2. The FTB's spoliation of evidence also prohibits it from invoking the deliberative-process privilege.

As in *Alexander*, there is evidence of destruction of computer files by the FTB. It is particularly ironic that the Ford documents that are the subject of this deliberative-process privilege issue are the last remnants of computer files that Ford admits in deposition to have destroyed at the direction of FTB attorney Bob Dunn[126] (she later changed her story about Dunn's involvement in the destruction of the computer files after a lunch break with FTB attorneys).[127] The district court admonished the parties not to destroy documents in response to Hyatt's motion for a protective order to prevent the FTB from any further destruction of documents.[128] This Ford-Dunn document destruction occurred in March 1999 [129] *after* the district court's admonition not to destroy documents. The discovery commissioner also admonished the FTB not to destroy documents prior to the Ford-Dunn computer file destruction.[130]

Anna Jovanovich then testified in deposition on May 26, 1999, to the intentional destruction of all protest file materials (except for some telephone notes) in October 1998 in her capacity as a lawyer consulting on this litigation to the California Attorney General. These were the only records of the two-year Hyatt protest, which now totals about three years without a single shred of her work on the protest remaining.[131]

This is not a mere suspicion of destruction of computer files as in *Alexander*, this is a pattern of destruction of documents by FTB in-house attorneys. Hence, for this additional reason, the deliberative-process privilege is not available to the FTB.

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[126] Ford depo., Vol. 2, pp. 262-63.

[127] Ford depo., Vol. 2, pp. 349-50.

[128] 3/3/99 Hearing transcript, at 32. (*See* Exhibit 20, to Vol. IX, in the accompanying Appendix of Exhibits filed with the Supreme Court.)

[129] Ford depo., Vol. II, pp. 262-63.

[130] 12/21/98 Hearing transcript, __. (Attached as Exhibit 5, to Vol. II, to the Appendix of Exhibits in Support of Hyatt's Post-Hearing Memorandum, and that appendix is attached as Exhibit 5, to Vol. II, of the accompanying Appendix of Exhibits filed with the Supreme Court.)

[131] Jovanovich Depo, Vol. I, pp. 71-72, Vol. II, p. 241.

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E. The deliberative-process privilege does not apply because the present case is not a judicial review of an administrative agency decision.

The deliberative-process privilege is also inapplicable because its use is limited solely to situations where, unlike here, a court conducts direct judicial review of an administrative decision.[132] In cases outside the context of a challenge or review of an agency decision, sound public policy demands that "an agency should not be permitted to invoke the mental process privilege as a shield to permit an agency to develop a body of 'secret, working law.'"[133]

In *RLI*, the court distinguished between a court's review of an administrative agency's ruling (to which the privilege may apply) and cases arising in other contexts (to which the privilege did not apply):

> In every instance in which this privilege has been applied or otherwise relied upon in published authority in this state (including but not limited to the decisions cited by the Department), the privilege was used to prevent inquiry into the mental process underlying an administrative decision that was undergoing direct review by a court. That plainly is not the situation here and this distinction renders the doctrine inapplicable.[134]

The court further reasoned that this distinction was not simply academic, but was supported by sound policy reasons:

> Moreover, we believe there is good reason why the privilege has not been applied in cases like the present ones. As applied in this state, the [deliberative-process privilege] primarily rests upon the appropriate function and scope of judicial review of an administrative decision. The court's function is to review the decision, not the reasoning underlying it; therefore, inquiry into the mental process of the decision-maker is irrelevant, inefficient and thus prohibited.[135]

This is theoretically relevant because the FTB has continually urged this Court to believe that its $22 million "proposed assessment" against Hyatt is not a decision but merely a preliminary proposal for later decision. Of course, in either case it is not relevant to the instant

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[132] *RLI Ins. Co. Group v. Superior Court*, 51 Cal. App. 4th 415, 437, 59 Cal. Rptr. 2d 111 (1996); *In re California Public Utilities Commission*, 892 F.2d 778, 782 (9th Cir. 1989).

[133] *RLI*, 51 Cal. App. 4th at 438.

[134] 51 Cal. App. 4th at 437, emphasis in original.

[135] 51 Cal. App. 4th at 438.

action because Hyatt is not contesting any assessment of tax, $22 million or otherwise, in this Nevada tort case.

Like the plaintiffs in *RLI*, Hyatt does not ask the trial court to conduct judicial review of any FTB decisions. Rather, Hyatt seeks redress for the tortious acts and misconduct committed by the FTB during its six-year investigation, audit, and surveillance of Hyatt. Unlike the judicial review cases to which the privilege has been applied, the reasoning behind the FTB's misconduct in carrying out the audit in the present case is relevant and directly at issue. As such, the FTB should not be allowed to cloak the highly deleterious auditing and protest processes employed against Hyatt under the veil of the deliberative-process privilege. Because this action is not a judicial challenge of an agency decision, the deliberative-process privilege would be unavailable even if it existed.

F. By its conduct the FTB has waived any deliberative-process privilege.

1. The Ford review notes criticizing the audit conducted by Cox.

The FTB has produced over 3,500 pages of audit workpapers showing day-by-day the FTB's massive intrusion into Hyatt's life and its one-sided and biased selection from these myriad of facts in deciding to tax and punish Hyatt. The FTB has produced over 70 pages of Narrative Reports on Gil Hyatt and two official determinations. In this litigation, the FTB has allowed volumes of testimony regarding its audit and investigation of Hyatt.

For some unknown reason, when Carol Ford was produced for deposition, the FTB would not let Ford testify regarding her work on the Hyatt audit or produce the notes of her work.[136] Yet, the FTB let Sheila Cox testify regarding her conversations and interactions with Ford regarding the audit.[137] The FTB also let Steve Illia, who is in charge of the residency audit group and who is Ford's boss, testify as to his conversations with Ford and other involvement regarding the audit.[138] A dozen other witnesses have also so testified. Indeed, Narrative

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[136] Ford Depo. excerpts. (*See* Exhibit 5, to Vol. II, and Exhibit 8, to Vol. V, of the accompanying Appendix of Exhibits filed with the Supreme Court).

[137] Cox depo., Vol. I, pp. 145-46.

[138] Illia depo., Vol. I, pp. 174-196.

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Reports prepared regarding the 1991 and 1992 tax year audits of Hyatt total 70 pages of detail of the FTB's alleged "deliberative-process" regarding how the audit was conducted and why the FTB came to its conclusion.[139]

By allowing so many others to testify on the same subject matter, the FTB has waived any right to assert the deliberative-process privilege in connection with the testimony and notes of Carol Ford, Penny Bauche, Monica Embry, and others. The FTB cannot capriciously invoke the privilege; and indeed the very capricious nature of the invocation of this privilege (as well as the way it was invoked — at the last minute and without any notice otherwise) indicates that the use of the privilege is for the purpose of stalling the litigation process and concealing the egregious behavior rather than the legitimate protection of the government's deliberative-process.

2. The undisclosed sourcing memos that determined the direction of the Hyatt audit.

Documents FTB 100288 and 100289-100929 consist of (a) a one page cover letter dated August 24, 1995 and (b) an 11 page Memorandum on Sourcing of Royalty Payments dated Aug. 21, 1995 by non-lawyer Monica Embry. The Embry memo is a direct response to a prior memorandum dated May 10, 1995 by non-lawyer Allen Shigemitsu. The Shigemitsu memo was produced by the FTB to Hyatt in 1996. First, the Embry memo was listed on the FTB supplemental privilege log, but asserted only the attorney-client privilege, not the deliberative-process privilege.[140] The FTB therefore has no right to assert the non-existent deliberative-process privilege after-the-fact in regard to the Embry memo.

Moreover, Shigemitsu's memo argued that Hyatt could be taxed on his royalty payments as California source income, as an alternative theory to the FTB's current theory of California residency. Shigemitsu stated in his memo:

> I believe that the royalties received by an inventor, who conceived and perfected the patent on his invention while a resident of California, is taxable to California as royalties paid on rights to use the patent, even if the inventor is no longer a resident of California . . . .

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[139] Cox Narrative Reports.

[140] FTB Writ Petition, Exh. 2, at 3.

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Shigemitsu also produced his legal research which the FTB produced at his deposition, and it was marked as a deposition exhibit without objection.[141]

Shigemitsu, a recipient of the subsequently withheld Embry memo, testified that the Embry memo was in direct response to his memo and asserted a contrary conclusion.[142] Shigemitsu also testified that he then wrote and distributed a reply memo dated June 6, 1996,[143] but this second Shigemitsu memo *has never been identified by the FTB on a privilege log nor produced to Hyatt.*

Having produced the original Shigemitsu memo, the FTB has waived any privilege that might otherwise have existed as to the Embry memo (FTB 100289-292). Regarding the cover letter (FTB 100288), the FTB waived any privilege that might otherwise attach to it and the underlying memo by producing it at Embry's deposition where it was marked as a deposition exhibit, and Embry was questioned about it *without objection by the FTB lawyers.*[144] This was a waiver that could not have been inadvertent.

All privileges have also been waived in regard to the second Shigemitsu memo. For the above reasons and for the additional reason that it was not listed in the privilege log. While it was never identified by the FTB, Shigemitsu acknowledged its existence under oath.[145] Hyatt respectfully requests that this Court affirm the district court's ruling ordering the production of the second Shigemitsu memo.

G. The deliberative-process privilege does not apply because it was not asserted by the head of the FTB after personal consideration.

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[141] *See* Exhibit 12 to the Appendix of Exhibits In Support of Hyatt's Post-Hearing Memorandum, and that appendix is attached as Exhibit 5, to Vol. II, in the accompanying Appendix of Exhibits filed with the Supreme Court.

[142] Shigemitsu depo., p. 56, lns. 4-8. (*See* Appendix of Exhibits In Support of Hyatt's Post-Hearing Memorandum, and that appendix is attached as Exhibit 5, to Vol. II, in the accompanying Appendix of Exhibits filed with the Supreme Court.)

[143] Shigemitsu Depo, p. 27, lns. 6-15.

[144] Embry depo., pp. 191-94. (*See* Appendix of Exhibits In Support of Hyatt's Post-Hearing Memorandum, and that appendix is attached as Exhibit 5, to Vol. II, in the accompanying Appendix of Exhibits filed with the Supreme Court.)

[145] Shigemitsu depo., p. 27, lns. 6-9.

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The deliberative-process privilege is also inapplicable to the present case because the agency head did not and apparently will not invoke the privilege. Only the agency head may assert the privilege after that officer's personal consideration of the matter.[146] This requirement exists "to insure that the privilege remains a narrow privilege which is not indiscriminately invoked."[147]

Thus, "courts have not permitted staff attorneys, especially those who are participating in the pending litigation, to assert the privilege on behalf of the agency."[148] The privilege may only be invoked if the agency head submits an affidavit or other statement demonstrating that he or she has reviewed the question of privilege and believes that disclosure of the material sought would genuinely threaten the public interest of efficient agency operations.[149]

The cases cited by the FTB confirm, rather than refute, that the deliberative-process privilege can only be invoked by the head of the agency. Citing *Coastal Corp. v. Duncan*,[150] the FTB acknowledges that the deliberative-process privilege can only be asserted by the head of an agency after careful consideration. The FTB, however, fails to mention in the lengthy *Coastal Corp.* discussion affirming that not only must the head of the agency make such a determination, but also that the agency head *cannot* delegate this duty to a subordinate nor can the agency's attorneys make such a determination. *Coastal Corp.* specifically rejected an agency's attempt to use an affidavit from a subordinate of the agency's head, even though the agency head had attempted to delegate that responsibility:

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[146] *United States v. Rozet*, 183 F.R.D. 662, 665 (N.D. Cal. 1998); *Exxon Corp. v. Dep't of Energy*, 91 F.R.D. 26, 43 (N.D. Tex. 1981); *Coastal Corp. v. Duncan*, 86 F.R.D. 514, 517-18 (D. Del. 1980); *see also United States v. Reynolds*, 345 U.S. 1, 7-8 (1953) (In the context of military and state secrets privilege, the Court held, "[t]here must be formal claim of privilege, lodged by the head of the department which has control over the matter, after personal consideration by that officer . . . . ").

[147] *Rozet*, 183 F.R.D. at 665; *see also Coastal Corp*, 86 F.R.D. at 518 ("Requiring the agency head to claim the privilege assures the Court . . . that executive privilege has not been lightly invoked by the agency.")

[148] *Rozet*, 183 F.R.D. at 665; *see also Exxon*, 91 F.R.D. at 43 ("[T]he privilege should be invoked with consistency and only after careful consideration. . . . To permit any government attorney to assert the privilege would derogate both of those interests.").

[149] *See Exxon*, 91 F.R.D. at 44; *Coastal Corp.*, 86 F.R.D. at 517.

[150] 86 F.R.D. 514 (D. Del. 1980).

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> Requiring the agency head to claim the privilege assures the court, which must make the ultimate decision, that the executive privilege has not been lightly invoked by the agency, [citation omitted], and that in the considered judgment of the individual with an overall responsibility for the administration of the agency, the documents withheld are indeed thought to be privileged.[151]

The CEO of the FTB is Jerry Goldberg.[152] He is the agency head who is responsible for invoking the deliberative-process privilege. In this case, the FTB belatedly submitted an affidavit from someone other than the head of the FTB — Paul Usedum who subsequently left the FTB — in its attempt to invoke the deliberative-process privilege.[153] The FTB has presented no evidence that Goldberg is even aware that FTB attorneys have been indiscriminately asserting the deliberative-process privilege, much less affirmed its invocations in these discovery proceedings. Furthermore, this oversight cannot be cured by one of his subordinates attempting to "bless" such conduct with an affidavit.

The authorities cited by the FTB therefore establish the FTB's own failure to satisfy this rudimentary requirement for invoking the deliberative-process privilege in this case.

Because the FTB failed to follow the proper and necessary procedures for invoking the deliberative-process privilege, for this additional reason, the FTB is not entitled to withhold discovery on the grounds of this privilege.

H. The cases cited by the FTB do not distinguish, but rather support, Hyatt's arguments regarding the deliberative process privilege.

The cases cited by the FTB also recognize that the deliberative-process privilege is *only* intended for policy-level decisions. They provide no support for the FTB's "second vein" theory. *Maricopa Audubon Soc'y v. United States Forest Service* found that "Exemption 5" to the FOIA recognizes a limited deliberative-process privilege and applied it in that case because

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[151] *Id.* at 518.

[152] Dick depo., p. 26, lines 15-19. (*See* Supplemental Appendix of Exhibits filed in support of Hyatt's post-hearing reply brief, and that appendix is attached as Exhibit 8, to Vol. V, in the accompanying Appendix of Exhibits filed with the Supreme Court.)

[153] Declaration submitted by Paul Usedom, attached as Exhibit 22, to Vol. IX, of the accompanying Appendix of Exhibits filed with the Supreme Court.

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[the document at issue] involved "policy making decisions of the Forest Service. . . ."[154] The court further stated that the purpose of the deliberative-process privilege is to ensure the "frank discussion of legal or policy matters."[155]

Maricopa also repeated a cautionary note — from another federal case cited by the FTB — regarding over-classifying documents as "predecisional" for the purpose of protecting them under the deliberative-process privilege:

> Characterizing . . . documents as 'predecisional' simply because they play into an ongoing audit process would be a serious warping of the meaning of the word.[156]

The FTB here is seriously warping the entire deliberative-process privilege in order to avoid producing apparently damning documents that Hyatt has a right to obtain.

Maricopa also extensively quoted and cited a third federal case relied on by the FTB — *National Labor Relations Bd. v. Sears, Roebuck & Co.*[157] *Sears*, in discussing the basis for protecting "predecisional materials," focused on policy decisions made by an agency:

> The public is only marginally concerned with reasons supporting a *policy* which an agency has rejected, or with reasons which might have supplied, but did not supply, the basis for a *policy* which was actually adopted on a different ground. In contrast, the public is vitally concerned with the reasons which did supply the basis for an agency *policy* actually adopted.[158]

The court in *Sears* further explained that "Exemption 5" to the FOIA was intended to protect the "agency's group thinking in the process of working out its policy and determining what its law shall be."[159] Both *Maricopa* and *Sears* are replete with references to "agency policy," making clear that it is "predecisional" documents pertaining to policy-level decisions which may be protected by the deliberative-process privilege. Indeed, the FTB's own

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[154] 108 F. 3d 1089, 1092 (9th Cir. 1997).

[155] *Id.*

[156] *Id.* at 1094, quoting *Coastal States Gas Corp. v. Dept. Of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980).

[157] 421 U.S. 132, 95 S.Ct. 1504, 44 L.Ed. 2d 29 (1975).

[158] 421 U.S. at 152 (emphasis added).

[159] *Id.* at 153.

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opposition recognizes that a "major" purpose of the privilege is "to protect prematurely disclosed policies or opinions before they are officially adopted as agency policy. . . ."[160] The FTB puts forth no authority that expands the deliberative-process privilege beyond policy-level decisions.

Additionally, the FTB does not dispute the fact that its auditors and reviewers in carrying out their duties of assessing taxes have no role in policy making. The highest-ranking FTB official to be deposed in this matter, Doug Dick, has so testified.[161] Anna Jovanovich also testified that auditors are not involved in FTB policy-making.[162]

Because the Ford notes merely relate to Hyatt alone and the FTB's decision to tax Hyatt — which is not a policy-level decision — the notes are not protected by the limited, statutory deliberative-process privilege.

I. Even if the deliberative-process privilege was applicable, this Court should still order disclosure based on Hyatt's substantial need for the documents.

Even if it were assumed for purposes of argument that the deliberative-process privilege *were* applicable to the present set of facts, which it is *not*, the FTB should still be required to disclose the documents that Hyatt seeks. The deliberative-process privilege is a qualified one, and "[a] litigant may obtain deliberative materials if his or her need for the materials and the need for accurate fact-finding override the government's interest in non-disclosure."[163] The Ninth Circuit has stated that among the factors to be considered in making this determination are: (1) the relevance of the evidence; (2) the availability of other evidence; (3) the government's role in the litigation; and (4) the extent to which disclosure would hinder frank

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[160] FTB Post-Hearing opposition brief, page 27, quoting *Coastal States*.

[161] Dick depo., p. 62, lines 5-16.

[162] Jovanovich depo, pp.285-86.

[163] *FTC v. Warner Communications Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984); *see also In re Sealed Case*, 121 F.3d 729, 737-38 (D.C. Cir. 1997); *United States v. Rozet*, 183 F.R.D. 662, 665 (N.D. Cal. 1998); *Principe v. Crossland Savings, FSB*, 149 F.R.D. 444, 448-49 (E.D.N.Y. 1993); *California First Amend. Coalition v. Superior Court*, 67 Cal. App. 4th 159, 172-173, 78 Cal. Rptr. 2d 847 (1998).

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and independent discussions regarding contemplated policies and decisions.[164] These factors weigh in favor of disclosure in the present case.

First, there can be no dispute that the documents sought are relevant to the matter. The documents comprise part of the FTB's audit files on Hyatt, which serve as a record of the FTB's activities for the six-year period of time in question — activities which form the basis for this suit. *Second*, the withheld information is not otherwise available to Hyatt. Hyatt is unaware of the contents of the redacted materials, and witnesses deposed to date are either unwilling or unable to testify as to the nature of the material withheld. *Third*, since the FTB is a party to this litigation and has a direct interest in the outcome of this suit, disclosure is favored.[165] *Fourth*, because of the extraordinary facts relating to only two audits of the same individual, disclosure of the requested documents in this litigation would not hinder frank and independent discussion regarding contemplated decisions and policies. Unlike cases of judicial review of an agency ruling, which because of their prevalent nature carry a legitimate risk that unlimited disclosure in cases of that type would eventually discourage candid deliberation within the agency, the present case is an atypical action based on government misconduct. "[I]n terms of a balancing test, the public value of protecting identifiable government misconduct is negligible."[166]

This is particularly true because the withheld documents involve an individual's audit with the overwhelmingly relevant issue that he is being accused of fraud by the FTB. Ford's review of the audit files was a major factor in the FTB's imposition of a fraud penalty against Hyatt. Her notes may well shed light on the FTB's fraud directed at Hyatt.

The FTB's interest in non-disclosure is diminished, if not obliterated, by the nature of Hyatt's claims, and is heavily outweighed by Hyatt's substantial need for the requested documents. There are very serious allegations made against the FTB in this case based upon its

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[164] Courts in other circuits have acknowledged a fifth factor: the seriousness of the litigation and the issues involved. *See Sealed Case, supra,* 121 F.3d at 737-38; *Principe,* 149 F.R.D. at 448-49. *Warner, supra,* 742 F.2d at 1161.

[165] *See Principe,* 149 F.R.D. at 449 ("Since the [government] has a direct interest in the outcome of the litigation, disclosure is favored.").

[166] *Alexander v. FBI,* 186 F.R.D. at 177 (D.D.C. 1999).

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treatment of Hyatt. Hyatt has suffered severe consequences due to the FTB's wrongful conduct. Therefore, even if the FTB could establish a *prima-facie* case that the deliberative-process privilege applies, a balancing of the relevant interests would still require the disclosure of the documents sought by Hyatt.

VII. The documents for which the FTB asserted the attorney-client privilege cannot be shielded from production for a myriad of reasons.

The party asserting the attorney-client privilege has the burden of establishing the applicability of the privilege.[167] The privilege is to be strictly construed because "[i]t is . . . an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle."[168]

To invoke the privilege, a document must involve a communication between the client and the attorney for the purpose of seeking or providing very important legal advice.[169] "It is also clear that, where the attorney acts as a negotiator or business agent for his client, the confidential communications between them are *not* privileged."[170]

In general, factors which indicate a document is not privileged include:

(1) failing to mark document as confidential or privileged;

(2) sending the document to non-lawyers;

(3) sending the document to people who may be lawyers, but who hold management positions;

(4) the document merely provides updates on ongoing business developments; and

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[167] *Mahoney v. Superior Court*, 142 Cal. App. 3d 937, 940, 191 Cal. Rptr. 425 (1983); *United States v. Wilson*, 798 F.2d 509, 513 (1st Cir. 1986) (If privilege holder "fails to meet his burden as to any one element," the privilege cannot be invoked.)

[168] *SEC v. Gulf & Western Industries, Inc.*, 518 F. Supp. 675, 680 (D. D. C. 1981) (citation omitted). *See also North Carolina Electric Membership Corp. v. Carolina Power & Light Co.*, 110 F.R.D. 511, 515 (M.D.N.C. 1986) ("[T]he proponent must provide the court with enough information to enable the court to determine privilege, and the proponent must show by affidavit that precise facts exist to support the claim of privilege . . . .").

[169] *In re Air Crash Disaster at Sioux City, Iowa on July 19, 1989*, 133 F.R.D. 515, 518 (N.D. Ill. 1990).

[170] *J. P. Foley & Co., Inc. v. Vanderbilt*, 65 F.R.D. 523, 526 (S. D. N. Y. 1974).

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(5) the document it fails to provide specific requests for legal advice or *service.*[171]

In this case, the FTB documents for which the FTB asserts the attorney-client privilege are not protected from production because:

i) The FTB's purported in-house attorney – Anna Jovanovich – was *not* acting as an attorney giving legal advice on California law or any other law in reviewing, receiving, or creating any of the documents;

ii) The documents were widely distributed within the FTB to non-attorneys, and any privilege that could have been asserted was therefore waived;

iii) The FTB also waived any privilege that could have been asserted for the documents by having its key witness – its lead auditor Sheila Cox – review the entire audit file, including the documents subject to this motion, to refresh her recollection days prior to her deposition in this matter; and

iv) The crime-fraud exception to the attorney-client privilege is applicable to the documents because Hyatt has set forth a *prima facie* case of the FTB's fraudulent and criminal (relative to California privacy law conduct in regard to the Hyatt audit.

Additionally, the FTB's new argument (not asserted in the trial court) that Section 6254 of the California Government Code supports the assertion of the attorney-client privilege for the subject documents is erroneous for the same reasons explained above that Section 6254 does not support the assertion of the deliberative-process privilege in this case: (i) the FTB's misconduct, not the agency's decision is at issue;[172] and (ii) Section 1798.70 of the California Civil Code specifically supercedes Section 6254. Hyatt's prior discussion on Section 6254 will not be repeated here.

In sum, the district court correctly found that the documents at issue are not protected by the attorney-client privilege.

A. Anna Jovanovich was not acting as an attorney during the FTB audits of Hyatt, but rather had become "an integral part" of the audit process and the FTB's decision making during both the audit and Hyatt's subsequent protest.

A communication is not privileged merely because it was sent by, sent to, or copied to

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[171] *North Carolina Electric Membership Corp.*, 110 F.R.D. at 516-517.

[172] The one case the FTB cited in regard to Section 6254 and the attorney-client privilege – *Roberts v. City of Palmdale*, 5 Cal.4th 363, 20 Cal.Rtpr.2d 330 (1993) – involved a direct challenge to the city planning department's decision on a parcel map approved for development. There was allegation of governmental wrongdoing. Advice from the city attorney regarding the decision on the parcel map was therefore found to be protected by the attorney-client privilege.

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an attorney, *i.e.*, a communication made to or by an attorney acting in some other capacity is not privileged. For example, the seeking or rendering of business advice is not privileged even if sought from or rendered by an attorney. "[T]he critical factor in determining whether a document is protected by the attorney-client privilege is whether legal, as opposed to business, advice is sought and given."[173]

In regard to government agencies, a clear distinction is made between communications and work performed by the agency's attorney that is legal advice as opposed to that which is part of the adjudicative function of the agency. In *Texaco Puerto Rico, Inc. v. Dept. of Consumer Affairs*, the First Circuit explained this key distinction in affirming an order requiring the government agency to produce correspondence between the agency and its attorneys:

> The court found as a fact, after in camera inspection of the disputed documents, that outside counsel had become an integral part of the adjudicative decision making process. Based on this factual finding, the court ruled that the attorney-client privilege did not apply because, when an administrative agency engaged in an adjudicative function delegates its responsibilities to outside counsel, then the work product generated by the firm is part of the adjudicative process itself and, hence, beyond the reach of the attorney-client privilege.
>
> [The agency] resists this analysis, pontificating that such a doctrine "would render the attorney-client privilege meaningless where state and local governments employ counsel and rely on their advice." . . . But this trumpeting misapprehends the tenor of the district court's ruling. The attorney-client privilege attaches only when the attorney acts in that capacity. [Citations omitted.] Here, the district court found, in substance, that [the Agency] delegated policymaking authority to its outside counsel to such an extent that counsel ceased to function as lawyers and began to function as regulators.[174]

Where an attorney working at an agency serves dual roles, the burden is on the agency to establish that the communications for which the attorney-client privilege is asserted were made by or to the attorney in her capacity as an attorney as opposed to her other role within the agency. In *Mobil Oil Corp. v. Dept. of Energy,*[175] the court ordered production of communications to and from the Department's General Counsel's office because the Department failed to establish that the communications were made primarily for securing legal

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[173] *United States v. IBM,* 66 F.R.D. 206, 210 (S.D.N.Y. 1974).

[174] *Texaco Puerto Rico, Inc. v. Dept. of Consumer Affairs*, 60 F.3d 867, 884 (1st Cir. 1995).

[175] 102 F.R.D. 1 (N.D.N.Y 1983).

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advice or legal services of some kind as opposed to the dual role of regulator and decision-maker that the General Counsel occupied.[176]

The showing by the agency of the applicability of the attorney-client privilege must be made with specific affidavits establishing that the communication was made by or to an attorney, not disclosed to third persons, and made for the purpose of giving or seeking legal advice.[177] This requirement is even more essential when the documents were generated by the government where many attorneys have functions other than the rendering of legal advice.[178]

In the present case, the district court found that Anna Jovanovich was intimately involved in conducting or supervising the audits and subsequently the Protest. It is for that reason that the district court found Ms. Jovanovich's documents, as opposed to Mr. Gould's, were not protected by the attorney-client privilege. Relevant to the district court's orders, the discovery commissioner explained:

> I think the case of Miss Jovanovich is unusual in that she has certainly played different roles in this litigation. I am wondering why her — how do you distinguish her advice from any kind of business advice that an attorney would be providing to run a business? Here it's the tax business, but how do you distinguish this from any other kind of business advice that would be discoverable as opposed to confidential attorney-client advice? I'm not sure that I see the confidentiality requirement served by the memos and other information supplied by Miss Jovanovich. She just seems to be a cog in the audit process along with all of the other people as opposed to running into some particular legal problem and then getting an opinion and then going on with the audit by, you know, a distinct and separate group of people. Here she seems to be an integral part of the process.[179]

The FTB made no showing in the motion heard by the discovery commissioner, the results of which were adopted by the district court, nor in its papers filed with this Court, to rebut the district court's adoptive findings, and has provided no persuasive evidence that the documents at issue were either received by, reviewed by, or created by Ms. Jovanovich as a result of her role as an attorney for the FTB and thus subject to the attorney-client privilege.

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[176] *Id.* at 9; *see also* page 10, n. 7.

[177] *Coastal Corp. v. Duncan*, 86 F.R.D. 514, 520 (D. Del. 1980).

[178] *Id.* at 521.

[179] 11/ 9/99 Hearing transcript. (*See* Exhibit 4 to the FTB's Writ Petition.)

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B. The FTB's disclosure of all or a part of the subject documents waives the privilege for the entire communication.

The attorney-client privilege does not apply when a document is communicated simultaneously to legal and non-legal personnel. "[N]o protection attaches to a document prepared for simultaneous review by legal and non-legal personnel."[180] "[C]ourts continue to state the rule of implied waiver in absolute form – any disclosure of a confidential communication outside a privileged relationship will waive the privilege as to all information related to the same subject matter."[181] The documents were sent to a number of non-lawyers, and many documents appear to be simply updating lawyers and non-lawyers alike in regard to the status of the audits.

Almost all of the documents at issue are notes regarding the progress of the audits or memos that are directed to non-attorneys or copied to non-attorneys. In such cases, the document itself is not a communication with an attorney seeking legal advice.

The discovery commissioner, for example, stated during the May 5, 1999 hearing (the second of three hearings before the discovery commissioner related to the subject documents) that FTB 100126 contains advice about the processing of Hyatt's tax claim and what should be done. This subject matter relates to the auditing "business" of the FTB, not to the seeking or rendering of legal advice. The analysis is similar for the other memos and notes on the progress and process of the audits. FTB 100126, 100139, 100209, 100218, 100401, and 100908-100909 are notes of progress of the audit, not attorney-client advice. The manner in which an audit is/will be conducted is not advice of an attorney, but is more akin to a manager being informed of a business plan or giving directions to carry out a business plan.

FTB 100288 and 100289-100292 are memos on sourcing. They are not written by an attorney and do not contain legal advice. Also, such documents were copied to many non-lawyers.

The FTB's privilege log did not identify the six people receiving copies of the

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[180] *United States v. IBM*, 66 F.R.D. at 213.

[181] *In re Martin Marietta Corp.*, 856 F.2d 619, 623 (4th Cir. 1988).

documents. Rather, during the hearing on May 5, 1999 the discovery commissioner identified such individuals. In this regard, the FTB has not sustained its burden in establishing that all of the recipients "were reasonably necessary for the transmission of the communication" and fall within the required veil of confidentiality.[182]

FTB 101634-100645 and 101646-100656 are memos on the fraud penalty. They are not written by the attorney, Anna Jovanovich. Rather, she is copied on the document because she was overseeing the audit. The discussion of when and whether to impose a fraud penalty is not a legal question but is an internal audit question for the FTB, *i.e.,* under what circumstances does the FTB impose a fraud penalty?

Moreover, where an attorney is merely acting as a conduit for information the client intends to disclose, no privilege attaches to such communication.[183] Also, a mere recitation of facts cannot be privileged.[184] The purpose and intent of the FTB's "audit file" is to create a record of the FTB's actions and findings.[185] The audit file must be disclosed to the taxpayer after the audit and once the taxpayer files a "protest."[186]

C. The FTB waived the privilege when Sheila Cox reviewed the entire file to refresh her recollection and prepare for her deposition.

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[182] *SEC v. Gulf & Western Industries, Inc.*, 518 F. Supp. 675, 681 (D. D. C. 1981) ("First, the communication must originate in confidence and must not be disseminated beyond those persons who need to know its contents.") (citation omitted).

[183] *In re Micropro Securities Litigation*, 1988 WL 109973, Fed. Sec. L. Rep. P 93, 986 (N.D. Cal. 1988); *In re 3 Com Corp. Securities Litigation*, 1992 WL 456813, Fed. Sec. L. Rep. P 97, 339 (N.D. Cal. 1992)("[B]ecause the documents were intended for publication, there was a lack of intent to maintain confidentiality, a requirement of privilege.").

[184] *State Farm Fire and Casualty Co. v. Superior Court*, 54 Cal. App. 4th 625, 639, 62 Cal. Rptr. 2d 834 (1997) (holding that the attorney-client privilege only protects disclosure of communications between the attorney and the client; it does not protect disclosure of underlying facts). *See North Carolina Electric Membership Corp.*, 110 F.R.D. at 517 ("Legal memoranda which summarize case law but contain no application to the client do not contain confidential client information and are thus not privileged.")

[185] FTB 03775. (*See* Exhibit 10 to the Appendix of Exhibits in Support of Hyatt's Post-Hearing Memorandum, and that appendix is attached as Exhibit 5, to Vol. II, in the accompanying Appendix of Exhibits filed with the Supreme Court.)

[186] FTB 00852. (*See* Exhibit 11 to the Appendix of Exhibits in Support of Hyatt's Post-Hearing Memorandum, and that appendix is attached as Exhibit 5, to Vol. II, of the accompanying Appendix of Exhibits filed with the Supreme Court.)

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The initial motion regarding the subject documents was heard on April 20, 1999 and was brought primarily due to the FTB's blanket waiver of any privileges relating to the subject documents resulting from Sheila Cox's use of and review of the entire audit files to prepare for her deposition.[187]

The week prior to the commencement of her Rule 30(b)(6) deposition, Cox spent two days preparing for the deposition by reviewing the FTB audit files on Hyatt. She spent one day in Sacramento reviewing the *original* files, and another day in Los Angeles reviewing a copy of the file in her attorney's office.[188] Cox acknowledged that the two day review adequately prepared her for her deposition. She testified that reviewing the entire file refreshed her recollection:

> Q. And based upon your review of the FTB file in Sacramento and in Mr. Leatherwood's office do you think that you are adequately prepared to testify today?
>
> A. Yes.
>
> Q. And do you think has that review helped you to refresh your memory about this audit that took place in 1994, '95 and '96?
>
> A. Yes.[189]

D. The specific documents at issue here for which the FTB asserts attorney-client privilege are not privileged for the myriad of reasons set forth above.

Sheila Cox's memos regarding assessment of fraud penalties (FTB 100634-100645 and 100646-101656) do not represent legal advice, but rather relate to how the audit was conducted and the internal FTB policies and procedures, as discussed above. Whether fraud is assessed against a "taxpayer" is not a legal decision or determination, but rather a matter of the FTB's evaluation of its investigative materials and how those materials are viewed under criteria

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[187] Hyatt's initial motion papers and reply papers filed in March and April of 1999 in regard to his motion to compel seeking the documents at issue in this writ petition are attached as Exhibits 1 and 2, respectively, to Vol. I, in the accompanying Appendix of Exhibits filed with the Supreme Court.

[188] Cox depo., Vol. I, pp. 203-207.

[189] Cox depo., Vol. I, 209, lns. 10-18.

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contained within the FTB's internal policies and procedures.

Additionally, the FTB waived any privilege concerning the fraud penalties by allowing Cox to testify at length and without objection as to why and on what basis the fraud penalties were assessed against Hyatt.[190] Other witnesses have similarly testified on the assessment of fraud penalties against Hyatt.[191]

Moreover as discussed above, the Narrative Reports totaling 70 pages discuss how and why the FTB is asserting fraud against Hyatt. The Cox Fraud Memos now at issue discuss the same subject.

The FTB cannot assert that a certain document is privileged after giving voluminous testimony on the topic — particularly where the author of the document is the one who testified concerning its contents, conclusions, findings, etc. The FTB, therefore, waived any privilege which might have attached to the fraud memos (FTB 100634-100645 and 100646-101656).

E. The FTB's comity and choice-of-law arguments fail, again, as they have every time the FTB has raised them during this litigation.

The FTB suggests that the principles of comity and choice of law require the Court to find the documents in question are protected by the attorney-client privilege.[192] The absurdity of the FTB's position is that it acknowledges in its petition that there is no difference between Nevada's law and California's law on the attorney-client privilege.[193] There is no basis to therefore make a "choice of law" and no basis to defer to California's law under the principle of comity. More significantly, the FTB has repeatedly raised comity and choice of law in its ill-fated dispositive motions in the district court. Hyatt extensively briefed these issues in successfully opposing the FTB's motions. Hyatt refers the Court to his opposition brief to the

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[190] Cox Depo, Vol. II, pp. 287-88, Vol. IV, pp. 1032, 1581-82.

[191] Lou Depo, Vol. 3, p. 190, lns. 8-17. (Attached to Hyatt's Appendix of Exhibits in Support of Hyatt's Post-Hearing Memorandum, and that appendix is attached as Exhibit 5, to Vol. II, in the accompanying Appendix of Exhibits filed with the Supreme Court.)

[192] FTB Writ Petition, p. 17, lns. 5 - 12.

[193] *Id.*, p. 16, ln. 17 - p. 17, ln. 3.

FTB's summary judgment motion.[194] The FTB's reference to comity and choice-of-law is no more appropriate here – and the FTB cites no authority in support of its bald reference to comity and choice-of-law – than they were in the FTB's ill-fated dispostive motions.

F. The crime-fraud exception to the attorney-client privilege also prevents the FTB from asserting the attorney-client privilege.

In addition to the FTB's misapplication and waiver of the attorney-client privilege, the FTB perpetrated its fraud and other torts in substantial part by using the material for which it now asserts the attorney-client privilege. The material is therefore discoverable pursuant to the crime-fraud exception. Hyatt sets forth in the accompanying "Appendix re *Prima Facie* Showing of the FTB's Fraudulent Conduct" the *prima facie* showing necessary to invoke the crime-fraud exception. Below, Hyatt summarizes the law regarding the crime-fraud exception and outlines the *prima facie* showing set forth in the accompanying appendix.

1. The crime-fraud exception applies here.

Nevada has adopted the crime-fraud exception as codified at NRS § 49.115, which provides:

> There is no privilege under NRS 49.095 or 49.105:
>
> 1. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud.

California has also enacted a crime-fraud exception with nearly identical wording, which provides an exception to the privilege "if the services of the lawyer were sought or obtained to enable or to aid anyone to commit or plan to commit a crime or fraud."[195] California case law interpreting the crime-fraud exception is therefore highly relevant to interpretation of Nevada's statute. A leading California case on the subject held:

> To invoke the Evidence Code section 956 exception to the attorney-client privilege, the proponent must make a prima facie showing that the services of the lawyer "were sought or obtained"

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[194] *See* pages 50-62 of Hyatt's Opposition to the FTB's Motion for Summary Judgment, attached as Exhibit 11, to Vol. VII, in the accompanying Appendix of Exhibits filed with the Supreme Court.

[195] Cal. Evid. Code § 956.

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> to enable or to aid anyone to commit or plan to commit a crime or fraud.[196]

In making a determination as to whether the crime-fraud exception is applicable, the court need only consider whether the moving party has made a *prima facie* showing. The court need not even consider any counter evidence presented by the opposing party.[197] Further, the showing by the moving party to establish a *prima facie* case of the crime-fraud need not establish wrongdoing beyond a reasonable doubt, but merely that the moving party had established each of the elements of the crime-fraud asserted.[198]

Additionally, parties seeking to invoke the crime-fraud exception need not establish that the attorney consulted was aware of the illicit purpose of the advice sought by his or her client:

> But the lawyer's innocence does not preserve the attorney-client privilege against the crime-fraud exception. The privilege is the client's, so "it is the *client's* knowledge and intentions that are of paramount concern to the application of the crime-fraud exception: the attorney need not know anything about the client's ongoing or planned illicit activity for the exception to apply."[199]

Since the crime-fraud exception requires only proof of a plan to commit a crime or fraud, Hyatt need not prove every element. In particular, Hyatt need not prove actual reliance or damages:

> We conclude that because section 956 applies where an attorney's services are sought to enable a party to plan to commit a fraud, the proponent of the exception need only to prove a false representation of a material fact, knowledge of its falsity, intent to deceive, and the right to rely.[200]

One issue that arises is the proximate relationship between the questioned communication and the crime or fraud. Nevada and California statutes do not require the

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[196] *State Farm Fire and Cas. Co. v. Superior Court*, 54 Cal. App. 4th 625, 643, 62 Cal. Rptr. 2d 834 (1997).

[197] *In re Grand Jury Proceedings (Doe)*, 983 F.2d 1076 (9th Cir. 1993).

[198] *In re Grand Jury Proceedings*, 87 F.3d 377, 381 (9th Cir.), *cert. denied*, 519 U.S. 945 (1996) (holding that crime-fraud exception does not require a completed crime or fraud, but rather only the consultation of an attorney in contemplation of such crime-fraud and that the moving party need not establish the crime or fraud beyond a reasonable doubt).

[199] *United States v. Chen*, 99 F.3d 1495, 1504 (9th Cir. 1996), *cert. denied*, 520 U.S. 1167 (1997) (emphasis added); *see also In re Grand Jury Proceedings*, 87 F.3d at 379.

[200] *BP Alaska Exploration, Inc. v. Superior Court*, 199 Cal. App. 3d 1240, 1263, 245 Cal. Rptr. 682 (1988).

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purpose of the attorney-client communication to be commission of a crime or fraud in order to invoke the exception. It is sufficient under the Nevada and California statutes that the attorney's services "were sought or obtained to enable or aid" the client to commit or plan to commit a crime or fraud:

> A finding that the privileged material "reasonably relates" to the subject matter of the crime or fraud should suffice. . . . In this case, NWEC proved that the BPAE communications with counsel were made as part of the investigation that resulted in the fraudulent December 23 letter. This established the reasonable relationship between the subject matter of the fraud and the privileged communications.[201]

A U.S. District court interpreting a very similar Kansas statute arrived at the same conclusion:

> The Court holds that the memoranda in question must have a reasonable relation to the ongoing fraud to be discoverable under the crime or fraud exception.[202]

2. A sham or fraudulent governmental proceeding is a basis for invoking the crime-fraud exception.

Most significant for this case, the crime-fraud exception applies with equal force to government agencies. When an attorney's advice is related to an allegedly wrongful use of agency process, the attorney-client privilege is vitiated.[203]

In *Recycling Solutions*, plaintiff Recycling Solutions, Inc. ("RSI") lost a bid on a government contract offered by defendant D.C. Department of Public Works ("Public Works"). RSI believed that Public Works rejected its bid based on race or ethnic discrimination, and RSI appealed to the D.C. Contract Appeals Board. The Appeals Board upheld the appeal and directed Public Works to award the contract to RSI. Rather than do so, Public Works appealed the directive of the Contract Appeals Board and allowed another bidder to perform the contract. RSI brought suit alleging that Public Works's appeal was a calculated wrongful scheme to

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[201] *Id.* at 1268.

[202] *In re A. H. Robins Company, Inc.*, 107 F.R.D. 2, 15 (D. Kan. 1985).

[203] *Recycling Solutions, Inc. v. District of Columbia*, 175 F.R.D. 407, 410 (D.D.C. 1997).

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maintain Public Works's discriminatory award. In discovery, RSI sought documents related to Public Works's appeal, which Public Works denied based upon the attorney-client privilege.[204] RSI contended that the documents were discoverable under the crime-fraud exception because Public Works had employed the services of counsel in furtherance of the improper appeal.[205] The court agreed, and in ordering the production of documents related to Public Works's initiation and prosecution of its appeal, the court stated:

> The heart of plaintiffs' claims on these issues is that the former Director of [Public Works], in her official capacity, participated in an unlawful conspiracy with her co-defendants to discriminate against plaintiffs because of their race or ethnicity, and to that end, involved them in protracted and duplicitous litigation to disguise the true nature of the conspiracy. If she consulted with an attorney to facilitate the commission of the overt acts necessary in furtherance of such a conspiracy, the evidence of it may not be suppressed or concealed behind a privilege of any description known to this Court to apply upon the facts of this case.[206]

Here, the FTB's use of its attorneys to further its sham audit which had a predetermined purpose and conclusion are similarly abhorrent. It amounted to nothing less than an unlawful and fraudulent conspiracy to extort money from Hyatt. Advice of counsel, to the extent that it can even be categorized as legal advice, sought in order to perpetrate such conduct, cannot then be protected by asserting the attorney-client privilege.

3. Spoliation of evidence is a basis for invoking the crime-fraud exception.

Where, as here, there is spoliation of evidence, particularly with an attorney's knowledge and consent, the attorney-client privilege cannot be used to shield such conduct.

In *In re Sealed Case*,[207] the Synanon Church undertook "a massive and systematic program to destroy and alter subpoenaed evidence or evidence sought pursuant to civil discovery requests."[208] As part of a grand jury investigation, the government subpoenaed

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[204] *Id.* at 408.

[205] *Id.* at 409.

[206] *Id.* at 410 (emphasis added).

[207] 754 F.2d 395 (D.C. Cir. 1985).

[208] *Id.* at 400.

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Synanon's attorneys to testify regarding Synanon's alleged violations of federal law. The court held that the testimony was not protected under the attorney-client privilege.[209] The court reasoned that regardless of whether the attorneys knowingly participated in the document destruction program, allegations that the attorneys' representation and advice assisted Synanon in carrying out its wrongful scheme warranted application of the crime-fraud exception.[210]

The Ninth Circuit cited *Sealed Case* with approval in *United States v. Laurins*,[211] holding that "[o]bstruction of justice is an offense serious enough to defeat the privilege."[212]

The FTB's spoliation of evidence in this case with the assistance and direction of its in-house counsel is detailed below. The district court has considered significant argument and numerous discovery motions regarding the FTB's "sanitization" of its files. Such spoliation of evidence engaged in by the FTB's in-house counsel is sufficient grounds by itself in which to invoke the crime-fraud exception to the attorney-client privilege.

4. Discovery obtained to date by Hyatt establishes a *prima facie* showing of fraudulent conduct executed by the FTB with the advice of its counsel.

The fraud engaged in by the FTB consisted of both its one-sided, manipulated audits of Hyatt and its false promises and misrepresentations successfully calculated to induce Hyatt's cooperation in providing the FTB with highly sensitive and confidential material which the FTB would supposedly review and maintain in strict confidence. Moreover, the FTB and its in-house counsel engaged in, and continue to engage in, spoliation of evidence in an apparent and ongoing effort to cover-up their misconduct.

i. The one-sided fraudulent audit.

The FTB's auditor, Sheila Cox, fully acknowledged in deposition testimony that she focused exclusively on information obtained which could be construed as supporting the FTB's position. She completely and purposely ignored documentary evidence and witness statements

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[209] *Id.* at 400-402.

[210] *Id.*

[211] 857 F.2d 529, 540 (9th Cir. 1988), *cert. denied*, 492 U.S. 906 (1989).

[212] *See also State Farm Fire and Cas. Co.*, 54 Cal. App. 4th at 643-646.

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directly contrary to the FTB's preordained conclusion — that Hyatt was a California resident longer than he stated in his tax returns.[213] Cox neither investigated nor considered the most relevant information concerning the linchpin for tax assessment — residency. If she had, she would have had no choice but to conclude that Hyatt was a Nevada resident from September 26, 1991 to the present.

The FTB conducted a biased, pre-ordained "investigation" whereby the auditor, Sheila Cox, acknowledged in deposition that she destroyed key evidence that supported Hyatt (*e.g.*, her contemporaneous handwritten notes and computer records of bank account analysis).[214] The FTB disregarded, refused to investigate, ignored, and "buried" the facts favorable to Hyatt which it uncovered during its invasive audit. For example, the FTB simply ignored:

- Hyatt's current neighbors in Nevada who supported his Nevada residency claim;
- Hyatt's former neighbors in California who told of his move to Nevada;
- Hyatt's friends and business associates who knew of his move to Nevada;
- Hyatt's adult son who knew of his move to Nevada;
- Hyatt's 300 Nevada credit card charges;
- Hyatt's Nevada rent, utilities, telephones, and insurance payments;
- Hyatt's Nevada voter registration and driver's license;
- Hyatt's Nevada home purchase offers and escrow papers; and
- Hyatt's Nevada religious, professional, and social affiliations.[215]

The FTB ultimately prepared and set forth two Narrative Reports totaling 70 pages which supposedly detail the evidence in favor of its conclusion concerning Hyatt's residency as well as a basis for asserting a fraud penalty against Hyatt.[216] Based on the depositions conducted to date, Hyatt has learned that, in compiling such Narrative Reports, the FTB ignored

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[213] Hyatt Protest Letter. (*See* Exhibit 14 to the Cowan affid., and the Cowan affid. is attached as Exh. 15, to Vol. VIII, of the accompanying Appendix of Evidence filed in the Supreme Court.)

[214] Cox depo., Vol. I, pp. 17, 174-175, 190, Vol. II, pp. 341, 342, 423-24, Vol. III, pp. 569, 605, 661, Vol. IV, pp. 861, 971.

[215] Hyatt Protest Letter.

[216] Cox Narrative Reports.

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substantial evidence from Hyatt's neighbors, business associates, and friends favorable to Hyatt and contrary to the FTB's preordained conclusions.[217]

In preparing its Narrative Reports, the FTB never spoke with or interviewed Hyatt. The FTB also ignored and failed to interview the following individuals having information favorable to Hyatt: Grace Jeng, his long-time assistant; his adult son, Dan; and Barry Lee, his long-time business associate.[218] Instead, the FTB audited Miss Jeng and Barry Lee[219] to try to intimidate them and separate them from Hyatt.

Instead of speaking with Hyatt's son, Dan, with whom Hyatt had a close ongoing relationship and who visited with Hyatt in Las Vegas during April 1992, and at many times thereafter, the FTB interviewed and obtained "affidavits" from Hyatt's bitter and long-time divorced ex-wife, his estranged daughter, and his estranged brother. His ex-wife and estranged brother had filed or forced Hyatt into a number of frivolous, and on their part, unsuccessful litigations. Nevertheless, these three "affidavits" obtained by the FTB from such estranged relatives were the cornerstone of its case and were prominently featured in its Narrative Reports.[220] In addition, such "affidavits" were neither affidavits nor given under oath.[221] More importantly, the statements set forth in such "affidavits" were nothing more than vague and general attacks on Hyatt and provided no specific evidence supporting the FTB's residency conclusion despite the frequent references and significant reliance on the "affidavits" in the narrative report. The only specific statements set forth in such "affidavits" are by Hyatt's estranged daughter, Beth, and yet she specifically wrote at the end of her statement that she could not be held to what is stated in such affidavit in a court of law. This tragic estrangement, the product of a long-standing divorce, produced wild accusations neither credible nor subject to proof. The FTB both exploited and overlooked the obvious bias motivating its "key" witness.

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[217] Hyatt Protest Letter; Cox depo., Vol. V, pp. 1181, 1187-1188.

[218] Cox depo., Vol. I, 29, 168-169, 181.

[219] Cox depo., Vol. VI, p. 1460-61, Vol VIII, p. 2021.

[220] Cox Narrative Reports.

[221] Cox depo., Vol. III, p. 756, lns. 18-25.

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