

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF NEVADA

3  
4 MONTGOMERY, *et al.*,

5 Plaintiffs,

6 v.

7 ETREPPID TECHNOLOGIES, LLC,  
8 *et al.*,

9 Defendants.

10 AND ALL RELATED MATTERS.  
11

)  
) 3:06-CV-00056-PMP-VPC  
) BASE FILE

) 3:06-CV-00145-PMP-VPC

) **ORDER**

12 Before the court is Michael Flynn’s (“Mr. Flynn”) motion to establish procedures to  
13 comply with Nevada Rules of Professional Conduct 3.3(a)(3) and (b) (#540). Defendants  
14 eTreppid Technologies L.L.C. and Warren Trepp (collectively “eTreppid”) joined in the motion  
15 (#585). Counter-defendant Michael Sandoval (“Sandoval”) opposed (#587). Plaintiffs Dennis  
16 Montgomery (“Mr. Montgomery”) and the Montgomery Family Trust (collectively “the  
17 Montgomery parties”) also opposed (#588) and filed a request for judicial notice (#589). Mr.  
18 Flynn replied (#605). The court has thoroughly reviewed the record and the motions and grants  
19 in part Mr. Flynn’s motion to establish procedures (#540).

20 **I. History and Procedural Background**

21 On April 18, 2008, Mr. Flynn filed the present motion, which follows months of  
22 contentious filings in this case surrounding Mr. Flynn’s withdrawal as counsel for the  
23 Montgomery parties.<sup>1</sup> Mr. Flynn served as lead counsel for the Montgomery parties from the  
24 beginning of these consolidated proceedings until September 4, 2007, when the District Court  
25 granted his motion to withdraw as counsel (#256). Mr. Flynn asserts that his withdrawal was  
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28 <sup>1</sup> As the court and the parties are well-aware of the facts of this case, the court here sets out facts relevant only to the present motion.

1 precipitated by the unsealing of certain documents in this case in April 2007, which led to his own  
2 investigation between April and June 2007 as to the truth of certain material facts that his clients,  
3 particularly Mr. Montgomery, told him (#540, pp. 9-11). Mr. Flynn states that even prior to his  
4 withdrawal, he believed that he had ethical duties pursuant to the Nevada Rules of Professional  
5 Conduct (“NRPC”) to remedy certain statements he and his clients made to the court, which he  
6 now believes to be false. *Id.* Additionally, subsequent to Mr. Flynn’s withdrawal, the  
7 Montgomery parties, through their new counsel, submitted a number of declarations and made  
8 representations to this court on various issues. *Id.* Mr. Flynn contends that these declarations and  
9 representations constitute serious “litigation misconduct,” including but not limited to, perjury  
10 and fraud upon the court. *Id.* Mr. Flynn further contends that the declarations trigger his ethical  
11 duties pursuant to NRPC to disclose information to this court. *Id.* Mr. Flynn requests guidance  
12 from the court as to his duties and the procedures he should use to disclose information because  
13 NRPC 3.3 and related case precedent fail to set out any procedures an attorney should utilize to  
14 comply with the rule. *Id.* at p. 3.

## 15 **II. Discussion and Analysis**

### 16 **A. Law**

#### 17 **1. Nevada Rules of Professional Conduct**

18 NRPC 1.9 requires that a lawyer who has formerly represented a client in a matter shall  
19 not:

20 (1) Use information relating to the representation to the  
21 disadvantage of the former client except as these Rules would  
22 permit or require with respect to a client, or when the information  
has become generally known; or

23 (2) Reveal information relating to the representation except as  
these Rules would permit or require with respect to a client.

24 NRPC 1.9(c). In the present case, Rules 1.6 and 3.3 are implicated in whether the rules “permit  
25 or require” the disclosure of client information.

26 NRPC 1.6 states that lawyers are prohibited from revealing “information relating to the  
27 representation of a client,” except under certain circumstances. NRPC 1.6(a). A lawyer may  
28 reveal client information “to the extent the lawyer reasonably believes necessary:”

1 (3) To prevent, mitigate, or rectify the consequences of a client’s  
2 criminal or fraudulent act in the commission of which the lawyer’s  
3 services have been or are being used, but the lawyer shall, where  
practicable, first make reasonable effort to persuade the client to  
take corrective action; ...

4 (5) To establish a claim or defense on behalf of the lawyer in a  
5 controversy between the lawyer and the client, ... or to respond to  
6 allegations in any proceeding concerning the lawyer’s  
representation of the client; ...

7 NRPC 1.6(b). NRPC 3.3, entitled “Candor Toward the Tribunal,” provides that:

8 (a) A lawyer shall not knowingly:

9 (1) Make a false statement of fact or fail to correct a false  
10 statement of material fact or law previously made to the tribunal  
by the lawyer; ...

11 (3) Offer evidence that the lawyer knows to be false. If ...  
12 the lawyer, ... or the lawyer’s client ... has offered material  
evidence and the lawyer comes to know of its falsity, the lawyer  
shall take reasonable remedial measures, including, if necessary,  
disclosure to the tribunal.

13 NRPC 3.3(a). NRPC 3.3(b) states:

14 A lawyer who represents a client in an adjudicative proceeding and  
15 who knows that a person intends to engage, is engaging, or has  
engaged in criminal or fraudulent conduct related to the  
16 proceeding shall take reasonable remedial measures, including, if  
necessary, disclosure to the tribunal.

17 NRPC 3.3(b). The NRPC defines “fraud” or “fraudulent” as “conduct that is fraudulent under  
18 the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.”

19 NRPC 1.0. A lawyer’s Rule 3.3(a) and (b) duties “continue to the conclusion of the proceeding,  
20 and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.”

21 NRPC 3.3(c).

22 The comments to Rule 3.3 emphasize the importance of truth in the decision-making  
23 process and strongly support disclosure where there is a question of a fraud upon the court.<sup>2</sup> The  
24 Comments emphasize a lawyer’s “special” duties and obligations as an officer of the court “to  
25 avoid conduct that undermines the integrity of the adjudicative process” and “to prevent the trier  
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27 <sup>2</sup> The NPRC are based on the ABA Model Rules of Professional Conduct (“ABA Rules”); as such,  
28 the court is permitted to consult the comments to the ABA Rules for guidance in interpreting and applying  
the NRPC. NRPC 1.0A.

1 of fact from being misled by false evidence.” ABA Rule 3.3, Comments 2 and 5. Comment 12  
2 states that a lawyer’s Rule 3.3(b) duty reflects a

3 special obligation to protect a tribunal against criminal or  
4 fraudulent conduct that undermines the integrity of the  
5 adjudicative process, such as bribing, intimidating, or otherwise  
6 unlawfully communicating with a witness, juror, court official or  
other participant in the proceeding, unlawfully destroying or  
concealing documents or other evidence or failing to disclose  
information to the tribunal when required to do so.

7 ABA Rule 3.3, Comment 12. ABA Rule 3.3(b) “was amended in 2002 to impose a greater duty  
8 upon lawyers to protect courts from fraud.” ABA Annotated Model Rules of Professional  
9 Conduct, 6th Ed., Rule 3.3 (2007). Comment 11 states that although the disclosure of such  
10 information may “result in grave consequences to the client,” the alternative – that the lawyer  
11 does not disclose the information and thereby cooperates with the client in deceiving the court  
12 – would “subvert the truth-finding process which the adversary system is designed to implement.”  
13 ABA Rule 3.3, Comment 11.

## 14 **2. The Attorney-Client Privilege and the Crime-Fraud Exception**

15 The attorney-client privilege protects confidential communications made by a client to an  
16 attorney for the purpose of seeking legal advice, as well as the attorney’s advice in response to  
17 such disclosures. *In re Grand Jury Subpoena 92-1(SJ)*, 31 F.3d 826, 829 (9th Cir. 1994); *see also*  
18 *U.S. v. Chen*, 99 F.3d 1495, 1501 (9th Cir. 1996). This privilege is the oldest known to the  
19 common law, and is also “perhaps, the most sacred of all legally recognized privileges, and its  
20 preservation is essential to the just and orderly operation of our legal system.” *U.S. v. Bauer*, 132  
21 F.3d 504, 510 (9th Cir. 1997). “Its purpose is to encourage full and frank communication  
22 between attorneys and their clients and thereby promote broader public interests in the observance  
23 of law and administration of justice.” *Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981). The party  
24 asserting the attorney-client privilege has the burden of establishing the relationship and the  
25 privileged nature of the communications. *Weil v. Investment/Indicators, Research and*  
26 *Management, Inc.*, 647 F.2d 18, 25 (9th Cir. 1981).

27 Yet, while the attorney-client privilege protects a client’s revelations of past conduct, “it  
28 cannot be used to shield ongoing or intended future criminal conduct.” *Chen*, 99 F.3d at 1501;

1 *see also Clark v. U.S.*, 289 U.S. 1, 15 (1932) (“A client who consults an attorney for advice that  
2 will serve him in the commission of a fraud will have no help from the law. He must let the truth  
3 be told.”). The crime-fraud exception applies to attorney-client communications which “solicit  
4 or offer advice for the commission of a crime or fraud.” *In re Grand Jury Subpoena 92-1(SJ)*,  
5 31 F.3d at 829.

6 The procedure for determining whether the crime-fraud exception applies customarily  
7 begins with a court’s *in camera* review of the communications at issue. *See United States v.*  
8 *Zolin*, 491 U.S. 554, 565 (1989) (“*in camera* review may be used to determine whether allegedly  
9 privileged attorney-client communications fall within the crime-fraud exception.”). *Zolin* set out  
10 a two-part analysis to determine when a court may conduct the initial *in camera* review of  
11 allegedly privileged information. *Chen*, 99 F.3d at 1503. First, the party opposing the privilege  
12 must make “a showing of a factual basis adequate to support a good faith belief by a reasonable  
13 person that *in camera* review of the materials may reveal evidence to establish the claim that the  
14 crime-fraud exception applies.” *Zolin*, 491 U.S. at 572 (citations and quotations omitted). This  
15 first step should “focus only on evidence by the party seeking *in camera* review.” *In re Grand*  
16 *Jury Subpoena 92-1 (SJ)*, 31 F.3d at 829. After such a showing is made, the court must  
17 determine, in its “sound discretion,” whether it will conduct an *in camera* review of the materials.  
18 *Zolin*, 491 U.S. at 572. In making this determination, the court should consider the following  
19 factors: the amount of material to be reviewed, the relevance of the allegedly privileged materials  
20 to the case, and the likelihood that *in camera* review will reveal evidence to establish the  
21 applicability of the crime-fraud exception.<sup>3</sup> *Id.*

22 Because an *in camera* review “is a much smaller intrusion on the attorney-client privilege  
23 than full disclosure,” the threshold to establish that *in camera* review is warranted is quite low.  
24 *In re Grand Jury Investigation*, 974 F.2d 1068, 1073 (9th Cir. 1992) (citing *Zolin*, 491 U.S. at  
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27 <sup>3</sup> The Ninth Circuit has also extended the *Zolin* standard to a situation in which a party seeks review  
28 to contest assertions of privilege. *In re Grand Jury Investigation*, 974 F.2d 1068, 1074 (9th Cir. 1992) (“...  
the party opposing the privilege need only show a factual basis sufficient to support a reasonable, good faith  
belief that *in camera* inspection may reveal evidence that the information in the materials is not privileged.”).

1 572) (the burden is “relatively minimal”). The purpose of the low-threshold is to discourage and  
2 prevent abuses of the attorney-client privilege. *Id.* *In camera* review by the court does not  
3 destroy the privileged nature of the contested communications. *Id.* at 1074.

4       Once the court conducts the *in camera* review and determines that there is a basis for the  
5 crime-fraud exception, any party seeking to outright vitiate or terminate the attorney-client  
6 privilege must: (1) “show that ‘the client was engaged in or planning a criminal or fraudulent  
7 scheme when it sought the advice of counsel to further the scheme;’” and (2) “demonstrate that  
8 the attorney-client communications for which production is sought are ‘sufficiently related to’ and  
9 were made ‘in furtherance of [the] intended, or present, continuing illegality.’” *In re Grand Jury*  
10 *Proceedings*, 87 F.3d 377, 381 (9th Cir. 1996); *see also In re Napster, Inc. Copyright Litigation*,  
11 479 F.3d 1078, 1094-95 (9th Cir. 2007) (the party seeking outright disclosure of privileged  
12 materials or communications must demonstrate, by a preponderance of the evidence, the existence  
13 of the crime-fraud exception). The attorney need not have been aware of the client’s motives –  
14 the focus is on the *client’s* knowledge and intent. *Napster*, 479 F.3d at 1090. Nor does the  
15 attorney have to have participated, “even unwittingly, in the client’s criminal activity” because  
16 a communication can be “in furtherance of” a fraud even if the attorney does nothing after the  
17 communication to assist the fraud, and even if the communication turns out not to be of any  
18 assistance in the fraud. *In re Grand Jury Proceedings*, 87 F.3d at 382. Moreover, the crime or  
19 fraud need not have succeeded for the exception to apply. *Napster*, 479 F.3d at 1090.

## 20                   **B. The Parties’ Arguments**

21       Mr. Flynn makes several arguments in his motion to establish procedures (#540).<sup>4</sup> First,  
22 Mr. Flynn argues that he has a duty to take remedial measures, including disclosure to this court  
23 pursuant to NRPC 3.3, because the Montgomery parties have filed false material evidence with  
24 this court. *Id.* at pp. 1-2. Mr. Flynn argues that he has “come to know” that the evidence the  
25 Montgomery parties submitted is false, and that his duty to disclose is triggered whenever the  
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27       <sup>4</sup> Although the court has determined that resolution of many of the issues presented in Mr. Flynn’s  
28 motion cannot be addressed until after the court has viewed the information *in camera*, the court here sets  
out each of the parties’ positions for purposes of clarity.

1 fraud is discovered, regardless of whether he is still representing the Montgomery parties. *Id.* at  
2 p. 2.

3 Mr. Flynn also argues that the Montgomery parties have effected a broad waiver of their  
4 attorney-client privilege by suing him for the return of his client files and “accusing him in *four*  
5 public forums of unethical, fraudulent, and even criminal conduct.” *Id.* at pp. 3-4, 11-12  
6 (emphasis in original).<sup>5</sup> He further argues that a finding of waiver is supported by the  
7 Montgomery parties’ use of perjured declarations to make these allegations against him, and by  
8 the fact that their perjury is material to many of the key issues in this case. *Id.* at p. 4. Mr. Flynn  
9 argues that NRPC 1.6(b) codifies the waiver principle and allows him to respond to a client’s  
10 accusations. *Id.* at p. 7. Mr. Flynn contends that should this court determine that the  
11 Montgomery parties’ have waived their attorney-client privilege, no NRPC 3.3 procedures are  
12 necessary because Mr. Flynn is then free to disclose the information, as it is no longer protected  
13 by the privilege. *Id.* at p. 12.<sup>6</sup>

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15 <sup>5</sup> Aside from his waiver argument, Mr. Flynn also argues that the information he has may or may not  
16 be subject to the attorney-client privilege for various reasons – the communications may not be protected by  
17 the privilege in the first instance, or they may be protected communications but subject to the application of  
18 exceptions to the privilege, such as the presence of third parties, no intention of confidentiality, or the crime-  
19 fraud exception.

20 <sup>6</sup> In the present order, the court makes only the initial determination of whether it will allow Mr.  
21 Flynn to submit his declaration for *in camera* review, and withholds a decision on the waiver issue at this  
22 time. However, the court does address the Montgomery parties’ procedural argument that Mr. Flynn’s  
23 motion is procedurally defective pursuant to Local Rule (“LR”) 7-2 of the Local Rules of Civil Practice for  
24 the District of Nevada (#588, p. 2). LR 7-2 provides that all motions filed in this court “shall be supported  
25 by a memorandum of points and authorities,” and that the failure to file points and authorities in support of  
26 a motion “shall constitute a consent to the denial of the motion.” LR 7-2(a). The Montgomery parties argue  
27 that Mr. Flynn’s motion to establish procedures should be denied in its entirety because, with respect to the  
28 waiver issue, he refers the court to the arguments in his motion for sanctions (#588, p. 2).

This LR 7-2 argument stems from the court’s denial of the Montgomery parties’ April 29, 2008  
emergency motion to seal and strike certain of Mr. Flynn’s filings relating to the motion to establish  
procedures and the motion for sanctions (#562). On April 30, 2008, this court found that the Montgomery  
parties’ emergency motion contained no “points and authorities,” instead consisting only of one sentence  
adopting and incorporating by reference “the [proposed] findings of facts and conclusions of law lodged  
concurrently herewith and attached hereto for the court’s convenience” (#565). Attached to the emergency  
motion were two proposed orders (#s562 and 563). Holding that the proposed orders were “not points and  
authorities, and there is no factual or legal basis for the relief requested,” the court denied the emergency  
motion (#565).

That situation is clearly distinguishable from the present motion. In the Montgomery parties’

1 Mr. Flynn states that the procedures he requests apply to Mr. Montgomery's statements  
2 to Mr. Flynn during the time Mr. Flynn represented him (the "representation period"), but which  
3 implicate the Montgomery parties and their current counsel in litigation misconduct and  
4 submission of false evidence after Mr. Flynn withdrew as counsel. *Id.* at p. 4. He refers to "at  
5 least three declarations of Montgomery," filed after his withdrawal, which potentially implicate  
6 client confidences he received during the representation period and which trigger his ethical  
7 duties. *Id.* at pp. 5, 11-16 (citing Mr. Montgomery's September 10, 2007 declaration (#261), and  
8 Mr. Montgomery's two March 10, 2008 declarations (#466 and #467)). Mr. Flynn also argues  
9 that some of the declarations Mr. Montgomery filed while Mr. Flynn was his counsel similarly  
10 trigger Mr. Flynn's ethical duties of disclosure. *Id.* at p. 16.

11 eTreppid joins Mr. Flynn's motion to establish procedures, and informs the court that it  
12 intends to subpoena the documents Mr. Flynn used to support his allegations (#585). eTreppid  
13 predicts that the Montgomery parties will object to their future subpoena, which will require  
14 eTreppid to file a motion to compel. *Id.* eTreppid argues that its burden on a motion to compel  
15 allegedly privileged documents is, pursuant to *Zolin*, "a relatively easy standard to satisfy," and  
16 that Mr. Flynn, as a party to the actual communications, likely has a lighter burden in submitting  
17 allegedly privileged documents. *Id.* eTreppid urges the court to grant Mr. Flynn's motion for *in*  
18 *camera* review to eliminate the need for eTreppid to file a motion to compel. *Id.*

19 The Montgomery parties oppose Mr. Flynn's motion (#588). They argue that Mr. Flynn  
20 has an ethical duty to his former clients pursuant to NRPC 1.9 not to reveal privileged  
21 communications unless permitted by other rules, which rules they contend do not apply here. *Id.*  
22 at p. 3. The Montgomery parties argue that NRPC 3.3(a)(3) is inapplicable because it applies  
23 only to evidence a lawyer presented while he represented his client, and that Mr. Flynn has not

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25 emergency motion, they cited absolutely no law or facts, simply including one sentence referencing a  
26 proposed order. In Mr. Flynn's motion to establish procedures, he includes numerous facts to support his  
27 motion and additionally sets out the law relevant to the main issue in the motion, *i.e.*, whether he has a Rule  
28 3.3 duty, and if so, how to comply. Because the resolution of Mr. Flynn's motion to establish procedures  
does not require the court to make a determination on the waiver issue, the court rejects the Montgomery  
parties' procedural argument.



1 demonstrated that he personally presented evidence or declarations while acting as counsel that  
2 he now “knows to be false.” *Id.* at pp. 4-5. The Montgomery parties contend that all of the  
3 evidence Mr. Flynn states is “false” was filed after Mr. Flynn withdrew and because Mr. Flynn  
4 was no longer acting as counsel, he has no Rule 3.3 duty. *Id.*

5 The Montgomery parties additionally assert that Mr. Flynn also failed to demonstrate that  
6 he has a Rule 3.3(b) duty. *Id.* at p. 6. The Montgomery parties contend that for Mr. Flynn to have  
7 a Rule 3.3(b) duty, the criminal or fraudulent conduct would have had to have occurred during  
8 the representation period. *Id.* Because Mr. Flynn has not alleged that any of the criminal or  
9 fraudulent conduct occurred while he represented the Montgomery parties, he has failed to  
10 demonstrate a duty. *Id.* Further, the Montgomery parties argue that the attorney-client privilege  
11 cannot be vitiated pursuant to the crime-fraud exception unless a two-part test is met, and Mr.  
12 Flynn has failed to meet this standard.<sup>7</sup> *Id.* at pp. 6-7. They also contend that Mr. Flynn failed  
13 to even allege that some of the post-withdrawal declarations he references are criminal or  
14 fraudulent. *Id.* at p. 7.<sup>8</sup>

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16 <sup>7</sup> The test the Montgomery parties refer to is the standard a party must meet to entirely vitiate the  
17 privilege once the court determines that communications reviewed *in camera* likely meet the crime-fraud  
18 exception. *In re Grand Jury Investigation*, 974 F.2d at 1074. As noted below, this is not at issue yet – in  
19 this order the court simply determines whether Mr. Flynn has met the threshold requirements to submit the  
20 alleged attorney-client communications for *in camera* review.

21 <sup>8</sup> The Montgomery parties additionally argue that the timing of Mr. Flynn’s motion demonstrates his  
22 bad faith. On September 4, 2007, the District Court granted Mr. Flynn’s motion to withdraw (#256), and on  
23 March 24, 2008, this court ordered that Mr. Flynn is entitled to collect past due attorneys fees and costs from  
24 the Montgomery parties for the time period prior to Mr. Flynn’s withdrawal as counsel (#502). The  
25 Montgomery parties argue that the fact that Mr. Flynn waited until after the court awarded his attorney fees  
26 to fulfill his alleged ethical duties demonstrates Mr. Flynn’s improper motive of revenge against his former  
27 clients, and also indicates that he does not truly have a Rule 3.3 “duty” (#588, p. 6). As evidence of his bad  
28 faith, the Montgomery parties request that this court take judicial notice of an email sent by Mr. Flynn’s son  
to the employees of Ms. Blixseth’s company, Opspring LLC, calling attention to Mr. Flynn’s current motion  
to establish procedures and the accompanying motion for sanctions (#589). Mr. Flynn argues that he has no  
improper motive here, and that the required disclosures are actually to his detriment because the disclosures  
could effectively preclude a judgment in favor of the Montgomery parties, which will force him to file a  
separate lawsuit to collect his attorneys fees (#540, p. 6). Further, Mr. Flynn points out that April 2008 was  
a reasonable time to file the present motion because prior to that, he was busy addressing the Montgomery  
parties’ allegations in the various forums in which they brought claims against him in order to obtain his  
client files (#605). The court’s finding is that Mr. Flynn’s son’s email is irrelevant to whether Mr. Flynn has  
met the *Zolin* threshold; as such, the court declines to take judicial notice of the email at this time.

1 Mr. Flynn responds that the Montgomery parties have “put the cart before the horse”  
2 (#605). Mr. Flynn asserts that he simply requests that this court establish procedures for his  
3 compliance with NRPC 3.3, and that only after these procedures are in place and he has submitted  
4 the declaration will the issue of whether the privilege should be terminated be ripe for decision.  
5 *Id.* at pp. 1, 6. Mr. Flynn further argues that the Montgomery parties have misinterpreted NRPC  
6 3.3, which he contends does not require that the lawyer actually know the evidence is false when  
7 it is offered, but rather requires the lawyer to take remedial measures when he “comes to know”  
8 of the falsity of submitted evidence. *Id.* at p. 3. Mr. Flynn contends that he has come to know  
9 that both evidence he submitted for the Montgomery parties while he was counsel and evidence  
10 the Montgomery parties’ current counsel submitted for the Montgomery parties after Mr. Flynn  
11 withdrew is false, and that the client communications he wishes to disclose to the court all  
12 occurred during the representation period. *Id.* Mr. Flynn further asserts that the alleged fraud on  
13 the court will continue if the court does not order the *in camera* review. *Id.* Importantly, he also  
14 contends that if he does not submit his declaration to the court, he will not be able to inform the  
15 court of certain state secrets that have been revealed to unauthorized persons. *Id.*

16 Mr. Flynn also responds that he has a duty pursuant to NRPC 3.3(b) because he has  
17 alleged that Mr. Montgomery’s post-withdrawal declarations are perjured; therefore, the crime-  
18 fraud exception applies. *Id.* at pp. 4-5. Mr. Flynn asserts that the attorney-client privilege should  
19 not be used as a “sword” to commit crimes such as perjury or to perpetrate a fraud upon the court.  
20 *Id.* at p. 6.

### 21 C. Merits

22 After reviewing the parties’ arguments and the relevant law, the court concludes that *in*  
23 *camera* review of Mr. Flynn’s declaration is warranted. This court is deeply concerned about the  
24 allegations of a fraud upon the court. However, since these are extremely serious allegations  
25 against the Montgomery parties and their current counsel, the court declines to make any finding  
26 of fact or law until it has evaluated the evidence.

27 The parties have not cited any cases which set out the procedure required to comply with  
28 a lawyer’s Rule 3.3 duties. The court’s own research also has not revealed such a procedure. As

1 eTreppid points out, the only related procedural test, set out in *Zolin*, involves the crime-fraud  
2 exception to the attorney-client privilege and is meant to apply “to situations where a party *not*  
3 privy to the communications is attempting to discover them” (#585, pp. 3-4). It appears that no  
4 court has applied the *Zolin* standard to the present situation, *i.e.*, as a procedure for complying  
5 with NRPC 3.3. However, the court finds the *Zolin* test applicable to the present situation given  
6 the similarities between the crime-fraud exception and a Rule 3.3 situation in which it is claimed  
7 that false material evidence has been offered to a court. Whether Mr. Flynn’s burden in this  
8 situation is lighter than the *Zolin* standard need not be answered since the court concludes that  
9 it is certainly no more stringent given that Mr. Flynn was a party to the communications.

10 As such, as set out in more detail below, the court concludes that pursuant to the first  
11 prong of the *Zolin* test, there has been a threshold showing to support a good-faith belief that *in*  
12 *camera* review of the allegedly privileged communications may reveal evidence of a fraud upon  
13 this court. In so concluding, the court notes that “some speculation is required under the *Zolin*  
14 threshold” because all that is required from the evidentiary showing is that it *may* reveal evidence  
15 of a crime or fraud. *In re Grand Jury Investigation*, 974 F.2d at 1073 (emphasis added). “A  
16 *prima facie* showing of crime-fraud is not required before an *in camera* inspection.” *Id.* (“There  
17 is an important difference between showing how documents may supply evidence that the crime-  
18 fraud exception applies and showing directly that the exception applies. This difference results  
19 in a considerably lower threshold for conducting *in camera* review than for fully disclosing  
20 documents.”).

21 Specifically, the court relies on Mr. Flynn’s May 5, 2008 sealed declaration setting out  
22 non-privileged facts to support his allegation of an ongoing fraud upon the court (#573 (*sealed*)).  
23 Without revealing the specific content of the sealed declaration, the court is especially concerned  
24 with the truth of some of Mr. Montgomery’s declarations, including those submitted prior to and  
25 after Mr. Flynn’s withdrawal, with respect to the location and existence of CD1, the key piece of  
26 evidence in this case; the possible alteration of evidence prior to its submission to the court; and  
27 the truth of Mr. Flynn’s representations to this court during the representation period, which were  
28 based on facts his clients told him. *Id.* Further support that the *Zolin* threshold test has been met

1 is the court's own comparison of Mr. Montgomery's September 10, 2007 declaration in this case  
2 (#261) with Mr. Montgomery's and Mr. Flynn's February 28, 2007 declarations and associated  
3 documents in case number 3:06-cv-00263-PMP-VPC (#115 and #114, respectively). Mr. Flynn's  
4 April 24, 2008 sealed declaration filed in support of his motion for sanctions, particularly with  
5 respect to information concerning CD1, also substantiates the court's finding that the *Zolin*  
6 threshold test is sufficiently satisfied (#547 (*sealed*)). Finally, also supportive is the fact that  
7 some of the information contained in Mr. Flynn's sealed declarations appears to conflict with the  
8 court's observation of Mr. Montgomery's testimony at recent Order to Show Cause hearings.

9         The Montgomery parties themselves also contributed to the court's conclusion. While the  
10 Montgomery parties made numerous legal arguments, it is what they failed to do that is telling.  
11 Despite the fact that the Montgomery parties had ample opportunity, they did not submit a  
12 declaration denying Mr. Flynn's allegations that they have perpetrated a fraud upon the court.  
13 Instead, in an attempt to discredit Mr. Flynn, the Montgomery parties submit Ms. Blixseth's  
14 declaration to support their view that Mr. Flynn had an improper motive in filing his motion.  
15 This attempt to discredit Mr. Flynn does not respond to Mr. Flynn's accusations. The court here  
16 is interested in information that refutes these serious claims.

17         In exercising its discretion to order the *in camera* review, the court applied the *Zolin*  
18 factors. The court anticipates that the amount of material it will be required to review will not  
19 be overly burdensome, especially considering the court's orders below regarding the designations  
20 Mr. Flynn must make in his declaration with each disclosure. The court also finds that this  
21 information is very relevant to the main issues in this case, particularly concerning key evidence.  
22 Finally, based on all of the evidence as well as the court's knowledge of this case, the court  
23 concludes that it is fairly likely that the *in camera* review may reveal evidence to establish  
24 whether a fraud has been perpetrated upon this court.

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1           **III. Conclusion**

2           Based on the foregoing and for good cause appearing:

3           **IT IS HEREBY ORDERED** that Mr. Flynn submit his declaration to the court, *in*  
4 *camera*, by **Wednesday, August 27, 2008**. Mr. Flynn shall include all allegedly privileged  
5 communications that relate to any alleged fraud upon the court that were generated during the  
6 course of his representation of the Montgomery parties, and which Mr. Flynn reasonably believes  
7 require disclosure to the court pursuant to the NRPC or fall under an exception to the attorney-  
8 client privilege.

9           **IT IS FURTHER ORDERED** that in his declaration, Mr. Flynn will inform the court  
10 as to each disclosure:

11           (1) whether he reasonably believes the communication is protected by the attorney-client  
12 privilege in the first instance;

13           (2) if it is privileged, whether he reasonably believes the communication is subject to an  
14 exception to the attorney-client privilege, which exception, and why and/or pursuant to  
15 which rule of professional conduct Mr. Flynn makes the disclosure; and

16           (3) how the communication relates to allegedly false evidence submitted to this court.

17           **IT IS FURTHER ORDERED** that Mr. Flynn shall be particularly careful to exclude any  
18 and all attorney-client privileged communications that are clearly not subject to an exception,  
19 which concern alleged past or completed crimes or frauds for which the Montgomery parties  
20 consulted Mr. Flynn in the first place, *i.e.*, those that would not come within the crime-fraud  
21 exception. *In re Grand Jury Subpoena 92-1(SJ)*, 31 F.3d 826, 831 (9th Cir. 1994).

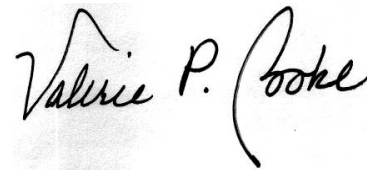
22           **IT IS FURTHER ORDERED** that after the court has an opportunity to review Mr.  
23 Flynn's declaration *in camera*, the court will make a determination as to whether it believes that  
24 Mr. Flynn *may* have a Rule 3.3 duty and/or whether the crime-fraud exception *may* apply to some  
25 or all of the communications. If the court so concludes, any party seeking outright disclosure of  
26 the privileged materials must demonstrate by a preponderance of the evidence, the existence of  
27 a crime-fraud. *In re Napster, Inc. Copyright Litigation*, 479 F.3d 1078, 1094-95 (9th Cir. 2007);  
28 *see also In re Grand Jury Proceedings*, 87 F.3d 377, 381 (9th Cir. 1996) (a party seeking to

1 vitiate the attorney-client privilege must (1) “show that ‘the client was engaged in or planning a  
 2 criminal or fraudulent scheme when it sought the advice of counsel to further the scheme;” and  
 3 (2) “demonstrate that the attorney-client communications for which production is sought are  
 4 ‘sufficiently related to’ and were made ‘in furtherance of [the] intended, or present, continuing  
 5 illegality.’”). At such time and if the court makes such a determination, the court will provide the  
 6 Montgomery parties with ample notice and an opportunity to be heard, including the opportunity  
 7 to present “countervailing evidence.” *See In re Napster, Inc. Copyright Litigation*, 479 F.3d  
 8 1078, 1093 (9th Cir. 2007) (in civil cases where outright disclosure is requested, a more formal  
 9 procedure is required, and the party seeking to preserve the privilege has the right to produce  
 10 countervailing evidence).<sup>9</sup> Depending on the content of the communications, when they were  
 11 made, and what they pertain to, the court may order additional briefing on certain issues,  
 12 including whether the communications are privileged in the first instance, waiver of the attorney-  
 13 client privilege, the crime-fraud exception, and Mr. Flynn’s Rule 3.3 duties.

14 **IT IS FURTHER ORDERED** that the outstanding issues contained in Mr. Flynn’s  
 15 motion to establish procedures (#540) are stayed for further decision until this court has an  
 16 opportunity to review Mr. Flynn’s forthcoming declaration.

17 **IT IS SO ORDERED.**

18 **DATED:** August 12, 2008.

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 22 **UNITED STATES MAGISTRATE JUDGE**

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26 <sup>9</sup> The *Napster* court also held that it may not be necessary in all cases to hold a “live hearing with  
 27 oral argument,” and that in appropriate cases, the court may decide the matter upon the submission of papers.  
 28 *In re Napster, Inc. Copyright Litigation*, 479 F.3d 1078, 1093 (9th Cir. 2007). Should it come to this point,  
 this court will make a decision regarding the need for oral argument at the proper time and after hearing from  
 the parties.