NOTE

SHEDDING LIGHT ON SHADY SUITS: APPLYING THE CRIME-FRAUD EXCEPTIONS TO THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE TO BAD-FAITH LITIGATION

Sabrina Parisi*

Introduction

"[N]o reasonable person would conclude that the statements were truly statements of fact."[1] In stunning candor, Sidney Powell conceded that her accusations against US Dominion, Inc. ("Dominion")—that the voting machine supplier facilitated widespread voter fraud in the 2020 presidential election—had no basis in fact, characterizing her statements instead as "vituperative, abusive and inexact" political rhetoric.[2] Powell's striking admission underscores her awareness that, as she and others clamored for courts to overturn the election, their claims similarly lacked basis in fact.

The crime-fraud exceptions to the attorney-client privilege and work product doctrine strip communications of their protection where the purposes of the privilege and the doctrine are no longer served; that is, where a lawyer's services are enlisted "to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud."[3] The exceptions have famously been invoked to reveal, for example, Monica Lewinsky's communications with her attorney during the preparation of Lewinsky's affidavit denying her sexual relationship with President Bill Clinton,[4] as well as Paul Manafort and

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1. Memorandum of Law in Support of Defendants' Motion to Dismiss at 27–28, US Dominion, Inc., v. Powell, 554 F. Supp. 3d 42 (D.D.C. 2021) (No. 1:21-cv-00040-CJN).

2. *Id.* at 32 (quoting Watts v. United States, 394 U.S. 705, 708 (1969)). Powell raised this as a defense against the $1.3 billion defamation suit filed by Dominion. *See* Debra Cassens Weiss, *Sidney Powell Lawyers Argue No Reasonable Person Would Have Accepted Her Stolen Election Claims as Fact*, ABA J. (Mar. 23, 2021, 12:56 PM), https://www.abajournal.com/news/article/sidney-powell-lawyers-argue-no-reasonable-person-would-have-accepted-her-stolen-election-claims-as-fact.

3. Proposed Rule 503(d)(1) of the Federal Rules of Evidence, 51 F.R.D. 315, 362; *see also* Paul F. Rothstein & Sydney A. Beckman, Federal Testimonial Privileges § 2:36 n.20 (2d ed. 2021); *In re* Grand Jury Investigation, 399 F.3d 527, 532 (2d Cir. 2005) ("In 1972, the Supreme Court promulgated Federal Rules of Evidence setting forth nine specific categories of privileges, including an attorney-client privilege. Proposed Federal Rule 503, defining the privilege, . . . was not adopted by Congress, [but] courts and commentators have treated it as a source of general guidance regarding federal common law principles.").

4. *See* Lance Cole, *Paul Manafort, Monica Lewinsky, and the Penn State Three Case: When Should the Crime-Fraud Exception Vitiate the Attorney-Client Privilege?*, 91 Temp. L. Rev. 555, 558 n.14 (2019).

Richard Gates' communications with their attorney regarding materially false information provided to the Department of Justice.[5]

The Trump campaign, Trump's political allies, and Trump himself (collectively, "the Trump team") instigated sixty-two lawsuits nationwide to overturn the results of the 2020 presidential election.[6] Courts characterized the litigation—designed to enlist the courts to disenfranchise millions of American voters and undermine the integrity of the election process—as "largely hypothetical,"[7] based on "speculation, conjecture, and unwarranted suspicion,"[8] and a "vast conspiracy."[9] Bad faith is therefore palpable in these suits that tout baseless claims designed to deprive the American public of the right to vote. Litigation so colored by bad faith constitutes an abuse of the judicial process and is precisely the kind of fraud that should trigger the crime-fraud exception.

This Note argues that the very act of conducting baseless litigation predominantly in bad faith—"bad-faith litigation" for short—constitutes a fraud on the court and is therefore a "fraud" within the meaning of crime-fraud exceptions to the attorney-client privilege and work product doctrine. Upon evidence that such a fraud has been committed against the court, attorney-client communications and attorney work product advancing the commission of the fraud should be revealed through compelled disclosure.

Support already exists for this Note's proposal. Courts possess an inherent power to sanction bad-faith conduct, including bad-faith litigation.[10] Both the Eleventh and Second Circuits have invoked the inherent power to trigger the crime-fraud exception upon findings of bad-faith litigation. In *JTR Enterprises, L.L.C. v. Colombian Emeralds*, the Eleventh Circuit, upon the district court's finding of a "massive fraud of the court," upheld the invocation of the crime-fraud exception, "which would reveal existence of the fraud as well as efforts to conceal it."[11] In *In re Grand Jury Subpoenas Dated March 2, 2015*,[12] the Second Circuit

5. *Id.* at 562–63.

6. William Cummings, Joey Garrison & Jim Sergent, *By the Numbers: President Donald Trump's Failed Efforts to Overturn the Election*, USA TODAY (Jan. 6, 2021, 10:50 AM), https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/.

7. Election Integrity Project of Nev., L.L.C. v. Eighth Jud. Dist. Ct., No. 81847, 2020 WL 5951543, at *2 (Nev. Oct. 7, 2020).

8. *See* Debra Cassens Weiss, *Judge Sanctions Pro-Trump Lawyers for Election Suit, Cites 'Guesswork' Affidavits and Unwarranted Claims*, ABA J. (Aug. 26, 2021, 10:31 AM), https://www.abajournal.com/news/article/federal-judge-ejects-claim-that-electronic-signature-protected-pro-trump-lawyers-issues-sanctions (citing King v. Whitmer, 556 F. Supp. 3d 680, 689 (E.D. Mich. 2021)).

9. O'Rourke v. Dominion Voting Sys., Inc., 552 F. Supp. 3d 1168, 1175 (D. Colo. 2021).

10. In *Hall v. Cole*, the Supreme Court made clear that "'bad faith' may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation." 412 U.S. 1, 15 (1973); *see also* JTR Enters., L.L.C. v. Colombian Emeralds, 697 F. App'x 976, 986 (11th Cir. 2017) ("Bad faith exists where an attorney knowingly or recklessly pursues a frivolous claim or needlessly obstructs the litigation of a non-frivolous claim.") (The case name has been corrected to "Colombian" within this Note because the case uses this spelling throughout with the exception of its header, which uses "Columbian.").

11. *JTR Enters. L.L.C.*, 697 F. App'x at 988.

12. 628 F. App'x 13, 15 (2d Cir. 2015).

affirmed an application of the crime-fraud exception to baseless litigation "carried on substantially for the purpose of furthering the crime or fraud."[13] Nevertheless, most courts have declined to extend the exception to bad-faith litigation, finding that the term "fraud" does not reach "wrongdoings that are not clearly criminal or tortious."[14] Consequently, communications or work product made in furtherance of the Trump team's dangerous and disingenuous election litigation would likely remain privileged in most circuits.[15]

In Part I, this Note begins by providing a brief overview of the attorney-client privilege, work product doctrine, and the crime-fraud exceptions to both. It then derives limiting principles from other contexts in which courts have dealt with bad-faith litigation to avoid chilling legitimate suits resting on seemingly unsteady ground. In Part II, this Note argues that bad-faith litigation fits comfortably within the meaning of "fraud" for the purposes of the crime-fraud exception. In Part III, this Note demonstrates that sanctioning bad-faith litigation in this manner is well within courts' inherent powers and consistent with the purposes of the attorney-client privilege and work product doctrine. In Part IV, this Note presents cases in which courts have already adopted the proposed use of the crime-fraud exception and argues that the Trump team's election litigation is similarly ripe for application. Finally, in Part V, this Note proposes amended language to Proposed Rule 503(d)(1) of the Federal Rules of Evidence, including a test for determining whether a party has engaged in bad-faith litigation and a standard of proof necessary to invoke the crime-fraud exception. In sum, this Note will show that, faced with bad-faith litigation, courts have the tools, the right, and the duty to invoke the crime-fraud exception.

I. BACKGROUND

A. The Attorney-Client Privilege and the Work Product Doctrine

The attorney-client privilege and work product doctrine are jealously guarded, penetrated only in cases of waiver or where protecting the communication no longer serves a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."[16] The following sections outline the general bounds of the privilege and the doctrine.

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13. *Id.* at 15; *see also* ROTHSTEIN & BECKMAN, *supra* note 3, § 2:36 n.15.

14. ROTHSTEIN & BECKMAN, *supra* note 3, § 2:36.

15. On October 19, 2022, District Court Judge David O. Carter applied the crime-fraud exception to eight emails related to President Trump and John Eastman's election litigation strategy. Eastman v. Thompson, No. 8:22-cv-00099-DOC-DFM, 2022 WL 11030550, at *16–21 (C.D. Cal. Oct. 19, 2022), *reconsideration denied*, No. SACV2200099DOCDFM, 2022 WL 17100471 (C.D. Cal. Oct. 28, 2022). Judge Carter's decision rested on his finding that the eight communications were "sufficiently related to *and* in furtherance of" the criminal obstruction of the January 6 proceedings and a conspiracy to defraud the United States. *Id.* at *17–20. As this Note will argue, Judge Carter's decision to invoke the crime-fraud exception could have rested independently on the ground that the Trump team's fraudulent litigation constituted a fraud on the court.

16. Trammel v. United States, 445 U.S. 40, 50 (1980) (quoting Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)).

1. The Attorney-Client Privilege

The attorney-client privilege protects confidential communications between attorney and client from compelled disclosure.[17] The privilege is "the oldest evidentiary privilege recognized in Anglo-American common law"[18] and applies in all federal and state courts within the United States.[19] The privilege lies with the client, who may invoke it once an attorney-client relationship has been established.[20] When the client is neither present nor has issued a waiver, the attorney "has the authority, and even the duty" to assert the privilege on the client's behalf.[21]

The privilege is grounded in the attorney's need to possess all information necessary to effectively represent the client consistent with the standards of the profession,[22] and is therefore designed "to encourage full and frank communication between attorneys and their clients"[23] in promotion of the "broader public interests in the observance of law and administration of justice."[24] Nevertheless, the privilege has not been recognized as a constitutional right,[25] and "applies only where

17. ROTHSTEIN & BECKMAN, *supra* note 3, § 2:1. The basic elements of the attorney-client privilege are: (1) "where legal advice of any kind is sought," (2) "from a professional legal adviser in his capacity as such," (3) "the communications relevant 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." 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 541–42 (John T. McNaughton rev., 1961). These elements "have been incorporated and developed in greater detail in proposed Federal Rule of Evidence 503, which, though never adopted into law, has proved a useful guide for federal courts in determining the perimeters of the privilege." ROTHSTEIN & BECKMAN, *supra* note 3, § 2:1.

18. Cole, *supra* note 4, at 556; *see also* ROTHSTEIN & BECKMAN, *supra* note 3, § 2:1 (noting that "[t]he attorney-client privilege is the oldest of the common law privileges"); Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) ("The attorney–client privilege is the oldest of the privileges for confidential communications known to the common law.").

19. Tom Lininger, *No Privilege to Pollute: Expanding the Crime-Fraud Exception to the Attorney-Client Privilege*, 105 MINN. L. REV. 113, 118 (2020).

20. Douglas R. Richmond, *Understanding the Crime-Fraud Exception to the Attorney-Client Privilege and Work Product Immunity*, 70 S.C. L. REV. 1, 8 (2018).

21. ROTHSTEIN & BECKMAN, *supra* note 3, § 2:19.

22. *See* Trammel v. United States, 445 U.S. 40, 51 (1980); *see also* Lininger, *supra* note 19, at 119 ("Such candor enables lawyers to serve their clients better, anticipating possible vulnerabilities and preparing for pitfalls that might otherwise have surprised the lawyers.").

23. *Upjohn*, 449 U.S. at 389; Fisher v. United States, 425 U.S. 391, 403 (1976) (recognizing that the purpose of the attorney-client privilege is "to encourage clients to make full disclosure to their attorneys").

24. *Upjohn*, 449 U.S. at 389; *see also* Lininger, *supra* note 19, at 119.

25. Howell v. Trammell, 728 F.3d 1202, 1222 (10th Cir. 2013) ("[S]tanding alone, the attorney-client privilege is merely a rule of evidence; it has not yet been held a constitutional right." (quoting Partington v. Gedan, 961 F.2d 852, 863 (9th Cir. 1992))). *See also* ROTHSTEIN & BECKMAN, *supra* note 3, § 2:2. Rothstein and Beckman explain:

> While generally the attorney-client privilege is not of constitutional scope, it has constitutional overtones in that a communication made by a client may fall within a recognized zone of privacy. These overtones, however, have not significantly affected the development of the privilege. Nonetheless, a violation of the privilege may occasionally constitute a violation [of] a defendant's Fifth Amendment right to due process or the Sixth Amendment right to counsel.

ROTHSTEIN & BECKMAN, *supra* note 3, § 2:2 (footnotes omitted).

necessary to achieve its purpose."[26] While the privilege must protect "the confidences of wrongdoers," the fundamental purpose underlying the privilege "ceas[es] to operate at a certain point, namely, where the desired advice refers *not to prior wrongdoing*, but to *future wrongdoing*."[27]

2. The Work Product Doctrine

The work product doctrine, first recognized in *Hickman v. Taylor*[28] and later codified under Federal Rule of Civil Procedure 26(b)(3),[29] protects an attorney's materials prepared "in anticipation of litigation" from discovery.[30] Following *Hickman*, courts developed a "two-tiered" approach to work product protection: while "fact" work product[31] receives qualified protection, "opinion" work product[32] protection is nearly absolute.[33] The doctrine is thus "not 'strictly' a privilege,"[34] but rather a form of "qualified immunity"[35] because a court may order disclosure of fact work product where the party seeking discovery demonstrates a "substantial need" and an inability to obtain substantially equivalent materials "without undue hardship."[36] Meanwhile, "extraordinary justification" is required

26. United States v. Zolin, 491 U.S. 554, 562 (1989) (quoting *Fisher*, 425 U.S. at 403) (dealing with the crime-fraud exception to the attorney-client privilege).

27. *Id.* at 562–63 (quoting 8 WIGMORE, *supra* note 17, § 2298, at 573).

28. 329 U.S. 495 (1947). The Court included the following materials as potentially encompassed by the work product doctrine: "private memoranda, personal recollections, declarations of witnesses, correspondence, briefs, mental impressions, personal beliefs, and various other types of tangible and intangible information." ROTHSTEIN & BECKMAN, *supra* note 3, § 11:3 (citing *Hickman*, 329 U.S. at 508).

29. FED. R. CIV. P. 26(b)(3).

30. *Hickman*, 329 U.S. at 508, 511; *see also* ROTHSTEIN & BECKMAN, *supra* note 3, § 11:3; Richmond, *supra* note 20, at 15. The work product doctrine is both "distinct from and broader than the attorney-client privilege." United States v. Nobles, 422 U.S. 225, 238 n.11 (1975); *see also In re* Sealed Case, 676 F.2d 793, 809 (D.C. Cir. 1982). While the privilege only applies to confidential communications between attorney and client, the work product is not so limited. *Id.* at 809. The court stated:

> At the very least, it applies to material 'obtained or prepared by an adversary's counsel' in the course of his legal duties, provided that the work was done 'with an eye toward litigation.' The work product privilege protects both the attorney-client relationship and a complex of individual interests particular to attorneys that their clients may not share. And because it looks to the vitality of the adversary system rather than simply seeking to preserve confidentiality, the work product privilege is not automatically waived by any disclosure to a third party.

Id. (quoting *Hickman*, 329 U.S. at 511).

31. *Id.* at 809–11. "Fact" work product refers to materials containing relevant, nonprivileged facts that do not reveal the "opinions, judgments, and thought processes of counsel." *Id.* at 809–10.

32. *Id.* at 811–12. "Opinion" work product refers to an attorney's mental impressions, conclusions, opinions, and legal theories. *Id.* at 809–12.

33. *Id.* at 810–11.

34. ROTHSTEIN & BECKMAN, *supra* note 3, § 11:1 (quoting *In re* Grand Jury Subpoena, 599 F.2d 504, 509 (2d Cir. 1979)).

35. *In re* Perrigo Co., 128 F.3d 430, 437 (6th Cir. 1997).

36. FED. R. CIV. P. 26(b)(3)(A)(ii).

to expose opinion work product to discovery.[37]

The work product doctrine exists primarily to preserve a "healthy adversary system."[38] In recognizing the doctrine, the Supreme Court reasoned that invasions of an attorney's work product would undermine "the interests of the clients and the cause of justice," and, without appropriate safeguards, "much of what is now put down in writing would remain unwritten."[39] Here lies a key distinction between the attorney-client privilege and the work product doctrine: while the privilege is designed to promote candid communications between attorney and client, the doctrine operates to preserve the adversary system and professionalism in the legal field[40] "by enabling attorneys to prepare cases without fear that their work product will be used against their clients."[41] But, as with the attorney-client privilege, the work product doctrine melts away where its application no longer serves its underlying purpose.[42]

B. The Current Crime-Fraud Exception

The crime-fraud exception arms courts with a powerful weapon against abuses of the attorney-client privilege and work product doctrine. Upon sufficient evidence that an attorney's services have been engaged in pursuit of a crime or fraud, the exception enables courts to reveal, sanction, and deter attorney-client communications and work product in furtherance of that crime or fraud.[43] This Section first examines the current scope of the exception to the attorney-client privilege. It then examines the current scope of the exception to the work product doctrine.

1. The Crime-Fraud Exception to the Attorney-Client Privilege

By its terms, the crime-fraud exception overrides the attorney-client privilege where a client seeks an attorney's assistance in committing certain ongoing or future "crimes" or "frauds."[44] Thus, upon sufficient evidence that a client has engaged an attorney's services in furtherance of a crime or fraud, related communications are discoverable.[45]

As a threshold matter, certain "crimes" or "frauds" fall patently within the ambit of the exception, while others are subject to judicial interpretation. Plainly, all crimes as defined by state and federal penal law rest squarely within the scope of

37. *In re Sealed Case*, 676 F.2d at 810; *see also* Upjohn Co. v. United States, 449 U.S. 383, 400 (1981) (discussing the "special protection" that Rule 26 accords to "work product revealing the attorney's mental processes").

38. *In re Sealed Case*, 676 F.2d at 818.

39. Hickman v. Taylor, 329 U.S. 495, 511 (1947).

40. ROTHSTEIN & BECKMAN, *supra* note 3, § 11:1.

41. *In re* Grand Jury, 705 F.3d 133, 151 (3d Cir. 2012) (citing *In re* Chevron Corp., 633 F.3d 153, 164 (3d Cir. 2011)); Moody v. Internal Revenue Serv., 654 F.2d 795, 800 (D.C. Cir. 1981) ("The work product privilege creates a zone of privacy within which a lawyer can prepare his case free of adversarial scrutiny.").

42. *See In re Chevron*, 633 F.3d at 164.

43. *See* ROTHSTEIN & BECKMAN, *supra* note 3, § 11:15.

44. *Id.* § 2:36.

45. *See id.*

the exception.[46] Thus, the crime-fraud exception has been applied, for example, in cases involving a murder-for-hire scheme,[47] obstruction of justice,[48] elicitation of false testimony,[49] intimidation of witnesses,[50] wire fraud,[51] social security fraud,[52] illegal use of wiretaps,[53] and other criminal conduct. Courts splinter when considering what sort of non-criminal "fraud" fits within the exception, but generally agree that civil frauds[54] of a *sufficiently serious nature*[55] trigger the exception.[56] Sufficiently serious civil frauds include, for example, intentional torts[57] and breaches of fiduciary duty.[58] However, most courts stop short of applying the exception to "wrongdoings that are not clearly criminal or tortious."[59]

The crime-fraud exception to the attorney-client privilege is predicated on the rationales underlying the privilege itself. The privilege is not absolute;[60] its protection extends only as far as necessary to serve "broader public interests."[61] Accordingly, where communications are "made in furtherance of or to conceal ongoing or future crimes or fraud," the crime-fraud exception lifts the privilege's

46. *Id.*

47. United States v. Lentz, 524 F.3d 501, 519, 524 (4th Cir. 2008).

48. *In re* Search Warrant Issued June 13, 2019, 942 F.3d 159, 165 (4th Cir. 2019).

49. United States v. Ruhbayan, 406 F.3d 292, 299 (4th Cir. 2005).

50. R.D. v. Shohola, Inc., 769 F. App'x 73, 75 (3d Cir. 2019).

51. *In re* Grand Jury Subpoena, 2 F.4th 1339, 1348–49 (11th Cir. 2021).

52. United States v. Swann, 788 F. App'x 553, 553–54 (9th Cir. 2019).

53. Marsh v. Curran, 362 F. Supp. 3d 320, 329 (E.D. Va. 2019).

54. *See* Whetstone v. Olson, 732 P.2d 159, 160 (Wash. Ct. App. 1986); Olson v. Accessory Controls and Equip. Corp., 757 A.2d 14, 21 (Conn. 2000).

55. *See* Stauffer Chem. Co. v. Monsanto Co., 623 F. Supp. 148, 152 (E.D. Mo. 1985) ("The alleged fraudulent activities must be of such a serious nature so as to warrant the obviation of the privilege." (citing *In re* Int'l Sys. & Controls Corp., 693 F. 2d 1235, 1242 (5th Cir. 1982))); Research Corp. v. Gourmet's Delight Mushroom Co., 560 F. Supp. 811, 820 (E.D. Pa. 1983) ("As its name connotes, [the crime-fraud exception] encompasses only serious unlawful activity. Hence, for the privilege to take flight, unlawful conduct, not mere inequity, must be demonstrated."); *In re* Sealed Case, 754 F.2d 395, 401 (D.C. Cir. 1985) (examining whether the government met its burden of "establishing a prima facie case of a violation sufficiently serious to defeat the privilege.").

56. Some courts restrict the exception strictly to crimes as defined by penal law and fraud as defined by common law. ROTHSTEIN & BECKMAN, *supra* note 3, § 2:36; *id.* n.10 (citing Ferrara & DiMercurio, Inc. v. St. Paul Mercury Ins. Co., 173 F.R.D. 7 (D. Mass. 1997); Milroy v. Hanson, 902 F. Supp. 1029 (D. Neb. 1995); Duttle v. Bandler & Kass, 127 F.R.D. 46 (S.D.N.Y. 1989)).

57. Cooksey v. Hilton Int'l Co., 863 F. Supp. 150, 151 (S.D.N.Y. 1994) ("[I]ntentional torts moored in fraud can trigger the crime-fraud exception."); Koch v. Specialized Care Servs., Inc., 437 F. Supp. 2d 362, 373 (D. Md. 2005) (finding the crime-fraud exception applied to "an intentional tort involving misrepresentation, deception, and deceit").

58. *See* Madanes v. Madanes, 199 F.R.D. 135, 148–49 (S.D.N.Y. 2001) (finding that an attorney's breach of the duty to maintain the confidences of his client would be sufficient to trigger the crime-fraud exception to the attorney-client privilege).

59. ROTHSTEIN & BECKMAN, *supra* note 3, § 2:36

60. *In re* Antitrust Grand Jury, 805 F.2d 155, 162 (6th Cir. 1986).

61. *In re Antitrust Grand Jury*, 805 F.2d at 162 (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)); Fausek v. White, 965 F.2d 126, 129 (6th Cir. 1992) (quoting *Upjohn*, 449 U.S. at 389).

protective veil.[62] The exception is rooted in the notion that engaging an attorney's services in furtherance of illegal or fraudulent activity subverts the fundamental purpose of the attorney-client privilege "to promote the proper administration of justice" and enable attorneys to "ethically carry out their representation."[63]

In sum, the crime-fraud exception reflects the notion that communications intended to enlist an attorney's services in furtherance of a crime or fraud are antithetical to the privilege's underlying purposes and unworthy of its protection.

a. Elements

To invoke the crime-fraud exception, the party seeking disclosure of an adversary's attorney-client communications "must make a prima facie showing (1) the client was committing or intending to commit a fraud or crime, and (2) the attorney-client communications were in furtherance of that alleged crime or fraud."[64] Whether these two elements have been satisfied is a question for the judge, not the jury.[65]

Turning to the two-part test, to satisfy the first prong—the client was committing or intending to commit a fraud or crime—the client must be engaged in, or intend to engage in, an *ongoing* or *future* crime or fraud.[66] Accordingly, communications between an attorney and a client regarding past crimes or frauds remain privileged, unless those communications concern the ongoing concealment or cover-up of past crimes or frauds.[67] Notably, the client need not succeed in committing the crime or fraud; to trigger the exception, the crime or fraud "need only have been the objective of the client's communication."[68]

Under the second prong—the communications were in furtherance of the alleged crime or fraud—the client's intent is dispositive: the client must *intend* to enlist the attorney's services *in furtherance* of "what the client knows or should know to be criminal or fraudulent (or perhaps otherwise illegal)."[69] Because the

62. ROTHSTEIN & BECKMAN, *supra* note 3, § 2:36 (footnotes omitted). The crime-fraud exception "does not open the attorney's files completely but rather permits disclosure only of communications" which bear a "reasonable relationship" to the relevant crime or fraud. *Id.* § 2:36 n.2 (citing *In re* Grand Jury Proceedings #5 Empaneled Jan. 28, 2004, 401 F.3d 247, 251 (4th Cir. 2005)).

63. *Id.* § 2:36.

64. Richmond, *supra* note 20, at 20 (quoting *In re* Grand Jury Subpoena, 745 F.3d 681, 687 (3d Cir. 2014)).

65. Lininger, *supra* note 19, at 124–25; ROTHSTEIN & BECKMAN, *supra* note 3, § 2:36 ("Whether the showing is sufficient falls within the sound discretion of the trial judge, and the court's decision will not be disturbed on appeal in the absence of abuse, according to the weight of authority."). In determining whether the moving party has successfully made a prima facie case, the court may consider evidence not necessarily independent of the communications at issue, evidence that would be inadmissible at trial, and, when presiding over a grand jury, ex parte affidavits. *Id.* § 2:36.

66. *See* Richmond, *supra* note 20, at 32.

67. ROTHSTEIN & BECKMAN, *supra* note 3, § 2:36 n.2 (citing *In re* Sealed Case, 754 F.2d 395 (D.C. Cir. 1985)); Richmond, *supra* note 20, at 32.

68. *In re* Grand Jury Subpoena Duces Tecum Dated September 15, 1983, 731 F.2d 1032, 1039 (2d Cir. 1984).

69. ROTHSTEIN & BECKMAN, *supra* note 3, § 2:36; Proposed Rule 503(d)(1) of the Federal Rules of Evidence, 51 F.R.D. 315, 362; *see also* Richmond, *supra* note 20, at 37.

client's intent controls, the attorney need not be aware of the client's criminal or fraudulent agenda[70] or have "any blameworthy intent."[71] To satisfy the "in furtherance" requirement, there must be a "nexus" or "logical link" between the communication and the crime or fraud.[72] Accordingly, the exception is not triggered where an attorney merely opines on the legality or illegality of a proposed activity.[73] Rather, "[t]he communication itself must further the crime or fraud"[74] and "can be demonstrated by evidence of some activity following the improper consultation, on the part of either the client or the lawyer, to advance the intended crime or fraud."[75]

b. Standard of Proof

While courts typically apply the above-mentioned two-part test, disagreement abounds as to exactly what level of proof, or quantum of evidence, is required to trigger the crime-fraud exception.[76] The Third Circuit traced the contours of this split in *In re Grand Jury*, revealing a patchwork of legal standards.[77] Some circuits require probable cause.[78] Others require a "reasonable basis to suspect or believe"[79] the client engaged the attorney's services in furtherance of a crime or fraud.[80] Still others require "evidence sufficient to compel the party asserting the privilege to come forward with an explanation for the evidence offered against the privilege,"[81] or sufficient "evidence that, if believed by a trier of fact, would establish that some violation was ongoing or about to be committed and that the

70. ROTHSTEIN & BECKMAN, *supra* note 3, § 2:36; United States v. Moazzeni, 906 F. Supp. 2d 505, 512 (E.D. Va. 2012) ("When applying the crime-fraud exception to the *attorney-client privilege*, the attorney need not be aware that illegal or fraudulent conduct is afoot." (citing *In re* Grand Jury Proceedings #5 Empaneled January 28, 2004, 401 F.3d 247, 251 (4th Cir. 2005))).

71. Lininger, *supra* note 19, at 124.

72. Richmond, *supra* note 20, at 39 (first quoting *In re* Grand Jury Subpoena, 745 F.3d 681, 692 (3d Cir. 2014); then quoting *In re* Neurontin Antitrust Litig., 801 F. Supp. 2d 304, 309–10 (D.N.J. 2011)).

73. *Id.* at 37.

74. *Id.* at 39.

75. *Id.* at 40 (internal quotation marks omitted) (quoting *In re* Pub. Def. Serv., 831 A.2d 890, 910 (D.C. Cir. 2003)).

76. *Id.* at 21–22.

77. *In re* Grand Jury, 705 F.3d 133, 152 (3d Cir. 2012).

78. *See In re* Richard Roe, Inc., 68 F.3d 38, 40 (2d Cir. 1995); *In re* Antitrust Grand Jury, 805 F.2d at 165–66 ("We are persuaded by the Second Circuit's [probable cause standard] and adopt it as our evidentiary standard of a prima facie showing."). *See also* Richmond, *supra* note 20, at 22.

79. *In re* Grand Jury, 705 F.3d at 152. *See, e.g.*, United States v. Neff, 787 F. App'x 81, 88 (3d Cir. 2019); United States v. Gorski, 807 F.3d 451, 460 (1st Cir. 2015); United States v. Brandner, 706 F. App'x 441, 442 (9th Cir. 2017). *See also* Richmond, *supra* note 20, at 21; Lininger, *supra* note 19, at 124–25 n.48.

80. Richmond, *supra* note 20, at 21 (citing United States v. Chen, 99 F.3d 1495, 1503 (9th Cir. 1996)).

81. *In re Grand Jury*, 705 F.3d at 152 (referring to United States v. Boender, 649 F.3d 650, 655–56 (7th Cir. 2011)); *In re* Grand Jury Subpoena, 419 F.3d 329, 336 (5th Cir. 2005) (requiring evidence "such as will suffice until contradicted and overcome by other evidence . . . a case which has proceeded upon sufficient proof to that stage where it will support [a] finding if evidence to the contrary is disregarded.") (quoting *In re* Int'l Sys. & Controls Corp. Sec. Litig., 693 F.2d 1235, 1242 (5th Cir. 1982)).

attorney-client communications were used in furtherance of that scheme."[82] Standards vary further *within* circuits.[83] The Supreme Court declined to resolve this issue in *United States v. Zolin*,[84] and courts have remained divided since.[85]

2. The Crime-Fraud Exception to the Work Product Doctrine

The crime-fraud exception to the work product doctrine exposes work product to disclosure if it is shown "to have been prepared in connection with advice or assistance" regarding, or in furtherance of, a client's ongoing or future crime or fraud.[86] The exception reaches only those specific documents that reasonably relate to the subject crime or fraud.[87] Like the attorney-client privilege, the work product doctrine is "perverted if it is used to further illegal activities" and "there are no overpowering considerations in either situation that would justify the shielding of evidence that aids continuing or future criminal activity."[88]

Just as the work product doctrine serves slightly different interests than the attorney-client privilege, the crime-fraud exception to the work product doctrine operates in a slightly different manner than the exception to the attorney-client privilege.[89] Because both the attorney and the client may claim work product protection, the breadth of the disclosure depends on whether the client and the attorney are, or the client alone is, culpable. If both attorney and client are culpable, materials that would otherwise be shielded by the doctrine are not protected.[90] However,

82. *In re Grand Jury*, 705 F.3d at 152 (referring to *In re* Grand Jury, 475 F.3d 1299, 1305 (D.C. Cir. 2007); *In re* Grand Jury Proc. # 5, 401 F.3d 247, 251 (4th Cir. 2005); *In re* Grand Jury Investigation, 842 F.2d 1223, 1226–27 (11th Cir. 1987)).

83. *See, e.g.*, Richmond, *supra* note 20, at 23. See United States v. BDO Seidman, LLP, 492 F.3d 806, 818 (7th Cir. 2007) (requiring "sufficient evidence to justify the district court in requiring the proponent of the privilege to come forward with an explanation for the evidence offered against it"); *Boender*, 649 F.3d at 656 (requiring "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") and Mattenson v. Baxter Healthcare Corp., 438 F.3d 763, 769 (7th Cir. 2006) (requiring "probable cause to believe that a crime or fraud has been attempted or committed and that the communications were in furtherance thereof") for examples of the range of standards that the Seventh Circuit has applied.

84. 491 U.S. 554, 563 n.7 (1989) ("The quantum of proof needed to establish admissibility was then, and remains, subject to question. . . . In light of the narrow question presented here for review, this case is not the proper occasion to visit these questions."). In *Zolin*, the Supreme Court contemplated when a court may hold an *in camera* hearing to determine whether the crime-fraud exception applies in a given case. The Court held that the requesting party must make "a showing of a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies." *Id.* at 572 (internal citations and quotation marks omitted).

85. *See* Richmond, *supra* note 20, at 21–23.

86. ROTHSTEIN & BECKMAN, *supra* note 3, § 11:15.

87. *Id.*

88. *In re* Grand Jury Proc., 604 F.2d 798, 802 (3d Cir. 1979).

89. Richmond, *supra* note 20, at 43.

90. *Id.* at 46–47.

if the client is culpable, but the attorney innocent, the attorney's mental impressions, conclusions, opinions, and legal theories remain protected.[91]

a. Elements

To invoke the crime-fraud exception to the work product doctrine, the discovering party must make a *prima face* showing that (1) "the client, the attorney, or an agent of either was engaged in or planning a criminal or fraudulent action or scheme" and (2) "the work product involved or was related to such misconduct."[92]

The moving party may satisfy the first prong by demonstrating the client or attorney was engaged in such planning at the time the client sought advice of counsel, or the client or attorney actually committed or attempted a crime or fraud after gaining the benefit of the attorney's work product.[93] The moving party may satisfy the second prong by demonstrating the work product reasonably related to the criminal or fraudulent activity,[94] but need not show any intent on the part of client in seeking counsel or the attorney in generating the work product.[95]

b. Standard of Proof

The standard of proof required to trigger the crime-fraud exception to the work product doctrine varies among jurisdictions in the same manner that the standard varies with respect to the crime-fraud exception to the attorney-client privilege.[96]

C. Limiting the Scope of the Proposal

The crime-fraud exceptions to the attorney-client privilege and work product doctrine are well-equipped to sanction a particular flavor of fraud: bad-faith litigation. This Section draws limiting principles from courts' previous encounters with such fraud to fashion a narrow definition of bad-faith litigation. Three contexts in particular are instructive: the sham exception to the *Noerr-Pennington* doctrine ("*Noerr* doctrine"), courts' enforcement of anti-SLAPP statutes, and Rule 11 of the Federal Rules of Civil Procedure. In each context, courts have devised tests to determine whether a party has in fact conducted bad-faith litigation.

These tests are instructive because, in addition to demonstrating how bad-faith litigation can be identified, they furnish important guardrails to protect meritorious or good-faith suits from the crime-fraud exception. There are three important

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91. *See In re* Grand Jury Proc., 102 F.3d 748, 751 (4th Cir. 1996) ("[A] guilty client may not use the innocence or ignorance of his attorney to claim the court's protection against a grand jury subpoena.") (quoting *In re* Sealed Case, 676 F.2d 793, 812 (D.C. Cir. 1982)); ROTHSTEIN & BECKMAN, *supra* note 3, § 11:15 ("Such an invasion is not justified by the misfortune of representing a criminal or fraudulent client.").

92. ROTHSTEIN & BECKMAN, *supra* note 3, § 11:15.

93. *In re* Sealed Case, 676 F.2d at 815.

94. *In re* Grand Jury Subpoena, 419 F.3d 329, 336 n.7 (5th Cir. 2005).

95. *In re Sealed Case*, 676 F.2d at 815.

96. Richmond, *supra* note 20, at 43.

limiting principles to derive from these doctrines: (1) to be "bad-faith litigation," the suit must be objectively baseless; (2) to be "bad-faith litigation," the suit must be subjectively motivated by bad faith; and (3) in determining whether a party acted with the requisite bad-faith, courts should consider the information available to the actor at the time, without relying on the benefit of hindsight.[97] By satisfying these requirements, courts may properly identify bad-faith litigation ripe for the crime-fraud exception, without ensnaring meritorious or good-faith suits.

1. Limiting Principles from the *Noerr* Doctrine

The *Noerr* doctrine supplies a long-accepted test for identifying "sham" litigation and sturdy ground for this Note's test for bad-faith litigation. Generally, the *Noerr* doctrine protects private individuals' First Amendment rights to petition the government "for a redress of grievances"[98] "with respect to the passage and enforcement of laws."[99] Under *Noerr*, individuals may associate together to lobby the government or file lawsuits[100] to pressure the government to take certain action without fear of prosecution.[101]

The *Noerr* doctrine's protection, however, vanishes under the sham exception. The sham exception first arose in the antitrust context, where, for example, a party would pursue litigation against a competitor merely to interfere with the competitor's business, not in a genuine effort to influence government action.[102] In *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.* ("*PRE*"), the Supreme Court fashioned the following two-part test, which, if satisfied, disqualifies the offending party from receiving *Noerr* protection.[103] To trigger the *Noerr* doctrine's sham exception, the court must find the suit is (1) objectively baseless as a matter of law; and (2) "conceals 'an attempt to interfere directly with the business relationships of a competitor,' . . . through the 'use [of] the governmental process . . . as an anticompetitive weapon.'"[104]

Because the *Noerr* doctrine has expanded beyond the antitrust context, the second prong has been interpreted to require a finding that the suit be solely and subjectively motivated by bad faith.[105] If both prongs of the test are met, the offending

97. While this Note offers in-depth treatment of the *Noerr* doctrine, anti-SLAPP statutes, and Rule 11, other doctrines are similarly instructive. For example, the torts of malicious prosecution and abuse of process both require a finding of objective baselessness and subjective bad-faith. For further discussion, see Matthew Spohn, *Combating Bad-Faith Litigation Tactics With Claims for Abuse of Process*, 38 COLO. L. 31 (2009).

98. U.S. CONST., amend I.

99. E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc. ("Noerr"), 365 U.S. 127, 138 (1961).

100. *See* J. THOMAS MCCARTHY & ROGER E. SCHECHTER, RIGHTS OF PUBLICITY AND PRIVACY § 11:44 (2d ed. 2021).

101. CHRISTINE M. G. DAVIS, RUSSELL J. DAVIS, LAURA HUNTER DIETZ, RACHEL M. KANE, ANDREW LEE, JUDY E. ZELIN & STEPHANIE ZELLER, NEW YORK JURISPRUDENCE § 287 (2d ed. 2021).

102. Alfred Weissman Real Est., Inc. v. Big V Supermarkets, Inc., 707 N.Y.S.2d 647, 654 (N.Y. App. Div. 2000) (citing City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365, 380 (1991)); *Noerr*, 365 U.S. at 144.

103. 508 U.S. 49, 60–61 (1993).

104. *Id.* (internal citations omitted).

party is deprived of *Noerr* immunity, and can be prosecuted under antitrust or other relevant law.[106]

The sham exception to the *Noerr* doctrine serves as the model for this Note's proposal. The well-settled definition of "sham litigation" translates easily to a suitable definition for bad-faith litigation. It also provides important safeguards to protect litigants championing legitimate, albeit slimly based, claims,[107] including two burdensome showings: that the subject petition be (1) objectively baseless, and (2) solely and subjectively motivated by bad faith.

The requirement that the suit be *solely* conducted in bad faith denotes courts' deliberate effort to avoid chilling good-faith petitions. Courts applying the sham exception therefore require "specific allegations demonstrating that" the allegedly sham litigation was "perpetrated *only* for reasons other than legitimate petitioning of government"[108] such that the petitioner "is not at all serious about the object of the petition."[109] Accordingly, even efforts that result in "deception of the public, manufacture of bogus sources of reference, (and) distortion of public sources of information" retain *Noerr* protection, so long as those efforts were intended to influence public officials.[110]

This Note, as explained below, proposes a slightly modified definition for "bad-faith litigation," requiring instead that the litigation be *predominantly*, rather than *solely*, motivated by bad faith. Whereas "solely" is "potentially all-excluding,"[111] "predominantly" offers some flexibility in an otherwise rigid framework.[112] In light of the remaining safeguards—that the litigation be objectively baseless and subjectively motivated by bad faith—the slightly relaxed predominance requirement creates a standard with somewhat broader reach, though sufficient stringency to effectively protect meritorious, good-faith litigation from unwarranted or disproportionate punishment. Thus, the *Noerr* doctrine's sham exception provides the

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105. *See* Brian P. Lanyon, *Sham Litigation in Zoning Challenges: Finding the Balance Between Protection of Constitutional Rights and Anticompetitive Business Practices*, 43 SETON HALL LEGIS. J. 135, 144 (2019) (citing Ann K. Wooster, Annotation, *Application of Noerr-Pennington Doctrine by State Courts*, 94 A.L.R. 455, § 3 (2018)). For examples of *Noerr*'s expansion beyond antitrust, see, for example, *Alfred Weissman Real Est., Inc*., 707 N.Y.S.2d at 652 (citing Video Int'l Prod., Inc. v. Warner-Amex Cable Commc'ns, 858 F.2d 1075, 1084 (5th Cir. 1988); Weiss v. Willow Tree Civic Ass'n, 467 F. Supp. 803, 807 (S.D.N.Y. 1979); Hotel St. George Assocs. v. Morgenstern, 819 F. Supp. 310, 321 (S.D.N.Y. 1993); Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220, 227–28 (7th Cir. 1975); MCI Commc'ns Corp. v. Am. Tel. & Tel. co., 708 F.2d 1081, 1154–55 (7th Cir. 1983)).

106. J. THOMAS MCCARTHY & ROGER E. SCHECHTER, RIGHTS OF PUBLICITY AND PRIVACY § 11:44 (2d ed. 2021); *PRE*, 508 U.S. at 60–61.

107. "[B]y definition, an objectively reasonable and ultimately successful effort to influence government action cannot be considered a sham." *Alfred Weissman Real Est., Inc*., 707 N.Y.S.2d at 654 (citing *PRE*, 508 U.S. at 58).

108. *Alfred Weissman Real Est., Inc*., 707 N.Y.S.2d at 653.

109. *Id*. at 654 (citing Fox News Network v. Time Warner, 962 F. Supp. 339, 345 (E.D.N.Y. 1997)).

110. *Noerr*, 365 U.S. 127, 140 (1961) (internal quotation marks omitted).

111. Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051, 1056 (D.C. Cir. 1981).

112. *See, e.g*., Octane Fitness, L.L.C. v. ICON Health & Fitness, Inc., 572 U.S. 545, 554–55 (2014) (discussing how the term "exceptional" creates an overly rigid standard).

framework for this Note's proposal, while other doctrines supply additional insight.

2. Limiting Principles from Anti-SLAPP Statutes

States' efforts to combat Strategic Lawsuits Against Public Participation ("SLAPPs")[113] provide further guidance on discerning a claim's baselessness and a litigant's bad faith. SLAPPs are meritless lawsuits designed to deter or punish citizens' exercise of First Amendment rights.[114] The SLAPP plaintiff does not seek legitimate relief; rather, the SLAPP plaintiff seeks to intimidate and silence citizens for, among other things:

> reporting violations of law, writing to government officials, attending public hearings, testifying before government bodies, circulating petitions for signature, lobbying for legislation, campaigning in initiative or referendum elections, filing agency protests or appeals, being parties in law-reform lawsuits, and engaging in peaceful boycotts and demonstrations.[115]

SLAPPs "masquerade as ordinary lawsuits,"[116] and therefore come in all shapes and sizes. Recent cases demonstrate this range: a pet care company hurled a lawsuit against a couple for writing a one-star Yelp review about the company's care of the couple's pets,[117] an attorney filed a defamation lawsuit against the San Francisco Chronicle for reporting on his disbarment,[118] and Resolute Forest Products, Inc. smacked Greenpeace International with a Racketeer Influenced and Corrupt Organizations ("RICO") suit for targeting Resolute with a hostile media campaign.[119]

The threat of litigation is not without teeth; such litigation is expensive, time-consuming, draining on judicial resources, and emotionally taxing.[120] In his five-year study of SLAPPs, George Pring saw passionate activists "frightened into silence, supporters drop out, resources diverted, fund-raising wither, public-issue

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113. Penelope Canan and George Pring first coined the acronym in 1988. *See* Penelope Canan & George W. Pring, *Strategic Lawsuits Against Public Participation*, 35 SOC. PROBS. 506, 506 (1988) [hereinafter Canan & Pring, *Strategic Lawsuits Against Public Participation*]; Penelope Canan & George W. Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 L. & SOC'Y REV. 385, 386 (1988).

114. Canan & Pring, *Strategic Lawsuits Against Public Participation*, *supra* note 113 at 506.

115. George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENV'T. L. REV. 3, 5 (1989) [hereinafter Pring, *SLAPPs*].

116. Batzel v. Smith, 333 F.3d 1018, 1024 (9th Cir. 2003) (quoting Wilcox v. Super. Ct., 27 Cal. App. 4th 809, 816 (Cal. Ct. App. 1994)); Pring, *SLAPPs*, *supra* note 115, at 8.

117. Duchouquette v. Prestigious Pets, L.L.C., No. 05–16–01163–CV, 2017 WL 510934, at *1 (Tex. Ct. App. Nov. 6, 2017); *Understanding Anti-SLAPP Laws*, REPS. COMM. FOR FREEDOM OF THE PRESS, https://www.rcfp.org/resources/anti-slapp-laws/#antislappstories (last visited Jan. 25, 2023).

118. REPS. COMM. FOR FREEDOM OF THE PRESS, *supra* note 117; Robertson v. Hearst Corp., A148504, 2018 WL 3122164, at *2 (Cal. Ct. App. June 26, 2018).

119. Resolute Forest Prods., Inc. v. Greenpeace Int'l, 302 F. Supp. 3d 1005, 1011–12 (N.D. Cal. 2017).

120. Pring, *SLAPPs*, *supra* note 115, at 6.

campaigns flounder, and community groups die."[121] In short, "SLAPPs send a clear message: that there is a 'price' for speaking out politically."[122]

To combat SLAPPs' chilling effect on free speech—and draining effect on judicial resources—at least twenty states have enacted anti-SLAPP statutes.[123] Anti-SLAPP statutes create a cause of action for citizens subjected to SLAPP suits.[124] Such statutes vary widely in nature and scope among states, but all aim to protect citizens' First Amendment rights and "dispose expeditiously of meritless lawsuits that may chill petitioning activity."[125] Most importantly for the purposes of this Note, anti-SLAPP statutes are designed to identify lawsuits that are both meritless and brought in bad faith without endangering meritorious lawsuits.

New York's recently amended anti-SLAPP statute is instructive. The amendments are designed to broaden the statute's reach and more effectively protect citizens against SLAPP suits.[126] As amended, the New York anti-SLAPP statute's penalties increase in severity based on the seriousness of the SLAPP. At the lowest level, where the SLAPPing party fails to demonstrate the pleading possesses "substantial basis in law,"[127] the statute requires dismissal of the complaint and awards costs and attorney's fees. Next, if the court finds the SLAPPing party "commenced or continued for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights," the statute provides for additional recovery of compensatory damages.[128] Lastly, where the court finds the SLAPPing party commenced or continued the action *solely* for such improper purposes, the statute provides for punitive damages.[129]

The amended statute reinforces two important concepts. First, the statute's escalating penalties stand for the intuitive notion that baseless claims brought in bad faith are inherently more culpable than merely baseless claims. Second, the statute's "substantial basis in law" standard draws a meaningful line between suits that ought to be dismissed, and those that ought to be protected.[130]

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121. *Id.* at 7.

122. *Id.* at 6.

123. Eric J. Handelman, *Establishing Proof in Filing of Anti-SLAPP Motion*, *in* 123 AM. JUR. PROOF OF FACTS 341 § 2 (3d ed. 2022).

124. *Id.* at § 7.

125. Duracraft Corp. v. Holmes Prods. Corp., 691 N.E.2d 935, 943 (Mass. 1998). In those states that do not have anti-SLAPP statutes, courts apply the *Noerr* doctrine. Handelman, *supra* note 123, § 8.

126. *See* N.Y. CIV. RIGHTS LAW § 70-a (McKinney 2020).

127. Carroll v. Trump, 590 F. Supp. 3d 575, 581 (S.D.N.Y. 2022) (citing N.Y. CIV. RIGHTS LAW § 70-a, subd. 1(a)).

128. *Id.*

129. *Id.*

130. Some disagreement exists among circuits as to whether the New York anti-SLAPP statute's "substantial basis" standard conflicts with the Federal Rules of Civil Procedure and is thus inapplicable in federal court. For a review of various circuit splits regarding this issue as it was discussed in a case applying California's anti-SLAPP statute, see La Liberte v. Reid, 966 F.3d 79, 86 (2d Cir. 2020). This circuit split does not interfere with this Note's proposal, which offers a standard akin to pleading standards set forth in the Federal Rules of Civil Procedure.

The statute's Notes of Decisions demonstrate how the "substantial basis in law" requirement operates. For example, an apartment building owner filed a lawsuit against a newspaper for libel based on an article revealing deficiencies in the property.[131] The owner's suit constituted a SLAPP because the contents of the article were "substantially true" and therefore the owner "knew or should have known long ago of the non-meritorious and futile nature of the instant litigation."[132] In contrast, a landowner filed a negligence and nuisance action against his neighbor, whose complaint to the county resulted in the revocation of the landowner's permit for a proposed well.[133] Because the landowner's suit had substantial basis in fact and law, it did not constitute a SLAPP.[134]

In sum, court enforcement of anti-SLAPP statutes demonstrates the importance of the first and second limiting principles embedded in this Notes' definition of bad-faith litigation: that the litigation be *both* meritless *and* brought in bad faith. Anti-SLAPP statutes underpin the notion that meritless suits ought to be dismissed, but meritless suits brought in bad faith warrant additional sanctions. Courts contemplating the crime-fraud exception must therefore find both conditions to be true to justify such a sanction.

3. Limiting Principles from Rule 11

Rule 11—yet another instructive guard against abusive litigation—supplies the third limiting principle for this Note's proposal. Courts may invoke Rule 11 to sanction a party for initiating or conducting litigation in bad faith.[135] Rule 11 enables courts to oversee the judicial process,[136] stating in relevant part:

> (b) By presenting to the court a pleading, written motion, or other paper . . . an attorney or unrepresented party certifies that . . .
>
> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
>
> (2) the claims . . . are warranted by existing law or by a *nonfrivolous* argument . . .;
>
> (3) the factual contentions have *evidentiary support* or . . . will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are *warranted on the evidence* or . . . are reasonably based on belief or a lack of information.[137]

131. Reus v. ETC Hous. Corp., 148 N.Y.S.3d 663, 665–66 (N.Y. Sup. Ct. 2021).

132. *Id.* at 667, 670.

133. Giorgio v. Pilla, 954 N.Y.S.2d 584, 586–87 (N.Y. App. Div. 2012).

134. *Id.*

135. Chambers v. NASCO, Inc., 501 U.S. 32, 48 (1991).

136. *See id.* at 48 n.13. *See also* Zaldivar v. Los Angeles, 780 F.2d 823, 830 (9th Cir. 1986) (citing ways in which Rule 11 enables court oversight of the judicial process and ways in which other rules are more applicable).

137. FED. R. CIV. P. 11 (emphasis added).

Thus, if a party presents a pleading to the court for an "improper purpose," the court may impose reasonable sanctions against that party, including by awarding reasonable attorney's fees to the opposing party. The Advisory Committee's Notes on the 1993 Amendments to the Rules clarify that Rule 11 does not intrude on or alter courts' inherent powers.[138]

Rule 11 serves several policy interests. The rule is designed to deter "dilatory or abusive tactics" and "streamline the litigation process by lessening frivolous claims or defenses" that clog courts' dockets.[139] Fee-shifting, specifically, is both punitive and restorative, as it punishes those who abuse the judicial process and makes whole those who have suffered as a result.[140] Furthermore, Rule 11 protects "the honor of the federal courts" and the ability of courts to ensure the safety of the public by sanctioning those who attempt to "[t]amper[] with the administration of justice."[141]

The structure and function of Rule 11 are instructive for the purposes of this Note. Rule 11 casts a wide net, reaching frivolous, meritless, and bad-faith claims alike. Therefore, any sanction imposed must reasonably correspond to the gravity of the infraction, which, more often than not, will not rise to a level warranting the crime-fraud exception. Nevertheless, Rule 11 is limited in several meaningful ways,[142] in part to avoid "chill[ing] an attorney's enthusiasm or creativity in pursuing factual or legal theories."[143] Most importantly for this Note's purposes, Rule 11 is limited by the instruction that, when evaluating the merits of the allegedly-violating claim, courts should "avoid using the wisdom of hindsight," considering instead what the signer may have reasonably believed at the time the paper was filed.[144] The court may weigh factors such as: the amount of time available to the signer for investigation; whether the signer had to rely on a client to provide facts underlying the relevant paper; whether the "paper was based on a plausible view of the law;" or whether the signer "depended on forwarding counsel or another

138. *Id.* advisory committee's note to 1993 amendment.

139. *Id.* advisory committee's note to 1983 amendment.

140. Jacob Singer, *Bad Faith Fee-Shifting in Federal Courts: What Conduct Qualifies?*, 84 ST. JOHN'S L. REV. 693, 696 (2010); Hall v. Cole, 412 U.S. 1, 5 (1973).

141. *See* Singer, *supra* note 140, at 697 (citing Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944), overruled on other grounds by Standard Oil Co. v. United States, 429 U.S. 17 (1976)).

142. First, Rule 11 reaches only papers filed with a court. Second, generally, the motion alleging Rule 11 violations must be filed "promptly after the inappropriate paper is filed" or risk being considered "untimely." FED. R. CIV. P. 11 advisory committee's note to 1993 amendment. Third, the request for sanctions must be filed in a separate motion and may only be filed once the opposing party has had at least twenty-one days (or another period as set by the court) to correct the alleged Rule 11 violation. *Id.* Fourth, Rule 11 does not jeopardize privileged communications or work-product; "[t]he provisions of Rule 26(c), including appropriate orders after in camera inspection by the court, remain available to protect a party claiming privilege or work product protection." FED. R. CIV. P. 11 advisory committee's note to 1983 amendment.

143. FED. R. CIV. P. 11 advisory committee's note to 1983 amendment.

144. *Id.*

member of the bar."[145] This limitation built into Rule 11 informs this Note's narrowly-drawn proposal to sanction bad-faith litigation with the instruction that courts evaluate suspect litigation based on information the litigant knew or reasonably believed at the time he or she instigated the claim. With these limitations and principles defined, the Note proposes a solution to bad-faith litigation.

II. THE CRIME-FRAUD EXCEPTION REACHES BAD-FAITH LITIGATION

This Note proposes that bad-faith litigation, or litigation that constitutes a "fraud on the court," is a "fraud" encompassed by the crime-fraud exception. This Part first proposes a test for determining whether a party has engaged in bad-faith litigation. It then demonstrates that "bad-faith litigation" constitutes a "fraud on the court." Finally, this Part shows that the crime-fraud exceptions to the attorney-client privilege and work product doctrine inherently reach such frauds on the court.

A. Defining Bad-Faith Litigation

To understand the scope of this Note's proposal, it is useful to distinguish among varying types of injudicious litigation. First, this Section clarifies that which this proposal does *not* reach: merely frivolous or meritless[146] litigation. Second, this Section defines the sort of litigation that this proposal does reach: litigation that is (1) objectively meritless or baseless *and* (2) predominantly and subjectively motivated by bad faith.

1. What Does *Not* Constitute Bad-Faith Litigation

a. Frivolous Litigation

In *Neitzke v. Williams*, the Supreme Court defined frivolous claims as those "lack[ing] an arguable basis either in law or in fact," such that the claims "embrace[] not only the inarguable legal conclusion, but also the fanciful factual allegation."[147] The frivolousness standard narrowly targets claims so absurd the litigant *cannot* succeed, "as opposed to having 'little or no chance' of success."[148] Frivolous allegations are therefore so lacking in credibility that they are best characterized as "irrational" or "wholly incredible," regardless of the existence of facts to the contrary.[149]

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145. *Id.* The Advisory Committee's note to the 1993 amendment elaborates: "the extent to which a litigant has researched the issues and found some support for its theories even in minority opinions, in law review articles, or through consultation with other attorneys should certainly be taken into account in determining whether paragraph (2) has been violated." *Id.* advisory committee's note to 1993 amendment.

146. This Note uses the terms "meritless" and "baseless" interchangeably.

147. Neitzke v. Williams, 490 U.S. 319, 325 (1989).

148. Alexander A. Reinert, *Screening Out Innovation: The Merits of Meritless Litigation*, 89 IND. L.J. 1191, 1203 (2014); *Neitzke*, 490 U.S. at 327;

149. Denton v. Hernandez, 504 U.S. 25, 32–33 (1992).

The frivolousness standard is designed to discourage "vexatious" lawsuits "describing fantastic or delusional scenarios" that waste judicial and private resources.[150] While the frivolousness standard is distinct from the Rule 12(b)(6) failure-to-state-a-claim standard,[151] courts can, and often do, address frivolous claims under Rule 12(b)(6) and the *Iqbal-Twombly* standard,[152] despite the availability of Rule 11.[153]

Frivolous suits are easily disposed of and therefore do not require the deterrent effect of the crime-fraud exception. *Ireland v. Discover Employees* serves as an apt example of such an easily dismissed case. In *Ireland*, the plaintiff was issued a credit card with a $500 limit.[154] The plaintiff sued the credit card company, claiming its employees fraudulently denied a credit line of eleven trillion dollars.[155] The court dismissed the action for lack of jurisdiction and frivolousness, finding with "legal certainty that [eleven trillion dollars] is not the actual amount in controversy."[156]

The crime-fraud exception thus need not be employed to deter frivolous litigation. Given the ease with which courts can detect and dismiss frivolous claims, the added sanction would be superfluous and disproportionate. Moreover, the general interest in efficiency outweighs any interest in further truth-seeking through application of the crime-fraud exception.

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150. *Neitzke*, 490 U.S. at 327–28.

151. A finding of frivolousness does not necessarily signal a failure to state a claim under Rule 12(b)(6), and vice-versa. *Neitzke*, 490 U.S. at 325–26 (rejecting a proposed rule that would deem a complaint failing to state a claim under Rule 12(b)(6) to be *per se* frivolous); *see also* Lomax v. Ortiz-Marquez, 140 S. Ct. 1721, 1726 (2020); Reinert, *supra* note 148, at 1210–11 (2014). The *Neitzke* Court based this distinction on the underlying purposes of each standard. *Neitzke*, 490 U.S. at 326. Rule 12(b)(6) aims to relieve litigants and courts of needless discovery and fact-finding by enabling judges to expeditiously dismiss claims based on an issue of law. *Id.* at 326–27. Because a court considering a Rule 12(b)(6) motion must assume the truth of the complaint's factual allegations, a finding of failure to state a claim does *not* contemplate the judge's belief or disbelief in the factual allegations. *Id.* at 327.

152. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 557 (2007); Ashcroft v. Iqbal, 556 U.S. 662, 678–79 (2009).

153. *See* Reinert, *supra* note 148, at 1215.

154. Ireland v. Discover Emps., No. 1:20-cv-00903-NONE-SAB, 2020 WL 3605214, at *4 (E.D. Ca. July 2, 2020).

155. *Id.*

156. *Id.* at *4, *6. In another exemplary case, *Li v. Dillon*, the plaintiff, "a frequent filer" in the Southern District of New York and "self-identifie[d] . . . suspended attorney," brought claims against four New York State Appellate Division Justices in their official capacities. 21-CV-5735 (VEC), 2021 WL 3146033, at *1 (S.D.N.Y. July 23, 2021). The plaintiff grounded his complaint on dicta contained in a prior decision (in a case the plaintiff himself initiated against former clients), in which the four justices found the plaintiff to have misappropriated certain funds. *Id.* Based on this alone, the plaintiff sought injunctive and declaratory relief, as well as attorney's fees, despite his *pro se* status. *Id.* Judge Caproni, noting judges' absolute immunity from suit for damages for any judicial acts, dismissed the case as frivolous, underscoring that a claim utterly lacks basis in law when its targets are clearly immune from suit. *Id.* at *2 (citing *Neitzke*, 490 U.S. at 325, 327).

b. Meritless Litigation

A claim is meritless if the "plaintiff's theory of relief is insufficient or . . . a reasonable jury could not find facts that would allow a plaintiff to recover."[157] Meritless and frivolous claims, though somewhat overlapping, are distinct. As described by Alexander A. Reinert, the dividing line between meritless and frivolous claims hinges on "timing and substance."[158] Accordingly, a court may dismiss a claim as frivolous at the complaint stage, prior to any adversarial argument or discovery.[159] In contrast, before deeming a claim meritless, a court may require adversarial briefing or discovery to clarify disputed matters of fact or law.[160] For example, in *Tancredi v. Metropolitan Life Insurance Co.*, the Second Circuit held that a policyholder's claim that the insurance company became a "state actor" when it converted to a stock life insurance company was meritless, but not frivolous, after considering the relevant precedent and finding that while "[h]indsight proves [the] allegation of state action was very weak, . . . it was not completely without foundation."[161]

Meritless litigation can take many forms. On the one hand, meritless claims might consist of nothing more than a failure to plausibly state the elements of a claim. The Tenth Circuit, for example, deemed meritless a RICO claim that failed to plead two essential elements of the offense.[162] On the other hand, meritless litigation can serve an important function in the judicial system. Reinert identifies three ways meritless litigation can positively contribute to the law.[163] First, meritless litigation can serve as a vehicle for the development of a legal doctrine.[164] Reinert cites *Wickard v. Filburn*[165] as a paradigmatic meritless case that spurred the Court's predominant construction of Congress' Commerce Clause power.[166] Second, meritless litigation can motivate a "direct change in the law."[167] To support this proposition, Reinert cites *Ledbetter v. Goodyear Tire & Rubber Co.*,[168] a

157. Reinert, *supra* note 148, at 1203. The *Iqbal-Twombly* "plausibility" standard directly targets meritless claims. *Iqbal*, 556 U.S. at 678. The Court explained:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Id. (internal citations omitted).

158. Reinert, *supra* note 148, at 1203.

159. *Id.* at 1202–03.

160. *Id.* at 1203.

161. Tancredi v. Metro. Life Ins. Co., 378 F.3d 220, 229–30 (2d Cir. 2004).

162. Barrett v. Tallon, 30 F.3d 1296, 1301–02 (10th Cir. 1994).

163. Reinert, *supra* note 148, at 1225–30.

164. *Id.* at 1225–27.

165. *See* Wickard v. Filburn, 317 U.S. 111, 120, 123–24 (1942).

166. Reinert, *supra* note 148, at 1226.

167. *Id.* at 1228.

168. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 623–32 (2007).

meritless case which motivated Congress to enact the Lilly Ledbetter Fair Pay Act of 2009, effectively overturning a narrow temporal restriction on employees' ability to challenge discriminatory compensation decisions.[169] Third, meritless litigation can be instrumental in discussions surrounding "proper institutional conduct and behavior."[170] Reinert refers to Lesley Wexler's discussion of *Al-Aulaqi v. Obama*,[171] a meritless case that spurred a nationwide debate about the war on terror, increased scrutiny of executive decisions related to the war on terror, and arguably increased transparency.[172]

In light of the potential benefits associated with meritless cases, the crime-fraud exception should not be invoked to deter purely meritless lawsuits, which, when brought in good-faith, offer a wellspring for legal innovation and positive change.

2. What *Does* Constitute Bad-Faith Litigation

"Bad-faith litigation" refers to a more egregious class of conduct than the assertion of "frivolous" or "meritless" claims. This Note proposes the following two-part test, modeled after the Supreme Court's test in *PRE*,[173] to determine whether a party has engaged in bad-faith litigation and thus inflicted a fraud on the court. First, mirroring the frivolous and meritless standards, the lawsuit must be "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits."[174] Second, the court must find the lawsuit to be predominantly and subjectively motivated by bad faith.[175]

The definition of bad-faith litigation is narrowly tailored to suits satisfying *both* prongs of the above two-part test in order to protect litigants who might otherwise be "deterred from testing" "colorable, albeit novel, legal claims . . . in a federal court."[176] Accordingly, a suit that is merely frivolous or meritless, yet initiated in good faith, does not satisfy this test. Likewise, a suit that is commenced in bad faith, yet possesses colorable, meritorious claims, fails the test as well. Thus, under this Note's proposal neither scenario would warrant the application of the crime-fraud exception to the attorney-client privilege.

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169. Reinert, supra note 148, at 1228; Daniel A. Klein, *Construction and Application of Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 125 Stat. 5 (2009)*, 58 A.L.R. Fed. 2d 201, § 2 (2011).

170. Reinert, *supra* note 148, at 1229.

171. *See* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 8 (D.D.C. 2010).

172. Reinert, *supra* note 148, at 1229–30 (citing Lesley Wexler, *Litigating the Long War on Terror: The Role of* al-Aulaqi v. Obama, 9 LOY. U. CHI. INT'L L. REV. 159 (2011)).

173. Pro. Real Est. Invest., Inc. ("PRE") v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60 (1993). This two-part test, discussed in greater detail below, was announced by the Supreme Court to determine whether a party had engaged in "sham" litigation unworthy of First Amendment protection. *Id.* at 60.

174. *Id.* at 60.

175. Porous Media Corp. v. Pall Corp., 186 F.3d 1077, 1080 n.4 (8th Cir. 1999); *see also* Lanyon, *supra* note 105, at 144.

176. Browning Debenture Holders' Comm. v. DASA Corp., 560 F.2d 1078, 1088 (2d Cir. 1977).

B. Bad-Faith Litigation Constitutes a Fraud on the Court

A party that engages in bad-faith litigation perpetrates a fraud on the court. A fraud on the court constitutes a direct attack on the integrity of the judicial process[177] because it "involve[s] an unconscionable plan or scheme which is designed to improperly influence the court in its decision."[178] Several circuits cite Professor Moore to define fraud on the court as:

> [E]mbrac[ing] only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can not [sic] perform in the usual manner its impartial task of adjudging cases that are presented for adjudication.[179]

A finding of fraud on the court turns on whether the judicial process itself, rather than the parties involved, is harmed. The Supreme Court found such a fraud on the court in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.* In 1926, Hartford faced "insurmountable Patent Office opposition" to its patent application for a glass-pouring machine that utilized a method referred to as "gob feeding."[180] To promote its application, a Hartford attorney prepared an article describing the device as "revolutionary" and a "remarkable advance in the art of fashioning glass."[181] Hartford officials then persuaded William P. Clarke, the National President of the Flint Glass Workers' Union, to sign the article.[182] After the article was published in the *National Glass Budget*, the Patent Office granted Hartford's application.[183] In a subsequent patent-infringement suit, Hartford attorneys expressly presented the article to the circuit court as *authored* by Clarke.[184] The circuit court held the patent valid, resting its decision heavily on the letter's authority.[185] The Supreme Court vacated the patent upon "[i]ndisputable proof" of the letter's true authorship, finding the Hartford attorneys had "tamper[ed] with the administration of justice."[186] The Court described the judgment as one "obtained by fraud" and "a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of

177. *See* Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944).

178. United States v. Sierra Pac. Indus., 862 F.3d 1157, 1168 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 2675 (2018) (citing Pumphrey v. K.W. Thompson Tool Co., 62 F.3d 1128, 1131 (9th Cir. 1995)) (describing what constitutes a fraud on the court).

179. *In re* Levander, 180 F.3d 1114, 1119 (9th Cir. 1999) (citing 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 60.33, at 515 (2d ed. 1978)); Demjanjuk v. Petrovsky, 10 F.3d 338, 352 (6th Cir. 1993); Great Coastal Express, Inc. v. Int'l Brotherhood of Teamsters, 675 F.2d 1349, 1356 (4th Cir. 1982); Kupferman v. Consol. Rsch. & Mfg. Corp., 459 F.2d 1072, 1078 (2d Cir. 1972).

180. 322 U.S. at 240.

181. *Id.* at 240.

182. *Id.* at 240.

183. *Id.* at 240–41.

184. *Id.* at 241.

185. *Id.*

186. *Id.* at 243, 246.

society."[187] Thus, a party who so abuses the judicial process commits a fraud on the court.

When a party brings a baseless action predominantly in bad faith, it abuses the judicial process and undermines the integrity of "the institutions set up to protect and safeguard the public."[188] The Supreme Court confronted such abusive litigation in *Chambers v. NASCO, Inc*. There, the sole shareholder and director of a television and radio company entered into an $18 million contract with NASCO, Inc. ("NASCO") for the sale of a television station.[189] When Chambers breached the contract, NASCO informed Chambers of its intent to file suit seeking specific performance.[190] Upon such notice, Chambers and his attorney embarked on an elaborate—and unsuccessful—scheme to deprive the district court of jurisdiction over the property at issue.[191] Despite the district court's eventual warning against such unethical behavior, Chambers persisted, filing "a series of meritless motions and pleadings and delaying actions."[192] The district court ultimately sanctioned Chambers and his attorneys for devising a scheme "first, to deprive this Court of jurisdiction and, second, *to devise a plan of obstruction, delay, harassment, and expense sufficient to reduce NASCO to a condition of exhausted compliance*."[193] The Supreme Court affirmed the district court's finding that Chambers' and his attorney's bad-faith conduct constituted abuse of the judicial process and a fraud on the court.[194] Importantly, Chamber's conduct comfortably fits within this Note's definition of bad-faith litigation: Chambers (1) filed meritless claims (characterized here as "false and frivolous pleadings"[195]) (2) subjectively and predominantly in bad faith (characterized here as "relentless, repeated fraudulent and brazenly unethical efforts" intended "to reduce plaintiff to exhausted compliance"[196]).[197] Bad-faith litigation, as defined above, is thus a fraud on the court.

187. *Id*. at 246, 251.

188. Chambers v. NASCO, Inc., 501 U.S. 32, 44 (citing Hazel–Atlas Glass Co. v. Hartford–Empire Co., 322 U.S. 238, 246 (1944)).

189. *Id*. at 35–36.

190. *Id*. at 36.

191. *Id*. at 36–37, 41.

192. *Id*. at 37–38.

193. *Id*. at 41 (emphasis added).

194. *Id*. at 50–51, 58.

195. *Id*. at 41.

196. *Id*. at 41, 58.

197. Courts typically evaluate whether a "fraud on the court" has occurred, in violation of Federal Rule of Civil Procedure 60(d)(3), *after* a judgment has been obtained. FED. R. CIV. P. 60(d)(3) ("This rule does not limit a court's power to . . . set aside a judgment for fraud on the court."). However, this Note's proposal contemplates both completed *and* attempted frauds on the court, consistent with Professor Moore's definition and crime-fraud exception's application to attempted crimes or frauds. Thus, a party that engages in bad-faith litigation commits a fraud on the court whether or not a final judgment has been reached.

C. A Fraud on the Court is a Fraud Within the Meaning of the Crime-Fraud Exception

The crime-fraud exception comfortably reaches frauds on the court. As noted above, at their core, the attorney-client privilege and work product doctrine protect the "broader public interests in the observance of law and administration of justice"[198] and a "healthy adversary system."[199] Their protections wash away, however, when their underlying purposes are no longer served.[200] Enter: the crime-fraud exception. The exception exists to expose attorney-client communications and work product made in furtherance of an ongoing crime or fraud because such conduct neither "promote[s] the proper administration of justice" nor enables attorneys to "ethically carry out their representation."[201]

Bad-faith litigation—which, as discussed above, can aptly be classified as a *fraud* on the court—is exactly the sort of "fraud" that the crime-fraud exception exists to penalize: conduct of a sufficiently serious nature that actively subverts the proper administration of justice, undermines the adversary system, and threatens the integrity of the entire judicial process. Moreover, an attorney who engages in bad-faith litigation certainly does not "ethically carry out" their representation. ABA Model Rule of Professional Conduct 3.1 states, in part:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, *unless there is a basis in law and fact* for doing so that is not frivolous, *which includes a good faith argument* for an extension, modification or reversal of existing law.[202]

Bad-faith litigation is thus incongruous with, and cannot be protected by, the attorney-client privilege or work product doctrine. Meanwhile, the crime-fraud exception is primed to address such fraudulent conduct.

III. COURTS POSSESS AN INHERENT POWER TO SANCTION BAD-FAITH LITIGATION

Courts are endowed with the inherent power to investigate and sanction bad-faith litigation. This Note argues that courts may properly invoke their inherent power to sanction bad-faith litigation by triggering the crime-fraud exception to the attorney-client privilege and work product doctrine.

Generally, courts wield an "implied powe[r] . . . to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates."[203] These "implied powers . . . cannot be dispensed with . . . because they are necessary to the

198. Upjohn v. United States, 449 U.S. 383, 389 (1981). *See supra* Part I.

199. *In re* Sealed Case, 676 F.2d 793, 818 (D.C. Cir. 1982).

200. Fisher v. United States, 425 U.S. 391, 403 (1976); ROTHSTEIN & BECKMAN, *supra* note 3, § 11:15 n.2 (citing *In re* Sealed Case, 107 F.3d 46, 51 (D.C. Cir. 1997)).

201. ROTHSTEIN & BECKMAN, *supra* note 3, § 2:36.

202. MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS'N 2020) (emphasis added).

203. Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) (citing Anderson v. Dunn, 19 U.S. 204, 227 (1821)).

exercise of all others."[204] Accordingly, courts possess this power over errant attorneys and litigants alike.[205] The inherent power to investigate and sanction bad-faith litigation, in particular, is well-established. In *Universal Oil Products Co. v. Root Refining Co.*, the Supreme Court affirmed federal courts' inherent power "to investigate whether a judgment was obtained by fraud."[206] In *Hall v. Cole*, the Court upheld courts' inherent power to sanction bad faith, making clear that "'bad faith' may be found, not only in the actions that led to the lawsuit, *but also in the conduct of the litigation*."[207] In *Chambers*, the Court clarified that the inherent power includes the power to sanction bad-faith litigation such as the filing of "false and frivolous pleadings."[208] Accordingly, courts are already well-equipped to investigate and sanction bad-faith litigation.

When "a fraud has been perpetrated upon the court,"[209] or "the very temple of justice has been defiled,"[210] courts should have the crime-fraud exception in their arsenal. Courts can invoke their inherent power to impose varying sanctions ranging in severity, including issuing an admonishment,[211] assessing attorney's fees against the responsible party,[212] finding contempt,[213] and suspending or disbarring the offending attorney.[214] While it is not certain exactly where the crime-fraud exception falls on this list, it is certainly more severe than an admonishment, but less severe than disbarment. Thus, invocation of the crime-fraud exception is a suitable candidate for courts choosing exactly how to wield their inherent power. In fact, the Eleventh Circuit has already deployed the inherent power to trigger the crime-fraud exception upon finding a fraud on the court, discussed in greater detail below.[215]

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204. *Id.* (internal quotation marks omitted) (citing United States v. Hudson, 11 U.S. 32, 34 (1812)).

205. Roadway Express, Inc. v. Piper, 447 U.S. 752, 766 (1980). To invoke that power, the Second Circuit, for example, requires "a particularized showing of bad faith." United States v. Int'l Brotherhood of Teamsters, 948 F.2d 1338, 1345 (2d Cir. 1991). Such a showing demands (1) "clear evidence that the challenged actions are entirely without color, and [are taken] for reasons of harassment or delay or for other improper purposes" and (2) "a high degree of specificity in the factual findings of [the] lower courts." *Id.* at 1345 (internal quotation marks omitted) (quoting Oliveri v. Thompson, 803 F.2d 1265, 1272 (2d Cir.1986)).

206. Universal Oil Prods. Co. v. Root Refining Co., 328 U.S. 575, 580 (1946).

207. Hall v. Cole, 412 U.S. 1, 15 (1973) (emphasis added).

208. *Chambers*, 501 U.S. at 50–51; *see also* Hughes v. Rowe, 449 U.S. 5, 14–15 (1980) (quoting Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978)).

209. *Chambers*, 501 U.S. at 44.

210. *Universal Oil Prods. Co.*, 328 U.S. at 580.

211. Flaksa v. Little River Marine Constr. Co., 389 F.2d 885, 888–89 (5th Cir. 1968), *cert. denied*, 392 U.S. 928 (1968) (listing available sanctions pursuant to courts' inherent power).

212. *Chambers*, 501 U.S. at 45. Federal courts possess this inherent power regardless of the so-called "American Rule," which bars fee-shifting in most circumstances. *Chambers*, 501 U.S. at 45 (citing Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 259 (1975)).

213. Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980).

214. *In re* Snyder, 472 U.S. 634, 643 (1985).

215. JTR Enters., L.L.C. v. Colombian Emeralds, 697 F. App'x 976, 988 (2017). *See infra* Part IV.

IV. APPLYING THE CRIME-FRAUD EXCEPTION TO BAD-FAITH LITIGATION

This Note demonstrates that bad-faith litigation amounting to a fraud on the court readily fits the definition of "fraud" for the purposes of the crime-fraud exception. A uniform expansion of the crime-fraud exception—if appropriately tailored to encompass only those actions that constitute frauds upon the court—would lift a critical impediment to courts' truth-seeking capabilities and serve as a powerful deterrent against bad-faith litigation without inappropriately chilling legitimate suits. Notably, the Eleventh and Second Circuits have already adopted this expansion of the crime-fraud exception.[216]

This Part first examines the Eleventh and Second Circuits' decisions to apply the crime-fraud exception to bad-faith litigation. Then, it offers the Trump team's election litigation as illustrative of bad-faith litigation ripe for application of the crime-fraud exception.

A. Where The Proposal Has Gained Traction

1. The Eleventh Circuit: *JTR Enterprises*

In 2011, JTR Enterprises, L.L.C. ("JTR") commenced an admiralty action in the Southern District Court of Florida seeking title to "an unknown quantity of emeralds" supposedly discovered by Jay Miscovich, the owner of JTR, and his partner, Steve Elchlepp "from an 18th-century shipwreck" in the Gulf of Mexico.[217] Motivation, Inc. ("Motivation"), the owner of a nearby shipwreck, filed a competing claim of title to the emeralds, believing the gems were genuine and possibly "migrated . . . from [the] 17th-century Spanish shipwreck site it controlled."[218] In the ensuing litigation, a status report revealed that the emeralds were "coated with epoxy, a substance not invented until twentieth century."[219] Faced with evidence directly contradicting JTR's claim that the emeralds were "ancient stones worth millions of dollars," Motivation moved for sanctions to be imposed against JTR, Miscovich, and others.[220]

The district court severed Motivation's motion for sanctions and proceeded to trial on JTR's admiralty claim.[221] Unable to determine whether Miscovich and Elchlepp legitimately discovered the emeralds, the court denied JTR's claim of

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216. *In re* Grand Jury Subpoenas Dated March 2, 2015, 628 F. App'x 13, 14–15 (2d Cir. 2015); *JTR Enters., L.L.C.*, 697 F. App'x at 988. While this Note is primarily concerned with federal law, a number of state courts have similarly applied the crime-fraud exception to bad-faith litigation. *See, e.g.*, State Farm Fire & Cas. Co. v. Super. Ct., 54 Cal. App. 4th 625, 631 (Cal. Dist. Ct. App. 1997); West Virginia ex rel. Allstate Ins. Co. v. Madden, 601 S.E.2d 25, 39 (W. Va. 2004); Cleveland Hair Clinic, Inc. v. Puig, 968 F. Supp. 1227, 1241 (N.D. Ill. 1996).

217. *JTR Enters., L.L.C.*, 697 F. App'x at 978.

218. *Id.* at 978–79.

219. *Id.* at 983.

220. *Id.* at 983–84.

221. *Id.* at 984.

title.[222] The district court subsequently proceeded with a trial on Motivation's motion for sanctions.[223] At this point, "Miscovich's fraud unraveled."[224] Far from discovering the treasure in the depths of the Gulf of Mexico, evidence revealed Miscovich purchased the eighty pounds of emeralds from a jeweler in Jupiter, Florida for $80,000 before planting them in the ocean.[225] In closing arguments, JTR's counsel admitted "the scheme to defraud was to represent emeralds of a certain quality as having a higher quality" and the "'artifice to defraud' was to use the District Court to grant 'the imprimatur or the blessing or the *Good Housekeeping* seal of approval to say that . . . these are antique emeralds.'"[226] The district court subsequently found by clear and convincing evidence that Miscovich had engaged in "a flagrant abuse of the judicial process," and perpetrated a fraud on the court.[227] Having found JTR's commencement of litigation to claim title to the emeralds constituted a fraud on the court, the district court invoked the crime-fraud exception to the attorney-client privilege to compel production of communications "between and among JTR, its members, and its counsel."[228]

On appeal, the Eleventh Circuit found "the district court had more than sufficient basis to invoke the crime-fraud exception," given that there could be "no serious dispute with the court's finding of a 'massive fraud of the court.'"[229] Finding itself a victim of fraud, the court acted well-within its inherent power by compelling disclosure of communications "which would reveal existence of the fraud as well as efforts to conceal it."[230] The record in this case was "unusually robust" due to the compelled disclosure of otherwise-privileged attorney-client communications.[231] Thus, *JTR Enterprises, L.L.C.* demonstrates a fitting application of the crime-fraud exception, as well as its practical impact on the court's truth-seeking capabilities.

2. The Second Circuit: *In re* Grand Jury Subpoenas Dated March 2, 2015

In *In re Grand Jury Subpoenas Dated March 2, 2015*, the Second Circuit upheld an application of the crime-fraud exception to "the very act of litigating."[232] While the specific facts underlying the decision remain sealed, the Court's reasoning is instructive. Here, the president and owner of an investment company was subject to an ongoing grand jury investigation into tax fraud.[233] At issue was whether the

222. *Id.* at 984–85.
223. *Id.*
224. *Id.* at 979, 985.
225. *Id.* at 985.
226. JTR Enters., L.L.C. v. An Unknown Quantity, 93 F. Supp. 3d 1331, 1342 (S.D. Fla. 2015).
227. *JTR Enters., L.L.C.*, 697 F. App'x at 985; *JTR Enters., L.L.C.*, 93 F. Supp. 3d at 1342.
228. *JTR Enters., L.L.C.*, 697 F. App'x at 985.
229. *Id.* at 988.
230. *Id.* at 988 (citing *In re* Grand Jury Investigation, 842 F.2d 1223 (11th Cir. 1987)).
231. *Id.* at 979.
232. *In re* Grand Jury Subpoenas Dated March 2, 2015, 628 F. App'x 13, 14 (2d Cir. 2015) (quoting *In re* Richard Roe, Inc., 168 F.3d 69, 71 (2d Cir. 1999)).
233. *Id.* at 13–14.

owner engaged his attorney's services to file a tax protest to further conceal the tax fraud and "shirk his tax liabilities."[234]

In upholding the application of the crime-fraud exception, the Second Circuit relied on its own reasoning in *In re Richard Roe, Inc.*:

> "[W]here the very act of litigating is alleged as being in furtherance of a fraud," we adopt a more stringent probable cause standard, that is, "the party seeking disclosure . . . must show probable cause that the litigation or an aspect thereof had little or no legal or factual basis and was carried on substantially for the purpose of furthering the crime or fraud."[235]

In *In re Richard Roe, Inc.*, the Second Circuit did not apply the crime-fraud exception because the "underlying litigation hardly lacked any legal or factual basis" and the evidence did not indicate any "intent to create or present misleading or false evidence."[236] However, in *In re Grand Jury Subpoenas Dated March 2, 2015*, the Second Circuit affirmed the application of the crime-fraud exception in light of the district court's probable cause finding that the "tax protest was based on a false, undocumented transaction."[237] In sum, *In re Grand Jury Subpoenas Dated March 2, 2015* further demonstrates that courts can, and have, applied the crime-fraud exception to the act of litigation *itself*, as opposed to "traditional" frauds.

B. The Trump Election Litigation is Ripe for Invocation of the Crime-Fraud Exception

Like the Eleventh and Second Circuits in the above-mentioned cases, district courts across the country have recently been forced to contend with fraudulent litigation. The Trump team's effort to litigate the results of the 2020 presidential election is a stunning example of bad-faith litigation ripe for the crime-fraud exception. The Trump team instigated at least sixty-two lawsuits[238] across seven states for the purpose of overturning an election[239] which was reliably deemed "the most secure in American history."[240] Through these suits, the Trump team sought

234. *Id.* at 13–15. A "tax protest" is a formal procedure through which taxpayers may contest their tax liability in federal court. *See* I.R.S., YOUR APPEAL RIGHTS AND HOW TO PREPARE A PROTEST IF YOU DISAGREE 3–5 (2021).

235. *In re Grand Jury Subpoenas Dated March 2, 2015*, 628 F. App'x at 14–15 (quoting *In re Richard Roe, Inc.*, 168 F.3d 69, 71 (1999)) (internal quotation marks omitted).

236. *In re Richard Roe, Inc.*, 168 F.3d at 72.

237. *In re Grand Jury Subpoenas Dated March 2, 2015*, 628 F. App'x at 15.

238. William Cummings, Joey Garrison, & Jim Sergent, *By the Numbers: President Donald Trump's Failed Efforts to Overturn the Election*, USA TODAY (Jan. 6, 2021, 10:50 AM), https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/.

239. Brendan Williams, *Did President Trump's 2020 Election Litigation Kill Rule 11?*, 30 B.U. PUB. INT. L.J. 181, 189 (2021); Jim Rutenberg, Nick Corasaniti & Alan Feuer, *Trump's Fraud Claims Died in Court, but the Myth of Stolen Elections Lives On*, N.Y. TIMES, https://www.nytimes.com/2020/12/26/us/politics/republicans-voter-fraud.html (last updated Oct. 11, 2021).

240. *Joint Statement from Elections Infrastructure Government Coordinating Council & The Election Infrastructure Sector Coordinating Executive Committees*, CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY

to invalidate millions of ballots across the United States based on a number of allegations: that Dominion's voting machines altered hundreds of thousands of votes;[241] that mail-in ballots were improperly completed and thus defective; that poll-watchers were improperly restricted from monitoring the voting process;[242] that ballots cast by indefinitely-confined voters are invalid; that a form used to cast early in-person absentee ballots is not a valid "written application;" that municipal officials improperly recorded witness information on absentee ballot certifications; that all ballots collected at certain events were cast illegally.[243] The list goes on. The Trump team's conduct satisfies this Note's proposed two-prong test: the litigation itself is both (1) objectively baseless and (2) subjectively and predominantly motivated by bad faith.

Regarding the first prong, courts have consistently found the Trump team's claims utterly lacking basis in fact. For example, in *Donald J. Trump for President, Inc. v. Secretary of Pennsylvania*, the Third Circuit began with: "Free, fair elections are the lifeblood of our democracy. Charges of unfairness are serious. But calling an election unfair does not make it so. Charges require specific allegations and then proof. We have neither here."[244] The Third Circuit proceeded to chastise the plaintiffs for bringing forth "vague and conclusory" allegations couched in the phrase "[u]pon information and belief," which, according to the court, "is a lawyerly way of saying that the Campaign does not know that something is a fact but just suspects it or has heard it."[245] Likewise, in *Bowyer v. Ducey*, the court found the complaint to be "sorely wanting of relevant or reliable evidence" and "void of plausible allegations that Dominion voting machines were actually hacked or compromised," instead evincing a troublingly "cavalier approach" to challenging the votes of hundreds of thousands of Arizona citizens.[246] Again, in *King v. Whitmer*, the court found "nothing but speculation and conjecture that votes for President Trump were destroyed, discarded or switched."[247] Yet *again* in *Wood v. Raffensperger*, the court dismissed the plaintiff's claims as similarly lacking, finding that "[e]ven if Wood's claim were cognizable in the equal protection framework, it is not supported by the evidence at this stage."[248] All these findings are illustrative of a spectacular absence of factual grounding to support the Trump team's extraordinary claims for relief.

(Nov. 12, 2020), https://www.cisa.gov/news/2020/11/12/joint-statement-elections-infrastructure-government-coordinating-council-election.

241. Rutenberg, Corasaniti & Feuer, *supra* note 239.

242. Donald J. Trump for President, Inc. v. Sec'y of Pennsylvania, 830 F. App'x 377, 382 (3d Cir. 2020).

243. Trump v. Biden, 951 N.W.2d 568, 632 (Wis. 2020).

244. *Donald J. Trump for President*, 830 F. App'x at 381.

245. *Id.* at 381, 382, 387.

246. Bowyer v. Ducey, 506 F. Supp. 3d 699, 706, 723 (D. Ariz. 2020). "Allegations that find favor in the public sphere of gossip and innuendo cannot be a substitute for earnest pleadings and procedure in federal court." *Id.* at 724.

247. King v. Whitmer, 505 F. Supp. 3d 720, 738 (E.D. Mich. 2020) *cert. denied*, 141 S. Ct. 1044 (2021).

248. Wood v. Raffensperger, 501 F. Supp. 3d 1310, 1327 (N.D. Ga. 2020).

Regarding the second prong, the Trump team's claims were predominantly and subjectively motivated by bad faith. Disturbingly, the Trump team *knew* their allegations lacked basis in fact.[249] In November 2020, Trump's campaign prepared an internal memo determining the election fraud claims against Dominion to be baseless.[250] The Federal Bureau of Investigation, Department of Homeland Security, Department of Justice, and U.S. Election Assistance Commission all confirmed by December 2020 that there was no evidence of widespread voter fraud in the 2020 presidential election.[251] Nevertheless, the Trump team vigorously pursued their claims in various federal courts. The knowing advancement of such baseless claims evinces the team's bad-faith endeavor to illegitimately capture the Oval Office, undermine the integrity of the election process, and disenfranchise millions of voters, including "more than 5.5 million Michigan citizens,"[252] "nearly 3.4 million Arizonans,"[253] and "over one million Georgia voters,"[254] all of whom, "with dignity, hope, and a promise of a voice, participated in the 2020 General Election."[255] Moreover, in *O'Rourke v. Dominion Voting Systems, Inc.*, Judge Neureiter concluded the Trump team "acted with objective bad faith in filing this lawsuit and dumping into a public federal court pleading allegations of a RICO conspiracy that were utterly unmerited by any evidence."[256] Thus, the Trump team's bad-faith litigation, waged on courts across the United States, constitutes a fraud of such breadth and magnitude as to warrant, and arguably *require*, the invocation of the crime-fraud exceptions to the attorney-client privilege and work product doctrine.

V. THE PROPOSAL

Proposed Rule 503(d)(1) of the Federal Rules of Evidence currently encapsulates the crime-fraud exception. This Note proposes an amendment to that Rule, not to alter the existing scope of the crime-fraud exception, but rather to affirm its applicability to bad-faith litigation and create a uniform approach to the same. Accordingly, this Note proposes the following language:

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249. Eastman v. Thompson, Case No. 8:22-cv-00099-DOC-DFM, 2022 WL 894256, at *2 (C.D. Cal. Mar. 28, 2022) (citing *Read the Trump Campaign's Internal Memo*, N.Y. TIMES (Sept. 21, 2021), https://www.nytimes.com/interactive/2021/09/21/us/trump-campaign-memo.html).

250. Alan Feuer, *Trump Campaign Knew Lawyers' Voting Machine Claims Were Baseless, Memo Shows*, N.Y. TIMES, https://www.nytimes.com/2021/09/21/us/politics/trump-dominion-voting.html (last updated Oct. 13, 2022).

251. *It's Official: The Election Was Secure*, BRENNAN CTR. FOR JUST. (Dec. 11, 2020), https://www.brennancenter.org/our-work/research-reports/its-official-election-was-secure.

252. *King*, 505 F. Supp. 3d at 725.

253. Bowyer v. Ducey, 506 F. Supp. 3d 699, 712 (D. Ariz. 2020).

254. Wood v. Raffensperger, 501 F. Supp. 3d 1310, 1331 (N.D. Ga. 2020).

255. *King*, 505 F. Supp. 3d at 725.

256. O'Rourke v. Dominion Voting Sys., Inc., 552 F. Supp. 3d 1168, 1205 (D. Colo. 2021).

Proposed Rule: The attorney-client privilege and work-product doctrine do not apply if the services of the lawyer were sought, obtained, or used to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud. For the purposes of this rule, "fraud" includes, among other things, bad-faith litigation. A court may find itself a victim of bad-faith litigation upon a probable cause finding that the litigation (1) objectively lacks basis in law, fact, or both and (2) was predominantly and subjectively motivated by bad faith. Litigation that satisfies this two-part test constitutes a "fraud on the court" and is thus a fraud within the meaning of the crime-fraud exceptions to the attorney-client privilege and work product doctrine.

Definitions:

- A claim "objectively lacks basis in law" where the legal allegations are so easily contradicted by settled law that no litigant could reasonably expect success on the merits.
- A claim "objectively lacks basis in fact" where the factual allegations are so lacking in credibility that they may be described as fantastical, irrational, delusional, or wholly incredible.
- A litigant acts "predominantly and subjectively in bad faith" where the litigation was initiated or conducted mainly, or for the most part, for an improper purpose, with no intention of seeking legitimate judicial relief. Such improper purposes include, among other things, claims intended to harass, intimidate, silence, oppress, vex, cause unnecessary delay, needlessly increase the cost of litigation, or obtain an unjustified settlement.

Commentary:

- Courts may invoke the crime-fraud exceptions to the attorney-client privilege and work product doctrines to sanction bad-faith litigation pursuant to courts' inherent power. *See* JTR Enters., L.L.C. v. Colombian Emeralds, 697 F. App'x 976, 988 (11th Cir. 2017).
- In determining whether a suit was initiated or conducted in subjective bad faith, courts should consider what the signer may have reasonably believed at the time the paper was filed and should avoid using the wisdom of hindsight.
  - The court may weigh factors such as: the amount of time available to the signer for investigation; whether the signer had to rely on a client to provide facts underlying the relevant paper; whether the "paper was based on a plausible view of the law;" or whether the signer "depended on forwarding counsel or another member of the bar." *See* FED. R. CIV. P. 11 advisory committee's note to 1983 amendment.
- A party seeking *in camera* review to determine whether the crime-fraud exception applies must satisfy the test announced in *United States v. Zolin*, 491 U.S. 554, 572 (1989).

Notes of Decisions:

- *In camera* review
  - To determine whether the crime-fraud exception applies in a given case, a district court may hold an *in camera* hearing. To obtain *in camera* review, the requesting party must make "a showing of a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies." *Zolin*, 491 U.S. at 572 (internal citations and quotation marks omitted).
- Meritless or Baseless
  - A lawsuit is "objectively baseless" if "no reasonable litigant could realistically expect success on the merits." Pro. Real Est. Inv., Inc. v. Columbia Pictures Indus. Inc., 508 U.S. 49, 60 (1993).
- Bad Faith
  - A litigant's "relentless, repeated fraudulent and brazenly unethical efforts" intended "to reduce plaintiff to exhausted compliance" constituted bad faith. Chambers v. NASCO, Inc., 501 U.S. 32, 41, 58 (1991).
  - "Bad faith exists where an attorney knowingly or recklessly pursues a frivolous claim or needlessly obstructs the litigation of a non-frivolous claim." JTR Enters., L.L.C. v. Colombian Emeralds, 697 F. App'x 976, 986 (11th Cir. 2017).
- Fraud on the Court
  - Litigant's scheme "first, to deprive this Court of jurisdiction and, second, to devise a plan of obstruction, delay, harassment, and expense sufficient to reduce NASCO to a condition of exhausted compliance" constituted a fraud on the court. *Chambers*, 501 U.S. at 41, 51.
  - Litigant's fraudulent representation to the court concerning the authorship of an article, which the court relied heavily upon in reaching its decision, constituted "a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society." Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944).
  - L.L.C.'s admiralty action seeking title to an unknown quantity of emeralds constituted a fraud on the court and warranted invocation of the crime-fraud exception to the attorney-client privilege upon clear and convincing evidence that the L.L.C. engaged in a scheme to defraud the court by falsely representing a set of stones as significantly more valuable than their true worth and sought to use the district court to grant "the imprimatur or the blessing" that the gems were antique emeralds. JTR Enters., L.L.C. v. An Unknown Quantity, 93 F. Supp. 3d 1331, 1342 (S.D. Fla. 2015).
  - Court invoked the crime-fraud exception to the attorney-client privilege in light of the district court's probable cause finding that

> the litigation "was based on a false, undocumented transaction." *In re* Grand Jury Subpoenas Dated March 2, 2015, 628 F. App'x 13, 15 (2d Cir. 2015).

To summarize, the proposed amendment to Rule 503(d)(1) is designed to formalize the crime-fraud exception's capacity to reach bad-faith litigation, as well as provide a uniform approach under such circumstances. The proposed amendment explicitly includes this Note's two-part test for identifying bad-faith litigation, clarifies key terminology, and incorporates the limiting principles outlined in Part I of this Note. The proposed amendment neither alters nor expands courts' existing power to wield the crime-fraud exception upon a finding of bad-faith litigation. Rather, it affirms courts' considerable truth-seeking powers to contend with such fraudulent conduct.

CONCLUSION

Bad-faith litigation is a "fraud" within the meaning of the crime-fraud exception. Meritless litigation, commenced predominantly and subjectively in bad faith, constitutes a fraud on the court and is thus irreconcilable with the purposes of the attorney-client privilege and work product doctrine. Given the robust safeguards embedded in this Note's definition of "bad-faith litigation," the proposed application of the crime-fraud exception need not chill suits based in law or fact or brought in good faith. Meanwhile, claims so corrupted by fraud as to constitute a fraud on the court ought not to proceed under the privilege and the doctrine's honorable protections.

The Trump team's exploitation of the United States judiciary, in an attempt to illegitimately capture the Oval Office, is a fraud befitting the crime-fraud exception. By pursuing outlandish, unsubstantiated claims designed to undermine the electoral process and disenfranchise millions of voters, the Trump team invaded courtrooms across the country with brazen indifference to the principles of justice and palpable bad faith. The Trump team's election litigation is therefore ripe for the crime-fraud exception, the invocation of which will reveal the team's fraudulence and serve as a powerful warning against future frauds on the courts of the United States.