-testify-against-a-client.html [https://perma.cc/K6GM-CFX9].

78. Lynn Bernabei & Kristen Sinisi, *The Legal Case Against Weinstein's Suppression Efforts*, LAW360 (Jan. 16, 2018, 12:38 PM), https://www.law360.com/articles/1001920/the-legal-case-against-weinstein-s-suppression-efforts [https://perma.cc/5UB3-MBKX].

79. *Id.*

80. Tom McParland, *Alan Dershowitz Set to Subpoena David Boies and Firm in Defamation Counterclaim Against Epstein Accuser*, LAW.COM (Dec. 2, 2019, 12:57 PM), https://www.law.com/newyorklawjournal/2019/12/02/alan-dershowitz-set-to-subpoena-david-boies-and-firm-in-defamation-counterclaim-against-epstein-accuser [https://perma.cc/L3UK-ZF6W].

81. Michael V. Ciresi, Roberta B. Walburn & Tara D. Sutton, *Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation*, 25 WM. MITCHELL L. REV. 477, 477–78 (1999).

officers and employees discussed risks associated with tobacco use.[82] Those documents, which included studies by in-house scientists, were crucial evidence to support Minnesota's claims.[83] The defendants invoked the attorney-privilege to resist discovery, arguing that the documents consisted of attorney-client communication because the defendants' attorneys were among the many officers and employees to whom the scientists sent their reports.[84] In a landmark ruling, a federal special master rejected the privilege claim, and characterized the defendants' efforts to withhold the information as fraudulent within the meaning of the crime-fraud exception.[85] Within short order of this ruling, Minnesota and most other states in the United States settled with the defendants for a multibillion-dollar sum.[86]

The discussion up to this point supports a generalization about crime-fraud exception. As is evident in widespread media accounts,[87] the use of the crime-fraud exception by prosecutors is frequent and is growing.[88] By contrast, the use of the crime-fraud exception in civil cases remains rare.[89]

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82. *Id*. at 479–87, 493–97.

83. *Id*. at 499–500, 528–31, 556–65.

84. *Id*. at 480–89, 529–32.

85. *Id.* at 552–57.

86. *Id.* at 479. C. Everett Koop, then the surgeon general of the United States, hailed the Minnesota tobacco litigation as "one of the most significant public health achievements of the second half of the 20th century." *Id.*

87. *See* Westlaw data, *supra* note 1 (showing that media coverage of the crime-fraud exception has tripled in the last two years); Rosenzweig, *supra* note 1 (arguing that "the world is awash in 'hot takes' on the use of the crime-fraud exception").

88. For example, the Tax Division of the U.S. Department of Justice recently announced that it will begin raising the crime-fraud exception more frequently and at earlier stages of the DOJ's enforcement actions. Strickland, *supra* note 5. *See* Brief of the National Ass'n of Criminal Defense Lawyers as Amicus Curiae in Support of Petition for a Writ of Certiorari at 17–18, Corp. & Client v. United States, No. 14-389 (Oct. 28, 2014), 2014 WL 5463364 (citing statistics indicating that the prosecutorial use of the crime-fraud exception to challenge the attorney-client privilege is a "growing problem"); Aviva Abramovsky, *Traitors in Our Midst: Attorneys Who Inform on Their Clients*, 2 U. PA. J. CONST. L. 676, 695–703 (2000) ("The 'crime-fraud' exception to the privilege has become an exception which swallows the rule in the case of prosecutorial intrusion into the lawyer-client relationship."); Max D. Stern & David Hoffman, *Privileged Informers: The Attorney Subpoena Problem and a Proposal for Reform*, 136 U. PA. L. REV. 1783, 1800–01 (1988) ("Use of the crime/fraud exception by prosecutors as a means of compelling attorney testimony has 'skyrocketed' in the past few years.").

89. *See generally* Christine Soares, *Rare Application of the Crime-Fraud Exception to the Attorney-Client Privilege*, MONDAQ (Mar. 15, 2013), http://www.mondaq.com/unitedstates/x/227064/White+Collar+Crime+Fraud/Rare+Application+of+Crime+Fraud+Exception+to+the+AttorneyClient+Privilege [https://perma.cc/R4UA-K44T] ("[T]he crime-fraud exception is applied most often in criminal cases."); Fried, *supra*

D. EXCEPTION NOW COVERS CIVIL FRAUD BUT NO OTHER CIVIL VIOLATION

Law students sometimes question why the crime-fraud exception applies to any crime, irrespective of gravity (including the most minor misdemeanors),[90] but only applies to one category of noncriminal activity: fraud. A few jurisdictions have expanded the scope of noncriminal conduct that qualifies under the exception, but the vast majority of jurisdictions limit the exception to crimes and noncriminal fraud.[91] The limit constrains the effectiveness of the exception in modern times. Given that virtually all fraud is potentially subject to prosecution as crime—especially considering the breadth of federal mail fraud and wire fraud statutes[92]—the scant application of the crime-fraud exception to noncriminal activity seems to be a missed opportunity. Surely there are noncriminal acts besides fraud that present as compelling a case for the exception as does a mere misdemeanor. Why, then, is the crime-fraud exception so constrained?

One possible explanation is that the odd boundaries of the crime-fraud exception are a historical accident. Some of the early cases

note 56, at 499 (noting that prosecutors represent a high proportion of litigants who introduce evidence under the crime-fraud exception to the attorney-client privilege); Andrea L. Borgford, *The Protected Status of Opinion Work Product: A Misconduct Exception*, 68 WASH. L. REV. 881, 890 n.69 (1993) (observing that the crime-fraud exception has been used primarily in grand jury settings); 1 ROBERT P. MOSTELLER, KENNETH S. BROUN, GEORGE E. DIX, EDWARD J. IMWINKELRIED, DAVID H. KAYE & ELEANOR SWIFT, MCCORMICK ON EVIDENCE § 95 (8th ed. 2020) (indicating that the most common context in which the crime-fraud exception to attorney-client privilege is raised is in grand jury settings).

90. MUELLER ET AL., *supra* note 11 ("The exception extends even to crimes of a relatively minor nature."); *see* United States v. Friedman, 445 F.2d 1076, 1085–86 (9th Cir. 1971) (applying the crime-fraud exception to unlawful possession of grand jury transcripts, which is a relatively minor offense); Lytle v. Mathew, 89 N.E.3d 199, 205 n.1 (Ohio Ct. App. 2017) (applying the crime-fraud exception to misdemeanor offense); Micron Tech., Inc. v. Rambus, Inc., 645 F.3d 1311, 1330–31 (Fed. Cir. 2011) (applying crime-fraud exception to a misdemeanor offense); *In re* 3dfx Interactive, Inc., 347 B.R. 386, 389–94 (Bankr. N.D. Cal. 2006) (holding that a misdemeanor offense could be sufficient to trigger the crime-fraud exception), *vacated on other grounds*, 2006 WL 3734297, at *8 (N.D. Cal. Dec. 15, 2006) (determining that the facts were insufficient in this case, but not disputing that a misdemeanor offense could provide the basis for the crime-fraud exception).

91. Kochanowski, *supra* note 14 (setting forth all states' different versions of the crime-fraud exception in an appendix).

92. The federal criminal fraud statutes are very expansive and could theoretically cover virtually any scheme or artifice to defraud that incidentally uses the mail, the telephone system, or computers. For examples of scholarship concerning the breadth of the federal mail fraud and wire fraud statutes, see Ellen S. Podgor, *Criminal Fraud*, 48 AM. U. L. REV. 729 (1999); and Jason T. Elder, *Federal Mail Fraud Unleashed: Revisiting the Criminal Catch-All*, 77 OR. L. REV. 707 (1998).

presented fact patterns sounding in fraud, but not prosecutable as crime due to the limited ambit of then-existing criminal codes.[93] When those early cases mentioned fraud explicitly as a ground for an exception to the attorney-client privilege, it made sense to refer to the exception as "crime-fraud" in the ensuing decades, even when the expansion of criminal codes made the inclusion of the term "fraud" somewhat duplicative.

The attempt to attribute the pairing of crime and fraud to historical accident seems dubious, however, because judges continue to cite noncriminal fraud as a valid basis for abrogating the privilege in modern times.[94] The enduring vitality of the fraud prong indicates that such misconduct does indeed present a strong case for piercing the attorney-client privilege. This could be true for several reasons.

First, the world of fraud is complicated, and the involvement of attorneys helps clients navigate that world. Perpetrators of fraud sometimes devise complex schemes. Advice from attorneys helps clients understand the lay of the land, present themselves credibly, keep regulators at bay, and threaten legal action against critics.[95] By contrast, the involvement of attorneys is less valuable when clients want to commit simpler crimes.[96] Thus, the unique value of attorneys to fraudulent schemes is one factor that justifies establishing a severe penalty—and formidable deterrent—by revoking the attorney-client privilege in such instances.

A second reason why fraud should forfeit the attorney-client privilege is that this misconduct preys on vulnerable victims. Perpetrators of fraud commonly seek to dupe elderly people and others whose credulousness, cognitive impairments, or lack of sophistication make them easier marks.[97] Victims of fraud are almost never

93. For a history of the early cases establishing the crime-fraud exception, see Fried, *supra* note 56, at 446–61.

94. MUELLER ET AL., *supra* note 11, at nn.18–25 (collecting recent fraud cases).

95. Scholars have noted that the involvement of attorneys has been crucial for the success of recent large-scale frauds, including the Enron scam. *See, e.g.*, Susan P. Koniak, *Corporate Fraud: See, Lawyers*, 26 HARV. J.L. & PUB. POL'Y 195, 195 (2003) ("The hidden dirty secret of corporate scandals is that without lawyers, few corporate scandals would exist and fewer still would succeed long enough to cause any significant damage."); Susan P. Koniak, *When the Hurlyburly's Done: The Bar's Struggle with the SEC*, 103 COLUM. L. REV. 1236, 1239–43 (2002) (discussing how involvement of lawyers was necessary for frauds perpetrated by Arthur Anderson and Enron).

96. *See* Koniak, *When the Hurlyburly's Done*, *supra* note 95, at 1236, 1239–43 (showing that Enron made use of its lawyers to aid in vastly complex criminal fraud).

97. *See* Andrew Jay McClurg, *Preying on the Graying: A Statutory Presumption to Prosecute Elder Financial Exploitation*, 65 HASTINGS L.J. 1099, 1110 (2014) ("Fraud perpetrators are alert to and prey on the cognitive and physical impairments of elders.

represented by counsel,[98] and when those who commit fraud seek to involve their counsel in the schemes, the asymmetry between the parties is stark indeed. Judges and legislators who take away the protection of the attorney-client privilege in fraud cases may very well be reacting to the vulnerability of the victims by imposing such a severe sanction on lawyer and client.

Third, fraud is hard to prove. Unlike garden-variety torts and other civil claims, an action for fraud requires the collection of extensive evidence showing the artifice, the intentional misrepresentations, and the absence of good-faith reasons for the defendants' conduct.[99] When a defendant can conceal all evidence by involving an attorney and invoking the attorney-client privilege, the injustice is manifest and the plaintiff's odds of presenting adequate proof are long indeed. Courts and legislators might have been thinking about proof issues when they decided that noncriminal fraud deserved the same treatment as crime as a reason to set aside the attorney-client privilege.[100]

As will be seen below, high-level environmental violations committed knowingly by clients who seek attorneys' assistance are analogous to noncriminal fraud in all three of the above-listed aspects.[101] The wrongdoers in the environmental context are operating in a

The MetLife study found that stranger perpetrators target victims who show visible signs of vulnerability 'such as handicap tags on cars, the use of a walking cane, or the display of confusion.'").

98. *Expanding Services to Reach Victims of Identity Theft and Financial Fraud*, U.S. DEP'T JUST. OFF. FOR VICTIMS CRIME (Oct. 2010), https://www.ovc.gov/pubs/ID_theft/pfv.html [https://perma.cc/D937-7UJR] (discussing the insufficiency of legal services for victims of financial fraud and related crimes).

99. Practitioners who specialize in fraud cases have noted the difficulty of proving fraudulent intent. *See, e.g.*, Brian Niemczyk, *The Perils of Suing and Being Sued for Fraud in Commercial Cases in Minnesota*, HELLMUTH & JOHNSON (Jan. 16, 2014), https://hjlawfirm.com/the-perils-of-suing-and-being-sued-for-fraud-in-commercial-cases-in-minnesota [https://perma.cc/AVD5-DTSE] ("[V]*ery few* fraud claims are ultimately successful. The most obvious reason for this is the extreme difficulty of proving each and every element of your fraud claim."); Adam Harrison, *What Is the Tort of Fraud in Maryland?*, HARRISON L. GRP. (Aug. 29, 2014), http://www.harrisonlawgroup.com/hlg-updates/what-is-the-tort-of-fraud-in-maryland [https://perma.cc/T9FH-DLRZ] (listing the elements of civil fraud and concluding that "fraud is one of the most difficult civil causes of action to prove"); *Fraud and Deceit: What Are They and How Do You Prove It*, LAW OFFS. STIMMEL, STIMMEL & ROESER, https://www.stimmel-law.com/en/articles/fraud-and-deceit-what-are-they-and-how-do-you-prove-it [https://perma.cc/2CFY-2LFY] ("Consider how hard [misstatement of fact] is to prove since you are trying to prove what is going on inside of someone's head.").

100. *See, e.g.*, 9A Michigan Pleading & Practice § 68:22 (2d ed. 2019) ("Because fraud is hard to prove or disprove, great liberality is allowed in the admission of evidence tending to show either its existence or nonexistence.").

101. *See infra* Part II.F.

complex regulatory world, in which lawyers are valuable partners.[102] The wrongdoers prey on vulnerable victims, including children and older people who are uniquely susceptible to certain forms of pollution and the nonhuman components of the environment that cannot defend themselves.[103] Finally, environmental violations are difficult to prove,[104] so this consideration militates in favor of granting access to attorney-client communication when clients have tried to entangle lawyers in their misconduct. Because knowing emission of noxious pollutants is every bit as egregious as fraud, and more egregious than low-level misdemeanors, a strong case can be made to recognize such environmental violations as an additional basis for overcoming the attorney-client privilege.[105]

To be clear, the crime-fraud exception presently has very limited utility to litigants seeking to combat polluters.[106] There are few published cases involving the invocation of the crime-fraud exception in the environmental context.[107] For reasons set forth in Part II, the

102. *See, e.g.*, Carlos Wing-Hung Lo, Ning Liu, Xue Pang & Pansy Hon Ying Li, *Unpacking the Complexity of Environmental Regulatory Governance in a Globalizing World: A Critical Review for Research Agenda Setting*, 22 J. ENV'T POL'Y & PLAN. 594, 594, 596–97 (reviewing the increasing complexity of environmental regulation across the world).

103. *See infra* note 177.

104. *See infra* Part II.E (describing judges' lack of experience when it comes to the prosecution of environmental crimes).

105. *Infra* Parts II, III.

106. *See* CORPORATE COUNSEL'S GUIDE TO THE ATTORNEY-CLIENT, WORK-PRODUCT & SELF-EVALUATIVE PRIVILEGES § 1:42 (2019) (observing that crime-fraud exception does not apply to environmental violations in general but only applies to the subset of environmental violations that are either crimes or frauds); *see, e.g.*, Olson v. Accessory Controls & Equip. Corp., 757 A.2d 14, 28–36 (Conn. 2000) (showing that plaintiff, who argued that documents at issue concealed full extent of environmental contamination from government regulators, could not show that document constituted a fraud within the meaning of the crime-fraud exception); Symposium, *Groundwater Pollution Panel*, 30 COLUM. J. ENV'T L. 403, 415 (2005) (noting Arizona Attorney General Terry Goddard's comment about underreporting by a corporation regarding the extent of environmental pollution in a public disclosure and comments while invoking attorney-client privilege to withhold studies setting forth contrary evidence)*; accord Groundwater Pollution Panel*, *supra* (quoting University of Texas Law Professor Tom Garity, who responded to Goddard's comment about underreporting with the following, "[t]his is a fairly typical way to do things"). *See generally* George Harris, *Taking the Entity Theory Seriously: Lawyer Liability for Failure to Prevent Harm to Organizational Client Through Disclosure of Constituent Wrongdoing*, 11 GEO. J. LEGAL ETHICS 597, 609–10 (1998) (noting that existing disclosure obligations for crime, fraud and imminent bodily harm are unlikely to extend to instances in which lawyers are aware of imminent environmental pollution).

107. *See* 2 ENVIRONMENTAL INSURANCE LITIGATION: LAW & PRACTICE § 18.11 (2018) ("Occasionally, policyholders will assert the 'crime-fraud' exception in an attempt to

present version of the crime-fraud exception is very unlikely to be helpful to parties seeking to promote environmental health. Indeed, the most famous use of the crime-fraud exception in environmental litigation during the last decade was not by plaintiffs, but rather by defendants: when Chevron defended against a multibillion dollar suit seeking to clean up pollution in Ecuador, the defendants used the crime-fraud exception in U.S. federal court to overcome the attorney-client privilege and obtain materials from the plaintiffs' attorney that led to a successful racketeering suit against him, followed by a criminal contempt proceeding.[108]

In sum, the crime-fraud exception has not proven to be very useful in facilitating lawsuits to reduce pollution. Courts strictly limit the application of the exception to those categories of misconduct expressly mentioned—crimes and noncriminal frauds—thereby excluding a wide range of harmful conduct in which clients might engage with lawyers' assistance.

E. Interplay with Attorneys' Ethical Rules

It is important to consider one final issue before moving on to this article's proposal. How do the privilege rules, as modified by the crime-fraud exception, relate to the ethical rules for lawyers? If the ethical rules are more restrictive than the privilege rules, then expansion of the crime-fraud exception might not have any effect on lawyers' behavior because the ethical rules are an independent source of preclusive authority. On the other hand, if the ethical rules are less restrictive than the privilege rules, then expansion of the crime-fraud exception could be efficacious.

pierce the attorney-client privilege—research, however, has revealed no insurance coverage case where this agreement succeeded.").

108. Due to the author's lack of familiarity with the Ecuadoran Lago Agrio litigation, this article offers no opinion on the use of the crime-fraud exception in that case, but the following sources address the crime-fraud issues and the subsequent fallout. *See* William Thompson & Arman Adzhemyan, *Litigating the Crime-Fraud Exception:* Chevron Corp. v. Donziger, INSIDE COUNS. (Aug. 25, 2014), https://www.gibsondunn.com/wp-content/uploads/documents/publications/ThomsonAdzhemyan-LitigatingTheCrimeFraudException.pdf [https://perma.cc/Y94P-XLMH] (reviewing defense counsel's successful use of the crime-fraud exception to obtain information that plaintiff's counsel claimed to be privileged); Jack Newsham, *Donziger Faces Criminal Contempt Prosecution Team at Seward & Kissell*, LAW.COM (Aug. 13, 2019), https://www.law.com/newyorklawjournal/2019/08/13/donziger-faces-criminal-contempt-prosecution-team-at-seward-kissel/?slreturn=20190802230543 [https://perma.cc/UR7P-T9WR] (discussing Steven Donziger's criminal contempt proceedings).

In particular, two categories of ethical rules require close scrutiny: first, confidentiality rules that might prevent a lawyer from making voluntary disclosures when the lawyer's client has engaged in misconduct triggering the crime-fraud exception; and second, fair-play rules that might prevent opposing counsel from attempting to extract such information by serving a subpoena on the lawyer who represents the client engaged in wrongdoing.

The first category of ethical rules to consider are those that obligate the lawyer to keep client information confidential. The ethical duty of confidentiality extends to any information that the attorney gathers in the course of representing a client, whether or not that information comes from confidential communication with the client.[109] The exceptions to the ethical duty of confidentiality are broader than the exceptions to the attorney-client privilege.[110] At the state level—the level that matters most because the ABA does not have any direct enforcement authority—any type of criminal activity by the client usually provides justification for the lawyer to disclose otherwise

109. MRPC, *supra* note 22, at r. 1.6(a) ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).").

110. See Model Rule of Professional Conduct 1.6(b), which currently provides as follows:

> A lawyer may reveal information relating to the representation of a client 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 and in furtherance of which the client has used or is using the lawyer's services;
>
> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
>
> (4) to secure legal advice about the lawyer's compliance with these Rules;
>
> (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
>
> (6) to comply with other law or a court order; or
>
> (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

MRPC, *supra* note 22, at r. 1.6(b).

confidential information necessary to prevent the crime.[111] This exception to the ethical duty of confidentiality applies whether or not the client has tried to use the lawyers' services in order to commit the crime.[112] Moreover, the client's commission of certain fraudulent acts could permit disclosure by the lawyer.[113] Thus, most of the conduct that would trigger the application of the crime-fraud exception to the attorney-client privilege would also fall within an exception to the ethical duty of confidentiality. The exceptions to the ethical duty could actually extend to additional categories of harmful client conduct falling outside the scope of the current crime-fraud exception, such as noncriminal environmental pollution threatening human health.[114] In such cases, the crime-fraud exception could conceivably be the "bottleneck" that limits lawyers from providing evidence about their clients' harmful pollution.

The second category of relevant ethical rules are those that forbid putting lawyers on the stand to talk about their clients. The ABA has adopted a model rule that bars prosecutors from subpoenaing attorneys to testify in any criminal proceeding if the prosecutors are seeking information about the attorneys' clients, unless such testimony is necessary as a last resort and the prosecutors do not ask about privileged matters.[115] There are several reasons, however, why this rule

111. In addition to adopting most of the exceptions to confidentiality that appear in ABA Model Rule of Professional Conduct Rule 1.6, most state bars have included a separate permissive disclosure ground allowing a lawyer to reveal information that the lawyer believes necessary to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime. The ABA maintains a web page that compares state bars' disclosure grounds under their various versions of Rule 1.6(b). *Variations of the ABA Model Rules of Professional Conduct Rule 1.6: Confidentiality of Information*, A.B.A. CTR. FOR PRO. RESP. [hereinafter *Variations of ABA MRPC 1.6*], http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_6.authcheckdam.pdf [https://perma.cc/783M-TVUT].

112. *See id.*

113. *Id.* (setting forth two exceptions, 1.6(b)(2) and 1.6(b)(3), allowing attorneys to make disclosures concerning the effect of fraudulent schemes in which clients have used attorneys' services). In some respects, these provisions seem to mirror the "fraud" prong of the current crime-fraud exception.

114. *See* Victor B. Flatt, *Disclosing the Danger: State Attorney Ethics Rules Meet Climate Change*, 2020 UTAH L. REV. 569, 577 (arguing that under ABA Model Rule 1.6(b)(1) and its state analogs, lawyers may disclose information about clients' emissions of harmful greenhouse gases, which pose imminent risks for human health).

115. See ABA Model Rule 3.8, which currently provides as follows:

> The prosecutor in a criminal case shall . . .
>
> (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

does not limit access to information subject to the crime-fraud exception. First, the rule only applies to prosecutorial subpoenas in criminal cases; other categories of attorneys and other settings are exempted.[116] Second, the rule does not limit other means through which prosecutors could access attorney-client communication (e.g., through subpoenaing documents, through subpoenaing participants in a conversation who are not attorneys, etc.).[117] Third, the rule does not narrow the scope of the crime-fraud exception, and simply cross-applies the privilege law that exists in each jurisdiction.[118] Fourth, approximately half of the states have not adopted this model rule.[119] Fifth, even in states that have adopted it, some authority suggests that federal prosecutors lie beyond the scope of the rule due to the Supremacy Clause.[120] Thus, the ethical rules do not appear to restrict attorney subpoenas that the crime-fraud exception would abide.

> (1) the information sought is not protected from disclosure by an applicable privilege;
>
> (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
>
> (3) there is no other feasible alternative to obtain the information . . .

MRPC, *supra* note 22, at r. 3.8.

116. *Id.*

117. *Id.* While the express terms of Model Rule 3.8(e) do not prevent prosecutors from serving subpoenas on third parties to obtain documents setting forth attorney-client communication, see MODEL STANDARDS FOR CRIM. JUST., standard 2.7(c)(i) (AM. BAR ASS'N 2020), which urges restraint: "The prosecutor using a subpoena should . . . avoid seeking the production of attorney-client privileged material. . ." These standards are merely hortatory, though, and they do not have the same force as the rules in state bars' ethical codes. Ellen S. Podgor, *The Role of the Prosecution and Defense Function Standards*: *Stagnant or Progressive?*, 62 HASTINGS L.J. 1159, 1175 (2011).

118. Ethical rules are distinct from privilege law. The ABA Model Rules and their state counterparts do not purport to modify the privileges (or exceptions to privileges) that arise under the common law or statutory law in any jurisdiction. For a general discussion of the distinction between ethical rules and privilege law, see Ann M. Murphy, *Is It Safe? The Need for State Ethical Rules to Keep Pace with Technological Advances*, 81 FORDHAM L. REV. 1651, 1654–59 (2013).

119. For a state-by-state breakdown, see *Variations on the ABA Model Rules of Professional Conduct*, A.B.A. CTR. FOR PRO. RESP., https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_8_e.pdf [https://perma.cc/8ZVG-2GST], for a chart. *See generally* Henning, *supra* note 77 ("[T]here was not a broad trend to follow the American Bar Association's lead in adopting Rule 3.8's limitation on prosecutors . . . .").

120. *Compare* United States v. Sup. Ct., 839 F.3d 888, 928 (10th Cir. 2016) ("[B]ecause such heightened requirements for attorney subpoenas would impede the grand jury's broad investigative mandate . . . the challenged provisions of [New Mexico's analog to ABA Model Rule 3.8(e)] conflict with federal law and are preempted."), *and* Baylson v. Disciplinary Bd., 975 F.2d 102, 112–13 (3d Cir. 1992) (finding violation of the Supremacy Clause where state ethics rule required prior judicial approval of

In sum, the current narrow scope of the crime-fraud exception cannot be justified on the ground that ethical restrictions for attorneys would render moot any expansion of the crime-fraud exception. To be sure, the exceptions to the ethical rules are not co-extensive with the crime-fraud exception, but for the most part, the exceptions to the ethical rules are more accommodating. There is space to expand the crime-fraud exception, especially in the context of environmental contamination that rises to a level that threatens human health.

II. SHOULD THE EXCEPTION EXTEND TO CIVIL VIOLATIONS OF ENVIRONMENTAL LAW?

This Part considers a specific proposal to expand the crime-fraud exception to the attorney-client privilege. The model statute set forth below would include language from the current crime-fraud exception and would add a new ground for abrogating the attorney-client privilege. When a party seeks a lawyer's assistance in connection with a knowing emission of a listed pollutant (an act referred to hereafter by the acronym KELP), that misconduct could provide a basis for overcoming the privilege.

At first blush, this Article's proposal might appear to be of scant value because a significant portion of acts that violate civil environmental laws could also constitute crimes, at least in theory. The analysis below shows that for various reasons, courts have been reluctant to recognize the potential breadth of the crime-fraud exception in environmental cases, so it makes sense to clarify explicitly how the exception could apply to pollution that the government declines to prosecute. The model statute also improves the procedure for adjudicating claims of attorney-client privilege when opponents object based on the claimants' lawbreaking.

A. MODEL STATUTE

Section ____: Certain Lawbreakers Disqualified from Invoking Privilege

1) **Scope of Exception**. There is no privilege under Section ____ [setting forth the attorney-client privilege and/or other professional privilege] if the services of the ____ [attorney or professional] were sought or obtained to enable or aid anyone

a) to commit or plan to commit a crime or fraud, or

b) knowingly to cause unlawful emission of a pollutant listed in [cross-reference statute(s) and/or regulation(s) setting forth pollutants and threshold quantities subject to this exception]

---

federal prosecutor's grand jury subpoena served on attorney), *with* Henning, *supra* note 77 (reporting that state versions of ABA Model Rule 3.8(e) "do not appear to have hampered the Justice Department to any great degree").

2) **Procedure for Objections to Privilege Claims**. When a party has raised a privilege claim under Section ____ [setting forth the attorney-client privilege and/or other professional privilege], any other party may object to the privilege claim on the ground that claimant has engaged in lawbreaking as set forth in subsection 1). The party opposing the privilege claim must prove to the court that probable cause exists to believe the claimant's conduct meets the requirement of subsection 1). In adjudicating the privilege claim and the objection under the lawbreaking exception, the court may consider the information and materials as to which the claimant seeks to apply the privilege, along with any other evidence and information that the court may properly consider under Section ____ [the state's version of Rule 104]. In camera review of the information and materials as to which the claimant asserts the privilege is appropriate where the objecting party 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 that one of the acts set forth in subsection 1) has occurred. A party objecting to a privilege claim on the ground that a crime has occurred within the meaning of subsection 1a) need not be criminal prosecutor, and in any event the crime need not have been convicted or charged for subsection 1a) to apply.

Each part of the model statute deserves a brief explanation here. The first subsection of the statute includes blanks the legislature could use to customize the scope of the exception. The disqualification could apply only to the attorney-client privilege, or it could apply to privileges for communication with other categories of professionals. Legislators could reasonably conclude that lawbreaking should foreclose resort to any professional privilege. Most professional privileges are not as ironclad as the attorney-client privilege, though, so there may already exist language in states' evidence codes allowing opponents to overcome privileges for non-attorney professionals with relative ease, based on a showing of need for the information in the pending litigation. In any event, if the listed misconduct should limit secrecy in attorney-client communication, there is no principled reason to exempt other professionals from similar limitations.

Subsection 1a) uses one of the most common formulations of the presently existing crime-fraud exception. This version appears in the California Evidence Code.[121] It is similar to the language of the original codification proposed for the Federal Rules of Evidence, but never

121. *See* CAL. EVID. CODE § 956(a) (2020) "There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud.").

adopted.[122] Many states have followed this model.[123] Also, rather than reinventing the crime-fraud exception, the model statute preserves familiar language so judicial decisions interpreting that language continue to serve as binding precedent. Not only will the continued use of the present crime-fraud exception help to preserve consistency and predictability in court decisions, but it also holds out hope that courts in the future might better exploit the breadth of the exception to cover environmental crimes. Some states are adding to their list of environmental crimes,[124] which would enhance the efficacy of the present crime-fraud exception. For all these reasons, it is preferable for the new environmental exception to complement rather than replace the long-standing crime-fraud exception.

Subsection 1b) sets forth the new exception. For ease of reference, this Article will call the language in subsection 1b) the KELP exception. The model statute gives states the option of cross-referencing whichever list of pollutants—and quantities of pollution—the states consider egregious enough for courts to vacate the attorney-client privilege. Such cross-referencing is common in various state laws. For example, state laws criminalizing narcotics offenses often cross-reference lists of substances that appear elsewhere in state statutes or regulations, or perhaps even in federal statutes or regulations.[125] Cross-referencing avoids cluttering the state's evidence code with a vast amount of highly technical language. It also could allow deference to agencies that have greater expertise with respect to harmful

122. According to David Fried,

> The Advisory Committee of the Supreme Court proposed Rule 503(d)(1) of the Federal Rules of Evidence to provide that there is no privilege when "the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knows or reasonably should have known to be a crime or fraud."

Fried, *supra* note 56, at 443–44 n.1 (citing 56 F.R.D. 183, 236 (1973)).

123. *See* Kochanowksi, *supra* note 7, at 1243–58 (contrasting different states' versions of the crime-fraud exception in 2019); *see also* Fried, *supra* note 56, at 443–44 n.1 (listing several states that had adopted a rule similar to proposed Federal Rule 503(d)(1) as of 1986).

124. For a searchable database that includes both bills and enacted legislation, see *Environmental Health State Bill Tracking Database*, NAT'L CONF. STATE LEGISLATURES (May 4, 2020), https://www.ncsl.org/research/environment-and-natural-resources/environmental-health-legislation-database.aspx [https://perma.cc/553Z-CAVJ].

125. NAT'L CRIM. JUST. ASS'N, A GUIDE TO STATE CONTROLLED SUBSTANCE ACTS 5 (1999), https://www.ncjrs.gov/pdffiles1/Digitization/184295NCJRS.pdf [https://perma.cc/S2BD-3XCC] (noting that many states' drug laws cross-reference the federal schedule of controlled substances).

pollutants. A state that distrusts the federal list might opt to cross-reference the state's own list, or the list of another state with greater resources.

The inclusion of the word "knowingly" at the start of subsection 1b) is significant. Given that the crime-fraud exception rests in part on equitable notions that knowing misconduct deserves a penalty, it would be strangely incongruous to extend the exception to civil law violations based on mere negligence. One additional advantage of restricting the KELP exception to knowing conduct is that the gravity of such conduct will always exceed the gravity of misdemeanor-level environmental crimes, which definitely count under the time-honored crime-fraud exception, but which could involve a low level of mens rea (some of these are negligence offenses and strict liability offenses). When environmental advocates urge legislators to adopt the new KELP exception, they will be able to argue that it sets a higher bar for culpability than already exists under current law.

Subsection 2) of the model statute discusses the procedure for objecting to privilege claims and the procedure for adjudicating such objections. The language of the statute basically tracks the holding by the U.S. Supreme Court in *United States v. Zolin*.[126] Memorializing *Zolin* is valuable, just as the Federal Rules of Evidence have memorialized other Supreme Court holdings relating to evidence law, such as the holding in *Daubert v. Merrell Dow Pharmaceuticals* concerning the admissibility of expert testimony[127] and the holding in *Bourjaily v. United States* concerning the admissibility of co-conspirator statements.[128] Not only will the inclusion of *Zolin*'s language improve the odds that practitioners and judges see it, but subsection 2) will also prevent state courts from adding procedural requirements that will reduce the success of objections based on crime, fraud, or KELP. *Zolin* is not a constitutional interpretation, so state courts can implement increased procedural requirements to strengthen the attorney-client privilege if the states' evidence codes did not endorse the *Zolin* procedure.

The final sentence of subsection 2) makes clear that both prosecutors and private parties have equal standing to assert criminal law violations as a basis for the lawbreaking exception. This sentence also indicates that a crime could be cognizable under subsection 1a) regardless of whether the alleged wrongdoer has been convicted or even charged. This sentence is a clarification of, not a departure from, present law under the crime-fraud exception. The clarification is valuable

126. *See supra* Part I.B.

127. *See* FED. R. EVID. 702.

128. *See* FED. R. EVID. 801(d)(2).

because some judges could otherwise ascribe improper significance to the lack of prosecutorial involvement.[129]

Like any model statute, this Article's template is only a starting place for a state legislature. It is possible that a legislature might want to include several noncriminal grounds other than fraud or KELP on which courts could overrule assertions of attorney-client privilege. Alternately, legislatures might want to narrow KELP to more urgent violations of environmental law, such as those violations presenting a more immediate risk of harming human health, causing extinction of species, or bringing about other irremediable environmental damage. No two states' evidence rules are exactly alike, so some variation in the exceptions to the attorney-client privilege is foreseeable. Indeed, variation is welcome, because it allows for comparison of different states' experiences in order to assess which version of the exception would be optimal in the long run.

B. Lawyers Should Disclose, Not Facilitate, Unlawful Pollution

The most important argument in favor of the KELP exception is also the most straightforward: signaling to would-be violators. The law should signal plainly that lawyers may not aid and abet knowing violations of environmental law, especially violations involving emission of pollutants in dangerous quantities (a list that presumably would be limited to the most harmful subset of pollution). The law should also signal that clients should *not even ask* lawyers to aid and abet such violations. Clients should know that they do so at their peril, and scrupulous lawyers who have heretofore represented such clients faithfully might suddenly be obligated to give evidence against their clients. Of course, clients would still be free to have a good-faith discussion with lawyers about the boundaries of the law, but when clients seek to involve attorneys in transgressing those boundaries, the law should speak with a clear voice. Legal scholars have written about the important signaling effect of the law,[130] and those arguments apply with special cogency in the area of environmental protection, which needs all the legitimacy it can get.

The present omission of KELP from the exceptions to the attorney-client privilege sends a troubling message to both clients and attorneys. So long as attorneys can find a way to avoid assisting with crimes or frauds, they may assist clients in environmental violations

129. For a discussion of the *Zolin* holding, see *supra* Part I.B.

130. *E.g.*, Cass Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 963 (1996) (discussing the "signaling effect" of laws forbidding discrimination).

without fear that attorney-client communications could be used against the client in court.[131] Attorneys who assist clients in committing KELP would be violating an ethical rule—Model Rule 1.2(d) and its state analogs[132]—but this ethical violation does not provide the basis for admission of evidence in court. A rational but unscrupulous attorney might reason accurately that the attorney's ethical violation will never come to light as long as the client is happy, so the attorney will enjoy impunity and good client relations when the attorney assists with KELP.

The general theoretical justifications for the crime-fraud exception apply with equal force to client communications seeking an attorney's assistance with violations of environmental laws.[133] The attorney-client privilege has no net social utility when it enables attorney and client to work together in order to violate important civil environmental laws without any accountability to the rest of society.[134] Knowing violations of civil environmental laws should effect a forfeiture on equitable grounds, because a party with unclean hands should not benefit from the protection of the law.[135] Finally, the attorney who assists a client with KELP is abdicating that attorney's professional duty in a way that makes the attorney-client privilege inapposite.[136] These rationales should apply equally to criminal environmental violations and KELP because the conduct is identical for all intents and purposes.[137]

131. *See* sources cited *supra* note 106.

132. *See* MRPC, *supra* note 22.

133. *See infra* notes 134–137.

134. *See* MUELLER ET AL., *supra* note 11.

135. Clark v. United States, 289 U.S. 1, 15 (1933) ("The privilege takes flight if the [attorney-client relationship] is abused."); *see also* David Cole, *The Crime-Fraud Exception in the Michael Cohen Case*, ACLU (Apr. 10, 2018), https://www.aclu.org/blog/executive-branch/crime-fraud-exception-michael-cohen-case?page=15 [https://perma.cc/X3VP-MCYD] (discussing equitable justification for crime-fraud exception).

136. MUELLER ET AL., *supra* note 11 ("[W]hen 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.").

137. David A. Barker, *Environmental Crimes, Prosecutorial Discretion, and the Civil/Criminal Line*, 88 VA. L. REV. 1387, 1389–90 (2002) (noting that the criminal provisions of federal environmental statutes are "essentially identical in scope and reach to the civil regulatory program created by the statutes").

C. THE CURRENT EXCEPTION IS HARD TO INVOKE WITHOUT PROSECUTION OR FRAUD CLAIM

Readers familiar with criminal environmental law might raise a question about the practical importance of this Article's proposal: don't federal statutes criminalize most knowing emission of listed pollutants? The Clean Water Act (CWA), the Clean Air Act (CAA), and the Resource Conservation and Recovery Act (RCRA) include criminal provisions that extend to violations with varying degrees of mens rea, some of which are not even purposeful or knowing.[138] Indeed, David Uhlmann, one of the nation's foremost experts on criminal environmental law and a former prosecutor of environmental crimes, has written that the mental state requirements for criminal and civil liability under federal environmental laws align more closely than critics have claimed.[139] If, in the environmental context, criminal liability is nearly coextensive with civil liability[140]—at least under federal statutes—how is it valuable to extend the crime-fraud exception to cover KELP?

The answer is that prosecutors tend to be the only ones who can successfully use the present crime-fraud exception.[141] The exception

138. *See generally* David Uhlmann, *Prosecutorial Discretion and Environmental Crime*, 38 HARV. ENV'T L. REV. 159, 167–71 (2014) (discussing the requisite mens rea in environmental crimes).

139. *Id.* at 159, 171 ("Congress made few distinctions under the environmental laws between acts that could result in criminal, civil, or administrative enforcement. . . . [I]t would be wrong to conclude that criminal cases are distinguished from civil cases by the presence or absence of knowing conduct. Polluters often act knowingly, so investigative and prosecutorial discretion frequently determines whether their knowing conduct will result in criminal, civil, or administrative enforcement, not limits imposed by Congress.").

140. Barker, *supra* note 137, at 1389–90 ("Today, most violations of environmental law, if committed knowingly, are criminally enforceable. The three statutes that cover the spectrum of criminal punishment for the release of toxins into the environment, the CWA (water pollution), the Resource Conservation and Recovery Act ("RCRA") (hazardous waste), and the CAA (air pollution), all provide felony-level punishment for these crimes. This statutory structure creates a broad criminal net which is essentially identical in scope and reach to the civil regulatory program created by the statutes." (footnotes omitted)).

141. *See generally* Soares, *supra* note 89. One reason why the crime-fraud exception is more or less the exclusive domain of prosecutors is that the courts tend to be more receptive when the argument comes from a prosecutor rather than a civil attorney. *See* Cary Bricker, *Revisiting the Crime-Fraud Exception to the Attorney-Client Privilege: A Proposal to Remedy the Disparity in Protections for Civil and Criminal Privilege Holders*, 82 TEMP. L. REV. 149, 153–62 (2009) (arguing that as a general matter, courts have set a lower bar for prosecutors than for civil litigants seeking to use the crime-fraud exception); Abramovsky, *supra* note 88 (arguing that because of courts' unwillingness to impose reasonable limits on prosecutors, "the 'crime-fraud' exception to the

is theoretically available to a civil litigant who can show the opposing party has sought to involve an attorney in committing a crime or fraud.[142] In reality, though, the vast majority of litigants who utilize the crime-fraud exception to overcome the attorney-client privilege are prosecutors, usually invoking the exception at the grand jury phase of an investigation.[143] When a civil litigant tries to use the crime-fraud exception in a case that has not been subject to prosecution, the government's absence is conspicuous.[144] Claimants of the attorney-client privilege are able to argue that the government would have charged the case if the government believed that a crime had indeed occurred.[145] This argument is currently available to defendants in almost every civil environmental case, because federal environmental prosecutions are now at a 30-year low.[146] Environmental plaintiffs

privilege has become an exception which swallows the rule in the case of prosecutorial intrusion into the attorney-client relationship"); Stern & Hoffman, *supra* note 88 (arguing that due in part to courts' pro-government inclinations, "[u]se of the crime/fraud exception by prosecutors as a means of compelling attorney testimony has 'skyrocketed' in the past few years"); George Bedell, *Navigating in the Wake of Seizure: Protecting Privileged Documents*, 79 FLA. BAR J. 8, 10 (2005) (noting that in both federal and state courts, when the crime-fraud exception is at issue, "challenges to claims of attorney-client privilege and attorney work product privilege in civil cases have been treated differently from identical privilege claims in criminal cases").

142. *See, e.g.*, Bedell, *supra* note 141, at 10–14.

143. *See* Borgford, *supra* note 89; MCCORMICK ON EVIDENCE, *supra* note 89.

144. *See* Bricker, *supra* note 141.

145. Strictly speaking, a charge is not necessary to demonstrate the occurrence of a crime for purposes of applying the crime-fraud exception. But judges seem wary to find the crime predicate in the absence of a prosecution, just as judges are wary to find the crime predicates in connection with other evidentiary rules when prosecutors have not charged the alleged wrongdoers. *See, e.g.*, FED. R. EVID. 801(d)(2)(E) (admitting coconspirator statements as non-hearsay, but not requiring a criminal charge to demonstrate the conspiracy); FED. R. EVID. 404(b) (admitting prior crimes under certain circumstances, but not requiring a criminal charge). *See generally* Jessica A. Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 AM. CRIM. L. REV. 737, 771 (2016) (observing that while rules admitting statements by coconspirators as non-hearsay and rules admitting other crimes' evidence are ostensibly available in both criminal and civil cases, only prosecutors seem to be able to introduce such evidence successfully); Pamela H. Bucy, *White Collar Crime and the Role of Defense Counsel*, 50 ALA. LAW. 226, 231 (1989) (noting that evidence is more likely to be offered and admitted under Rules 801(d)(2)(E) and 404(b) in criminal trials than in civil trials, although the rules technically apply in both settings); SEC v. Tome, 638 F. Supp. 629, 633 (S.D.N.Y. 1986) (indicating that "the vast majority of cases discussing the coconspirator exclusion from the hearsay rule are criminal cases," and "[t]here is a paucity of civil cases involving the coconspirator exclusion"), *aff'd*, 833 F.2d 1086 (2d Cir. 1987).

146. Bowden, *supra* note 13 ("Criminal prosecutions have dropped to a 30-year low at the Environmental Protection Agency (EPA) under the Trump administration . . . . EPA's criminal referrals in pollution cases sat at 166 last year, the lowest number since the Reagan administration."); Umair Irfan, *How Trump's EPA Is Letting*

who assert that a criminal prosecution may be "right around the corner" will lack credibility, because prosecutors usually insist on bringing criminal charges first if there is a possibility of parallel criminal and civil proceedings.[147] When the prosecution does not take an alleged environmental crime seriously, a court is less likely to dissolve the attorney-client privilege at the request of a civil plaintiff who argues that the privilege holder committed an environmental crime.[148]

For similar reasons, civil litigants generally have a hard time utilizing the fraud prong of the crime-fraud exception in environmental cases. Suits against polluters usually do not involve fraud claims.[149] When the complaint omits any fraud theory, it may strike the court as somewhat disingenuous for that plaintiff to argue that the defendant's fraud justifies abrogating the attorney-client privilege.[150] A careful

Environmental Criminals Off the Hook, in One Chart, VOX (Feb. 27, 2019), https://www.vox.com/2019/1/16/18183998/epa-andrew-wheeler-environmental-policy-enforcement [https://perma.cc/N5TP-KJZZ] ("Referrals for criminal prosecution for environmental crimes are at a thirty-year low."); *see* Knickmeyer, *supra* note 13 (indicating that federal prosecution rate for environmental violations has nearly hit the lowest level in the last 25 years); Iovino, *supra* note 13 (indicating that environmental prosecutions have dropped to the lowest level in decades). A group called Public Employees for Environmental Responsibility collected extensive data showing the decline in criminal environmental prosecutions under the Trump administration. *See* Kristen Sade, *Criminal Enforcement Collapse at EPA*, PEER (Jan. 14, 2019), https://www.peer.org/criminal-enforcement-collapse-at-epa [https://perma.cc/FNW7-BQYJ] (setting forth statistics showing decline in referrals for prosecution). Even during the Obama administration, federal prosecutors only charged a small fraction of the environmental crimes that actually occurred. *See* Graham Kates, *Environmental Crime: The Prosecution Gap*, CRIME REP. (July 14, 2014), https://thecrimereport.org/2014/07/14/2014-07-environmental-crime-the-prosecution-gap [https://perma.cc/5BC7-8GPN] ("More than 64,000 facilities are currently listed in agency databases as being in violation of federal environmental laws, but in most years, fewer than one-half of one percent of violations trigger criminal investigations, according to EPA records. . . . [T]he vast majority of corporate environmental transgressions—even cases that involve the releases of large amounts of toxic chemicals—are relegated to civil and administrative enforcement.").

147. If the government plans to prosecute, government attorneys are likely to see tactical disadvantages in simultaneous civil and criminal proceedings. The U.S. Supreme Court has indicated that the prosecution may seek a stay order from a district court so that the criminal case precedes the civil case. United States v. Kordel, 397 U.S. 1, 12 n.27 (1970).

148. *See* Bricker, *supra* note 141.

149. *But see, e.g.*, *infra* note 150.

150. Indeed, the inclusion of a fraud claim seems to be the only way a party in a civil environmental case can hope to benefit from the crime-fraud exception. *See, e.g.*, *In re* Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 180 F. Supp. 3d 273, 281–84 (S.D.N.Y. 2016) (noting that plaintiffs were able to invoke fraud prong of crime-fraud exception in litigation involving claims that defendant had contaminated groundwater, and that fraud claims were central to the litigation, including the claim

judge might focus on the subtle distinction in the different burdens of proof: a plaintiff overcomes the attorney-client privilege by showing *probable cause* to believe that the defendant tried to enlist his attorney in committing fraud,[151] while a fraud claim should not go in the complaint unless the proof can meet the *preponderance of the evidence* standard.[152] More likely, though, a judge will note the omission of the fraud claim from the complaint and assume that the plaintiff does not believe a fraud claim would have an adequate factual basis, so the court should not use it as a basis to pierce the attorney-client privilege.

In sum, the current crime-fraud exception could help environmental plaintiffs in theory, but it is unlikely to be helpful in practice. The opponent can persuasively argue that the lack of a criminal prosecution or a civil fraud claim belies the plaintiff's assertion that a crime or fraud has occurred. As one prominent commentary noted, "[i]n the great majority of instances, the commission of a crime or fraud is the ultimate issue in the case, and the attorney-client communication is relevant precisely as evidence of such commission."[153] There simply are not many cases in which the crime-fraud exception assists a party who failed to charge a criminal count or sue for fraud. Environmental plaintiffs focus on civil environmental claims. Until the environmental contamination at issue in those cases is itself a proper basis for an exception to the attorney-client privilege, environmental plaintiffs will rarely be able to defeat defendants' privilege claims.

D. STATES' ENVIRONMENTAL CRIMINAL STATUTES VARY WIDELY

The divergence of states' criminal environmental statutes provides another reason to adopt this Article's proposal. While most

of purposeful misrepresentations in corporate restructuring for the purpose of defrauding creditors). *But see, e.g.*, Olson v. Accessory Controls & Equip. Corp., 757 A.2d 14, 28–36 (Conn. 2000) (determining that documents were not part of a fraud within the narrow definition of the crime-fraud exception where plaintiff, who lost his job after complaining about environmental contamination, sued for wrongful discharge and negligent misrepresentation—but not fraud—when his attempt to obtain attorney-client communication failed).

151. *Supra* Part I.B.

152. Plaintiffs' counsel should not add a fraud claim to the complaint unless there is adequate proof on which to prevail at trial. "In civil trials, the generally recognized standard of proof is the preponderance of the evidence standard." Michael S. Greger, *Preliminary Questions of Fact for the Judge: The Standard of Proof for Pretrial Admissibility Problems*, 20 SW. U. L. REV. 453, 461 (1991).

153. Fried, *supra* note 56, at 461 (raising concerns about "circularity" when the crime-fraud exception is the means through which the party piercing the privilege proves the primary charge or claim in the case, which virtually always is crime or fraud).

states have authorized at least a few prosecutors to charge crimes that harm the environment,[154] the statutes utilized by these prosecutors vary significantly.[155] There exists a patchwork of criminal environmental statutes ranging from the most basic provisions to comprehensive codes that supplement the federal statutory scheme in important ways.[156]

Why is this variation relevant to the application of the crime-fraud exception? Simply put, states with extensive criminal statutes will have broader crime-fraud exceptions. The attorney-client privilege will be stronger in red states than in blue states.[157] Of course, federal criminal provisions apply equally in all states, and could theoretically provide the basis for applying the crime-fraud exception in a state proceeding. But as noted previously, the infrequency of federal environmental prosecutions constrains the use of federal statutes as the basis for the crime-fraud exception, because the argument that the privilege claimant has violated federal criminal law does not seem meritorious in the absence of a federal prosecution.[158]

Variation and unpredictability in the application of the crime-fraud exception are undesirable.[159] The benefits of confidentiality—and of exceptions to confidentiality—are greatest when the boundaries are easy to discern and consistent across state lines.[160] This

154. Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 547 (2011) ("[M]ost states have a state-level prosecutorial unit that prosecutes environmental crimes." (footnote omitted)).

155. For a comprehensive listing and discussion of various states' environmental criminal statutes, see John DeCicco & Edward Bonanno, *A Comparative Analysis of the Criminal Environmental Laws of the Fifty States: The Need for Statutory Uniformity as a Catalyst for Effective Enforcement of Existing and Proposed Laws*, 9 CRIM. JUST. Q. 216 (1988); Richard H. Allan, *Criminal Sanctions Under Federal and State Environmental Statutes*, 14 ECOLOGY L.Q. 117 (1987), which includes a chart showing variations in states' criminal environmental law statutes; and H. Allen Irish, *Enforcement of State Environmental Crimes on the Federal Enclave*, 133 MIL. L. REV. 249, 258–59 (1991), which states that, "[E]ach of the fifty states has enacted environmental criminal statutes of varying degrees of severity."

156. *See supra* notes 154–55 and accompanying text.

157. *Cf.* Joshua Ozymy & Melissa Jarrell, *Red State, Blue State, Green State: Analyzing the Geography of Federal Environmental Crime Prosecutions Within and Across the U.S. States*, 3 PALGRAVE COMMC'NS 1, 1–11 (2017) (noting that states have different experiences with the prosecution of environmental crime, and these variations sometimes align with differences in political culture).

158. *Supra* Part II.C.

159. *See* Daily & Thornquist, *supra* note 52, at 595 (indicating that unpredictable application of crime-fraud exception could have a chilling effect, and uniform standards are the best solution to this problem).

160. *See id.*

Article's proposal could enhance consistency. States vary widely in the degree to which they have criminalized environmental law, but states' civil environmental statutes are not so variable, due in part to the fact that the codification of civil environmental law preceded the codification of criminal environmental law by a few decades.[161] By grounding the exception to the attorney-client privilege in both criminal and civil law, the proposed statute could reduce the variation from jurisdiction to jurisdiction in the interpretation of the crime-fraud exception—at least in environment cases.

E. Judges Are Unfamiliar with Mens Rea Standards for Environmental Crimes

Another important consideration is judicial wariness of the mens rea standards in criminal environmental statutes. Due to the paucity of environmental prosecutions and the lack of specialization among trial judges, virtually no judge has significant experience with such prosecutions.[162] Some judges may be incredulous when prosecutors explain that criminal environmental statutes set a low bar for mens rea in environmental prosecutions; the similarity between mental state requirements for criminal and civil cases in the context of environmental law is greater than in other contexts with which judges are more familiar, such as assault.[163] When called upon to rule on a privilege matter that necessitates a determination about a client's intent to commit an environmental crime, a judge may be reluctant to recognize the full breadth of the mens rea provisions in environmental criminal statutes.[164] Judges have been hesitant to rely on precedents that allow

161. *See supra* note 155.

162. *See supra* note 146.

163. *See* Uhlmann, *supra* note 138; *supra* note 137.

164. *See* Richard J. Lazarus, *Mens Rea in Environmental Criminal Law: Reading Supreme Court Tea Leaves*, 7 FORDHAM ENV'T L. REV. 861, 876–80 (1996) (discussing general reluctance of judges, including Supreme Court Justices, to find that the government has adequately proven mens rea in environmental cases); Bobby Yu, *Criminal Ambiguity: Redefining the Clean Water Act's Mens Rea Requirements*, 11 SETON HALL CIR. REV. 327, 337 (indicating that "[c]ourts have had great difficulty" interpreting mens rea requirements for criminal provisions under the Clean Water Act); Anthony J. Celebrezze, Jr., E. Dennis Muchnicki, J. Michael Marous & Mary Kay Jenkins-Smith, *Criminal Enforcement of State Environmental Laws: The Ohio Solution*, 14 HARV. ENV'T L. REV. 217, 228–29 (1990) (criticizing the "lack of consistency in the manner in which courts at all levels have interpreted and applied the 'knowing' standard" in environmental prosecutions (quoting 18 U.S.C. § 1001 (1982))). *See generally* Stoyan Barrett & Rob White, *Disrupting Environmental Crime at the Local Level: An Operational Perspective*, PALGRAVE COMMC'NS (2017) ("[V]ery often judges and magistrates do not seem to take environmental crime seriously."); THEODORE M. HAMMETT & JOEL EPSTEIN, LOCAL PROSECUTION OF ENVIRONMENTAL CRIME 51 (1993), https://www.ncjrs.gov/pdffiles1/

aggregation of corporate mens rea when various constituents have the requisite components, but no individual has all the required components.[165] Judges feel a countervailing instinct to rule in favor of the attorney-client privilege when the argument to abrogate the privilege is not plain.[166]

This Article's proposal provides clarity by making the judge's task more straightforward. If the party seeking to pierce the attorney-client privilege can show the opposing party tried to abuse attorney-client communication to further an environmental crime or KELP, the judge has a clear basis on which to overrule the privilege. Any knowing violation—civil or criminal—will be sufficient. A list of substances and quantities will be available, and cross-referenced in the statute, in order to clear up any possible confusion about the scope of KELP. Such lists have proven to be straightforward and easy to use in other contexts, such as drug prosecutions.[167] This Article's proposal allows judges to focus more on the culpability of the wrongdoer while worrying less about technical questions arising from the odd boundaries of the current crime-fraud exception.

F. Knowing Pollution Deserves the Same Treatment as Crime or Fraud

It is instructive to compare the gravity of KELP and two categories of offenses now covered by the crime-fraud exception: misdemeanors and noncriminal frauds.[168] This comparison shows that KELP violations are at least as deserving of inclusion as grounds for finding an exception to the attorney-client privilege.

Digitization/143270NCJRS.pdf [https://perma.cc/WZ6F-J7BS] (noting discomfort of some judges with environmental criminal prosecutions as a general matter).

165. *E.g.*, United States v. Bank of New Eng., 821 F.2d 844, 855 (1st Cir. 1987) (approving the use of a collective standard for mens rea in a corporate prosecution, such that the corporation may have a guilty mind based on the aggregation of individual mental states of corporate constituents, even where no individual constituent possesses all the necessary mental elements); ALEXANDER SARCH, CRIMINALLY IGNORANT: WHY THE LAW PRETENDS WE KNOW WHAT WE DON'T 234 (2019) (noting that "most courts are wary of the collective knowledge doctrine").

166. *E.g.*, Davenport Grp. v. Strategic Inv., Civ. A. No. 14426-NC, 1995 WL 523591, at *1 (Del. Ch. Aug. 24, 1995) ("Public policy encourages courts to protect the attorney-client privilege: Courts should proceed cautiously [when asked to override the privilege]." (internal quotation marks and citations omitted)).

167. *See* NAT'L CRIM. JUST. ASS'N, *supra* note 125.

168. *See supra* Part I.D.

The fact that the current crime-fraud exception extends to misdemeanor violations of environmental law,[169] but not to civil violations involving KELP, simply defies logic. Misdemeanor violations of environmental law do not require specific intent or knowledge; conviction of the defendant is sometimes possible based on mere negligence or even strict liability.[170] By contrast, civil environmental violations involving KELP (i.e., knowing emission of listed pollutants) necessarily involve a more culpable mens rea than would be sufficient for the lowest-level misdemeanors.[171] Because the crime-fraud exception rests in part on an equitable notion of penalizing foul play,[172] some consideration of relative culpability should inform the decision of what conduct to include as a ground for an exception to the privilege. If misdemeanors based on negligence or strict liability can qualify, then the subset of civil violations that involve knowing emission of listed pollutants should also qualify.[173] A lawyer certainly should not assist a knowing violation of civil environmental law any more than a lawyer should assist a negligent or unwitting violation of criminal environmental law.[174] The comparison of noncriminal fraud to KELP

169. MUELLER ET AL., *supra* note 11, at 2 ("The exception extends even to crimes of a relatively minor nature."); *see, e.g.*, Lytle v. Mathew, 89 N.E.3d 199, 205, 205 n.1 (Ohio Ct. App. 2017) (applying crime-fraud exception to misdemeanor offense); Micron Tech., Inc. v. Rambus Inc., 645 F.3d 1311, 1330–31 (Fed. Cir. 2011) (same); *In re* 3dfx Interactive, Inc. 347 B.R. 386, 389–94 (Bankr. N.D. Cal. 2006) (holding that misdemeanor offense could be sufficient to trigger crime-fraud exception), *vacated on other grounds*, 2006 WL 3734297, at *8 (N.D. Cal. Dec. 15, 2006) (determining that facts were insufficient in this case, but not disputing that misdemeanor offense could provide basis for crime-fraud exception); United States v. Friedman, 445 F.2d 1076, 1085–86 (9th Cir. 1971) (applying crime-fraud exception to unlawful possession of grand jury transcript, which is a relatively minor offense).

170. David Uhlmann, who formerly prosecuted environmental crime for the U.S. Department of Justice, has explained the low level of culpability that is sufficient for certain environmental misdemeanors under federal law. "But even where accidental pollution is involved, criminal prosecution still might be possible for CWA and CAA violations. Those statutes authorize prosecution for negligent discharges (CWA) and negligent endangerment (CAA). In addition, misdemeanor prosecutions under the Refuse Act and the Migratory Bird Treaty Act are strict-liability offenses that do not require proof of mental state. Criminal violations of those statutes require the same proof as civil or administrative claims." Uhlmann, *supra* note 138, at 171 (footnotes omitted).

171. *See, e.g.*, *id.* at 169 ("[T]he misdemeanor provisions of the CWA apply only when the defendant acted negligently.").

172. *See supra* Part I.A.

173. *See supra* note 169.

174. It is somewhat difficult to imagine how attorney-client communication could fall within the crime-fraud exception when the communication facilitated a negligent or unintentional misdemeanor violation of environmental law. No published case seems to address this fact pattern. As noted previously, there are few criminal

also supports this Article's proposal. Recall that courts have tolerated the inclusion of noncriminal fraud in the crime-fraud exception for a number of reasons, including the following: 1) fraud is complicated (making the assistance of lawyers uniquely valuable); 2) fraud preys on vulnerable victims (making a severe sanction more appropriate); and 3) fraud is hard to prove (heightening the need for access to attorney-client communication).[175] These circumstances are also present when clients seek lawyers' assistance in connection with KELP.[176] The world of environmental regulation is also very complicated, and the guidance of attorneys is more valuable in this highly technical field than, say, in the context of street crime. Knowing pollution preys on vulnerable victims: children and the elderly are the most sensitive and least capable of protecting themselves against this pollution,[177] and of course the nonhuman environment has no recourse in the court system. Finally, KELP is difficult to prove, and the information available in attorney-client communication could certainly be as valuable to environmental plaintiffs as it is to fraud plaintiffs. These parallel circumstances strengthen the case to treat KELP in the same manner as

environmental prosecutions in the United States, and misdemeanor violations are probably a low priority among the various categories of criminal violations that prosecutors could charge. *See supra* note 146. Perhaps it could be possible for attorney-client communication to facilitate a misdemeanor violation of environmental law based on negligence, such as when the lawyer arranges for faulty audits or monitoring systems that result in negligent releases of pollutants. Some authority from the realm of criminal law suggests that the specific intent language in the crime-fraud exception would not be a good fit with an offense involving negligence, just as prosecutors are unable to charge an attempt to commit a negligence crime because the defendant lacks the requisite specific intent. *See, e.g.*, Alan Stone, *Attorney-Client Privilege and the Crime-Fraud Exception: Rejection of a Specific Intent Requirement in* In Re *Sealed Case*, 60 TUL. L. REV. 1061, 1074 (1986). But the fact remains that the inclusion of negligence misdemeanors within the scope of the crime-fraud exception makes the omission of intentional civil law violations seem odd indeed.

175. *See supra* Part I.D.

176. *Id.*

177. According to Professor Gina McCarthy, who directs the Center for Climate, Health and the Global Environment at the Harvard T.H. Chan School of Public Health, children and the elderly are especially vulnerable to the effects of environmental pollution. Gina McCarthy, *Keynote Remarks of Symposium on Energy & Environmental Policy: The Quest for Rationality*, 28 N.Y.U. ENV'T L.J. 120, 126 (2020); *accord* Jonathan Cannon & Jonathan Riehl, *Presidential Greenspeak: How Presidents Talk About the Environment and What It Means*, 23 STAN. ENV'T L.J. 195, 257 (2004) (noting that several U.S. presidents have acknowledged that children and the elderly are more susceptible to health risks due to environmental pollution); Cynthia Kennedy, *Cairo, Beijing, and the Global Environmental Crisis: The Continuing International Dialogue on Population Stabilization and Sustainable Development*, 8 GEO. INT'L ENV'T L. REV. 451, 456–57 (1996) ("[C]hildren and the elderly . . . are particularly vulnerable to environmental hazards.").

noncriminal fraud for purposes of establishing an exception to the attorney-client privilege.

III. BENEFITS OF EXTENDING THE EXCEPTION TO CIVIL ENVIRONMENTAL VIOLATIONS

This Part lists several practical benefits that could result from broadening the crime-fraud exception to include KELP. Possible objections are considered in the next Part.

A. Reduced Dependence on Government to Pierce Privilege

As noted previously, the use of the crime-fraud exception by civil plaintiffs suing for environmental contamination is presently very difficult unless the government has brought criminal charges against the same defendant.[178] A court is likely to discount the civil plaintiff's allegation of criminal conduct by the defendant, because the court assumes that the government would have brought criminal charges if the allegation had merit.[179] Environmental prosecutions are now at a thirty-year low, at least in the federal system, for reasons related to politics more than the frequency of criminal violations.[180] The prosecution rate has been quite low in both Republican and Democratic administrations.[181] If the vitality of the crime-fraud exception depends on the initiative of environmental prosecutors, environmental plaintiffs will continue to face difficulty when they invoke the exception to pierce the attorney-client privilege.

This Article's proposal would reduce the dependence of environmental plaintiffs on federal prosecutors. Because KELP could provide an independent basis for overcoming the attorney-client privilege, and plaintiffs' attorneys could make a prima facie showing of KELP without relying on prosecutors, the expanded exception could provide more opportunities to defeat privilege claims in civil environmental suits. The new exception would also make clear that when a judge must rule on a privilege claim and an objection asserting criminal activity by the privilege holder, it is neither necessary for the objector to be a prosecutor nor to show that the claimant has been convicted or even charged for the criminal activity. Of course, prosecutors could still undermine the independence of a civil plaintiff by moving to stay the civil litigation while the government proceeds with the criminal

178. *See supra* Part II.C.
179. *See supra* Part II.C.
180. *See supra* Part II.C.
181. *See supra* Part II.C.

prosecution.[182] But it appears that the U.S. Department of Justice is not considering any charges at all in a wide range of cases involving criminal environmental violations because the EPA has not referred those cases,[183] and, therefore, federal prosecutors would not seek stay orders. Empowerment of "private attorneys general" is more important now than ever, and equal access to exceptions that can prevail against privilege claims will help to bolster private enforcement of environmental laws.

B. EXPANDED TEMPORAL SCOPE FOR EXCEPTIONS TO PRIVILEGE

The crime prong of the crime-fraud exception has limited utility because it only abrogates the attorney-client privilege with respect to particular criminal acts that can be charged by prosecutors.[184] That conduct tends to be discrete in time. In other words, virtually all indictments allege that the crime at issue occurred on a particular day.[185] The requirement that prosecutors charge offenses as occurring on a particular day derives from the Sixth Amendment of the U.S. Constitution, which requires specificity in the allegations against the accused.[186] While there are a few continuing offenses such as conspiracy, the proof of those offenses tends to require more work by prosecutors in order to gather proof of collusion among several defendants, so such charges remain fairly rare.[187] The specificity requirement for charging incidentally limits the breadth of the crime-fraud exception,

182. The U.S. Supreme Court has indicated that the prosecution may seek a stay order from a district court so that the criminal case precedes the civil case. United States v. Kordel, 397 U.S. 1, 12 n.27 (1970).

183. *See supra* note 146.

184. *See supra* Part II.C.

185. *Cf.* U.S. DEP'T OF JUST., CRIMINAL RESOURCE MANUAL § 223: PARTICULAR ALLEGATIONS—TIME AND DATE, https://www.justice.gov/archives/jm/criminal-resource-manual-228-particular-allegations-time-and-date [https://perma.cc/4MXB-JKGG].

186. The U.S. Department of Justice uses the following language to explain the policies served by the Sixth Amendment's mandate of specificity in the charging instrument: "The specificity requirement serves to insure that a defendant only has to answer to charges actually brought by the grand jury and not a prosecutor's interpretation of the charges, that the defendant is apprised of the charges against him in order to permit preparation of his defense, and that the defendant is protected against double jeopardy." U.S. DEP'T OF JUST., CRIMINAL RESOURCE MANUAL § 223: REQUIREMENT OF SPECIFICITY, https://www.justice.gov/jm/criminal-resource-manual-223-requirement-specificity [https://perma.cc/RJ8L-4S7X].

187. *See generally* ERIC C. SURETTE, 16 AM. JUR. *Conspiracy* § 41 (2d ed. 2020) (providing an overview of the evidence required to prosecute conspiracy).

because courts are reluctant to pierce the privilege based on uncharged misconduct.[188]

The inclusion of KELP as a basis for overcoming the attorney-client privilege would allow consideration of conduct occurring over a wider range of time. Civil complaints are not subject to the same rules that necessitate rigid temporal limits on misconduct alleged in indictments.[189] Indeed, civil environmental violations tend to occur over time and are alleged as such in civil complaints.[190] Judges, guided by the language used in complaints would likely be more inclined to consider a wider range of conduct as the basis for the exception, whereas judges considering an argument under the current crime-fraud exception would likely focus on the precise crime charged in the indictment.[191]

C. Greater Accountability for Past Pollution

If attorney-client communication in furtherance of KELP could provide a new basis for dissolving the attorney-client privilege, environmental plaintiffs would likely be able to win more lawsuits and obtain more resources with which to remediate pollution. Of course, this argument is necessarily speculative. The crime-fraud exception now applies so rarely in environmental cases that one can only conjecture about the value of an expanded exception applicable to KELP.[192] But the experience of some plaintiffs in other contexts gives reason for optimism.

To offer only one example, the multistate litigation against the tobacco industry faltered for many years until the plaintiffs were finally able to use the crime-fraud exception to obtain documentary evidence indicating the defendants were knowingly causing harm to human health. An early attempt to invoke the crime-fraud exception in the tobacco litigation won approval from a federal district court in New

188. *See supra* Part II.C.

189. *Cf.* Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 1064 (2003) (concluding that "[a] uniform pleading standard with notice as the touchstone remains illusory" in the context of civil complaints); Kyle Graham, *The Continuing Violations Doctrine*, 43 GONZ. L. REV. 271, 272–73 (2008) (explaining the continuing violations doctrine and its implications for complaints and statutes of limitations in civil cases).

190. *See* NICK J. VIZY, THE LAWYER'S BRIEF ARTICLE I: THE CRIME-FRAUD EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE (PART 1) (2009) (observing that in the corporate context, environmental violations "may extend over a considerable period").

191. *See supra* Part II.C.

192. *See supra* Part I.D.

Jersey,[193] but the Third Circuit vacated the district court's decision and removed the district judge after the tobacco defendants asserted that he was biased.[194] Only the relentless advocacy of plaintiffs' counsel in Minnesota was able to overcome the tobacco industry's stonewall tactics.[195] Attorneys representing both the state of Minnesota and Blue Cross-Blue Shield of Minnesota realized that the success of their case would turn on pretrial discovery.[196] In order to overcome the tobacco defendants' privilege claims, the plaintiffs asserted that the companies were misusing the attorney-client privilege by routing to the attorneys certain internal memos and studies setting forth evidence that tobacco harmed human health.[197] The plaintiffs argued that the purpose of involving the attorneys was simply to conceal the documents from disclosure, and that this concealment was a fraud on the public.[198] According to two of the nation's leading experts on legal ethics, Stanford Professor Deborah Rode and Georgetown Professor David Luban, "Minnesota's strategy in the tobacco litigation succeeded brilliantly."[199] The Minnesota court held that the defendants' attempt to conceal health information about cigarettes was indeed fraudulent, and this fraud prohibited the tobacco defendants from relying on the attorney-client privilege.[200] Within six months of the ruling rejecting the defendants' claims of privilege, the tobacco industry entered into

193. Haines v. Liggett Grp., Inc., 140 F.R.D. 681, 684 (D.N.J. 1992) (finding defendants had used attorney-client privilege as a ruse to prevent disclosure of documents revealing dangers of cigarettes), *rev'd on other grounds*, 975 F.2d 81, 94 (3d Cir. 1992).

194. Haines v. Liggett Grp. Inc., 975 F.2d 81, 94, 98 (3d Cir. 1992) (vacating trial court without reaching issue of crime-fraud exception, and also removing trial judge after determining he harbored prejudice against defendants).

195. Some of the plaintiffs' attorneys involved in the Minnesota tobacco litigation have written a very thorough article detailing the plaintiffs' strategy. *See* Ciresi et al., *supra* note 81, at 513–40 (recounting how Minnesota Attorney General Skip Humphrey, working in collaboration with a coalition of forty-six states' attorneys general, was able to utilize the crime-fraud exception in order to defeat the tobacco industry's privilege claims).

196. *Id.* at 489 (indicating that the plaintiffs set out on a "determined discovery quest").

197. *Id.* at 508.

198. *Id.* at 513–32.

199. DEBORAH RHODE & DAVID LUBAN, LEGAL ETHICS 260 (5th ed. 2009); *see also id.* at 257 (hailing the Minnesota tobacco litigation as "[o]ne of the nation's most dramatic examples of the crime-fraud exception").

200. For a detailed discussion of the trial court's ruling and the special master's report on which it was based, see Ciresi et al., *supra* note 81, at 532–57.

a multibillion dollar settlement with the Minnesota plaintiffs and their counterparts in other states.[201]

A recent environmental case provided a rare, but highly promising, example of the results plaintiffs can achieve when they can overcome the attorney-client privilege. The multidistrict MTBE litigation involved several complex claims brought by public entities, including a number of states, who asserted that various defendants in the oil industry had polluted groundwater with a harmful gasoline additive.[202] One important issue for the plaintiffs was showing a link between a defendant in bankruptcy and another entity that had significant resources with which to pay a judgment.[203] In discovery, the defense had inadvertently disclosed emails setting forth attorney-client communication.[204] Plaintiffs argued that these documents showed the defendants were engaging in a fraudulent scheme of corporate restructuring for the purpose of withholding assets from creditors.[205] The U.S. District Court for the Southern District of New York agreed with the plaintiffs' arguments, and found that the defendants' scheme provided a basis on which to vitiate the attorney-client privilege.[206] Plaintiffs were able to use the documents effectively, and docket sheets indicate that by the spring of 2020, plaintiffs had recovered millions in settlement proceeds from the defendants.[207]

201. RHODE & LUBAN, *supra* note 199 (noting that the settlement followed shortly after the ruling on crime-fraud exception); Ciresi, *supra* note 81, at 557–66 (explaining how the plaintiffs' use of the crime-fraud exception uncovered important information that would lay the groundwork for the settlement with the tobacco industry); *see also* Richard D. Hurt, John O. Ebbert, Monique E. Muggli, Nikki J. Lockhart & Channing R. Robertson, *Open Doorway to Truth: Legacy of the Minnesota Tobacco Trial*, MAYO CLINIC PROC. 446, 446 (2009), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2676127 [https://perma.cc/CUW2-HLE7] ("Only a few single events in the history of public health have had as dramatic an effect on tobacco control as the public release of the tobacco industry's previously secret internal documents."). This tactic was only possible because the plaintiffs were able to use the crime-fraud exception to overcome the defendants' assertion of the attorney-client privilege. *See supra* note 195.

202. *In re* Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 180 F. Supp. 3d 273, 276 (S.D.N.Y. 2016).

203. *Id.* (noting that the emails at issue were important because they might allow plaintiffs to pierce the veil and recover assets from the second entity).

204. *Id.* at 276, 284.

205. *Id.* at 279–80.

206. *Id.* at 283–84.

207. The docket for *MTBE Products Liability Litigation*, including settlement activity continuing through the spring of 2020, can be found on the free nonprofit website the Court Listener. *In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation (1:00-cv-018980-VSB)*, CT. LISTENER, https://www.courtlistener.com/docket/4357482/in-re-methyl-tertiary-butyl-ether-mtbe-products-liability-litigation/?page=25 [https://perma.cc/4YX5-NZ3G].

To be clear, the foregoing examples involved the existing crime-fraud exception. Is there reason to believe that an expanded exception applicable to KELP could help to hold defendants accountable for their pollution? Consider the following hypothetical illustrations.

Example #1: An officer of a corporation asked an attorney to assist with changing corporate procedure in a way that, while not fraudulent or criminal, would result in knowing emissions of listed pollutants. The attorney refused to undertake this representation but became aware that another attorney did exactly what the client requested, causing significant environmental harm that is ongoing and harmful to human health. The KELP exception would allow the first attorney to provide evidence when called as a witness in a civil suit against the corporation.[208] Moreover, emails or other documents sent to the attorney by the corporate officer in order to advance the scheme would be discoverable and admissible as evidence in that civil litigation.

Example #2: An officer of a corporation asked a lawyer to threaten retaliation against an employee who could potentially become a whistleblower concerning KELP at one of the corporation's plants. The lawyer did what the client requested. This threat facilitated the continuation of KELP. The threat was neither criminal nor fraudulent. The lawyer later realized the error of her ways and decided that she wanted to provide evidence in a civil action against the corporation. This Article's proposal would allow her to do so.

Example #3: A third-party contractor was at corporate headquarters one day and overheard attorney-client communication in furtherance of KELP. (Alternatively, a third-party received an errant email setting forth such communication.) Now plaintiffs want to bring an environmental suit against the corporation. The evidence does not support a fraud claim, and prosecutors do not wish to file criminal charges. Plaintiffs want to call the third-party as a trial witness (or offer the email as an admission by a party opponent) in order to prove the involvement of the attorney and the corporate manager in the

208. Statements made to a prospective attorney in an initial consultation are ordinarily subject to the attorney-client privilege, whether or not the consultation actually results in the formation of an attorney-client relationship. *E.g.*, Barton v. U.S. Dist. Ct. for Cent. Dist. of Cal., 410 F.3d 1104, 1111 (9th Cir. 2005) ("Prospective clients' communications with a view to obtaining legal services are plainly covered by the attorney-client privilege . . . [even if] actual employment does not result." (internal quotations omitted)).

KELP that is the basis for the civil lawsuit.[209] This Article's proposal would help to facilitate the plaintiffs' strategy.

Example #4: The government tried to bring a criminal case against a polluter, but that prosecution failed for some reason. Either the grand jury declined to indict or the trial jury acquitted. The defendant now feels vindicated in the criminal justice system, but civil plaintiffs decide to sue for KELP and the plaintiffs have evidence establishing probable cause to believe that attorney-client communication furthered the environmental violations. The court is reluctant to utilize the crime-fraud exception because the criminal charges failed (which should not technically be dispositive, but is influential for this particular judge's assessment of the case).[210] There is no basis on which to find that the attorney and the client tried to engage in fraud. This Article's proposal could potentially provide an avenue for overcoming the attorney-client privilege.

Example #5: A corporation emitted harmful pollutants for a prolonged period. The government considered a prosecution, but investigation revealed that no single person at the corporation had the requisite mens rea to support criminal charges. Assume that courts in this jurisdiction do not allow the aggregation of compartmentalized constituent mental states in order to establish a collective corporate mens rea.[211] Environmental plaintiffs realize that the standards in a civil case will not be so strict, so they sue to recover damages for the corporation's pollution. The plaintiffs want to introduce into evidence certain documents in which attorney-communication furthered KELP.

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209. Ordinarily, such eavesdropping would not defeat the application of the privilege, assuming both attorney and client had a reasonable expectation that their conversation was private and that no third party was listening. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 71, cmts. b, c (AM. L. INST. 2000) (clarifying that when the eavesdropping is conspicuous, the privilege does not apply). Inadvertent disclosure such as an errant email does waive the attorney-client privilege in many jurisdictions, although there is a range of authority on this point. *See, e.g.*, FED. R. EVID. 502 and its state analogs (indicating that inadvertent disclosure does not waive the attorney-client privilege under certain circumstances).

210. *Supra* Part II.C. (noting that judges' determinations under the crime prong of the crime-fraud exception depend in part on what happens, or does not happen, in the criminal prosecution of the party asserting the privilege).

211. The leading case allowing the aggregation of corporate mens rea is United States v. Bank of New England, 821 F.2d 844, 855–56 (1st Cir. 1987), which approved the use of a collective standard for mens rea in a corporate prosecution, such that the corporation may have a guilty mind based on the aggregation of individual mental states of corporate constituents, even where no individual constituent possesses all the necessary mental elements. Some judges in other jurisdictions are reluctant to embrace this standard. SARCH, *supra* note 165 (noting that "most courts are wary of the collective knowledge doctrine").

The record in this case may not be adequate to support the application of the traditional crime-fraud exception, but the expanded exception could potentially allow for the admission of the documents.

Example #6: Certain government officials seek an assurance from an attorney in their agency that the officials would not be subject to prosecution if they committed KELP. The attorney responds that, due to immunity laws that apply in this particular situation, the officials would not need to worry about prosecution.[212] The officials act on this advice and, as the attorney predicted, no prosecution ensures. Environmental plaintiffs file suit, however. Assume that the immunity provisions apply uniquely in the context of a criminal case, but that a private suit would still be possible. This Article's proposal would provide plaintiffs with a means of accessing the attorney-client communication that could help them win the case.

In addition to the above-listed examples, consider the context in which the KELP exception would probably be most efficacious. A client has sought assistance from his attorney to further conduct that theoretically could count as both an environmental crime and as civilly actionable KELP. Plaintiffs sue this defendant for civil environmental violations, but the government does not file criminal charges by the time the civil case goes to trial. The crime-fraud exception could conceivably apply to the conduct at issue in this case, but the judge is reluctant to apply it for reasons discussed earlier in this Article.[213] As a backstop, plaintiffs are able to utilize the KELP exception. The combination of the crime-fraud exception and the KELP exception emboldens the judge to find in favor of the plaintiffs, who gain access to valuable attorney-client communication proving the violations of civil environmental law.

Of course, there will likely also be many cases in which the new KELP exception does not overcome the attorney-client privilege. Attorneys cover their tracks well, and they are likely to be even more

212. The immunity of government officials is a complicated matter of law, and standards are different depending on whether the official is facing criminal prosecution or civil litigation. Another important variable is the level of government (federal or state) on each side of the litigation. *See, e.g.*, Seth Waxman & Trevor Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195 (2003) (reviewing some of the immunity rules that apply in criminal prosecutions of government officials); James Buchwalter, Paul Coltoff, Cecily Fuhr, Lonnie Griffith, Michele Hughes, Alan Jacobs, William Lindsley, Anne Melley, Karl Oakes & Sally Necheles, 14A C.J.S. *Civil Rights* §§ 480, 482 (2020) (discussing different standards of immunity depending on an official's' status and the circumstances of the alleged misconduct).

213. *Supra* Parts II.C, E.

careful when there are additional exceptions to the privilege. Nevertheless, it is foreseeable that this Article's proposal could benefit plaintiffs in a subset of cases and could thereby improve the likelihood of holding polluters accountable for their violations of civil environmental law.

D. IMPROVED DETERRENCE OF FUTURE POLLUTION

Once the KELP exception takes effect, its value would not be limited to cases in which attorneys publicly betray and give evidence against their clients. Its value might be even greater in that it would provide a strong incentive for clients to refrain from using attorney-client communication to further KELP in the future.

When an attorney senses that a client seeks assistance with an illegal course of conduct, prudence counsels against public revelation of the client's plans until the attorney first tries to dissuade the client from committing the violation in the first place. Cale Jaffe, an environmental law professor at the University of Virginia who has extensive experience in litigation, has wisely noted that even if whistleblower provisions could conceivably apply in cases involving potential environmental harm, the best strategy for an attorney representing a client contemplating these environmental violations would be to admonish the client privately and hopefully persuade the client to reconsider.[214] In a jurisdiction that has adopted the new KELP exception, the attorney would have a new tool in the toolkit for client counseling: "Look, client, you know I don't want to be disloyal to you, but this new law would allow the opponent to put me on the stand and ask me questions about your plan to involve me in furthering knowing emission of listed pollutants; let's be careful and make sure that could never happen." An attorney would not violate ethical rules if the attorney spoke candidly with a client about the risks of proceeding with an illegal plan that would cause KELP.[215] Such conversations may be the

214. Jennifer Hijazi, *Attorney Ethics Rules: Another Climate Law Frontier?*, E&E NEWS (Aug. 13, 2019), https://www.eenews.net/stories/1060933249 [https://perma.cc/9UAP-DQG8] (quoting Jaffe as suggesting that when a client has engaged in, or is on the verge of engaging in, conduct that might result in a disclosure obligation for the attorney, the best initial strategy for the attorney is to "remonstrate with the client confidentially" in the hope of persuading the client to take action that would avoid the need for disclosure by the attorney); *see, e.g.*, MRPC, *supra* note 22, at r. 2 (permitting attorneys to make such appeals in confidential counseling of clients).

215. MRPC, *supra* note 22, at r. 1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with

way in which the new law could have its most valuable effect in deterring environmental violations—or at least that subset of violations for which the client seeks the lawyer's assistance.

E. Better Alignment of Evidentiary and Ethical Rules

As noted previously, the ethical rules for lawyers include exceptions to the duty to preserve client confidences, such that attorneys sometimes have an opportunity to reveal these confidences in order to avert significant harm to third parties.[216] In a fascinating and important article, Professor Victor Flatt argues that ethical rules for lawyers presently could allow for the revelation of information about harm relating to global warming.[217] Other commentators,[218] including this author,[219] have urged the adoption of new exceptions to the ethical duty of confidentiality in order to make clear that attorneys could reveal client information when necessary to avert significant environmental harm. In any event, the exceptions to the confidentiality rule are generally permissive in nature; they do not require lawyers to make such disclosures if lawyers do not wish to do so.[220]

The present exceptions to the ethical duty of confidentiality do not map well with existing contours of the crime-fraud exception to the attorney-client privilege. There is now wider latitude for lawyers to disclose client confidences to audiences other than the courts (i.e., through an exception to the ethical duty of confidentiality) than there is for the use of evidence consisting of attorney-client communication (i.e., through an exception to the attorney-client privilege).[221] This asymmetry risks the possibility that scrupulous lawyers might want

a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.").

216. *Supra* Part I.E.

217. Victor B. Flatt, *Disclosing the Danger: State Attorney Ethics Rules Meet Climate Change*, 2020 UTAH L. REV. 569 (arguing that the current versions of attorney ethics rules on disclosing harmful client activity could extend to greenhouse gas emissions).

218. *E.g.*, Irma S. Russell, *Unreasonable Risk: Model Rule 1.6, Environmental Hazards, and Positive Law*, 55 WASH. & LEE L. REV. 117, 171–82 (1998) (advocating amendment of ABA Model Rule 1.6 to allow reporting of certain environmental hazards notwithstanding ordinary obligations to maintain client confidences).

219. Tom Lininger, *Green Ethics for Lawyers*, 57 B.C. L. REV. 61 (2016) (proposing a set of amendments to the ABA Model Rules, including reform of the exceptions to confidentiality under Rule 1.6(b), in order to impose various duties of environmental protection).

220. MRPC , *supra* note 22, at r. 1.6(b) ("A lawyer *may* reveal information relating to the representation of a client [for any of the reasons listed below] . . . ." (emphasis added)). Most states have adopted this permissive language.

221. *Supra* Part I.E.

to help avert the harms covered by exceptions to the ethical duty of confidentiality, but the courts could not receive evidence of client information relevant to those concerns.[222] The adoption of the KELP exception to the attorney-client privilege would increase the likelihood that the exceptions to the ethical duty of confidentiality would match the exceptions to the attorney-client privilege, so disclosures by attorneys would actually make a difference. In other words, this Article's proposal would increase the odds that whistleblowers could not only tip off third parties about the risk of imminent environmental harm, but also testify about that harm in a lawsuit for remediation or injunctive relief.

IV. FORESEEABLE OBJECTIONS

This Part considers possible objections to the proposals discussed above. Space constraints limit the extent of the analysis in the following Subparts, but it is useful to list and begin responding to certain foreseeable objections. A more thorough treatment must await future scholarship.

A. CHILLING EFFECT ON LAWYER-CLIENT COMMUNICATION

Critics might argue that expansion of the crime-fraud exception would erode clients' faith in their lawyers' willingness or ability to keep clients' secrets.[223] As a result, clients may become less forthright in communication with their lawyers. Because lawyers would not be able to advise clients concerning the legal implications of the withheld information, the odds of misconduct by the client and inept performance by the lawyer would increase.

There are at least three flaws with this argument. First, it assumes that this Article's proposal represents a significant expansion of the crime-fraud exception. Most of the misconduct subject to the KELP

222. *See* MUELLER ET AL., *supra* note 11 (discussing the crime-fraud exception alongside the exceptions to the ethical duty of confidentiality, and noting that "[e]ach exception has an independent sphere of operation").

223. *E.g.*, Daily & Thornquist, *supra* note 52, at 595 (discussing risk of chilling effect in particular context of crime-fraud exception). *See generally* Patrick T. Casey & Richard S. Dennison, *The Revision to ABA Rule 1.6 and the Conflicting Duties of the Lawyer to Both the Client and Society*, 16 GEO. J. LEGAL ETHICS 569, 574 (2003) ("If the client fears that the lawyer may, should, or must disclose client's confidences and secrets, . . . honesty and full candor will not be an element of that attorney client relationship." (quoting David Praver, *Memo to Commission on Evaluation of Rules of Professional Conduct-Center for Professional Responsibility*, A.B.A. (Apr. 13, 2020), http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/praver.html [http://perma.cc/5HJZ-TDAS])).

exception is already technically subject to the current crime-fraud exception,[224] but prosecutors' unwillingness to file criminal charges for KELP makes judges reluctant to use the crime prong[225] and the infrequency of fraud claims in most environmental complaints makes it difficult for plaintiffs to use the fraud prong.[226] So the inclusion of civil violations involving KELP as a basis for abrogating the attorney-client privilege would not enlarge the scope of the current crime-fraud exception very much.

Second, the argument about the "chilling effect" of limits on confidentiality presumes that attorney-client communication is not already "chilled" by distrust under current circumstances. In fact, however, the current version of the crime-fraud exception engenders distrust between lawyer and client, in part because the nonuniformity in jurisdictions' interpretation of the crime-fraud exception makes the security of confidentiality unpredictable.[227] This Article's proposal would likely enhance predictability by improving uniformity, and might thereby improve clients' trust of their lawyers as the boundaries become more clear.

Third, recent history has shown that alarmist predictions concerning the deleterious effect of new exceptions to attorney-client confidentiality have not come true. Even when the attorney's ability to maintain confidences is not ironclad, clients still have a strong self-interest to share information candidly with their attorneys.[228] The list of exceptions to confidentiality has grown steadily over the last several decades,[229] but clients have continued to impose confidence in their lawyers. There is no reason to believe that this Article's proposed expansion of a preexisting exception would push the lawyer-client relationship over the brink.

224. *Supra* notes 141–45 and accompanying text.

225. *Supra* Part II.C.

226. *Supra* Part II.C.

227. Daily & Thornquist, *supra* note 52, at 595 (suggesting that unpredictability in enforcement of crime-fraud exception could have chilling effect on lawyer-client communicating, but arguing that "[t]he solution to this problem seems to be increased uniformity in the evidentiary requirements for successful assertion of the crime fraud exception").

228. *Supra* note 18 and accompanying text.

229. Lininger, *supra* note 219, at 68–71 (listing reforms over the last several decades that have created new exceptions to confidentiality rules, including exceptions to avoid both physical harm and financial harm).

B. INCONGRUOUS "WHISTLEBLOWER" ROLE FOR LAWYERS

Another possible objection is that the expanded crime-fraud exception would transform the lawyer's role in an inappropriate way. Whereas lawyers have traditionally functioned as partisan advocates in an adversarial system,[230] the proposed rule contemplates that lawyers might sit in judgment of their own clients, reporting certain categories of client misconduct that the lawyers might observe. According to critics, a hybrid role as both partisan advocate and whistleblower could cause confusion for lawyers and diminish the zealous advocacy to which every client is entitled.[231]

Three answers to this objection are possible. First, the proposed crime-fraud exception would not require lawyers to become whistleblowers. The rule would provide opportunities for the use of attorney-client communication in court, but would not compel lawyers to provide such information.[232] Similarly, the ethical rules setting forth exceptions to confidentiality are generally permissive rather than mandatory.[233] So a lawyer could forbear from blowing the whistle even when the expanded crime-fraud exception might provide an opportunity to do so.

Second, the Supreme Court has clarified that whistleblowing concerning a client's misconduct is not equivalent to ineffective assistance of counsel.[234] The Court based this holding on the notion that the client did not have a right to engage in the misconduct at issue, so the attorney's intervention did not infringe the client's exercise of lawful rights.[235] Such analysis would be even more persuasive in the context of this Article's proposal, because the Supreme Court does not enforce the right to counsel as strictly in civil cases as in criminal cases.

Third, other reforms over the last few decades have expanded disclosure grounds without undermining the partisanship of lawyers. Examples include the rules permitting disclosures to prevent imminent third-party harm, the rules permitting revelation of wrongdoing

230. *Id.* at 67–68 (discussing tradition of partisan advocacy for clients).

231. *See id.* at 79–80.

232. *Supra* Part II.A. To be sure, a party could seek an order to compel testimony by opposing counsel about communication with the client, but the court would probably only grant that order as a last resort, if the testimony were crucial and no other equally probative evidence were available to the proponent.

233. *Supra* note 110 (setting forth all the exceptions in ABA Model Rule 1.6(b)).

234. Nix v. Whiteside, 475 U.S. 157, 175–76 (1986).

235. *Id.* at 170–75 (holding that where statements by the accused to his lawyer indicated that he would lie in court, the lawyer acted properly in giving the client an ultimatum that the lawyer would "noisily withdraw" and thereby signal to the judge that the client was lying).

by corporate employees, and the rules permitting reports of child abuse and elder abuse.[236] When considered against that backdrop, the additional increment of disclosure facilitated by this Article's proposal does not seem to be a radical departure from past practice, and thus does not threaten the zeal of lawyers any more than prior reforms did.

C. Inconsistency with Ethical Rules on Conflicts and Client Autonomy

Perhaps critics might object to this Article's proposal on the ground that it would contravene the ethical rules requiring lawyers' unconditional fealty to clients. The ethical rules recognize the autonomy of clients and insist that clients, not lawyers, must determine the objectives of representation.[237] Other ethical rules forbid lawyers from representing clients when there exists a conflict of interest based on any actual or potential division of loyalty—including a difference between the client's objectives and the lawyer's objectives.[238] Critics might assume that such rules would prevent lawyers from disclosing, or giving evidence about, clients' choices to engage in conduct such as KELP.

Client autonomy, however, does not necessitate lawyers' complicity in lawbreaking. It is well settled that lawyers should not assist clients in violating the law.[239] When clients instruct their lawyers to provide help with lawbreaking, the lawyers may respond by commenting on the legal implications of the clients' contemplated course of conduct, but the lawyers may not affirmatively assist with the illegal conduct. To withhold assistance from a client's scheme to break the law is not to disrespect the client's autonomy, but rather to comport oneself with the scruples befitting an officer of the court.[240]

236. Lininger, *supra* note 219, at 68–71, 108–10.

237. MRPC, *supra* note 22, at r. 1.2(a) ("[A] lawyer shall abide by a client's decision concerning the objectives of the representation . . . .").

238. *Id.* at r. 1.7(a)(2) (describing that a conflict of interest arises when "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to . . . a third person or by a personal interest of the lawyer").

239. *Id.* at r. 1.2(d) (forbidding lawyers from assisting clients in certain categories of lawbreaking, but allowing lawyers to counsel clients about legal implications of a proposed course of conduct); *see also id.* at r. 8.4(d) (prohibiting lawyers from engaging in conduct that is "prejudicial to the administration of justice").

240. *See generally* Powell v. Alabama, 287 U.S. 45, 73 (1932) (noting that "[a]ttorneys are officers of the court").

Similarly, it is well settled that lawyers do not violate conflict-of-interest rules when they abide by disclosure obligations.[241] If that were the case, the conflict rules would preempt the disclosure grounds set forth in the confidentiality rules altogether, which is surely not the case.[242]

D. Unfairness of Abrogating Privilege Based on Minor Violations

Critics might fault this Article's proposal for vitiating the attorney-client privilege based simply on a single noncriminal, nonfraudulent act. Given our profession's reverence for the attorney-client privilege, it might seem odd to deny the protection of the privilege to a client whose misconduct is so minor.

Two responses spring to mind. First, the present version of the crime-fraud exception applies to misdemeanors.[243] The inclusion of high-level civil environmental law violations as bases on which to revoke the attorney-client privilege seems appropriate considering the negligible gravity of conduct covered by some misdemeanor statutes.

Second, the only new conduct covered by this Article's proposal is the act of seeking or obtaining a lawyer's services "to enable or aid anyone . . . knowingly to cause unlawful emission" of a listed pollutant.[244] That language will cover only a subset of civil environmental law violations—those in which the wrongdoer acts with a blameworthy mental state.[245]

241. MRPC, *supra* note 22, pmbl. para. 9 (discussing "conflicting responsibilities" to clients and third-party interests: "Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living."). It is plain that the framers of these rules did not intend for partisan advocacy on behalf of clients to trump all other duties in every circumstance. The heading above paragraph 6 of the commentary to Model Rule 1.6(b)—"Disclosure Adverse to Client"—makes clear that the framers of the rules contemplated the need for disclosure that would be against the interest of the client but would nonetheless be proper due to overriding considerations such as the public interest and the urgent need to prevent third-party harm. *Id.* at r. 1.6 cmt.

242. There is no language in ABA Model Rule 1.6(b) requiring client consent for a lawyer to rely on one of the permissive disclosure grounds set forth in that rule. To the contrary, the disclosure grounds requiring client consent are those set forth in ABA Model Rule 1.6(a). That juxtaposition indicates that client consent is unnecessary for lawyers to resort to the grounds in 1.6(b).

243. *Supra* note 26.

244. *Supra* Part II.A.

245. "Knowingly" is actually the second-highest gradation of mens rea. MODEL PENAL CODE § 2.02 (AM. L.INST., Proposed Official Draft 1962). Furthermore, liability for facilitating misconduct by another person generally requires a level of purposefulness and/or specific intent that ranks high in the taxonomy of mens rea. *Cf.* MODEL PENAL

E. Difficulty of Proving Facts to Support Application of Exception

Critics might also complain about the difficulty of demonstrating misconduct that vitiates the attorney-client privilege under this proposal. A party invoking the new exception would need to prove that the privilege holder intended to enlist the aid of an attorney in order to accomplish KELP. Outsiders might have difficulty gaining access to sufficient information to make that showing.

This challenge is not unique to the new version of the exception, however. Under the current crime-fraud exception, outsiders also face difficulty demonstrating that the privilege holder's wrongful acts and culpable intent justify abrogating attorney-client privilege. The Supreme Court has made the task somewhat easier by setting a low bar for the required quantum of proof—which some lower courts have equated with the probable cause standard[246]—and *in camera* hearings sometimes present an opportunity to question the privilege holder and other "insiders."[247] These same techniques would still be available after expansion of the crime-fraud exception to include KELP.

Of course, prosecutors have unique power to persuade witnesses—including attorneys such as Michael Cohen—to offer insights that might help establish the crime-fraud exception.[248] But civil plaintiffs might also be able to utilize comparable, if less persuasive, tools. For example, under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), a defendant can seek apportionment of liability to others with responsibility for the contamination;[249] this process of blame shifting is somewhat analogous to cooperation by one criminal defendant in the government's investigation of another suspect, and might create similar opportunities to expose information that allies had previously kept confidential.[250] It is also possible that defendants will disclose attorney-client communication inadvertently in discovery or through some other means.[251] In any event, circumstantial proof is always an option when

Code § 2.06. Thus, it would be inaccurate to say that the language in this article's proposal would abrogate the attorney-client privilege based on conduct undertaken with relatively benign motives.

246. *See supra* notes 47–48 and accompanying text.

247. *Supra* notes 57–64 and accompanying text.

248. *See* Bump, *supra* note 70.

249. *See* Frank Prager, *Apportioning Liability for Cleanup Costs Under CERCLA*, 6 Stan. Env't L.J. 198 (1986).

250. *Supra* note 55 and accompanying text.

251. *In re* Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 180 F. Supp. 3d 276, 284 (S.D.N.Y. 2016) (noting that defendants' disclosure of attorney-client

parties are unable to provide direct proof of wrongdoing sufficient to pierce the attorney-client privilege.[252]

F. Logistical Problems with Judicial Enforcement of Exception

Judges might object that this Article's proposal would create nuisances in their courtrooms. New time-consuming hearings might be necessary once additional categories of misconduct can provide a basis for overcoming privilege claims. The hearings might require that judges slog through scientific evidence (e.g., evidence of emissions) in order to apply the new exception to the attorney-client privilege.

The objection is fair as far as it goes. Checking the abuse of privilege will sometimes require judicial intervention, but the deterrent effect of the revised rule might stop such abuse before it occurs, often avoiding the need for time-consuming hearings. Judges' reluctance to deal with scientific matters will always be a challenge that arises in environmental proceedings, but the importance of such proceedings is worth the trouble.

There are several ways in which court administrators might address judges' concerns. Judicial education programs could improve judges' understanding of, and comfort with, scientific evidence.[253] Similarly, CLE training for lawyers could help standardize and streamline the presentation of proof. Some jurisdictions might opt to create specialized courts for environmental matters, just as jurisdictions now relegate tax cases, bankruptcy cases, drug cases, housing cases, and family law cases to specialized courts.

G. Exclusion of Some Civil Violations from Scope of Exception

Why limit this Article's proposal to civil violations relating to environmental law? Why not extend the crime-fraud exception to other important categories of civil violations? To offer only a few examples, violations of civil rights statutes and child protection statutes might seem significant enough to warrant inclusion in an updated crime-fraud exception.

This Article does not argue against an even wider expansion of the crime-fraud exception. Given space constraints, this Article only

communication in emails was a mistake during discovery, and the inadvertent disclosure did not waive the attorney-client privilege; nonetheless, the emails were subject to the crime-fraud exception, so plaintiffs could use them as evidence).

252. *Supra* note 56 and accompanying text.

253. *See* Tom Lininger, *Green Ethics for Judges*, 86 GEO. WASH. L. REV. 711, 752–53 (2018) (offering recommendations to improve judicial education regarding environmental and scientific subjects).

focuses on one example of civil violations that should provide a new basis for overcoming the attorney-client privilege. As noted previously, violations of civil environmental law present a particularly compelling case for extension of the crime-fraud exception because they are similar in many respects to the civil frauds now covered by the exception.[254] Both fraud and environmental pollution typically harm vulnerable victims that are sometimes incapable of vindicating their rights in court (in the case of environmental violations, the victims include future generations as well as nonhuman entities).[255] Both fraud and environmental pollution occur in relatively complicated regulatory environments, so perpetrators find it valuable to seek lawyers' aid.[256] In addition, both fraud and environmental violations can be hard to prove—a consideration that militates in favor of granting access to attorney-client communication when clients have tried to entangle lawyers in their misconduct.[257] The point of this comparison is not to argue that environmental violations should be the only new category of wrongdoing added to the crime-fraud exception, but rather to argue that environmental violations are a good choice for a "test case" to expand the privilege. Further expansion may very well be appropriate.

H. Possible Emergence of Nonlawyer Compliance Counselors

Perhaps this Article's proposal might be viewed as threatening lawyers' near-monopoly over the lucrative business of counseling clients about environmental regulatory matters. As clients become frustrated that lawyers might turn on them and report clients' attempts to involve lawyers in KELP, clients might want to seek help from a different category of advisers: nonlawyer compliance counselors.

This fear seems to be unfounded. The attorney-client privilege might indeed disappear when clients seek lawyers' assistance with KELP, but the alternative of nonlawyer compliance counselors is not preferable because there is usually no guarantee that communication with such counselors will be confidential under any circumstances.[258] The attorney-client privilege, by definition, only applies communication with attorneys.[259]

254. *Supra* Part I.D.

255. *Supra* Part I.D.

256. *Supra* Part I.D.

257. *Supra* Part I.D.

258. No state has yet established an evidentiary privilege for clients' communication with nonlawyer compliance counselors.

259. *See supra* note 14 and accompanying text.

Moreover, clients will continue to have strong selfish reasons to seek advice from the most competent counselors; those licensed to practice law.[260] Even if nonlawyers could conceivably be adept at this task, there are statutes in most states forbidding the unauthorized practice of law, and legal advice is an activity that falls squarely within the scope of those statutes.[261] In sum, conscientious lawyers need not worry that they will be replaced by nonlawyers.

CONCLUSION

This Article argues that the crime-fraud exception should extend to civil violations of environmental law, particularly violations involving knowing emission of listed pollutants (KELP).[262] There is no principled reason for the present version of the crime-fraud exception, which applies to any category of crime (including the most inconsequential misdemeanors)[263] and to any category of fraud (including minor misrepresentations)[264] but does not apply to a civil law violation with grave consequences for environmental or human health. The misuse of the attorney-client relationship to further such civil law violations is every bit as egregious as the involvement of attorneys in criminal or fraudulent schemes.

Society cannot tolerate the costs of the attorney-client privilege when clients seek attorneys' help with high-stakes lawbreaking. This Article's proposal to include serious environmental harm as a ground for abrogating the attorney-client privilege is a step in the right direction. There are likely other categories of civil law violations that also deserve inclusion in the updated list of misconduct vitiating the attorney-client privilege. However, space does not permit consideration of all such grounds in this Article. The objective here has been to show that certain violations of civil environmental law are, for all intents and purposes, just as worrisome as those crimes and frauds that can trigger the application of the current exception. The time has come to

260. Lininger, *supra* note 219, at 108–09 (explaining that clients have a strong interest to seek good advice on matters relating to environmental law, whether or not clients can be 100% sure that their communications with their lawyers will remain confidential: "[C]lients do not share information with lawyers merely to keep it secret. Clients speak with lawyers because they need legal services.").

261. Michele Cotton, *Improving Access to Justice by Enforcing the Free Speech Clause*, 83 BROOK. L. REV. 111, 111 (2017) ("State laws against the unauthorized practice of law (UPL) generally prohibit nonlawyers from giving legal advice." (internal quotation marks omitted)).

262. *Supra* Part II.A.

263. *Supra* note 26 and accompanying text.

264. *Supra* note 27 and accompanying text.

revise the taxonomy of disqualifying conduct, and the inclusion of civil environmental law violations should merely begin, not end, that project.

Adoption of this Article's proposal would not only bring rationality to the demarcation of boundaries in privilege law but would also strengthen the protection of the environment. Now that the number of federal environmental prosecutions has dropped to the lowest levels in three decades,[265] it would be naïve to rely on federal prosecutors as the primary enforcers of environmental law. The dereliction of the Justice Department threatens significant harm to the environment and to human health.[266] Prosecutors have always been in the best position to check misuse of the attorney-client privilege,[267] but the Department of Justice has abdicated that duty in the context of environmental law. Private plaintiffs' attorneys, therefore, need to step into the breach. Amendment of the crime-fraud exception would help "private attorneys general" succeed in this vital role.

Privilege law cannot abide privilege holders' purposeful reliance on the assistance of attorneys to commit serious violations of civil environmental law. Whether the opponents of the wrongdoers are prosecutors or private attorneys, the law must provide effective remedies for abuse of the attorney-client relationship.

265. *Supra* note 146 and accompanying text.

266. Iovino, *supra* note 13 (quoting Ethan Elkind, climate program director at UC Berkeley School of Law, who indicated that the historically low rate of federal environmental prosecutions poses risks of significant harm to the environment and to public health).

267. *Supra* Part II.C (explaining that prosecutors are in a stronger position to use the current version of the crime-fraud exception, and that judges give greater credence to crime-fraud objections brought by prosecutors rather than civil plaintiffs' attorneys).