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“BETTER CALL SAUL” IF YOU WANT DISCOVERABLE COMMUNICATIONS: THE MISREPRESENTATION OF THE ATTORNEY- CLIENT PRIVILEGE ON *BREAKING BAD*

Armen Adzhemyan and Susan M. Marcella*

INTRODUCTION

What if *Breaking Bad* had an alternate ending? One where the two lead characters and co-conspirators in a large methamphetamine cooking enterprise, Walter White and Jesse Pinkman,¹ are called to answer for their crimes in a court of law. Lacking hard evidence and willing (*i.e.*,

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1. This article uses the first names of characters on the assumption that readers possess general familiarity with the television series *Breaking Bad* (if the assumption is incorrect, then we strongly encourage binge watching the series immediately). We use the rich story and richer characters to discuss a difficult concept affecting all lawyers—the scope and waiver of the attorney-client privilege. In order to assist the reader's appreciation of the attorney-client privilege issues discussed, we offer this brief synopsis of the characters mentioned throughout the article.

Walter White (“Walt”) is the main character of *Breaking Bad*. He is a high school chemistry teacher who is diagnosed with cancer. To pay for the cancer treat-

living) witnesses, the prosecution calls upon Saul Goodman. Saul, following through on his representations to Walt and Jesse, claims all communications with his clients are protected by the attorney-client privilege. Would a federal court in the District of New Mexico or a New Mexico state court buy what Saul is selling? Although the answer is no, this question proves to be an excellent study of the nuances and limitations of the attorney-client privilege.

The attorney-client privilege is one of the oldest legal principles underpinning American jurisprudence. Yet, sophisticated clients, represented by able counsel, often misunderstand the narrow reach of protection the privilege provides and the fragility of the protection in the face of constant risk of waiver. *Breaking Bad* wades into the deepest intricacies of privilege law through one of its central characters, Saul Goodman—a “two-bit, bus-bench lawyer” with a penchant for an inflatable Statue of Liberty, instrumental renditions of patriotic song, and U.S. Constitution wallpaper adorning his office.² Despite all appearances to the contrary, Saul proves to be a highly intelligent character who helps both Walt and Jesse throughout their adventures producing methamphetamine. But in doing so, Saul grossly misrepresents the formation of the attorney-client relationship and the scope of the protection afforded by the privilege, while ignoring any possible waiver of the privi-

ment, Walt enlists the help of his former student turned drug-dealer, Jesse Pinkman, to cook methamphetamine.

Jesse Pinkman (“Jesse”) is Walt’s partner in crime, though as the series progresses, the tension between the two rises.

Skyler White (“Skyler”) is Walt’s wife, whose marriage deteriorates as her involvement in Walt’s illicit activities increases.

Hank Shrader (“Hank”) is Walt and Skyler’s brother-in-law. He is also an agent with the Drug Enforcement Agency (“DEA”).

Saul Goodman (“Saul”), a.k.a. Jimmy McGill, is a criminal defense attorney in Albuquerque, New Mexico who is hired by Walt and Jesse to facilitate their drug-manufacturing activities. Saul is the primary driver of this article because he is the embodiment of how not to dispense legal advice.

Gustavo Fring (“Gus”) is the proprietor of a network of “Pollos Hermanos” fast-food restaurants located throughout the southwestern United States. Gus uses his network of restaurants and corporate connections to operate a large methamphetamine production and distribution network.

Mike Ehrmantraut (“Mike”) is a former Philadelphia police officer who ostensibly works as Saul’s private investigator. Mike also works as an enforcer for Gus. His dual loyalties raise serious concerns about maintaining the privilege.

Brandon Mayhew (“Badger”) is a secondary character and a friend of Jesse. He is also involved in selling methamphetamine on the streets, which leads to his arrest by Albuquerque police. When Badger retains Saul as his lawyer, Saul enters the lives of the main protagonists.

2. *Breaking Bad: Live Free or Die* (AMC television broadcast July 15, 2012).

lege as a result of disclosure or the crime-fraud exception. Consequently, Saul's hilarious appearances throughout the show offer valuable tangents to explore many key issues surrounding the attorney-client privilege.

Initially, this article reviews the law regarding the attorney-client privilege in federal courts and in New Mexico, including a discussion of waiver.³ Next, this article explores *Breaking Bad's* depiction of the privilege, focusing on the perpetuation of two common myths: the myth of the dollar bill as a prerequisite to the formation of a privileged relationship and the myth that all communications with a lawyer are protected.⁴ This article concludes with a discussion of the risks of waiver portrayed on *Breaking Bad*.⁵ In particular, this article examines some of the issues raised by Saul's joint representation of Walt and Jesse;⁶ Skyler's involvement in her husband Walt's illicit methamphetamine enterprise;⁷ and Mike's inclusion in confidential attorney-client communications.⁸ Of course, no discussion of the prospect of waiver on *Breaking Bad* is complete without exploring the crime-fraud exception to the attorney-client privilege.⁹ In truth, nearly all of Saul's communications on *Breaking Bad* likely fall within the crime-fraud exception. Thus, this article limits the discussion of the crime-fraud exception to an interesting question about the reach of the exception raised by Saul's representation of Walt, Skyler, and Jesse: does a lawyer's involvement with a legitimate business transaction using illicit funds vitiate the attorney-client privilege? As discussed in detail below, the answer depends on the stringent intent requirement of the federal money laundering statutes.¹⁰

I. OVERVIEW OF ESTABLISHING AND WAIVING THE ATTORNEY-CLIENT PRIVILEGE

Breaking Bad—and in particular Saul¹¹—touches on many critical issues surrounding the attorney-client privilege, from the formation of the

3. See *infra* Part I.

4. See *infra* Part II.

5. See *infra* Part III.

6. See *infra* Part III.A.1.

7. See *infra* Part III.A.2.

8. See *infra* Part III.A.3.

9. See *infra* Part III.B.

10. See *infra* Part III.B.2.

11. *Breaking Bad: Better Call Saul* (AMC television broadcast Apr. 26, 2009) ("My real name's McGill."). Saul is not the first television lawyer with very questionable qualifications to change his identity. See *The Simpsons: Marge on the Lam* (FOX television broadcast Nov. 5, 1993) (Lionel Hutz: "As of this moment, Lionel Hutz no longer exists. Say hello to Miguel Sanchez"). Perhaps television writers operate under

attorney-client relationship to waiving the protection. To appreciate the richness of the privilege issues raised by *Breaking Bad*, a brief overview of the attorney-client privilege is necessary. After discussing the elements required to establish the privilege, this section addresses some common pitfalls that result in waiver of the protection.

A. Establishing the Attorney-Client Privilege

The attorney-client privilege “is one of the oldest recognized privileges for confidential communications. By assuring confidentiality, the privilege encourages clients to make full and frank disclosures to their attorneys, who are then better able to provide candid advice and effective representation. This, in turn, serves broader public interests in the observance of law and administration of justice.”¹² The purpose of the privilege is to “serve[] the client’s need for legal advice,” and “also serve[] the attorney’s need to receive complete information in order to give the proper advice.”¹³ The privilege is a rule of evidence, defined by common law, statute, or rules of court—but it is not enshrined in the Constitution.¹⁴

1. Elements of the Attorney-Client Privilege under Federal Common Law

In federal courts, the requirements for establishing the attorney-client privilege vary depending on the type of claim asserted. In diversity jurisdiction cases where “state law supplies the rule of decision,” federal courts look to state law to determine the application of the attorney-client

an unwritten rule that lawyers with questionable credentials and identity must also assert questionable privilege claims. See *The Simpsons: The Springfield Connection* (FOX television broadcast May 7, 1995) (Lionel Hutz: “I’ll have you know the contents of that dumpster are private! You stick your nose in, you’ll be violating attorney-dumpster confidentiality.”).

12. *Mohawk Indus. Inc. v. Carpenter*, 558 U.S. 100, 108 (2009) (internal marks and citations omitted). For a detailed discussion of the historical origins of the attorney-client privilege, see PAUL R. RICE ET AL., 1 ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES §§ 1:1–1:13 (2014-15 ed.); Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061 (1978).

13. *In re Qwest Commc’ns Int’l Inc.*, 450 F.3d 1179, 1185 (10th Cir. 2006).

14. See, e.g., *Howell v. Trammell*, 728 F.3d 1202, 1222 (10th Cir. 2013) (quoting *Partington v. Gedan*, 961 F.2d 852, 863 (9th Cir.1992)) (“[S]tanding alone, the attorney-client privilege is merely a rule of evidence; it has not yet been held a constitutional right.”); *Ammerman v. Hubbard Broad., Inc.*, 1976-NMSC-031, ¶ 6, 89 N.M. 307 (“There can be no real question about rules of privilege being rules of evidence . . .”).

ent privilege.¹⁵ Otherwise, “[t]he common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege.”¹⁶ Under federal common law, the essential elements of the attorney-client privilege generally reflect Professor Wigmore’s famous formulation:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.¹⁷

The privilege belongs to the client.¹⁸ And the party resisting disclosure bears the burden of proving each element.¹⁹ Despite the widespread acceptance of the Wigmore formulation, courts do not give each element of the privilege equal weight. As Judge Friendly aptly summarized, “What is

15. FED. R. EVID. 501; *see also* *Frontier Refining Inc. v. Gorman-Rupp Co., Inc.*, 136 F.3d 695, 699 (10th Cir. 1998) (“Rule 501 of the Federal Rules of Evidence provides that state law supplies the rule of decision on privilege in diversity cases.”).

16. FED. R. EVID. 501; *see also In re Qwest*, 450 F.3d at 1184 (quoting FED. R. EVID. 501) (“[P]rivileges in federal-question cases generally are ‘governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.’”).

17. 8 J. H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292 (McNaughton rev. abbreviation 1961); *see, e.g.,* *Cavallaro v. United States*, 284 F.3d 236, 245 (1st Cir. 2002) (“[W]e first lay out the essential elements of the privilege, as described by Wigmore”); *United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961) (quoting “Wigmore’s famous formulation”); *United States v. Rockwell Int’l*, 897 F.2d 1255, 1264 (3d Cir. 1990) (quoting Wigmore); *United States v. Tedder*, 801 F.2d 1437, 1441 (4th Cir. 1986) (quoting Wigmore); *United States v. El Paso Co.*, 682 F.2d 530, 538 n.9 (5th Cir. 1982) (quoting Wigmore); *Fausek v. White*, 965 F.2d 126, 129 (6th Cir. 1992) (quoting Wigmore); *United States v. Evans*, 113 F.3d 1457, 1461 (7th Cir. 1997) (quoting Wigmore); *United States v. Graf*, 610 F.3d 1148, 1156 (9th Cir. 2010) (listing Wigmore’s elements); *In re Universal Serv. Fund Tele. Billing Practices Litig.*, 232 F.R.D. 669, 674 (D. Kan. 2005) (listing Wigmore’s elements).

18. *Bovino v. MacMillan*, 28 F. Supp. 3d 1170, 1177 n.6 (D. Colo. 2014) (internal marks and citations omitted) (“[A]ttorney-client privilege belongs to the client and an attorney cannot invoke the privilege for his own benefit when his client desires to waive it[.]”).

19. *In re Foster*, 188 F.3d 1259, 1264 (10th Cir. 1999) (“A party claiming the attorney-client privilege must prove its applicability, which is narrowly construed.”); *In re Grand Jury Subpoenas*, 144 F.3d 653, 658 (10th Cir. 1998) (“The party seeking to assert the attorney-client privilege has the burden of establishing its applicability.”).

vital to the privilege is that the communication be made in *confidence* for the purpose of obtaining *legal advice from the lawyer*.²⁰

Unsurprisingly, issues relating to confidentiality²¹ and the precise boundaries between legal and non-legal advice feature prominently on *Breaking Bad*. Courts uniformly agree that the privilege does not apply to business, lobbying, or public relations advice, even from a lawyer.²² Difficulties arise when communications contain both legal and non-legal advice. When confronting such “mixed” communications, the majority of federal courts apply the “predominant” or “primary purpose” test.²³ As the Second Circuit emphasized:

[The] predominant purpose of a communication cannot be ascertained by quantification or classification of one passage or another; it should be assessed dynamically and in light of the advice being sought or rendered, as well as the relationship between advice that can be rendered only by consulting the legal authorities and advice that can be given by a non-lawyer.²⁴

In other words, if a lawyer renders legal advice, but also counsels the client on other related matters, such as public policy, business decisions, or prudent conduct, the privilege is not necessarily lost so long as the predominant purpose of the communication was to render legal advice.

20. *Kovel*, 296 F.2d at 922 (emphasis in original). Conversely, the requirement that the communication originate with the client appears to have fallen out of favor. *See* FED. R. EVID. 503(b) (Proposed Official Draft 1975) (stating that privilege includes confidential communications between lawyer’s representatives, lawyers, or representatives of the client); *United States v. BDO Seidman, LLP*, 492 F.3d 806, 815 (7th Cir. 2007) (internal marks and citations omitted) (noting that proposed Rule 503 “has been recognized as a source of general guidance regarding federal common law principles”); *United States v. Ballard*, 779 F.2d 287, 290 (5th Cir. 1986) (“[A] lawyer’s responses to [a client’s] inquiries are privileged.”).

21. *See infra* notes 40-41 and accompanying text for a discussion of the requisite degree of confidentiality.

22. *See, e.g., United States v. Chen*, 99 F.3d 1495, 1501-02 (9th Cir. 1996) (discussing distinction between legal advice and business advice and noting, “[w]hat matters is whether the lawyer was employed with or without ‘reference to his knowledge and discretion in the law,’ to give the advice.”); *In re Chevron Corp.*, 749 F. Supp. 2d 141, 165 (S.D.N.Y. 2010) (internal citations omitted) (“[C]ommunications, even between lawyer and client, are not privileged unless they are made for the purpose of rendering legal advice or, to use another formulation, unless they relate to the rendition of ‘professional legal services.’”).

23. *See RICE, supra* note 12, at § 7:6 (emphasis in original) (“[T]here is general agreement that the protection of the privilege applies only if the *primary* or *predominant purpose* of the attorney-client consultation is to seek legal advice or assistance.”).

24. *In re Cnty. of Erie*, 473 F.3d 413, 420-21 (2d Cir. 2007) (footnotes omitted).

2. Elements of the Attorney-Client Privilege under New Mexico Rules of Evidence

Unlike the federal court framework, “New Mexico’s approach to privileges is a special product of our state law jurisprudence.”²⁵ As the Court of Appeals detailed in *Public Service Company of New Mexico v. Lyons*, New Mexico courts prohibited legislative expansion of privileges because “rules of privilege, being evidentiary and thus procedural in nature, were constitutionally the domain of the judiciary.”²⁶ Rule 11-501 reflects this unique source of privilege law in New Mexico and limits privileges to those required by the state constitution and the rules promulgated by the New Mexico Supreme Court.²⁷ As a result, “New Mexico’s approach to privilege is a special product of [New Mexico’s] state law jurisprudence,” which, unlike the federal approach, “prohibits New Mexico courts from engaging in [] ad hoc expansion” of the privilege.²⁸ New Mexico’s unique approach to privilege rules stands in stark contrast with that of its sister states, which tend to rely on a legislative definition of the privilege.²⁹

Besides the mechanism for defining the privilege, there is little substantive difference between the elements for establishing the attorney-client privilege under federal common law and under Rule 11-503, with one minor exception discussed below.³⁰ For the privilege to apply, Rule 11-503 requires: (1) a communication (2) made in confidence (3) between privileged persons (4) for the purpose of facilitating the attorney’s rendi-

25. Pub. Serv. Co. of N.M. v. Lyons, 2000-NMCA-077, ¶ 12, 129 N.M. 487.

26. *Id.* ¶ 11 (citing *Ammerman v. Hubbard Broad., Inc.*, 1976-NMSC-031, ¶¶ 11–12, 89 N.M. 307).

27. Rule 11-501 NMRA (“Unless required by the constitution, these rules, or other rules adopted by the supreme court, no person has a privilege to A. refuse to be a witness; B. refuse to disclose any matter; C. refuse to produce any object or writing; or D. prevent another from being a witness, disclosing any matter, or producing any object or writing.”); *Lyons*, 2000-NMCA-077, ¶ 11.

28. *Lyons*, 2000-NMCA-077, ¶ 12 (citing *State ex rel. Att’y Gen. v. First Judicial Dist. Court*, 2014-NMCA-018, ¶ 12, 96 N.M. 254).

29. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-2234 (1994) (providing the statutory definition of attorney-client privilege); CAL. EVID. CODE §§ 950–962 (West 2015) (providing the statutory definition of attorney-client privilege); COLO. REV. STAT. ANN. § 13-90-107(1)(b) (West 2014) (providing the statutory definition of attorney-client privilege); TEX. R. EVID. 503 (1998) (defining the evidentiary rule related to attorney-client privilege).

30. The language of New Mexico Rule of Evidence 503 is nearly identical to the proposed, but never adopted, Federal Rule of Evidence 503(b). *Compare* Rule 11-503(B) NMRA, *with* FED. R. EVID. 503(b) (Proposed Official Draft 1975).

tion of professional legal services to the client.³¹ Like federal common law, the privilege belongs to the client or the client's agents, though an attorney may assert the privilege on behalf of the client.³² And the burden of proving the privilege falls upon the party resisting disclosure.³³ Although "[t]here is scant New Mexico law distinguishing legal advice from business advice," New Mexico courts have adopted the "primary purpose" test applied by federal courts.³⁴

Finally, like the federal common law, Rule 11-503(B)'s definition of "privileged persons" includes the usual participants, such as the client, the lawyer, and the "lawyer's representative."³⁵ New Mexico's definition of "privileged persons" diverges slightly from federal common law because it expressly includes communications "between representatives of the client" as falling within the zone of protection.³⁶ Federal courts, in contrast, are split on the application of the privilege to intra-corporate communications among non-lawyers.³⁷

31. *Santa Fe Pac. Gold Corp v. United Nuclear Corp.*, 2007-NMCA-133, ¶ 14, 143 N.M. 215 (citing Rule 11-503 NMRA).

32. Rule 503(C)(1)–(4) NMRA (providing that the privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client; or the successor, trustee, or similar representative of a corporation, association, or other entity).

33. *See, e.g., Bhandari v. Artesia Gen. Hosp.*, 2014-NMCA-018, ¶ 14, 317 P.3d 856.

34. *Id.* ¶ 15 (collecting cases).

35. Rule 11-503(B) NMRA.

36. *Id.* at 11-503(B)(4). To clarify, the issue is whether employees (or other representatives of the client) may communicate among themselves before consulting a lawyer and later cloak the communication under the protection of the attorney-client privilege. *Cf. Wultz v. Bank of China Ltd.*, No. 11 Civ. 1266 (SAS)(GWG), 2015 WL 362667, at *6 (S.D.N.Y. Jan. 21, 2015) ("[W]e are unaware of any case law suggesting that a person's collection of information is protected merely because the person harbors a plan to provide the information later to an attorney—particularly where there is no proof that the attorney sought to have the individual collect the information at issue."). This issue is somewhat distinct from the related concept of waiving the privilege after consulting an attorney by disclosing the communication too broadly. *Muro v. Target Corp.*, 243 F.R.D. 301, 306 (N.D. Ill. 2007) (internal marks and citations omitted) ("[T]he privilege once established can be waived if the communication is shared with corporate employees who are not directly concerned with or did not have primary responsibility for the subject matter of the communication.").

37. *Compare Jarvis, Inc. v. Am. Tel. & Tel. Co.*, 84 F.R.D. 286, 292 (D. Colo. 1979) (holding the attorney-client privilege was "never intended to protect so extended a chain of communications"), *with Williams v. Sprint/United Mgmt. Co.*, No. 03-2200-JWL-DJW, 2006 WL 266599, at *3 (D. Kan. Feb. 1, 2006) ("[T]he Court finds that although written communication between corporate management employees is not necessarily protected by the attorney-client privilege, a party may be able to successfully demonstrate applicability of privilege by establishing that the communication

In short, with the minor exception of the scope of the privilege as to communications among a client's representatives, New Mexico and federal courts generally analyze the application of the privilege under similar standards.³⁸

B. Waiver of the Attorney-Client Privilege

Even if a party establishes each element of the attorney-client privilege, there remain numerous ways to waive that privilege.³⁹ Two important waiver doctrines implicated by *Breaking Bad* are waiver by disclosure and the crime-fraud exception.

1. Waiver by Disclosure to Third Parties

The client (or the client's authorized representative) may waive the privilege by disclosure to third parties because "confidentiality is key to

was made in confidence for the primary purpose of obtaining legal advice."); see RICE, *supra* note 12, § 5:15 (collecting cases on both sides of the debate but concluding that extending the privilege to preparatory communications is of no concern "if the established elements of the privilege are enforced"). This disagreement among federal courts can have significant consequences in litigation because of the increasing proliferation of electronic communications with intertwining legal and business discussions among multiple participants to email chains that add or remove attorneys at various points in the communication.

38. In the litigation context, the attorney-client privilege dovetails with the work-product doctrine because parties (and their counsel) often assert each or both protections during the course of discovery. The work-product doctrine, however, has only a limited bearing on the communications in *Breaking Bad*. As codified, the protection applies only to "documents and other tangible things," whereas very few communications on *Breaking Bad* are recorded as documents (and it is difficult to argue that a pile of cash is work product). Fed. R. Civ. P. 26(b)(3); Rule 1-026(B) NMRA. If pressed to testify, Saul may argue that aside from the protection for documents, the doctrine also protects his litigation strategy, opinions, and mental impressions. See generally *Hickman v. Taylor*, 329 U.S. 495 (1947). For example, Saul may argue that following Badger and Jesse's arrests, his "witness interviews" were in furtherance of his litigation strategy; therefore his communications with Jesse, Walt, and others are protected as opinion work product. *Id.* at 509–10 (protecting witness interview statements and knowledge); see also *Appeal of Hughes*, 633 F.2d 282, 290-91 (3d Cir. 1980) (finding that private investigator testimony regarding witness interviews is core work product). However, there is nothing fascinating, doctrinally, in exploring this particular argument any further and courts are not likely to entertain Saul's argument in any event. See *United States v. Adlman*, 134 F.3d 1194, 1198–1202 (2d Cir. 1998) (holding work product doctrine applies if document prepared "because of" litigation but "withholds protection from documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation."). Because the work-product doctrine is not prevalent on *Breaking Bad*, the remainder of this article focuses on the attorney-client privilege.

39. See generally, RICE, *supra* note 12, at ch. 9.

the privilege” and “must be jealously guarded by the holder of the privilege lest it be waived.”⁴⁰ Ordinarily, attorney-client communications made “in the presence of a third person do not fall within the privilege, even when the client wishes the communication to remain confidential, because the presence of the third person is normally unnecessary for the communication between the client and his attorney.”⁴¹ But there are exceptions to the general rule of waiver. This article focuses on some of those exceptions that arise throughout *Breaking Bad*.⁴²

First, *Breaking Bad* may implicate the joint client or common interest doctrines.⁴³ Ordinarily, the presence of third parties who possess “a commonality of interest with the client” will not waive the privilege.⁴⁴ The doctrines apply where two or more clients who share a common legal interest in a matter agree to exchange information concerning that matter.⁴⁵ That is, if two separate parties have aligned legal interests, then sharing privileged material between them will not waive the protection. As discussed in greater detail below, the communications between Walt,

40. *In re Qwest Commc'ns Int'l Inc.*, 450 F.3d 1179, 1185 (10th Cir. 2006) (quotation and alteration omitted); *see also* *United States v. Ary*, 518 F.3d 775, 782 (10th Cir. 2008) (quoting *In re Qwest*, 450 F.3d 1179) (“Because confidentiality is critical to the privilege, it will be ‘lost if the client discloses the substance of an otherwise privileged communication to a third party.’”); *Gingrich v. Sandia Corp.*, 2007-NMCA-101, ¶ 12, 142 N.M. 359 (holding privilege waived by party’s “prior extrajudicial disclosures to members of Congress”); Rule 11-511 NMRA (“A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if the person voluntarily discloses or consents to disclosure of any significant part of the matter or communication.”).

41. *Jenkins v. Bartlett*, 487 F.3d 482, 490 (7th Cir. 2007); *see also* *NXIVM Corp. v. O’Hara*, 241 F.R.D. 109, 138 (N.D.N.Y. 2007) (“Obviously, when communications between a party and her attorney occur in the presence of a third party, the privilege may be waived.”).

42. *See infra* Part III.A, discussing application of common interest exception to waiver, marital exception to waiver, and attorney’s agent exception to waiver in the context of *Breaking Bad*.

43. *See infra* Part III.A.1.a, for a discussion of the different doctrines at issue and confusion as to the proper terms.

44. *In re Grand Jury Investigation*, 918 F.2d 374, 386 n.20 (3d Cir. 1990).

45. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922 (8th Cir. 1997) (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 126(1)); *see also* *United States v. Moscony*, 697 F. Supp. 888, 894 (E.D. Pa. 1988) (“[C]ommunications among several clients and their jointly retained counsel allied in a common legal cause are intended to be insulated from exposure beyond the confines of the group.”). But communications subject to the joint client or common interest doctrines are not privileged from disclosure to the other parties to the joint or common relationship. *See* Rule 11-503(D)(5) NMRA (excluding “communications relevant to a matter of common interest” among joint clients from the attorney-client privilege if offered in an action between the clients).

Jesse, and Saul raise the difficult question of whether their legal interests are sufficiently aligned to warrant protection from disclosure.⁴⁶

Second, the privilege may not be waived by the inclusion of a spouse in attorney-client communications. Skyler's increasing involvement in Walt's legal affairs raises questions regarding the interaction of the marital privilege with the attorney-client privilege. As noted below, New Mexico's robust marital privilege protects Walt and Skyler's communications.⁴⁷

Finally, the privilege is not waived if an agent of the attorney is present and his or her presence is necessary for the attorney to provide legal advice.⁴⁸ "[C]ourts have extended the privilege to the substantive advice and assistance of associates, clerks, and paralegals, investigators, interviewers, technical experts, accountants, physicians, patent agents, and other specialists in a variety of social and physical sciences."⁴⁹ However, Mike's inclusion in the privilege "circle of trust" raises the prospect of waiver given his principal-agent relationship (or lack thereof) with Saul.⁵⁰

2. The Crime-Fraud Exception

In addition to waiver by disclosure, the privilege "takes flight" if the crime-fraud exception applies to the attorney-client communication.⁵¹ The crime-fraud exception exists because the "attorney-client privilege is no shield for either the attorney or the client if the purpose of the communication is to further a crime or intended crime."⁵² The exception applies "even if the attorney is unaware that his advice is sought in furtherance of such an improper use."⁵³ To successfully invoke the crime-

46. *Infra* Part III.A.1.

47. *Infra* Part III.A.2.

48. Extending the privilege to an attorney's agents who assist the attorney in rendering legal advice is known as the *Kovel* doctrine. See *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961) (holding privilege applies to independent accountant who helped "translate" financial documents for the attorney); *Cavallaro v. United States*, 284 F.3d 236, 240 (1st Cir. 2002) (applying "*Kovel* doctrine"). Courts typically extend the privilege to such agents as paralegals, translators, accountants retained to assist an attorney "translate" financial documents, consultants in specific fields, and the like as long as the expertise of the agent assists the attorney in rendering legal advice to the client. See generally RICE, *supra* note 12, § 3:3.

49. RICE, *supra* note 12, § 3:3 (collecting cases); *Sanchez v. Matta*, 229 F.R.D. 649, 660 (D.N.M. 2004) (holding privilege applies because "employees made those communications to [the investigator], an agent of their employer's counsel.").

50. See *infra* Part III.A.3.

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

52. *In re* September 1975 Grand Jury Term, 532 F.2d 734, 737 (10th Cir. 1976).

53. *In re* Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983, 731 F.2d 1032, 1038 (2d Cir. 1984).

fraud exception, the party seeking disclosure must demonstrate “probable cause to believe that a fraud or crime has been committed and that the communications in question were in furtherance of the [crime or] fraud.”⁵⁴ Whether described as “probable cause” or a “prima facie showing,” the proponent of disclosure must demonstrate that “a prudent person [would] have a reasonable basis to suspect the perpetration or attempted perpetration of a crime or fraud, and that the communications were in furtherance thereof.”⁵⁵ Courts may conduct an *in camera* review of the documents (or testimony) to determine if the crime-fraud exception applies.⁵⁶ But, “[b]efore engaging in *in camera* review to determine the applicability of the crime-fraud exception, the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.”⁵⁷ The crime-fraud exception has similar elements under New Mexico law.⁵⁸ Merely satisfying the elements of the crime-fraud exception, however, may not necessarily result in the disclosure of the communications sought.⁵⁹

54. *United States v. Jacobs*, 117 F.3d 82, 87 (2d Cir. 1997); *see also In re Grand Jury Subpoena*, 745 F.3d 681, 691 (3d Cir. 2014) (internal marks and citations omitted) (“[T]he crime-fraud exception to the attorney-client privilege applies where there is a reasonable basis to suspect that the privilege holder was committing or intending to commit a crime or fraud and that the attorney-client communications or attorney work product were used in furtherance of the alleged crime or fraud”); *In re Grand Jury Subpoenas*, 144 F.3d 653, 660 (10th Cir. 1998) (“To invoke the crime-fraud exception, the party opposing the privilege must present prima facie evidence that the allegation of attorney participation in the crime or fraud has some foundation in fact.”); *Mackey v. Staples the Office Superstore LLC*, No. CV 09–0023 JCH/WPL, 2010 WL 9523829, at *10 (D.N.M. Feb. 12, 2010) (“Although the Tenth Circuit has not determined the level of proof required to satisfy the prima facie standard, it has stated that the evidence must show that the client was engaged in or planning some criminal or fraudulent conduct when it sought the assistance of counsel and that the assistance was obtained in furtherance of the conduct or was closely related to it.”).

55. *In re Grand Jury Subpoena*, 731 F.2d at 1039.

56. *United States v. Zolin*, 491 U.S. 554, 568 (1989).

57. *Id.* at 572 (internal marks and citations omitted). This showing is not as extensive as the “probable cause” or “prima facie” showing for establishing that the exception applies. *See, e.g., Mackey*, 2010 WL 9523829, at *10-11 (holding that evidence is “insufficient to present a prima facie case” but the evidence “may be sufficient to warrant an *in camera* review”).

58. Rule 11-503(D)(1) NMRA.

59. *See William E. Thomson & Armen Adzhemyan, Litigating the Crime-Fraud Exception: Chevron Corp. v. Donziger*, *INSIDE COUNSEL* (Aug. 25, 2014), <http://www.insidecounsel.com/2014/08/25/litigating-the-crime-fraud-exception-ichevron-corp>; *cf. In re BankAmerica Corp. Sec. Litig.*, 270 F.3d 639, 644 (8th Cir. 2001) (“[D]istrict

While the crime-fraud exception probably applies to all of Saul's communications with Walt, Jesse, and Skyler, this article does not simply focus on Saul's many illicit acts. Rather, this article focuses on a narrow issue raised by the exception: does the crime-fraud exception apply to legal advice regarding a legitimate transaction funded by illicit funds?⁶⁰

C. Proving the Contents of Attorney-Client Communication

Even if the privilege applied to Saul's communications with his clients, *Breaking Bad* raises an interesting question of whether prosecutors can obtain information about Walt and Jesse's criminal activities by compelling Saul's testimony. The question is interesting because unlike modern civil litigators, Saul never relies upon written communications with Walt or Jesse.⁶¹ Thus, the only way to prove the contents of those communications is through witness testimony. So, can Saul be compelled to testify?

State rules of professional conduct, including the ABA Model Rules, generally prohibit a prosecutor from using the subpoena power to compel testimony on a matter concerning privilege.⁶² However, federal courts are split on whether those rules can apply to federal prosecutors, particularly in a grand jury setting.⁶³ For example, the Tenth Circuit has upheld Colorado's Rule of Professional Conduct 3.8(f), which is "applicable to federal prosecutors subpoenaing attorneys to divulge information on past and present clients in connection with a criminal proceeding other than a grand jury."⁶⁴ In contrast, a federal judge in New Mexico recently ruled that the United States has standing to challenge New Mexico's Rule

courts should be highly reluctant to order disclosure without conducting an *in camera* review of allegedly privileged materials.”).

60. *Infra* Part III.B.

61. Saul's six voicemails to Jesse are probably the only attorney-client communications recorded. *Breaking Bad: End Times* (AMC television broadcast Oct. 2, 2011).

62. Rule 16-308(E) NMRA (providing that a prosecutor shall not “subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes: (1) the information sought is not protected from disclosure by any applicable privilege; (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and (3) there is no other feasible alternative to obtain the information.”). See also MODEL RULES OF PROF'L CONDUCT R. 3.8(f).

63. Compare *Whitehouse v. U.S. Dist. Court. for Dist. of R.I.*, 53 F.3d 1349, 1357-58 & n.12 (1st Cir. 1995), with *Stern v. U.S. Dist. Court. for Dist. of Mass.*, 214 F.3d 4, 21 (1st Cir. 2000).

64. *United States v. Colorado Supreme Court*, 189 F.3d 1281, 1284 (10th Cir. 1999).

of Professional Conduct 16-308(E) as it applies to federal prosecutors.⁶⁵ Thus, while New Mexico state prosecutors may have to comply with Rule 16-308(E) and obtain court approval before serving a subpoena for Saul's testimony, the U.S. Attorney's office in New Mexico is currently litigating the right to procure such testimony without preapproval.

II. THE FORMATION AND SCOPE OF THE ATTORNEY-CLIENT PRIVILEGE ON *BREAKING BAD*

*Breaking Bad*⁶⁶ presents ample material on the nature, scope, and essence of the attorney-client relationship. Discussing every attorney-client issue touched upon by the show is simply not possible. Therefore, this section focuses on two issues that are often a source of confusion, even among sophisticated lawyers: the formation of the attorney-client privilege and its limited scope.

A. Formation of the Attorney-Client Privilege—*The Myth of the Dollar Bill*

Exchanging a dollar bill with a lawyer does not magically cloak subsequent conversations with that lawyer under the protection of the privilege. Not even seven barrels of cash⁶⁷ can buy the attorney-client privilege where none is warranted. Rather, because “the rationale of the attorney-client privilege is to encourage more open communications from the client to the attorney when legal advice is being sought, the attorney-client relationship begins when the attorney is initially approached by a pro-

65. *United States v. Supreme Court of New Mexico*, 980 F. Supp. 2d 1334, 1346 (D.N.M. 2013) (“Plaintiff faces an immediate [dilemma] of choosing to follow Rule 16–308(E) or to gather evidence under the federal standards violating the rule.”). Subsequently, the district court granted in part and denied in part the United States’ motion for summary judgment, holding that Rule 16-308(E) applies to U.S. Attorneys in ordinary criminal proceedings, but not in grand jury proceedings. *United States v. Supreme Court of New Mexico*, 13-cv-407, slip op. at 7-21 (D.N.M. Feb. 3, 2014).

66. The spinoff series (and prequel to *Breaking Bad*) following the life of Jimmy McGill before he became Saul Goodman offers further opportunities to write about attorney-client relationships and professional responsibility issues. *See, e.g., Better Call Saul: Uno* (AMC television broadcast Feb. 8, 2015) (Jimmy [while knocking on someone’s door]: “I’m an officer of the court. Open up in the name of the law.”); *Better Call Saul: Mijo* (AMC television broadcast Feb. 9, 2015) (Jimmy: “I’m not saying anything about this to anybody. As far as I’m concerned, you’re a client. This is a consultation. Everything you just said is privileged.”); *Better Call Saul: RICO* (AMC television broadcast March 23, 2015) (Jimmy [commenting on documents obtained from a dumpster]: “You can’t say it’s private if a hobo can use it as a wigwam!”).

67. *Breaking Bad: To’hajiilee* (AMC television broadcast Sept. 8, 2013).

spective client for that purpose.”⁶⁸ It is not a prerequisite for the attorney to undertake the representation because “communications of prospective clients in their initial interviews are protected if legal assistance in the form of advice or representation is being sought.”⁶⁹ Importantly, the payment of fees is not a prerequisite to the formation of an attorney-client relationship.⁷⁰

When viewers first meet Saul, his communications with Badger represent one of the few instances where *Breaking Bad* accurately portrays the attorney-client privilege. Badger, who is arrested as part of an undercover sting operation by the Albuquerque Police Department, calls Saul from jail based on Saul’s prominent billboard and bus-bench advertisement touting his catchphrase: “Better Call Saul!”⁷¹ Saul visits Badger in jail and proceeds to ask preliminary questions to understand the legal issues surrounding Badger’s arrest.⁷² The jailhouse conversation satisfies all of the elements of the privilege and there is no apparent waiver. The conversation relates to Badger’s arrest, for which Badger predictably seeks the advice of counsel.⁷³ The conversation is confidential because

68. See RICE, *supra* note 12, § 2:4; see also *In re Auclair*, 961 F.2d 65, 69-70 (5th Cir. 1992) (“Of critical importance to a meaningful pre-representation interview is the availability of the attorney-client privilege from the initial salutation and greeting on.”); *June v. Union Carbide Corp.*, No. 04-cv-00123-MSK-MJW, 2007 WL 161034, at *2 (D. Colo. Jan. 17, 2007) (“The attorney-client privilege which would have attached during the communications between Plaintiffs’ counsel and the prospective clients has not been waived.”); Rule 11-503(A) NMRA (emphasis added) (extending privilege to a “client . . . who *consults with*, seeks advice from, or retains the professional services of a lawyer”).

69. See RICE, *supra* note 12, § 2:4 (collecting cases). However, communications from a lawyer to prospective clients are not privileged if the prospective clients do not indicate any request for legal advice. *Id.*; see, e.g., *Breaking Bad: Green Light* (AMC television broadcast Apr. 11, 2010) (Saul [while cold calling residents]: “Yeah, yeah, the one that was on TV. Did any little piece fall on your property? I’m not looking for an entire wing here, Mr. Linkas. It could be a nut or a bolt. It could be a bag of peanuts just so long as it caused you pain and suffering.”).

70. See RICE, *supra* note 12, § 2:4; see also *Cole v. Ruidoso Mun. Schools*, 43 F.3d 1373, 1384 (10th Cir. 1994) (internal marks and citations omitted) (“For there to have been an attorney-client relationship, the parties need not have executed a formal contract. Nor is the existence of a relationship dependent upon the payment of fees.”); *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1317 (7th Cir. 1978) (“A professional [attorney-client] relationship is not dependent upon the payment of fees.”); *George v. Caton*, 1979-NMCA-028, ¶ 24, 93 N.M. 370 (“No formal contract, arrangement or attorney fee is necessary to create the relationship of attorney and client.”).

71. *Breaking Bad: Better Call Saul* (AMC television broadcast Apr. 26, 2009).

72. *Id.*

73. *Id.*

Saul ensures that officers are not in the interrogation room and that the camera is turned off before speaking with his client.⁷⁴ Saul is an attorney (viewers assume). And Badger is his prospective client who has yet to pay Saul a dime.⁷⁵ Thus, each element of the privilege applies and, initially, there does not appear to be a waiver through disclosure or the crime-fraud exception.⁷⁶

Rapidly, *Breaking Bad*'s accurate representation of the attorney-client privilege disappears, replaced by two lingering myths. In the episode that first introduces viewers to Saul as a criminal defense lawyer representing Badger, the show also perpetuates the myth of the dollar bill.⁷⁷ As the events in the episode "Better Call Saul" unfold, Walt and Jesse realize that Badger may plea bargain with the DEA and disclose their involvement in manufacturing methamphetamine.⁷⁸ To avoid this particular outcome, Walt and Jesse bind, blind-fold, and kidnap Saul and take him to the New Mexico desert to persuade Saul to scuttle any possible plea offer.

74. *Id.* The topic of jailhouse and prison communications and its relation to the attorney-client privilege is rich, though unfortunately beyond the scope of this article. See *Nordstrom v. Ryan*, 762 F.3d 903, 911–12 (9th Cir. 2014) ("Inasmuch as Nordstrom remains incarcerated and alleges the ADC Director has personally informed him that prison officials are permitted to read his legal mail, he has adequately alleged the threatened repetition of the alleged Sixth Amendment violation."); Matt Kaiser, *DOJ Says They Can No Longer Afford To Respect The Attorney-Client Privilege*, ABOVE THE LAW (July 24, 2014, 10:17 AM), <http://abovethelaw.com/2014/07/doj-says-they-can-no-longer-afford-to-respect-the-attorney-client-privilege/>.

75. *Breaking Bad: Better Call Saul* (AMC television broadcast Apr. 26, 2009) (Saul: "And I need that in a cashier's check or a money order. It doesn't matter. Actually, uh, I want it in a money order. And make it out to Ice Station Zebra Associates. That's my loan out. It's totally legit. It's done just for tax purposes.").

76. Perhaps the only other example of privileged attorney-client communications on *Breaking Bad* involves Skyler and her divorce attorney, Pamela. As Skyler's marriage to Walt deteriorates and her concern about Walt's illegal drug activities increases, Skyler consults Pamela for advice on how to proceed. See *Breaking Bad: I.F.T.* (AMC television broadcast Apr. 4, 2010) (Pamela: "Skyler, I can't advise you properly if you don't tell me all the facts. Understand, I'm bound by the attorney-client privilege to keep everything you tell me a secret. I can't tell a soul unless you authorize me to." Skyler: "Even if it's something illegal?" Pamela: "Especially if it's illegal. I'm your lawyer, not the police. My job is to protect you."). Pamela's advice is nearly identical to the commentary to the New Mexico Rules of Professional Conduct. See Rule 16-106 NMRA cmt. 4 (citations omitted) ("A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.").

77. *Breaking Bad: Better Call Saul* (AMC television broadcast Apr. 26, 2009).

78. *Id.*

After clarifying that he is willing to accept bribes, Saul coaxes Walt and Jesse to “put a dollar in my pocket. Both of you. You want attorney-client privilege don’t you? So then everything you say is strictly between us. I mean it. Put a dollar in my pocket. Come on, make it official . . . Now you, ski bum. Get with the dollar. Be smart.”⁷⁹ After accepting the dollar bills, Saul proclaims, “Okay you’re now both officially represented by Saul Goodman and Associates. Your secrets are safe with me under threat of disbarment.”⁸⁰ This interaction illustrates one of Saul’s countless misrepresentations. There is simply no reason to exchange a dollar.⁸¹ To invoke the privilege, Saul only needs to confirm that Walt and Jesse seek his legal advice as potential clients. Moreover, the other elements of the privilege may apply because the communications in the desert are confidential (not to mention desolate) and a portion of the conversation arguably relates to the provision of legal advice (involving Badger’s arrest and its legal implication on Walt and Jesse’s operations).⁸² Thus, the privi-

79. *Id.*

80. *Id.*

81. *See supra* note 70.

82. *But see In re Grand Jury Proceedings*, 680 F.2d 1026, 1028 (5th Cir. 1982) (en banc) (holding the crime-fraud exception may apply to communications between attorney and client who paid the legal bill of three co-conspirators in exchange for enticing them to join the conspiracy). Walt and Jesse’s retention of Saul to essentially scuttle any possible plea deal by Badger with the DEA implicates a rather significant conflict of interest for Saul involving his duty of loyalty to the *client*. Rule 16-108(F) NMRA states that (among other factors) a “lawyer shall not accept compensation for representing a client from one other than the client unless . . . there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship.”). That is, the lawyer’s loyalty must remain to his client, not the financier of the lawyer’s fees. In addition, the lawyer’s advocacy should not inadvertently create the perception of an attorney-client relationship where none exists. This issue often arises in the context of attorneys representing a corporation who conduct an internal investigation without clearly defining the parties to the attorney-client relationship, *i.e.*, the attorneys fail to give *Upjohn v. United States* warnings clearly defining that the lawyers represent the corporation and not any individual employees or executives they interview. 449 U.S. 383 (1981). The individuals interviewed by the corporation’s lawyers may later claim they believed the attorneys were their lawyers and, therefore, the lawyers should be disqualified from representing the corporation in subsequent proceedings. *See generally* Grace M. Giesel, *Upjohn Warnings, the Attorney Client Privilege, and Principles of Lawyer Ethics: Achieving Harmony*, 65 U. MIAMI L. REV 109, 115 (2010) (“If the person honestly and reasonably believes that the attorney represents or may represent the individual in the future, then there is an attorney-client relationship for purposes of malpractice, conflicts of interest, and attorney-client privilege.”).

lege may protect the conversation whether or not the characters exchange a dollar bill.⁸³

B. Breaking Bad and the Scope of the Attorney-Client Privilege—The Myth of Protecting All Communications Involving a Lawyer

Much like the myth of the dollar bill, *Breaking Bad* perpetuates another common falsehood that even sophisticated lawyers occasionally espouse: the privilege applies to all communications involving a lawyer. But Saul's involvement in the communication "does not, *ipso facto*, make all communications with [Saul] privileged."⁸⁴ The attorney-client privilege is confined to the rendition of *legal* advice, *i.e.*, the "type of services that [a lawyer's] education and certification to practice qualify him to render"⁸⁵ This is not to say that every word out of a lawyer's mouth must contain legal jargon, but the advice sought from the lawyer must generally be in his capacity as such and not for some other purpose, such as business advice.⁸⁶

83. While the exchange of money is not a prerequisite to the formation of an attorney-client relationship, objective acts demonstrating the existence of such a relationship can help the parties avoid confusion in the event of future disputes. *Cf.* *George v. Caton*, 1979-NMCA-028, ¶ 23, 93 N.M. 370 ("Defendants had a duty to be precise, meticulous and definite so that no misunderstanding would arise as to the relationship of the parties.").

84. *United States v. Chen*, 99 F.3d 1495, 1501 (9th Cir. 1996); *Sinclair Oil Corp. v. Texaco, Inc.*, 208 F.R.D. 329, 332 (N.D. Okla. 2002) ("The mere act of copying an attorney in a communication between nonattorneys does not protect the communications between the nonattorneys."); *Wierciszewski v. Granite City Illinois Hosp. Co., LLC*, No. 11-cv-120-GPM-SCW, 2011 WL 5374114, at *2 (S.D. Ill. 2011) ("Moreover, neither the mere presence of the lawyer's name on a document nor the copying of counsel on an email automatically makes an item privileged."); *In re Chevron Corp.*, 10-MC-21JH/LFG, 2010 WL 9545704, at *1 (D.N.M. Sept. 13, 2010) (internal marks and citations omitted) ("The privilege does not protect communications between an attorney and third parties, including experts and technical advisors. It does not protect against disclosure of facts, even when those facts have been communicated between an attorney and a client. Nor does it foreclose consideration and inquiry into the general nature of a lawyer's activities on behalf of a client, or the conditions of a lawyer's employment, including any facts surrounding the lawyer's retention.").

85. RICE, *supra* note 12, § 7:10.

86. *See supra* notes 23-24 and accompanying text discussing predominant purpose doctrine. This doctrine traces its origins to Judge Wyzanski, who recognized over half a century ago, a lawyer's "duty to society as well as to his client involves many relevant social, economic, political and philosophical considerations. And the privilege of nondisclosure is not lost merely because relevant nonlegal considerations are expressly stated in a communication which also includes legal advice." *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 359 (D. Mass. 1950); *In re County of Erie*, 473 F.3d 413, 419 (2d Cir. 2007) ("The issue usually arises in the context of communi-

Saul's problem differs from an in-house lawyer who combines business and legal advice while advising a corporate client because Saul essentially functions as a consigliere⁸⁷ to a criminal enterprise.⁸⁸ That is, Saul does not risk waiver because he wears multiple hats; rather he risks waiver because the hat he wears does not afford protection under the attorney-client privilege by operation of the crime-fraud exception.⁸⁹

Even setting aside the criminal element of Saul's advice, little of what he communicates is predominantly legal—despite his protestation to the contrary.⁹⁰ As an initial matter, Saul has a habit of grossly overstating the reach of the attorney-client privilege. For example, Saul invokes the attorney-client privilege when Mike demands to know Jesse's whereabouts.⁹¹ But a client's whereabouts, like the client's identity or the lawyer's fee arrangement, lies beyond the cloak of the attorney-client privilege.⁹² When Saul doles out substantive advice, his communications

cations to and from corporate in-house lawyers who also serve as business executives.”). In the era of intertwining business and legal communications by email, “[i]t is far easier to state the principle than to apply it.” *Urban Box Office Network, Inc. v. Interface Managers, L.P.*, No. 01 Civ. 8854 (LTS)(THK), 2006 WL 1004472, at *5 (S.D.N.Y. Apr. 18, 2006). In other words, the specific context for each communication is highly relevant to determine whether its predominant purpose is legal advice or some other advice.

87. *ANALYZE THIS* (Warner Bros. Entm't 1999) (discussing pronunciation of the term).

88. See, e.g., *Breaking Bad: Better Call Saul* (AMC television broadcast Apr. 26, 2009) (Saul: “What did Tom Hagen do for Vito Corleone?” Walt: “I'm not Vito Corleone.” Saul: “No shit! Right now, you're Fredo. But with some sound advice and the proper introductions, who knows? . . . And so if you want to make more money and keep the money that you make, ‘Better Call Saul!’”). When invoking *The Godfather* to answer Walt's question, Saul—inadvertently perhaps—reinforces another stereotype. See *YOU'VE GOT MAIL* (Warner Bros. Entm't 1998) (Kathleen Kelly: “What is it with men and *The Godfather*?” Joe Fox: “The Godfather is the I-Ching. The Godfather is the sum of all wisdom. The Godfather is the answer to any question. What should I pack for my summer vacation? ‘Leave the gun, take the cannoli.’”).

89. Discussed *infra* Part III.B.

90. *Breaking Bad: Better Call Saul* (AMC television broadcast Apr. 26, 2009) (Saul: “Walter, I'm your lawyer. Anything you say to me is totally privileged. I'm not in the shakedown racket. Even drug dealers need lawyers. Especially drug dealers.”).

91. *Breaking Bad: Full Measure* (AMC television broadcast June 13, 2010) (Saul: “Look, Mike, there are rules to this lawyer thing.” Mike: “Is that right?” Saul: “Yea. ‘Attorney-client privilege?’ I mean, that's a big one! And that's something I provide for you! So if I give up Pinkman, well, then you're gonna be asking ‘old Saul gives ‘em up pretty easy. What's to keep him from giving me up?’ You see? So, then, where's the trust?”).

92. *In re Walsh*, 623 F.2d 489, 494 (7th Cir. 1980) (“[A]ttorneys may be questioned as to their clients' whereabouts and whether they have had contact with them.”); *In re Grand Jury Subpoenas*, 906 F.2d 1485, 1488 (10th Cir. 1990) (“It is well

revolve around profiting⁹³ from Walt's methamphetamine production by introducing Walt to Gus through "a guy who knows a guy who knows another guy;"⁹⁴ taking a twenty percent cut of the profits for making the introduction;⁹⁵ and by supplementing his financial tips with extensive money laundering advice based on "years of experience."⁹⁶ That Saul occasionally sprinkles his business advice with legal advice is irrelevant.⁹⁷ His communications are likely not privileged because Saul's predominant

recognized in every circuit, including our own, that the identity of an attorney's client and the source of payment for legal fees are not normally protected by the attorney-client privilege."); RICE, *supra* note 12, § 6:18 (fee arrangements are not privileged). Nor would disclosure violate Saul's duty of confidentiality under NMRA Section 16-106. See *Barkley v. Olympia Mortg. Co.*, No. 04-CV-875 (RJD)(KAM), 2007 WL 656250, at *14 (E.D.N.Y. Feb. 27, 2007) (finding that disclosure of "name, race and last known address and telephone number" of clients would not violate attorney-client privilege or attorney's duty of confidentiality under New York law, which is substantially similar to Rule 16-106 NMRA). Such information, however, may be more difficult to obtain in the context of civil litigation than in criminal grand jury proceedings. Cf. *In re Friedman*, 350 F.3d 65, 72 (2d Cir. 2003) (holding that before permitting civil discovery from a lawyer, the court should consider "the need to depose the lawyer, the lawyer's role in connection with the matter on which discovery is sought and in relation to the pending litigation, the risk of encountering privilege and work-product issues, and the extent of discovery already conducted").

93. Saul betrays his motives when Walt stops cooking methamphetamine. *Breaking Bad: Caballo Sin Nombre* (AMC television broadcast Mar. 28, 2010) (Saul: "Speaking of cash, you know what's giving me heartburn lately? Your former partner. This guy, he works like a bastard, right? Builds a business single-handed. Finally the big money shows up and what does he do? He walks out. Talent like that, and he flushes it down the crapper. It's like Michelangelo won't paint.").

94. *Breaking Bad: Mandala* (AMC television broadcast May 17, 2009).

95. *Breaking Bad: Phoenix* (AMC television broadcast May 24, 2009).

96. *Breaking Bad: 4 Days Out* (AMC television broadcast May 3, 2009) (Saul: "Alright, \$16,000 laundered at 75 cents on the dollar minus my fee, which is 17%. Comes to \$9,960. Congratulations, you just left your family a second-hand Subaru."); *Breaking Bad: Phoenix* (AMC television broadcast May 24, 2009) (distributing Walt's money through a website); *Breaking Bad: Kafkaesque* (AMC television broadcast May 16, 2010) (Saul: "You are now the owner of this fine establishment."); *Breaking Bad: Abiquiu* (AMC television broadcast May 30, 2010) (Saul: "Based on her years of experience in money laundering, I suppose."); *id.* (Saul [discussing sources of seed money for investment]: "Laser Tag! Seven thousand square feet of rollicking fun in the heart of northern Bernalillo County!"); *Breaking Bad: Full Measure* (AMC television broadcast June 13, 2010) (Saul: "Believe me, money-laundering ain't what it used to be. God, do I miss the Eighties."); *Breaking Bad: Open House* (AMC television broadcast July 31, 2011) (Saul: "Two words—nail salon. It's perfect for money laundering.").

97. *Bhandari v. Artesia Gen. Hosp.*, 2014-NMCA-018, ¶ 18, 317 P.3d 856 (emphasis added) ("[A] court faced with a situation where the primary purpose of a communication is not clearly legal, or business advice should conclude the communication is

purpose is to offer “business” or “investment advice.”⁹⁸ Likewise, Saul’s many communications surrounding his role as a quasi-banker or accountant⁹⁹ also fall outside the protection of the privilege.¹⁰⁰ Thus, even ignoring Saul’s criminal culpability, the bulk of his advice remains outside the reach of the attorney-client privilege because the advice lacks mooring to Saul’s training and experience as a lawyer (as opposed to Saul’s training and experience as a criminal). Even if Saul represented an independently wealthy cast of characters with no ties to the drug business, the cloak of the attorney-client privilege would likely not reach his advice because its predominant purpose would be for business instead of legal reasons.

In sum, when Walt and Jesse retain Saul, the start of the attorney-client relationship is based on an inaccurate representation of the attorney-client privilege. Walt and Jesse’s relationship with Saul perpetuates two false, but lingering, conceptions of the privilege in popular culture: the myth of the dollar bill magically commencing a privileged relationship and the myth of involving a lawyer in communications to protect the conversation from disclosure. By prominently featuring these myths, *Break-*

for a business purpose, unless evidence *clearly* shows that the legal purpose outweighs the business purpose.”).

98. *United States v. Chen*, 99 F.3d 1495, 1501 (9th Cir. 1996) (internal quotation marks and citations omitted) (holding that lawyer-client communications were not privileged where the “clients did not approach him for legal advice and assistance, but rather with the aim of finding investment opportunities”); *United States v. Huberts*, 637 F.2d 630, 639–40 (9th Cir. 1980) (holding that a lawyer retained to purchase printing press for counterfeiter acted as business agent, not attorney); *Colton v. United States*, 306 F.2d 633, 638 (2d Cir. 1962) (holding that “a little investment advice” to clients is not privileged). *See also Breaking Bad: Green Light* (AMC television broadcast Apr. 11, 2010) (Saul: “But, speaking as your business associate, I’m strongly advising that you get your shit together.”).

99. *See, e.g., Breaking Bad: End Times* (AMC television broadcast Oct. 2, 2011) (Saul keeps Jesse’s money in a safe); *Breaking Bad: Blood Money* (AMC television broadcast Aug. 11, 2013) (agreeing to transfer money from Jesse to Mike’s granddaughter and the parents of a child shot by Jesse and Walt’s associate); *Breaking Bad: Buried* (AMC television broadcast Aug. 18, 2013) (Saul’s employees help Walt “deposit” seven barrels of cash).

100. *Olender v. United States*, 210 F.2d 795, 806 (9th Cir. 1954) (emphasis added and internal citations omitted) (“[C]ommunications to an attorney in the course of seeking business rather than legal advice are not privileged, nor are communications to an attorney who acts simply as a scrivener of deeds, or *who simply deposits money in a bank for his client.*”); *In re Stein Law Firm*, No. MC 05-0033 JB, 2006 WL 1305041, at *10 (D.N.M. Feb. 9, 2006) (internal quotation marks and citations omitted) (“The attorney-client relationship is not genuine where its only purpose is to gain confidentiality for the client or to use the lawyer as a mere conduit for the payment of money. . . . To the extent the attorney’s services to the [clients] took the form of transferring funds and facilitating transactions, they were not privileged.”).

ing Bad inspired the writing of this article, which will hopefully usher their timely demise.¹⁰¹

III. THE RISK OF WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE ON *BREAKING BAD*

Aside from inaccurately enlarging the scope of the attorney-client privilege, *Breaking Bad* also minimizes the risk of waiver. First, the show does not suggest that privileged communications are waived when disclosed to third parties, despite prominent risks of waiver in the context of joint representation, disclosure to family members, and disclosure to agents.¹⁰² Each of these fertile topics is discussed in detail below.¹⁰³ Second, the show—perhaps deliberately—avoids any mention of the crime-fraud exception. As noted above, if applied to Saul, the exception would swallow up virtually all of his communications, leaving nothing to explore in this article.¹⁰⁴ However, some aspects of Saul’s representation of Walt, Skyler, and Jesse raise interesting questions about the reach of the exception. In particular, this article explores whether the crime-fraud exception vitiates the privilege if a lawyer engages in a legitimate business transaction that is financed with illicit funds.¹⁰⁵

101. If only we could call a vacuum repairman to cause these myths to disappear. Cf. *Breaking Bad: Granite State* (AMC television broadcast Sept. 22, 2013).

102. One waiver issue that frequently arises in litigation is the scope of waiver following intentional disclosure of privileged communication, also known as the “sword and shield” doctrine, the “implied waiver” doctrine, and the “at-issue” waiver doctrine, among other names. See *In re von Bulow*, 828 F.2d 94, 101 (2d Cir. 1987) (“[I]t has been established law for a hundred years that when the client waives the privilege by testifying about what transpired between her and her attorney, she cannot thereafter insist that the mouth of the attorney be shut.”); *Public Service Company of New Mexico v. Lyons*, 2000-NMCA-077, ¶ 1, 129 N.M. 487 (establishing that New Mexico requires “offensive or direct use of privileged materials before the party will be deemed to have waived its attorney-client privileges.”). This topic is of particular interest to litigators who occasionally grapple with the strategic decision of producing a helpful, but otherwise privileged, document. This issue arises in *Breaking Bad* only tangentially; thus, we leave that discussion for another day. Cf. *Breaking Bad: Crawl Space* (AMC television broadcast Sept. 25, 2011) (depicting a sequence where Walt instructs Saul to divulge information to the DEA regarding Hank’s life being in danger, but Saul’s anonymous tip to the DEA does not otherwise disclose any confidential communications between Saul and Walt).

103. *Infra* Part III.A.1–3.

104. *Supra* Introduction.

105. *Infra* Part III.B.2.

A. Waiver by Disclosure

1. Disclosure to Multiple Clients—Saul’s Dual Representation of Walt and Jesse

The simmering tension between Walt and Jesse throughout *Breaking Bad* creates compelling television—and substantial risk of waiver of the attorney-client privilege as to joint communications involving Walt, Jesse, and Saul. As a general rule, waiver occurs when privileged communications involve third parties outside the attorney-client relationship.¹⁰⁶ However, the joint client and common interest doctrines offer an exception to the general rule of waiver and permit disclosure of privileged communications to parties who share congruent (if not identical) legal interests. Thus, communications with Saul in the presence of Walt and Jesse are not privileged unless the joint client or common interest doctrine applies. As discussed below, Walt and Jesse’s diverging legal, business, and personal interests, present a substantial barrier to the parties’ successful invocation of either doctrine.

a. Identifying the Correct Doctrine at Issue: Joint Client or Common Interest Doctrine

As a threshold matter, there is some confusion among courts (and practitioners) as to the precise name of the doctrine at issue. Courts often use the terms “joint client,” “co-client,” “joint defense,” “common interest,” or “community of interest” interchangeably.¹⁰⁷ But the terms are not synonymous. When the same lawyer represents two clients in the same matter (as in the case of Saul simultaneously representing Walt and Jesse), the doctrine at issue is the “joint client” or “co-client” doctrine, which requires a strict identity of interests.¹⁰⁸ When two clients are represented by separate lawyers in a matter where the clients share a common interest, the doctrine at issue is the “common interest” or “community-of-interest” doctrine where “courts can afford to relax the degree to which

106. See *supra* notes 40-41 and accompanying text.

107. *In re Megan-Racine Assoc., Inc.*, 189 BR 562, 570 n.4 (Bankr. N.D.N.Y. 1995) (“Courts and commentators use the terms ‘joint-defense privilege,’ ‘common interest privilege’ and ‘pooled information situation’ interchangeably. Perhaps the best term, as it is the least misleading, is ‘common interest exception to waiver.’”).

108. *In re Teleglobe Commc’ns Corp.*, 493 F.3d 345, 366 (3d Cir. 2007); cf. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 75 (2000) (noting that privilege is not waived if “two or more persons are jointly represented by the same lawyer” as to “matters of common interest”); *id.*, § 75, cmt. c (“Co-client representations must also be distinguished from situations in which a lawyer represents a single client, but another person with allied interests cooperates with the client and the client’s lawyer.”).

clients' interests must converge without worrying that their attorneys' ability to represent them zealously and single-mindedly will suffer."¹⁰⁹ The precise level of congruence of interest required by the common interest doctrine varies by jurisdiction.¹¹⁰ But if successfully invoked, the common interest doctrine applies "to the full range of communications otherwise protected by the attorney-client privilege" regardless of the anticipation of litigation.¹¹¹

Aside from the precise level of congruence of interest, the joint client and common interest doctrines do not vary in substance. Both doctrines are exceptions to the general rule that disclosure to third parties results in a waiver of the privilege.¹¹² Under certain circumstances where the privilege is ordinarily waived by the inclusion of third parties, the doctrines operate as "an extension of the attorney client privilege" to cloak such communications from disclosure.¹¹³ The party asserting the

109. *In re Teleglobe*, 493 F.3d at 366; RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 75 (2000); *United States v. Gonzalez*, 669 F.3d 974, 980 (9th Cir. 2012) (holding that clients "need not have identical interests and may even have some adverse motives").

110. *Compare McNally Tunneling Corp. v. City of Evanston*, No. 00 C 6979, 2001 WL 1246630, at *3 (N.D. Ill. Oct. 18, 2001) (internal quotation marks and citations omitted) (holding that common interest applies because parties to a settlement agreement "do not have an incentive to blame each other for the alleged breach of contract"), *with Santa Fe Pac. Gold Corp v. United Nuclear Corp.*, 2007-NMCA-133, ¶ 16, 143 N.M. 215 ("The key consideration is that the nature of the interest be identical, not similar, and be legal, not solely commercial.").

111. *United States v. BDO Seidman, LLP*, 492 F.3d 806, 816 (7th Cir. 2007). Some courts continue to invoke the obsolete "joint defense" doctrine, which applies to multiple parties with separate representation, but requires "litigation be the reason for sharing of communications." RICE, *supra* note 12 § 4:36. However, "the community-of-interest privilege has completely replaced the old joint-defense privilege for information sharing among clients with different attorneys." *In re Teleglobe*, 493 F.3d at 364 n.20 (3d Cir. 2007). Therefore, the existence of pending litigation is not required to invoke the common interest doctrine among multiple clients represented by separate counsel. *See also* Rule 11-503(B)(3) NMRA (noting that privilege extends to another client's lawyer "in a matter of common interest").

112. *See* RICE, *supra* note 12, § 4:35 ("Both [the community of interest doctrine and the joint defense doctrine] . . . are exceptions to the general principle that communications in the presence of, or shared with, third-parties destroys the confidentiality of the communications and the privilege protection that is dependent on confidentiality."); Rule 11-503(B)(3) NMRA (extending privilege to clients "in a matter of common interest").

113. *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989) (internal quotation marks and citations omitted); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 75, cmt. a (noting that the doctrine "qualifies the requirement of § 71 that the communication be in confidence and . . . qualifies the rule of § 79 concerning waiver").

doctrine bears the burden of establishing “a common legal, as opposed to commercial, interest” and “that the communications are made in the course of formulating a common legal strategy.”¹¹⁴ Consequently, the proponent of either doctrine must establish “both a theoretical and a practical component. In theory, the parties among whom privileged matter is shared must have a common legal, as opposed to commercial, interest. In practice, they must have demonstrated cooperation in formulating a common legal strategy.”¹¹⁵ However, the doctrine ceases to apply when the parties’ interests diverge.¹¹⁶

b. The Joint Client Doctrine Does Not Protect Walt and Jesse’s Joint Communications with Saul

Because Saul simultaneously represents Walt and Jesse, the proper doctrine at issue is the joint client doctrine, which requires strict identity of issues.¹¹⁷ However, Walt and Jesse never share *strictly* identical legal interests. Rather, their legal interests nearly always diverge.

First, “hir[ing] the same attorney” is “a situation that is almost always ripe with *real* conflicts of interest.”¹¹⁸ Because of the acrimony between Walt and Jesse, Saul’s ability to represent both “with the candor, vigor, and loyalty that our ethics require” is severely diminished.¹¹⁹ Second, as illicit drug manufacturers, Walt and Jesse potentially have a conflicting legal interest in blaming each other if arrested.¹²⁰ This potential

114. *Libbey Glass, Inc. v. Oneida, Ltd.*, 197 F.R.D. 342, 348 (N.D. Ohio 1999); *see also* *United States v. Weissman*, 195 F.3d 96, 99–100 (2d Cir. 1999); *Santa Fe Pac. Gold*, 2007-NMCA-133, ¶ 19 (holding that under New Mexico rules, for the common interest doctrine to apply, proponent must demonstrate “(1) that each document contains a privileged communication and (2) that each document disclosed to [third party] was designed to further the common legal interest.”).

115. *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 447 (S.D.N.Y. 1995).

116. Identifying the precise point where the common interest doctrine ceases to apply because of diverging interests is “a factual question” for the presiding judge. RICE, *supra* note 12, § 4:35. At least one court has held that the doctrine “remains intact until it is expressly terminated or until circumstances arise that readily imply to all the joint clients that the relationship is over” and does not apply to “a duplicitous party who feigns common interest while scheming otherwise with a shared, trusted advisor.” *Mass. Eye & Ear Infirmary v. QLT Phototherapeutics, Inc.*, 412 F.3d 215, 226 (1st Cir. 2005) (internal marks and citations omitted).

117. *In re Teleglobe Commc’ns Corp.*, 493 F.3d 345, 366 (3d Cir. 2007).

118. *United States v. Almeida*, 341 F.3d 1318, 1324 (11th Cir. 2003) (emphasis in original).

119. *In re Teleglobe*, 493 F.3d at 366.

120. *Cf. McFarland v. Yukins*, 356 F.3d 688, 709-10 (6th Cir. 2004) (holding that it is a conflict of interest for counsel to represent co-defendants charged with possessing

conflict materializes into an actual conflict later in the series.¹²¹ Therefore, as soon as Saul learns of Walt and Jesse's activities, he should be aware of a potential conflict of legal interest between the two joint clients.

Finally, determining “[w]hen interests sufficiently diverge to justify a conclusion that joint representation has ended is often a difficult factual question for courts.”¹²² For Walt and Jesse, however, they use Saul to scheme against one another almost immediately after retaining him, which generally vitiates any protection offered by the joint client doctrine.¹²³

c. The Common Interest Doctrine Cannot Protect Walt and Jesse's Joint Communications with Saul

Although the joint client doctrine should govern Walt and Jesse's joint communications with Saul, this article also explores the application of the more forgiving common interest doctrine to those communications in order to analyze additional, nuanced issues raised by the dual representation of Walt and Jesse. The discussion of the common interest doctrine is important to highlight Saul's disregard of the risk of waiver—even if such a discussion requires us to take some liberties with the application

same drugs in their jointly-occupied apartment, where counsel failed to raise the possibility of co-defendant as possessor of drugs).

121. See *Breaking Bad: One Minute* (AMC television broadcast May 2, 2010) (depicting Jesse's threat to divulge Walt's identity to the DEA if he is ever arrested).

122. RICE, *supra* note 12, § 4:33.

123. *Mass. Eye & Ear Infirmary v. QLT Phototherapeutics, Inc.*, 412 F.3d 215, 226 (1st Cir. 2005) (“The rules of discovery therefore do not insulate from discovery the communications of a duplicitous party who feigns common interest while scheming otherwise with a shared, trusted advisor.”). Nor could Walt and Jesse argue that the joint client doctrine applies because of the so-called “Eureka principle”—that “counsel's failure to avoid a conflict of interest should not deprive the client of the privilege.” *Eureka Inv. Corp., N.V. v. Chicago Title Ins. Co.*, 743 F.2d 932, 938 (D.C. Cir. 1984); see also *In re Teleglobe*, 493 F.3d at 368 (applying “The Eureka Principle”). In *Eureka*, the D.C. Circuit declined to apply the joint client doctrine when the interests of the co-clients (an insurer and its insured) obviously diverged. *Id.* at 937 (holding the joint client doctrine “does not apply to matters known at the time of communication not to be in the common interest of the attorney's two clients.”). Rather, the court analyzed the communications at issue as those of separate clients consulting the same attorney and concluded that the attorney's knowledge of the conflict—standing alone—did not waive the attorney-client privilege as to the separate communications. *Id.* at 937-38. Importantly, the court considered it “crucial” that the attorney and the client considered their communications to be separate from the joint representation. *Id.* at 937. Thus, Walt and Jesse's separate communications with Saul may remain privileged despite their obvious conflict of interest, but not their joint communications.

of the common interest doctrine to Saul's dual representation of Walt and Jesse.¹²⁴

Walt and Jesse's relationship with Saul begins with Saul's boastful proclamation, "you're now both officially represented by Saul Goodman and Associates. Your secrets are safe with me under threat of disbarment."¹²⁵ However, Walt and Jesse's relationship with Saul satisfies neither the "theoretical" nor "practical" components of the common interest doctrine.¹²⁶

While Walt and Jesse initially agree to manufacture and sell methamphetamine with Saul as their advisor, they never settle into the role of cooperating clients—which fails to satisfy the "theoretical component" of the common interest doctrine. From the outset, Walt's controlling and perfectionist personality consistently collides with Jesse's relaxed and careless ethos. The mismatch in personality reflects on the characters' broader disconnect and raises the basic question: when the characters first meet Saul, what is their common *legal* interest? Walt and Jesse certainly share the common interest of avoiding detection and prosecution. But the common interest doctrine is inapplicable "simply because [the clients] routinely deal with one another and neither desires to be sued."¹²⁷ For example, in a subpoena enforcement action by the F.T.C., a company's lawyer provided legal advice to the company's advertising agency regarding draft advertisements because both the company and the agency were "concerned about the consequences of failing to comply with the applicable law and regulations."¹²⁸ Such general concerns about complying with the law are "simply not enough to transform their mutual commercial interest in the . . . advertising campaign into a coordinated legal strategy."¹²⁹ Likewise, Walt and Jesse share a common interest in avoiding adverse legal consequences from their joint methamphetamine manufacturing enterprise, which is insufficient to warrant protection under the common interest doctrine. Thus, Walt and Jesse cannot satisfy the "theoretical" component of the common interest doctrine because from the

124. See *supra*, Part III.A.1.a, discussing the various doctrines that may apply to protect shared communications by parties on the same side of a dispute. As noted above, while the joint client doctrine is the appropriate doctrine to analyze communications between co-clients like Walt and Jesse, for discussion purposes only, we also consider the more liberally construed common interest doctrine.

125. *Breaking Bad: Better Call Saul* (AMC television broadcast Apr. 26, 2009).

126. See *supra* text accompanying note 115.

127. *LG Electronics U.S.A., Inc. v. Whirlpool Corp.*, 661 F. Supp. 2d 958, 967 (N.D. Ill. 2009).

128. *In re F.T.C., No. M18-304 (RJW)*, 2001 WL 396522, at *5 (S.D.N.Y. Apr. 19, 2001).

129. *Id.*

start of their relationship they share no common legal interest beyond avoiding detection and criminal prosecution for their illegal activities.¹³⁰ Courts “do not believe the common interest doctrine stretches that far.”¹³¹

Walt and Jesse fare even worse in satisfying the “practical” component of the common interest doctrine because their communications with Saul betray the absence of furthering a joint legal effort. Indeed, Walt and Jesse’s communications with Saul either further their own individual interests or their joint economic interests, neither of which furthers a common legal interest.¹³²

For example, of the few joint (as opposed to separate) meetings between Walt, Jesse, and Saul, one particularly tense meeting in Saul’s office simultaneously highlights Walt and Jesse’s diverging interests, Saul’s conflicting loyalties, and the absence of any common legal interest. The meeting begins with Jesse (after presumably conspiring with Saul) offering to buyout Walt’s stake in their joint methamphetamine production business.¹³³ Saul, purportedly representing Jesse’s interests in buying out Walt, presses Walt to sell his stake.¹³⁴ But Walt reveals that he has no intention of selling his stake in the venture. Rather, Walt reveals that he is working with Gus.¹³⁵ And based on the new arrangement with Gus, Walt is “in,” but Jesse is “out” of the joint venture.¹³⁶ Saul, sensing the shifting power dynamic, executes the epitome of conflicts by immediately abandoning Jesse’s interests and switching loyalties to Walt—going so far as to dramatically reduce his fees for laundering Walt’s forthcoming wealth.¹³⁷ Saul’s brazen switch in loyalties catches Jesse off-guard.¹³⁸

130. See *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922 (8th Cir. 1997) (holding the presence of White House lawyers and Mrs. Clinton’s personal lawyers in joint meetings was not protected because their common legal interest “amount[s] to no more than an assertion that ‘we all want to obey the law.’”).

131. *Id.*

132. *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 512–13 (D. Conn. 1976); *Net2Phone, Inc. v. Ebay, Inc.*, No. 06-2469, (KSH), 2008 WL 8183817, at *8 (D.N.J. June 26, 2008) (“[A] legal interest cannot arise simply because a company acts in a way that advances the economic interests of its majority shareholder. A logical extension of plaintiff’s argument would expand the application of the common interest doctrine to cover all business transactions where a company acted in the interest of its majority shareholder. While shareholders and the corporation may share an interest in commercial success, this shared economic interest is not a legal interest.”).

133. *Breaking Bad: Mas* (AMC television broadcast Apr. 18, 2010).

134. *Id.*

135. *Id.*

136. *Id.* (Walt: “Let’s see . . . how shall I put this? I’m in. You’re out.”).

137. *Id.* (Saul: “Whoa-whoa Walt. Hold on there! Hey, what was the offer, if I may ask?” Walt: “It’s, uh, three million for three months of my time.” Saul: “What—You-

Aside from laying bare Saul's actual conflict of interest in simultaneously representing Walt and Jesse, the meeting also reveals the absence of any common legal interest between Walt and Jesse. Rather, the meeting reveals their relationship as partners in a joint economic venture struggling to buy each other out. Courts consistently find this sort of relationship insufficiently congruent to apply the common interest doctrine.¹³⁹ In *SCM Corporation v. Xerox Corporation*, for example, Xerox invoked the common interest doctrine with respect to a memorandum prepared by its lawyers analyzing antitrust issues raised by a joint venture with the Rank Organization (a 50% stakeholder in the joint venture along with Xerox).¹⁴⁰ The court concluded that Rank's interest in the memorandum was not "around the possibility of shared exposure to antitrust liability."¹⁴¹ Rather, Rank "was negotiating the price for relinquishing voting and managerial control in Rank-Xerox to its formerly equal partner" and thus "the parties were not commonly interested, but adverse, negotiating

you're gonna need that money laundered, right? I mean of course. What was our deal before? Seventeen percent? That's a shade high. Let's settle on an even fifteen. That's a nice round number." Walt negotiates Saul down to five percent.).

138. *Id.* (Jesse: "What in the hell just happened? You're my lawyer, not HIS!" Saul: "That's the way of the world, kid. You go with the winner."). Saul's shifting (and distinctly not dual) loyalty becomes a recurring theme throughout the series, including references to the negotiated rate for laundering money. *See, e.g., Breaking Bad: Kafkaesque* (AMC television broadcast May 16, 2010) (Jesse: "Right. So you can get your five percent." Saul: "No, that's seventeen percent." Jesse: "I heard you say five. You said it right in front of me." Saul: "Yeah, that was for your partner. Privileges of seniority and all—but for you it's the usual seventeen percent, and that's a bargain.").

139. At a minimum, Saul's shifting loyalty during the meeting "readily impl[ies] to" Walt and Jesse that their joint legal relationship "is over." *Mass. Eye & Ear Infirmary v. QLT Phototherapeutics, Inc.*, 412 F.3d 215, 226 (1st Cir. 2005) (internal marks and citations omitted) (holding that a common interest relationship "remains intact until it is expressly terminated or until circumstances arise that readily imply to all [the parties] that the relationship is over."); *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 363 (3d Cir. 2007) ("The keys to deciding the scope of a joint representation are the parties' intent and expectations, and so a district court should consider carefully (in addition to the content of the communications themselves) any testimony from the parties and their attorneys on those areas."); *Ducker v. Amin*, No. 1:12-VC-01596-SEB-DMI, 2013 WL 6887970, at *4 (S.D. Ind. Dec. 31, 2013) ("From that point forward—though the court does not know when that point occurred—one of them no longer faced potential liability or other adverse consequences from BWI, and their common interest dissipated. No longer did they have a reason to engage in new communications for the purposes of protecting common legal interests and obtaining legal advice in pursuit of their common interest."). Therefore, the common interest doctrine cannot apply to their communications after that meeting.

140. 70 F.R.D. 508, 512 (D. Conn. 1976).

141. *Id.*

at arm's length a business transaction between themselves."¹⁴² The court held that "general consideration" of "the overall profitability of the joint enterprise" where "both parties' interests converged does not lessen the significance of their divergent interests. Their interests regarding antitrust considerations were not sufficiently common to justify extending the protection of the attorney-client privilege to their discussions."¹⁴³ Similar to Rank's negotiations with Xerox, Walt and Jesse's communications with Saul simply reflect two parties to a joint venture constantly negotiating their role within that venture. Thus, the communications fail to further a shared legal interest.

Walt and Jesse's individual communications with Saul further illuminate the absence of "demonstrated cooperation in formulating a common legal strategy."¹⁴⁴ The communications evince the absence of furthering a shared legal interest because Walt and Jesse exclude each other from key communications with Saul¹⁴⁵ and even scheme against one another.¹⁴⁶ The

142. *Id.*

143. *Id.*; see also *In re Sulfuric Acid Antitrust Litig.*, 235 F.R.D. 407, 429 (N.D. Ill. 2006) (emphasis in original) (holding that "application" of the common interest doctrine "becomes questionable, however, when, as here, the two parties are negotiating a joint venture"); *Corning Inc. v. SRU Biosystems, LLC*, 223 F.R.D. 189, 190 (D. Del. 2004) ("[T]he Court views the negotiations between these two corporations to reveal that SRU's disclosures to BD were made not in an effort to formulate a joint defense but rather to persuade BD to invest in SRU."); *TIFD III-E, Inc. v. United States*, 223 F.R.D. 47, 50 (D. Conn. 2004) ("The rule "does not encompass a joint business strategy that merely happens to include as one of its elements a concern about litigation. . . . Moreover, even if the parties shared legal concerns, the communications at issue are not about those concerns. If anything, the letters in question appear to be arm's length, possibly even adversarial, communications."); cf. *Nelson Bros. Prof'l Real Estate, LLC v. Freeborn & Peters, LLP*, 773 F.3d 853, 857-58 (7th Cir. 2014) (affirming jury verdict that a law firm representing both parties to a joint venture, while showing favoritism to one party, owed a duty to disclose conflict of interest).

144. *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 447 (S.D.N.Y. 1995).

145. See *Breaking Bad: Mas* (AMC television broadcast Apr. 18, 2010) (implying that Jesse and Saul exclude Walt); *Breaking Bad: Face Off* (AMC television broadcast Oct. 9, 2011) (depicting Jesse and Saul conferring about Hector Salamanca); *Breaking Bad: Problem Dog* (AMC television broadcast Aug. 28, 2011) (Walt: "And you tell Saul before you tell me?" Jesse: "Look, he's my lawyer, same as yours.").

146. See, e.g., *Breaking Bad: Mandala* (AMC television broadcast May 17, 2009) (depicting Walt and Saul discussing working with Gus without involving Jesse); *Breaking Bad: Half Measures* (AMC television broadcast June 6, 2010) (Saul: "You want your criminal associate [Jesse] taken into police custody?" . . . Walt: "So it, it's possible?") Saul: "Well it falls under my Premium Services Package, but you can afford that."); *Breaking Bad: Bullet Points* (AMC television broadcast Aug. 7, 2011) (following discussion of Gus's threats Saul notes, "Well, I mean, from what you told me, it sounds like, uh, Pinkman is first up in the imminent demise department"); *Breaking*

conflict between Walt and Jesse only increases throughout the series, concluding with Walt revealing Jesse's hiding location to a white supremacist gang, knowing the gang is likely to kill Jesse.¹⁴⁷ The common interest evaporates when one party is motivated to blame the other.¹⁴⁸ Such motivation is certainly present between Walt and Jesse, who at one point want to kill each other.

In sum, applying the "theoretical" and "practical" requirements of the common interest doctrine (and assuming the attorney-client privilege otherwise applies), courts would decline to extend the common interest doctrine to Walt and Jesse's communications with Saul for at least two reasons. First, they lack any common legal interest other than avoiding detection and prosecution, which is insufficient to invoke the doctrine.¹⁴⁹ Second, the communications further their own self-interests (or the economic interests of their joint venture) but not a common legal interest. Thus, Walt and Jesse's joint communications with Saul satisfy neither the theoretical nor practical requirements of the common interest doctrine.¹⁵⁰

Bad: Blood Money (AMC television broadcast Aug. 11, 2013) (Saul calls Walt immediately after meeting Jesse to ask for Walt's directions regarding Jesse's \$5 million); *Breaking Bad: Confessions* (AMC television broadcast Aug. 25, 2013) (Walt [instructing Saul]: "Just work your magic. Call me when [Jesse's] out" following Jesse's arrest for throwing money out of his car).

147. See *Breaking Bad: Ozymandias* (AMC television broadcast Sept. 15, 2013) (Jack: "If you can find him, we'll kill him." Walt: "Found him."); see also *Breaking Bad: Bug* (AMC television broadcast Sept. 11, 2011) (Jesse and Walt physically fight); *Breaking Bad: Confessions* (AMC television broadcast Aug. 25, 2013) (Jesse beats up Saul after discovering that Saul's security guard pick-pocketed the ricin cigarette at Walt's (and Saul's) request).

148. *McNally Tunneling Corp. v. City of Evanston*, No. 00 C 6979, 2001 WL 1246630, at *3 (N.D. Ill. Oct. 18, 2001) (holding a common interest applies where parties to a settlement agreement "do not have an incentive to blame each other for the alleged breach of contract").

149. See *supra* text accompanying notes 127–131.

150. Setting the legal analysis aside and simply viewing Walt and Jesse's relationship as fans of the show, it is difficult to argue that by the end of the series, Walt and Jesse do not share a "common interest"—even if they do not necessarily share a common *legal* interest. In particular, Walt and Jesse consistently work with each other against outside threats—from rival methamphetamine distributors to a common nemesis like Gus or the DEA. In every instance, Walt and Jesse's interests eventually align to defeat a third party adversary. See, e.g., *Breaking Bad: Mandala* (AMC television broadcast May 17, 2009) (Walt and Jesse meeting with Saul to discuss the threat of other drug dealers following the murder of Combo, one of Jesse's friends who deals methamphetamine on the streets); *Breaking Bad: Sunset* (AMC television broadcast Apr. 25, 2010) (Walt and Jesse work together to dispose of the RV before the DEA gains access); *Breaking Bad: Full Measures* (AMC television broadcast June 13, 2010) (Walt and Jesse work together to resolve the threat from Gus by first using Saul to give Mike a fake address in Virginia then by killing Gale); *Breaking Bad: Face Off*

2. Disclosure to Family Members

Skyler's eventual involvement with Walt's methamphetamine enterprise raises a question about waiver of the privilege through the presence of family members.¹⁵¹ Ordinarily, the presence of most family members waives the attorney-client privilege unless "the presence of the relative or friend was reasonably necessary for the protection of the client's interests in the particular circumstances," *i.e.*, the common interest doctrine.¹⁵² Although analyzing the numerous conflicts of interest between Skyler and Walt would be interesting,¹⁵³ the issue of protecting their communications is more appropriately analyzed under New Mexico's robust application of spousal privilege.¹⁵⁴ Either the speaker or the listener may claim the

(AMC television broadcast Oct. 9, 2011) (Walt and Jesse work toward killing Gus); *Breaking Bad: Felina* (AMC television broadcast Sept. 29, 2013) (Walt frees Jesse from Jack's gang). Thus, a discussion of whether their communications with a lawyer satisfy a particular privilege doctrine appears artificial in the context of two powerful protagonists who save each other's lives.

151. As one treatise summarized, "As to relatives and friends of the client, the results of the cases are not consistent." 1 MCCORMICK ON EVID. § 91 (7th ed. 2013).

152. *Id.*

153. In addition to the on-going conflict throughout the series between Walt and Skyler regarding their children's exposure to Walt's activities, *see, e.g., Breaking Bad: Ozymandias* (AMC television broadcast Sept. 15, 2013) (Skyler attempting to stab Walt), there is also the conflict of interest regarding the money Skyler gives to Ted Beneke through Saul. *See, e.g., Breaking Bad: Live Free or Die* (AMC television broadcast July 15, 2012) (Walt: "So you took it upon yourself to give away \$622,000 of my money to a man who had been sleeping with my wife." Saul: "She's my client, same as you. Does this arrangement get a little tricky at times? Absolutely. But I try my best, you know, ethically, my duty." Walt: "Ethically? I'm sorry, I must be hearing things. Did you actually just use the word 'ethically' in a sentence? You're not Clarence Darrow, Saul. You're a two-bit bus-bench lawyer, and you work for me."). *Cf. United States v. Gonzalez*, 669 F.3d 974, 980-81 (9th Cir. 2012) (holding no common interest between husband and wife after husband's legal strategy turned to blaming wife for "insurance scam.").

154. Rule 11-505 NMRA (stating that spousal privilege applies to "confidential communication" between spouses while they were married). The privilege extends to communications made during the marriage, regardless of the marital status of the couple at the time of testimony. *State v. Teel*, 1985-NMCA-115, ¶ 12, 103 N.M. 684 ("[C]ertain communications of defendant voiced to his former wife during their marriage may be subject to exclusion under Evid. Rule 505."). The federal common law is largely in accord, though separated into two spousal privileges. The first is the spousal testimony privilege, which is limited to the testifying spouse. *Trammel v. United States*, 445 U.S. 40, 53 (1980) (limiting federal spousal testimony privilege to the witness-spouse, who "may be neither compelled to testify nor foreclosed from testifying"). The spousal testimony privilege does not survive the termination of the marriage. *Pereira v. United States*, 347 U.S. 1, 6 (1954). The second is the marital communications privilege, which "protects private communications made between

spousal privilege.¹⁵⁵ Communications “contemplated under the rule” include “utterances or expressive acts intended by one spouse to convey a meaning or message to the other.”¹⁵⁶ Thus, Skyler is correct when she proclaims, “Married couples can’t be compelled to testify against one another.”¹⁵⁷ And, to the extent Walt and Saul’s attorney-client privileged communications pass to Skyler (and vice versa), they retain their privilege.¹⁵⁸

3. Disclosure to Attorney’s Agents

The final disclosure issue raised by *Breaking Bad* concerns the use of an attorney’s agents during the provision of legal services. As discussed, the *Kovel* doctrine extends the privilege if an attorney’s agent is included in confidential communications where the agent’s participation is “highly useful” to lawyer-client communications.¹⁵⁹ Although “there is no private-investigator’s privilege,”¹⁶⁰ the *Kovel* doctrine extends to investigators retained by counsel.¹⁶¹ And that brings us to Mike, whom we

spouses during the marriage.” *Montoya v. City of Albuquerque*, No. CV-03-0261 JB/RHS, 2004 WL 3426435, at *5 (D.N.M. May 18, 2004). This second privilege is available to either spouse, even when they are no longer married. *Id.*

155. Rule 11-505 NMRA.

156. *Teel*, 1985-NMCA-115, ¶ 9.

157. *See Breaking Bad: Abiquiu* (AMC television broadcast May 30, 2010) (Skyler adds: “So there’s that.”). Rule 11-505 includes an exception for crimes against the person or property of one spouse or child by the other. Rule 11-505(D) NMRA. Arguably, that exception could apply because Walt kidnaps their daughter. *Breaking Bad: Ozymandias* (AMC television broadcast Sept. 15, 2013). But without any criminal proceedings against Walt, Skyler lacks any forum to testify.

158. *L-3 Comms. Corp. v. Jaxon Eng. & Maint., Inc.*, No. 10-cv-02868-MSK-KMT, 2014 WL 3732943, at *3 (D. Colo. July 29, 2014) (holding that attorney-client privileged email forwarded to spouse of client does not lose privilege because the “document forwarded in this manner goes from one protected form, to wit: attorney client privileged, to another: spousal privilege”); *see also Kirzhner v. Silverstein*, 870 F. Supp. 2d 1145, 1153 (D. Colo. 2012) (“[D]isclosure of documents to one’s spouse does not waive the attorney-client privilege.”).

159. *See supra* text accompanying notes 48–49 (discussing the *Kovel* doctrine).

160. *U.S. Dep’t of Ed. v. Nat’l Collegiate Ath. Assoc.*, 481 F.3d 936, 938 (7th Cir. 2007).

161. *Sanchez v. Matta*, 229 F.R.D. 649, 660 (D.N.M. 2004); *see also In re Grand Jury Proceeding*, 79 Fed. App’x 476, 477 (2d Cir. 2003) (“[T]he attorney-client privilege may extend to communications with a third party, such as an accountant or private investigator hired to assist in the rendition of legal services.”) (citing *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961)). The use of investigators often coincides with on-going or imminent litigation, which also implicates the work product doctrine. *See United States v. Nobles*, 422 U.S. 225, 238-39 (1975) (holding that attorneys often must rely on investigators and work product doctrine applies to materials prepared by

first encounter as Saul's private investigator.¹⁶² As Saul's investigator, Mike is privy to substantial attorney-client communications between Walt, Jesse, and/or Saul—raising the question of whether Mike's inclusion maintains the attorney-client privilege over those communications under the *Kovel* doctrine. In these circumstances, the answer is likely no.

Under the *Kovel* doctrine, the privilege extends only to an investigator who is a lawyer's agent.¹⁶³ As the series progresses, viewers eventually discover that Mike is actually on Gus's payroll (yet is billing Saul for investigative services).¹⁶⁴ Because Saul does not "prescribe[] what the agent shall or shall not do before the agent acts, or at the time when he acts," Saul does not have a principal-agent relationship with Mike.¹⁶⁵ Moreover,

such agents); Appeal of Hughes, 633 F.2d 282, 290–91 (3d Cir. 1980) (holding that an investigator's work in assisting attorney in anticipation of litigation, including instructions received from attorney, documents sought at request of attorney, and recollection of witness interviews, was core work product that need not be disclosed).

162. We first meet Mike when Saul dispatches him to sanitize Jesse's house following Jane's death. *Breaking Bad: ABQ* (AMC television broadcast May 31, 2009). However, we first *know* about Mike when Saul refers to a private investigator who "charged [Saul] for three hours" to track down Walt, though Saul "seriously doubt[s] it took him more than one." *Breaking Bad: Better Call Saul* (AMC television broadcast Apr. 26, 2009). Finally, in a scene that resonates all too well with one of these authors whose last name is extremely difficult to pronounce, we never learn the proper pronunciation of Mike's last name. *Breaking Bad: Madrigal* (AMC television broadcast July 22, 2012) (Hank: "Have a seat, Mr. Ehrmantraut. Am I, is that right?" Mike: "Close enough.").

163. *Cavallaro v. United States*, 284 F.3d 236, 248 (1st Cir. 2002) (internal marks and citations omitted) ("Typically, agents of an attorney are retained by or at the discretion of the attorney and under the attorney's supervision."); *In re Grand Jury Subpoena*, 599 F.2d 504, 510 (2d Cir. 1979) (holding that privilege does not apply to investigators who are not agents of counsel); *Gucci Am., Inc. v. Guess?, Inc.*, 271 F.R.D. 58, 73 (S.D.N.Y. 2010) ("[I]nformation evidencing direct supervision" of investigator by attorney is "a fact essential to the attorney-agent analysis."); see also RICE, *supra* note 12, § 3:5.

164. Our first hint that Mike's loyalties lie elsewhere appears when Mike calls Gus regarding "the cousins"—cartel assassins—visiting Walt with an axe. *Breaking Bad: Caballo Sin Nombre* (AMC television broadcast Mar. 28, 2010) (Mike calls Gus's associate); *Breaking Bad: I.F.T.* (AMC television broadcast Apr. 4, 2010) (Mike: "I'm assuming Saul Goodman doesn't need to know. Mum's the word."); *Breaking Bad: Green Light* (AMC television broadcast Apr. 11, 2010) (Gus: "Does the lawyer know?" Mike: "Should he?" Gus: "No."). By the end of the third season, Mike explains the entire situation to Walt with the simplicity and clarity we expect from him. *Breaking Bad: Half Measures* (AMC television broadcast June 6, 2010) (Mike: "The problem is the Boss [Gus] wouldn't like it." Walt: "Saul?" Mike: "My boss. Your boss.").

165. *In re Grand Jury Subpoena Dated March 20, 2013, No. 13-mc-189, 2014 WL 2998527*, at *9 (S.D.N.Y. July 2, 2014) (internal marks and citations omitted) ("Con-

merely establishing the formalities of lawyer-agent relationship is insufficient to invoke the privilege.¹⁶⁶ Thus, Mike's inclusion in confidential communications likely defeats the privilege.¹⁶⁷ Even if Mike were Saul's agent, his disclosure to third parties of confidential communications between Saul and Saul's clients may also result in waiver of the privilege.¹⁶⁸

The inapplicability of the *Kovel* doctrine does not necessarily resolve the issue. Courts have yet to address the precise situation depicted on *Breaking Bad* where an apparent agent of a lawyer surreptitiously works for another party and even discloses confidential communications to his actual principal without attorney or client consent.¹⁶⁹ Conceivably, courts may apply principles of apparent agency and not find waiver of the privilege as to communications involving Mike based on familiar principles of fairness, at least until the client (Walt) learns the identity of Mike's actual principal.¹⁷⁰ Or, courts may insist that the proponents of the

trol by the principal of the agent is of paramount importance in determining if an agency relationship exists.”). The relationship between Mike and Saul can be described, at best, as a “working relationship,” which is insufficient to cloak their conversations with the protection of the privilege. See *Liggett Group, Inc. v. Brown & Williamson Tobacco Corp.*, 116 F.R.D. 205, 211 (M.D.N.C. 1986).

166. *Sokol v. Wyeth, Inc.*, 07-CV-8442(SHS)(KNF), 2008 WL 3166662, at *8 (S.D.N.Y. Aug. 4, 2008) (finding no attorney-client privilege for communications between attorney, client, and consultant because the consultant acted as an agent of the client despite formalities of retention by attorney).

167. *United States v. Evans*, 113 F.3d 1467, 1462 (7th Cir. 1997) (“[A]s a general matter, the attorney-client privilege will not shield from disclosure statements made by a client to his or her attorney in the presence of a third party who is not an agent of either the client or attorney.”).

168. See *In re Grand Jury Subpoena*, 2014 WL 2998527, at *12 (analyzing the unauthorized disclosure of privileged material by a lawyer's investigator under the factors identified by FED. R. EVID. 502(b) for inadvertent disclosure); see also *supra* text accompanying notes 40–41; see also *Breaking Bad: Green Light* (AMC television broadcast Apr. 11, 2010) (Mike: “From the lawyer, I'm supposed to let you know the Pinkman kid is looking to sell. . . . What I hear, he and Walter are splitsville.” Gus: “Really?” Mike: “That's what Goodman says. Cats and dogs.”).

169. Cf. *Cooke v. Superior Court*, 143 Cal. Rptr. 915, 917 (Cal. Ct. App. 1978) (holding (in a dissolution of marriage proceeding) that attorney-client privilege remained intact where “a family servant . . . began to eavesdrop on conversations between [husband] and his attorneys” and even copied and transmitted documents to wife who forwarded documents to her lawyers).

170. Courts regularly apply principles of fairness and control when evaluating inadvertently disclosed communications (particularly communications disclosed by corporate employees without the authorization of the principal). See *In re Grand Jury Subpoena*, 2014 WL 2998527, at *1, 12; see also *Apionishev v. Columbia Univ. in City of New York*, No. 09 Civ. 6471(SAS), 2012 WL 208998, at *11 (S.D.N.Y. Jan. 23, 2012) (holding inadvertent disclosure of documents by an employee did not waive privilege because it “seems unfair to let Apionishev benefit by a mistake made by a lay person,

privilege must demonstrate that the “agent will protect the rights and interests of the principal”¹⁷¹ because merely establishing the formalities of lawyer-agent relationship does not satisfy the burden of the proponent of the attorney-client privilege.¹⁷²

B. Waiver through the Crime-Fraud Exception

The crime-fraud exception withholds protection for attorney-client communications made in furtherance of a crime or fraud.¹⁷³ Although the attorney’s knowledge of the client’s criminal activity is not required to establish the exception,¹⁷⁴ most communications with Saul reveal his knowledge of ongoing criminal activities because he operates as a “consigliere” to the methamphetamine enterprise.¹⁷⁵ If this article focused on the crime-fraud exception as a general matter, it would swiftly establish that the exception vitiates the attorney-client privilege as to nearly all of Saul’s communications, leaving nothing further to discuss.¹⁷⁶ Neverthe-

outside of counsel’s control.”); *J.N. v. S. W. School Dist.*, No. 1:14-CV-0974, 2014 WL 4792260, at *8 (M.D. Pa. Sept. 24, 2014) (applying reasoning of *Apionishev* to documents inadvertently disclosed to plaintiff); *Dexia Credit Local v. Rogan*, 231 F.R.D. 268, 277 (N.D. Ill. 2004) (“Although an agent may be on the ‘inside’ at the time the confidential communications were made between the corporation (on whose behalf the agent was acting) and counsel, once this agent leaves the corporation’s employ, the privilege, and the legal rights associated with it, do not leave with this agent. Rather, the privilege remains with the corporation, because it belongs to the corporation.”).

171. See RICE, *supra* note 12, § 3:3.

172. *Sokol v. Wyeth, Inc.*, No. 07 Civ. 8442 (SHS)(KNF), 2008 WL 3166662, at *8 (S.D.N.Y. Aug. 4, 2008).

173. See *supra* Part I.B.2 for an overview of the elements of the crime-fraud exception.

174. See *supra* text accompanying note 53.

175. See *infra* note 190. Even where Saul lacks specific knowledge of the particular criminal conduct, he is aware that his actions are in furtherance of an overall criminal enterprise. See, e.g., *Breaking Bad: Buyout* (AMC television broadcast Aug. 19, 2012) (Saul informs Mike, after obtaining a frivolous *ex parte* restraining order that, “[w]hatever you have planned, best pull the rip cord while you still have a chance”).

176. *In re Grand Jury Proceedings*, 680 F.2d 1026, 1029 (5th Cir. 1982) (en banc) (“[W]here the government makes a prima facie showing that an agreement to furnish legal assistance was part of a conspiracy, the crime or fraud exception applies . . .”). For examples of Saul’s extensive involvement in the drug conspiracy see *Breaking Bad: Better Call Saul* (AMC television broadcast Apr. 26, 2009) (Jesse: “When the going gets tough, you don’t want a criminal lawyer. You want a criminal, lawyer. Know what I’m saying?”); *id.* (Saul procuring a false confession from “Jimmy In n Out” and offering to do for Walt what “Tom Hagen [did] for Vito Corleone”); *Breaking Bad: 4 Days Out* (AMC television broadcast May 3, 2009) (Walt: “We just have to cook more, a lot more.” Saul: “Yeah, that’s my legal opinion. Make hay while the sun is shining.”); *Breaking Bad: Mandala* (AMC television broadcast May 17, 2009) (Saul

less, Saul's counsel to Walt, Skyler, and Jesse raises one interesting question regarding the scope of the crime-fraud exception as to lawyers advising on legitimate transactions (such as the purchase of a car wash¹⁷⁷ or gifts to beloveds¹⁷⁸) financed by illicit funds. Specifically, the highly contextual nature of the crime of money laundering—and in particular the concealment element—requires more than a mere showing of “suspicious” transactions by the lawyer's client (or even the lawyer) to invoke the crime-fraud exception.¹⁷⁹

1. Overview: Crime-Fraud Exception and Money Laundering

The party invoking the crime-fraud exception must first demonstrate “probable cause” or “prima facie” evidence “that a fraud or crime has been committed” and second “that the communications in question

[to Walt and Jesse]: “What you two need is an honest to God business man. Somebody who treats your product like the simple, high margin commodity that it is. Somebody who ships out of town. Deals only in bulk, Someone who has been doing this for twenty years and never been caught.”); *Breaking Bad: Phoenix* (AMC television broadcast May 24, 2009) (Saul: “He's a hacker cracker extraordinaire. This guy can hijack random desktops all around the world. Turn them into zombies that do his bidding.”); *Breaking Bad: ABQ* (AMC television broadcast May 31, 2009) (Saul sending Mike to clean up Jesse's house after Jane dies); *Breaking Bad: Box Cutter* (AMC television broadcast July 17, 2011) (Skyler: “He carools? He carools to his job at a meth lab?”) Saul: “Hey, whoa! Ho ho! You're breaking up there. I didn't quite catch that last—Whoa! You're a Chatty Cathy today.”). These are just a handful of examples.

177. *Breaking Bad: Open House* (AMC television broadcast July 31, 2011).

178. *Breaking Bad: Hermanos* (AMC television broadcast Sept. 4, 2011).

179. *Amusement Indus., Inc. v. Stern*, 293 F.R.D. 420, 438 (S.D.N.Y. 2013) (internal marks and citations omitted) (“Amusement points to a number of transfers from and back to the escrow account that appear suspicious and unnecessary. However, Amusement has not shown probable cause to believe that Stern designed these transfers in whole or in part to conceal or disguise the source, ownership, or control of the proceeds. Indeed, there is simply no evidence on this point. Accordingly, Amusement has not shown probable cause to believe that Stern committed the crime of money laundering.”). The bar to prosecuting a lawyer for money laundering is even greater. *See* U.S. ATTORNEY MANUAL § 9-105.600 (1997), http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/105mcrn.htm#9-105.600 (“Because the Department firmly believes that attorneys representing clients in criminal matters must not be hampered in their ability to effectively and ethically represent their clients within the bounds of the law, the Department, as a matter of policy, will not prosecute attorneys under § 1957 based upon the receipt of property constituting bona fide fees for the legitimate representation in a criminal matter, except if [] there is proof beyond a reasonable doubt that the attorney had actual knowledge of the illegal origin of the specific property received (prosecution is not permitted if the only proof of knowledge is evidence of willful blindness).”).

were in furtherance of the [crime or] fraud.”¹⁸⁰ To invoke the exception, the proponent must demonstrate probable cause that Saul is laundering money,¹⁸¹ using illicit funds,¹⁸² or conspiring to commit those crimes.¹⁸³ Money laundering cases are rich in facts—often with striking similarities to the characters on *Breaking Bad*.¹⁸⁴ For example, in *United States v. Henry*, the government proved that one of the defendants “arranged the exchange of \$50,000 in cash from the sale of marijuana for a cashier’s check, made payable to the defendant’s mother, which was used to purchase a limousine.”¹⁸⁵ One of the defendants “testified that ‘we’ obtained the cashier’s check from Pfohl because he was ‘a legitimate big businessman and he could show where the money came from [and] we couldn’t.’”¹⁸⁶ This conduct is very similar to that of Saul, who advises Jesse to use a nail salon to take Jesse’s “dirty money” and “slip it into this salon’s nice, clean cash flow,” which results in Jesse’s “filthy drug money” transforming “into nice clean, taxable income brought to you by a savvy

180. See *supra* note 54 and cases cited therein.

181. 18 U.S.C. § 1956.

182. 18 U.S.C. § 1957 (defining the crime of using illegally obtained funds as: “[w]hoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than \$10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b)”). The statute defines “monetary transactions” as “the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, or funds or a monetary instrument (as defined in section 1956(c)(5) of this title) by, through, or to a financial institution (as defined in section 1956 of this title).” *Id.* § 1957(f)(1). That statute also provides a safe harbor to protect the Sixth Amendment right to counsel. *Id.* (“[B]ut such term does not include any transaction necessary to preserve a person’s right to representation as guaranteed by the sixth amendment to the Constitution.”).

183. See 18 U.S.C. § 1956(h) (“Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties . . .”); see also 18 U.S.C. § 371.

184. See, e.g., *United States v. Henry*, 325 F.3d 93, 103 (2d Cir. 2003).

185. *Id.* at 103-04.

186. *Id.* at 104; see also *United States v. Pena-Rodriguez*, 110 F.3d 1120, 1123–25 (5th Cir. 1997) (upholding conviction for conspiracy to launder money for a drug enterprise—with a striking similarity to Gus’s operation—where appellant provided “vehicles for the shipment of marijuana and cocaine, as well as constructing false fuel tanks that were used to store contraband during its transportation.”). Aside from purchasing property, using tainted funds to pay a lawyer may also result in a money laundering charge against the client. *United States v. Magluta*, 418 F.3d 1166, 1177 (11th Cir. 2005) (“In sum, Magluta went to great pains to conceal the fact that he was using drug proceeds to pay his lawyers. His doing so meets the definition of money laundering for purposes of § 1956(a)(1)(B)(i), even if the final transfer of the laundered proceeds were also for Magluta’s personal benefit.”).

investment in a thriving business.”¹⁸⁷ Therefore, Saul’s extensive involvement in the purchase of various businesses to help Walt, Skyler, and Jesse hide the source of their drug money strongly implies that the conduct runs afoul of federal money laundering laws.

But merely demonstrating suspicious transactions is insufficient to constitute money laundering because “designed to conceal” is the crucial element.¹⁸⁸ Thus, the crime-fraud exception applies if a prudent person has a reasonable basis to suspect that Saul knowingly engaged in financial transactions designed to “conceal or disguise the nature, the location, the source, the ownership, or control” of funds “obtained from illegal activities.”¹⁸⁹ Saul certainly knows the illegal source of the funds. He is an active advisor to Jesse and Walt’s venture.¹⁹⁰ The only question is whether Saul advises on any transactions designed to “conceal.”

187. *Breaking Bad: Kafkaesque* (AMC television broadcast May 16, 2010).

188. *Cf. Cuellar v. United States*, 553 U.S. 550, 568 (2008) (reversing money laundering conviction because evidence of merely concealing funds is insufficient to demonstrate intent to “conceal or disguise the nature, the location, the source, the ownership, or control” of the funds); *United States v. Brown*, 186 F.3d 661, 670 (5th Cir. 1999) (internal marks and citations omitted) (“Congress intended a stringent *mens rea* requirement for [the crime of] promotion money laundering. . . . We have previously stressed the importance of not turning the money laundering statute into a money spending statute.”); *In re 650 Fifth Ave. & Related Properties*, 777 F. Supp. 2d 529, 562 (S.D.N.Y. 2011) (internal marks and citations omitted) (holding the intent element “is particularly important in cases involving payments of business expenses, since the crime of money laundering promotion is aimed not at maintaining the legitimate aspects of a business nor at proscribing all expenditures of ill-gotten gains, but only at transactions which funnel ill-gotten gains directly back into the criminal venture.”).

189. 18 U.S.C. §§ 1956-57; *United States v. Johnson*, 450 F.3d 366, 375 (8th Cir. 2006) (“A conviction under § 1957 requires a showing (1) that the defendant knowingly engaged in a monetary transaction, (2) that the defendant knew the property involved derived from specified unlawful activity, and (3) that the property was of a value greater than \$10,000.”).

190. *See, e.g., Breaking Bad: Better Call Saul* (AMC television broadcast Apr. 26, 2009) (Saul: “I’ll tell you one thing, you’ve got the right product.”); *Breaking Bad: Mandala* (AMC television broadcast May 17, 2009) (Saul: “What about product on hand? How’s your inventory?” Jesse: “Thirty-eight and change.” Saul: “Thirty-eight ounces? Grams?” Jesse: “Pounds.” Walt: “You did say to make hay while the sun was shining.” Saul: “Guys, why the long faces here? You’re sitting on a gold mine. . . . You two suck at peddling meth. Period. . . . What you two need is an honest to God business man. Somebody who treats your product like the simple, high margin commodity that it is.”); *Breaking Bad: Phoenix* (AMC television broadcast May 24, 2009) (Saul: “Yeah well I guess that’s why gangsters had molls. . . . Gun molls. Have you ever seen ‘White Heat?’”); *Breaking Bad: Caballo Sin Nombre* (AMC television broadcast Mar. 28, 2010) (Saul: “The kids? Paging Dr. Phil. My Daddy’s a drug dealer and my mommy turned him in . . . she’s bluffing and she

2. Saul's Advice and the "Designed to Conceal" Element

The designed to conceal element of money laundering is highly contextual. For example, purchasing a car under a family member's name may constitute money laundering in some situations but not others.¹⁹¹ Saul's various transactions demonstrate the difficulty of invoking the crime-fraud exception based on money laundering allegations surrounding a lawyer's transactional advice.

On the one hand, Saul's involvement with the purchase of the car wash does not present a close question of his involvement in a money laundering scheme designed to conceal the source of Walt's drug money. He knew that Walt and Skyler wanted to purchase the car wash to launder illicit funds.¹⁹² Moreover, Saul is inextricably involved in the concealment. First, Saul creates the false paperwork to permit Walt and Skyler to claim that they obtained the seed money for the car wash from gambling wins.¹⁹³ Therefore, Saul takes an affirmative step toward masking the source of the money. Second, whether in the context of polishing nails or cleaning cars, Saul is aware that the purchased business is meant to laun-

knows it."); *Breaking Bad: I.F.T.* (AMC television broadcast Apr. 4, 2010) (Saul: "You got any idea how stupid it is to ignore your counsel's calls? What if I was trying to warn you the DEA was about to kick in your door?"); *Breaking Bad: Green Light* (AMC television broadcast Apr. 11, 2010) (Saul: "Good! 'Oh, boohoo, I won't cook meth anymore.' You're a crybaby. . . . I'm unplugging the website, so no more money laundering."); *id.* (Jesse shows Saul the meth he cooked); *Breaking Bad: One Minute* (AMC television broadcast May 2, 2010) (Saul: "Believe me, there's no honor among thieves. Except for us, of course.").

191. *Compare* *United States v. Lovett*, 964 F.2d 1029, 1034 (10th Cir. 1992) ("There is ample evidence that the defendant's purchase of the pickup was designed, at least in part, to conceal or disguise the location or source of the proceeds of his fraudulent activity."), *with* *United States v. Sanders*, 929 F.2d 1466, 1472-73 (10th Cir. 1991) (purchasing car in daughter's name using illicit funds not concealment).

192. *Breaking Bad: Abiquiu* (AMC television broadcast May 30, 2010) (Saul: "Is that you talking or Yoko Ono?" Walt: "She has a point. It makes more sense that I invest right here." Saul: "Based on her years of experience in money laundering, I suppose. . . . You buy this place, all you got is a big building that squirts water. You got no Danny here."); *Breaking Bad: Open House* (AMC television broadcast July 31, 2011) (Saul: "Two words—nail salon. It's perfect for money laundering. It's a high volume cash-preferred business with a discreet work force." . . . Skyler: "We're not buying a nail salon, Mr. Goodman. We're getting the car wash.").

193. *Breaking Bad: Abiquiu* (AMC television broadcast May 30, 2010) (Saul: "I'll generate false Currency Transaction Reports out the wazoo, as well as the necessary W-2Gs. I know a couple casino managers who will jump at the chance to report false losses. So, win-win for everyone."). This also invokes the intent to avoid the reporting requirements element of money laundering. 18 U.S.C. § 1956(a)(1)(B)(ii) ("[K]nowing that the transaction is designed in whole or in part . . . to avoid a transaction reporting requirement under State or Federal law . . .").

der dirty money obtained from illegal activities.¹⁹⁴ But such level of knowledge is not necessary. Even when lawyers create legitimate business or investment opportunities with the intent of merely attracting funds from illicit activities to the legitimate investment, they are complicit in money laundering.¹⁹⁵ In *United States v. Griffin*, the defendants used a real estate lawyer to create a real estate investment vehicle that used illicit funds from cocaine dealers to purchase distressed properties and return proceeds to the drug traffickers as legitimate investment income.¹⁹⁶ Saul's actions align with the conduct of the lawyer in *Griffin* because both created legitimate business opportunities funded by illegal drug activities.

Moreover, invoking the crime-fraud exception does not require the lawyer's knowledge. Thus, even assuming Saul had no knowledge of the purpose of the transaction, the crime-fraud exception would still apply because Walt and Skyler (the clients) used Saul to further their criminal activities.¹⁹⁷ If sufficient evidence is adduced, a court would likely find

194. *Breaking Bad: Kafkaesque* (AMC television broadcast May 16, 2010) (Saul: "Now, you know you need to launder your money, right? Do you understand the basics of it? Placement? Layering? Integration? . . . You wanna stay out of jail, dontcha? You wanna keep your money and your freedom? Because I've got three little letters for you: I R S. If they can get Capone, they can get you. . . . Now, you give me your money—that's called placement. Hand me that little thing. This is the nail salon, right? I take your dirty money and I slip it into this salon's nice, clean cash flow. That's called layering. Final step: integration. The revenues from the salon go to the owner—that's you. Your filthy drug money has been transformed into nice clean, taxable income brought to you by a savvy investment in a thriving business." Jesse: "So, you want me to buy this place so I can pay taxes? I'm a criminal, yo." Saul: "Yeah, and if you want to stay a criminal and not become say, a convict, then maybe you should grow up and listen to your lawyer." Jesse: "Right. So you can get your five percent." Saul: "No, that's seventeen percent.").

195. *United States v. Griffin*, 84 F.3d 912, 926–928 (7th Cir. 1996).

196. *Id.* at 918.

197. *See United States v. Barnes*, 230 F.3d 311, 315 (7th Cir. 2000) (affirming attempted money laundering conviction where defendant "took the following steps on February 18: he placed a call to an attorney for the purpose of setting up an immediate real estate closing for the sale of the two properties in exchange for money he believed to be the proceeds of illegal narcotics sales; he instructed the attorney's assistant to set up the meeting for later that day and to see that the paperwork would be ready; and he was on his way to that meeting, with the purported buyer, at the time of his arrest. A reasonable observer could conclude that these steps were substantial and that they were undertaken in accordance with a design to violate the statute."). The issue of money laundering is even simpler if the lawyer is involved with a sham business—as opposed to a legitimate car wash. *See, e.g., United States v. Anderskow*, 88 F.3d 245, 247, 253 (3d Cir. 1996) (finding a law firm partner guilty of money laundering "given [his] lulling of disgruntled customers, his admitted knowledge that disbursing advance fees among the co-conspirators violated both the Trust's contractual obligations and his ethical duties, and his financial motive . . .").

probable cause to suspect the communications with Saul regarding the car wash (or nail salon or Danny's laser tag business) were in furtherance of a crime or fraud.¹⁹⁸

On the other hand, some of Saul's transactions involving Jesse present a closer question as to Saul's intent to conceal the source of illicit funds. For example, when Jesse wishes to antagonize his parents, he uses Saul (purportedly representing an anonymous buyer) to negotiate the purchase of his parents' home with an all cash offer funded by drug money.¹⁹⁹ Saul's negotiated purchase of the house on behalf of an anonymous buyer, however, does not appear to satisfy the requisite "designed to conceal" element. Saul's only deception relates to the true identity of the buyer, Jesse, whom Saul refers to as wishing to "remain nameless . . . for our purposes you might as well visualize a large bag of money."²⁰⁰ But purchasing something with cash, even in someone else's name, without more, is insufficient concealment to constitute money laundering.²⁰¹ Furthermore, the intent to conceal vanishes when Jesse reveals himself as the owner of the house to his parents (the sellers) and

198. *Cf.* *Amusement Indus. Inc. v. Stern*, 293 F.R.D. 420, 438 (S.D.N.Y. 2013) (declining to invoke the crime-fraud exception for transactions that looked "suspicious and unnecessary" without any additional evidence as to concealment). We also note that Walt and Jesse's payments to Saul for representing third parties, such as Badger, may constitute money laundering. *Compare Breaking Bad: Better Call Saul* (AMC television broadcast Apr. 26, 2009) (Walt [following Badger's arrest]: "\$10,000. Cash. To you. I'm not saying to throw the case, just no talking to the DEA."), with Eugene R. Gaetke and Sarah N. Welling, *Money Laundering and Lawyers*, 43 SYR. L. REV. 1165, 1168 n.2 (1992) ("§ 1956 is implicated when an attorney is hired by one who has committed specified unlawful activity who pays the attorney to represent a third person who might be a subordinate of the payor. In this fact scenario, the . . . client's legal expenses are being assumed by the criminal organization and the payment of the legal fee might be viewed as a financial transaction promoting the specified unlawful activity. To the extent that the lawyer 'knowingly' accepts this fee with the stated purpose of promoting the unlawful activity of the organization by ensuring that the subordinate refuses to cooperate with the government, she may violate § 1956.").

199. *Breaking Bad: Caballo Sin Nombre* (AMC television broadcast Mar. 28, 2010).

200. *Id.*

201. *United States v. Sanders*, 929 F.2d 1466, 1472-73 (10th Cir. 1991) ("Although Mr. Sanders titled the Lincoln [purchased by trade-in and cash] in his daughter's name, and Mrs. Sanders signed the daughter's name to the car purchase agreement, we conclude that the daughter's presence in person at the car lot during or somewhat subsequent to the transaction, the fact that the daughter shared the family last name, and defendant's and her husband's conspicuous use of the car after the purchase, undermine the government's argument (based in large part upon the titling of the car in the daughter's name), that the Lincoln purchase involved the requisite design of concealment.").

to Hank (law enforcement).²⁰² Nor does the transaction offend 18 U.S.C. Section 1957 because the sale utilizes no “financial institution.”²⁰³ Similarly, when Jesse decides (out of guilt and compassion) to provide cash gifts to his former girlfriend, Andrea, and her son, Brock, (both directly and through Saul), the cash gifts do not evince any concealment of the drug money because Jesse and Saul both identify that Jesse is the individual providing the money.²⁰⁴ Aside from failing to satisfy the elements of money laundering, those two transactions also fall outside the scope of Jesse’s general criminal activities. The transactions do not further Jesse’s methamphetamine production or distribution, nor do they disguise his criminal activities. Rather, Jesse purchases the house out of spite and he gifts money to Andrea out of guilt. The source of the money is tainted, but spending illicit funds is not a crime—unless it is over \$10,000 and involves a financial institution.²⁰⁵ Thus, a court would not likely find probable cause that Saul’s involvement in these two specific transactions furthers Jesse’s general criminal activities.²⁰⁶

In sum, Saul’s extensive involvement in Walt and Skyler’s money laundering operation is likely to vitiate any protection as to any communications in furtherance of the laundering transactions because “a prudent person [would] have a reasonable basis to suspect the perpetration” of money laundering and that the communications “were in furtherance

202. Compare *id.* at 1472 (“As outlined above, both defendant and her husband, Johnny Lee, were present at these purchases and were readily identified by the respective salespersons involved. Further, both cars were conspicuously used by the Sanderses, making the association of these vehicles with the Sanderses obvious to law enforcement.”), with *Breaking Bad: Caballo Sin Nombre* (AMC television broadcast Mar. 28, 2010) (Jesse reveals himself as the owner of the house to his parents) and *Breaking Bad: One Minute* (AMC television broadcast May 2, 2010) (Hank drives to Jesse’s house and punches Jesse inside the house).

203. Section 1957 refers to 31 U.S.C. § 5312(a)(2), which includes 26 different definitions of financial institutions, including “persons involved in real estate closings and settlements.” However, Saul’s negotiations with Jesse’s parents’ counsel did not involve any realtors. One may argue that Saul is himself a “financial institution” because he is “a loan or finance company.” *Id.* at § 5312(a)(2)(P); see also *Breaking Bad: Better Call Saul* (AMC television broadcast Apr. 26, 2009) (Saul: “And make it out to Ice Station Zebra Associates. That’s my loan out. It’s totally legit. It’s done just for tax purposes.”). But the connection is tenuous at best, especially if we assume that “Ice Station Zebra Associates” was not involved in Jesse’s real estate transaction.

204. *Breaking Bad: Hermanos* (AMC television broadcast Sept. 4, 2011) (Saul pays Jesse’s former girlfriend under \$10,000, which is the threshold amount for Section 1957).

205. 18 U.S.C. § 1957.

206. Cf. *Amusement Indus. Inc. v. Stern*, 293 F.R.D. 420, 438 (S.D.N.Y. 2013) (holding “suspicious and unnecessary” transactions insufficient to invoke the crime-fraud exception).

thereof.”²⁰⁷ However, Saul’s involvement in Jesse’s purchase of his parents’ house and his cash gifts to his former girlfriend do not appear to further any crime or fraud. They merely involve the spending of illicit funds, which, under Jesse’s circumstances, is not illegal. Thus, it would be difficult to provide evidence to establish probable cause of any crime and thereby vitiate the attorney-client privilege as to those transactions.²⁰⁸

CONCLUSION

Saul is a savvy, witty television lawyer cast in a brilliant series.²⁰⁹ But even the best lawyers misjudge the scope of protection afforded by the attorney-client privilege. Despite the critical role the attorney-client privilege plays in permitting client access to frank legal advice, its protection is fragile.

The attorney-client privilege protects communications between the attorney and the client regarding legal advice. On *Breaking Bad*, Saul’s jailhouse communications with Badger depict one of the few instances of protected attorney-client communications. In virtually every other instance, the series distorts the creation and scope of the privilege. The privilege does not arise simply by exchanging money with a lawyer. Yet, Saul mischaracterizes the formation of the attorney-client relationship by perpetuating the myth of the dollar bill. Nor does the privilege extend to non-legal communications, even those involving a lawyer. However, throughout the series, Saul maintains the illusion of privilege while promulgating all sorts of advice, such as business and banking wisdom. By perpetuating these two myths, Saul grossly misrepresents the protection afforded to his communications with Walt and Jesse.

Saul also displays a cavalier disregard of the dangers posed by waiver of the attorney-client privilege. Ordinarily, disclosure of privileged communications to third parties waives the privilege. Yet, Saul often includes third parties to communications without considering waiver implications. First, Saul improperly represents two clients with adverse

207. *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1039 (8th Cir. 1984).

208. As noted above, there is an underlying dilemma for anyone wishing to prove the contents of Saul’s communications because nearly all such communications were in person and not recorded. See *supra* Part I.C. However, an *in camera* examination of Saul (on the highly unlikely assumption of truthful testimony) is likely to establish the availability of the crime-fraud exception. *In re Grand Jury Subpoena*, 745 F.3d 681, 690 (3d Cir. 2014) (“[T]he District Court did not err in concluding that there was a factual basis to support a good faith belief that *in camera* examination of Attorney might reveal evidence establishing the applicability of the crime-fraud exception and in conducting an *in camera* examination of Attorney.”).

209. See also *supra* note 66 (discussing the spinoff series focused on Saul).

interests, which is fatal to any claim of protection under either the joint client or common interest doctrine. The joint client doctrine requires strictly identical legal interests, which Walt and Jesse never really share. The common interest doctrine extends the attorney-client privilege to clients who share a congruent legal interest. But, as Saul's shifting loyalties to his purportedly joint clients demonstrate, Walt and Jesse's interests never completely align to permit a successful assertion of either the joint client or common interest doctrine, which in turn risks waiver of the privilege as to Walt, Jesse, and Saul's joint communications. Second, Saul risks waiver by involving Skyler in privileged communications with Walt. However, New Mexico's robust spousal privilege likely protects such disclosures. Third, Saul risks waiver by utilizing an investigator who turns out not to be his agent. Each of these situations poses varying degrees of risk of waiver by disclosure.

Finally, while the crime-fraud exception would likely swallow all of Saul's communications, this article explored a narrow swath of those communications relating to business transactions. Specifically, the article addresses whether a lawyer's involvement in a legitimate business transaction funded with ill-gotten money raises the specter of the crime-fraud exception. Because of the stringent "designed to conceal" element of the crime of money laundering, the crime-fraud exception likely does not vitiate the privilege as to Saul's communications relating to the purchase of Jesse's parents' house (or Jesse's cash gifts to his former girlfriend). But the crime-fraud exception squarely applies to the purchase of the Whites' car wash because the business laundered more than just cars—and Saul knew it.

