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I. INTRODUCTION

Imagine the following attorney-client privilege scenario.[1] Adam Smith is David James's attorney. David wants to kill his wife, Victoria, in order to collect on her life insurance policy. David calls Adam to talk about the life insurance policy and murder. Adam answers the call and informs David that the conversation will be recorded for Adam to recall the conversation, if needed, at a later date. David asks about how murder affects the payout on a life insurance policy. He then asks how often murders go unsolved and the easiest way to get away with murder. Adam advises him that the best way to get away with murder is to take Victoria out on their boat and have her fall over the edge.[2] David agrees, and the next day he does as advised. As he pushes her over the edge, he

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1. This is a much more straightforward, over-the-top example than what would normally happen in practice. The crime-fraud exception can be complicated and is usually very difficult to prove.

2. It is assumed that if Victoria's murder goes unsolved, David will be able to collect on the policy.

yells out to Victoria, "This is what needs to be done. My attorney told me how to get rid of you and collect on your life insurance policy."

Unfortunately for David, Victoria survives and goes to the police. Victoria tells the police about everything that happened, including David's statement about his attorney's advice. The police bring in David, who says that his lawyer told him that murdering Victoria was the easiest way to get to the life insurance policy. David mentions that Adam recorded their phone call. David is charged with attempted murder.

After reviewing David and Victoria's statements, the government subpoenas Adam for a deposition and the phone call recording. Adam moves to quash the subpoenas, claiming attorney-client privilege. The government responds, claiming the crime-fraud exception applies. It submits evidence of David and Victoria's statements.[3] The government requests that the court review the phone call recording *in camera*. The court agrees to review *in camera* because there is a reasonable belief that the recording will provide enough evidence to show that the crime-fraud exception applies.[4]After *in camera*[5] review, the court decides that the crime-fraud exception applies, based on the recording and statements. It denies the motion to quash. The government can now compel Adam to testify about the conversation with David.

The previous scenario is what occurs under the crime-fraud exception to the attorney-client privilege. This paper explores the possibility of including intentional torts within the exception. Part II discusses the development and history

3. Note that David's statement that Adam advised him may be a waiver, regardless of the crime-fraud exception. For the purpose of the scenario, it is assumed that it does not waive the communication.

4. *See* United States v. Zolin, 491 U.S. 554, 574–75 (1989).

5. There is not a set standard that must be met in order to apply the crime-fraud exception. Courts have struggled with this. PETER NICHOLAS, EVIDENCE 316 (3d ed. 2014).

of the attorney-client privilege. Part III then explains the crime-fraud exception to the attorney-client privilege, which leads into Part IV, the extension of the crime-fraud exception to intentional torts, including its acceptance and rejection by federal courts. Part V then concludes with how to implement the crime-fraud exception as a firm part of the crime-fraud exception to the attorney-client privilege.

II. DEVELOPMENT OF THE ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege is one of the oldest legal privileges.[6] Each state has its own controlling statute on the attorney-client privilege.[7] However, these statutes have a general, overarching framework, defined by Wigmore using common law.[8] According to Wigmore, the attorney-client privilege is:

> (1) where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communication relating to that purpose, (4) made in confidence (5) by the client, (6) are at his insistence permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.[9]

Courts use Wigmore's definition of the attorney-client privilege,[10] as he is considered *the* expert on privileges.[11] However, the definition is somewhat ambiguous in practice.[12] Therefore, common law patches the holes in

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6. *Id.* at 291.

7. *See, e.g.*, N.Y. C.P.L.R. 4503 (CONSOL. 2016).

8. NICHOLAS, *supra* note 5, at 291 (citing 8 WIGMORE, EVIDENCE § 2292, at 554 (McNaughton rev. 1961)).

9. *Id.*

10. *See, e.g.,* United States v. Graf, 610 F.3d 1148, 1156 (9th Cir. 2010); Cavallaro v. United States, 284 F.3d 236, 245 (1st Cir. 2002); CP Salmon Corp. v. Pritzker, 238 F. Supp. 3d 1165, 1171 (D. Alaska 2017).

11. *See, e.g.*, United States v. Mass. Inst. of Tech., 129 F.3d 681, 684 (1st Cir. 1997).

12. *See id.* (explaining that while the attorney-client privilege is well-established and a straightforward way to safeguard communications, waiver presents a collection of different rules for different problems that are "far from

Wigmore's definition.

A. *History of the Attorney-Client Privilege*

The attorney-client privilege in the United States derives from English law.[13] In the Sixteenth Century, England passed the Statute Against Perjury, requiring witness attendance under penalty of a fine.[14] From the requirement, questions arose regarding witnesses' fitness to testify, especially those who were a party to the case.[15] This created an incentive for litigants to find out what the other party disclosed to his legal advisor, and therefore created the attorney-client privilege.[16] However, the privilege did not become a well-settled common law doctrine, until the Nineteenth Century,[17] after developments like attributing the privilege to the client rather than the representative were created.[18]

After the American Revolution, the United States retained the English attorney-client privilege.[19] Prior to 1820, courts in twenty reported cases, including six state courts and two federal circuits, adopted the English

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settled.").

13. *Attorney-Client Privilege in the United States* § 1:1, Westlaw (database updated Dec. 2017).

14. *Id.* at § 1:2. *But see* 4 WILLIAM BLACKSTONE, COMMENTARIES (stating that perjury existed before the Perjury Statute of 1563 and was punishable by death at common law).

15. *Attorney-Client Privilege in the United States*, *supra* note 13, at § 1.1. The Statute Against Perjury deemed parties to the case unfit to testify, as the nature of the jury trial changed from thinking witnesses were untrustworthy to wanting witnesses to introduce the facts to the jury. This reflected a desire to have juries rule based on their neighborhood-based, personal knowledge of the facts. If the court found an integral witness unfit to testify, it helped the opposing party's case, as there would be a gap in the evidence.

16. *Id.*

17. EDWARD J. IMWINKELRIED, THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES § 2.2 (3d ed. 2018).

18. *See Attorney-Client Privilege in the United States*, *supra* note 13, at § 1.3.

19. *Id.* at § 1:12.

attorney-client privilege.[20] United States courts' main change to the privilege was removing the English limitation of documents or conversations "pending or in anticipation of litigation."[21]

Congress affirmed the attorney-client privilege when it created the Federal Rules of Evidence.[22] After careful review of proposed rules from the judiciary, the House passed the Federal Rules of Evidence on February 6, 1974.[23] In total, there are sixty-eight Federal Rules of Evidence, covering the topics of: judicial notice, presumptions, relevance, privileges, witnesses, opinions, expert testimony, hearsay, authentication, identification, and evidence contents.[24]

The Judiciary recommended to the House Committee nine non-constitutional privileges, encompassing thirteen rules.[25] However, the House Committee decided to scrap the

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20. *Id.* (citing Lynde v. Judd, 3 Day 499 (Conn. 1807); Calkin v. Lee, 2 Root 363 (Conn. 1796); Mills v. Griswold, 1 Root 383 (Conn. 1792); State v. Phelps, 1 Kirby 282 (Conn. 1787); Bank of Columbia v. French, 2 F. Cas. 631 (No. 867) (C.C.D.C. 1804); Murray v. Dowling, 17 F. Cas. 1047 (No. 9,959) (C.C.D.C. 1803); Anonymous 8 Mass. 370 (1811); Hoffman v. Smith, 1 Cai. 157 (N.Y. 1803); Jackson v. Burtis, 14 Johns. 391 (N.Y. Sup. Ct. 1817); Yordan v. Hess, 13 Johns. Rep. 492 (N.Y. Sup. Ct. 1816); Baker v. Arnold, 1 Cai. 258 (N.Y. Sup. Ct. 1803); Riggs v. Denniston, 3 Johns. Cas. 198 (N.Y. Sup. Ct. 1802); Heister v. Davis, 3 Yeates 4 (Pa. 1800); Morris' Lessee v. Vanderen, 1 U.S. 64, 1 Dall. 64, 1 L. Ed. 38 (Pa. 1782); Andrews v. Solomon, 1 F. Cas. 899 (No. 378) (C.C.D. Pa. 1816); Corps v. Robinson, 6 F. Cas. 597 (No. 3,252) (C.C.D. Pa. 1809); Holmes v. Comegys, 1 U.S. 439, 1 Dall. 439, 1 L. Ed. 213 (Pa. C.P. 1789); State v. Squires, 1 Tyl. 147 (Vt. 1891); Parker v. Carter, 18 Va. (4 Munf.) 273 (1814); Clay v. Williams, 16 Va. (2 Munf.) 105 (1811). These cases focused on legal advisors withholding their own or client documents.

21. *Attorney-Client Privilege in the United States*, *supra* note 13, at § 1:12.

22. FED. R. EVID., Historical Note. In 1961, the Judicial Conference of the United States designated the Honorable Earl Warren to appoint an advisory committee on the usefulness of uniform evidence rules. By March 1969, the Judicial Conference Standing Committee on Rules of Practice and Procedure approved the Advisory Committee's draft of the rules, with edits, and submitted the draft to the Supreme Court. Chief Justice Warren Burger, on behalf of the Supreme Court, submitted the proposed rules to Congress on February 5, 1973.

23. *Id.*

24. *See* FED. R. EVID.

25. *Id.* The recommended non-constitutional privileges were: "[r]equired

nine recommendations for two rules, Federal Rules of Evidence 501 and 502.[26] Federal Rule of Evidence 501 encompasses all privileges[27] and states that the common law governs a claim of privilege, unless there is a different rule in the United States Constitution, federal statute, or Supreme Court rules.[28] However, Rule 501 also states that in a civil case, state law governs a claim or defense of privilege, if the state law supplies the "rule of decision."[29]

Federal Rule of Evidence 502 discusses the disclosure and waiver for attorney-client privilege information.[30] It does not actually explain the attorney-client privilege; explanation is left to the common law.[31]

Rule 501's application varies by court and state. In state courts, the state statutes, court rules, and common law apply to attorney-client privilege decisions.[32] In federal courts, the

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reports, lawyer-client, psychotherapist-patient, husband-wife, communications to clergymen, political vote, trade secrets, secrets of state and other official information, and identity of informer."

26. *See* FED. R. EVID. 501 advisory committee notes on 1974 enactment. While the recommended privileges were not circumscribed in a rule, a few privileges are commonly recognized through common law, like the psychotherapist-patient, Jaffee v. Redmond, 518 U.S. 1 (1996), husband-wife, Trammel v. United States, 445 U.S. 40 (1980), and communications to clergymen, *In re* Grand Jury Investigation, 918 F.2d 374 (3d Cir. 1990); *see also* Christine Bartholomew, *Exorcising the Clergy Privilege*, 103 VA. L. REV. 1015, 1020–21 (2017).

27. FED. R. EVID. 501.

28. *Id.*

29. *Id.* This means that state privilege law applies in diversity cases, while federal privilege law applies in non-diversity cases and in cases where a federal court uses state law to fill in gaps in federal law. FED. R. EVID. 501.

30. FED. R. EVID. 502.

31. *See id.* Rule 502(a) lays out the waiver requirements for disclosure to a federal office or agency; Rule 502(b) explains that an inadvertent disclosure does not operate as a waiver if reasonable steps were made to prevent and reverse the disclosure; Rule 502(c) discusses state court proceeding disclosures; and Rule 502(d)–(f) explains the controlling effects of court orders, party agreements, and the rule, respectively. Because the crime-fraud exception does not involve Rule 502's disclosure and waiver rules, this paper focuses on Rule 501's broad grant of discretion to states to determine their own attorney-client privilege.

32. *See* PAUL F. ROTHSTEIN, FEDERAL RULES OF EVIDENCE, FED. RULES OF

type of case dictates the attorney-client privilege application. For cases where the state law supplies the rule of decision in a federal civil case,[33] state common law attorney-client privilege applies.[34] For federal civil cases not based on diversity, federal attorney-client privilege law applies.[35] For federal criminal cases, federal common law principles will apply.[36]

In addition to the Federal Rules, states have their own attorney-client privilege statutes. Figure One in the Appendix lays out each state's attorney-client privilege statute's privilege holder distinction, as well as its crime-fraud exception.[37] In Figure One, there are slightly different attorney-client privileges between states. However, Alabama's privilege seems to be the most widely accepted, with nineteen states adopting it or a similar version.[38] The

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EVIDENCE RULE 501 (3d ed. 2019), Westlaw (database updated Feb. 2019).

33. Where state law provides the rule of decision, diversity jurisdiction applies. *Id.* Diversity jurisdiction is a claim for over $75,000 with citizens from different states or countries. 28 U.S.C. § 1332(a) (2011). However, diversity encompasses more than just state law; it can appear in cases "where a claim or defense is based upon federal law." ROTHSTEIN, *supra* note 32. In those cases, federal privilege law applies. *Id*. In cases of mixed federal and state law issues, courts either favor admissibility or federal law. *Id.*

34. *See* FED. R. EVID. 501.

35. ROTHSTEIN, *supra* note 32; *see also* FED. R. EVID. 501.

36. ROTHSTEIN, *supra* note 32.

37. The figure provides the pertinent, relevant parts of each attorney-client privilege. Important to note, Figure One does not give common law interpretation of the state statutes or court rules because each court may interpret and apply the law differently. For example, the United States District Court for the Western District of New York may interpret New York's common law attorney-client differently than the Eighth Judicial District of New York. The difference may occur by looking at different common law precedents, even though each court's interpretation was based on the New York's attorney-client privilege.

38. ALA. R. EVID. 502(b). Alabama's law is used out of simplicity in reading the chart in the appendix—it is not indicative of time or importance. Alabama's privileges states that the client, as the privilege holder, can prevent disclosure of confidential communications between: (1) the client/client's representative and the attorney/attorney's representative, (2) the attorney and the attorney's representative, (3) the client/client's representative, the attorney/attorney's representative, and an attorney/attorney's representative representing another

privilege applies if the communications were for professional legal services.

Two states apply particularly unique privileges: Indiana and Maryland. In Indiana, attorneys are not *required* to testify about confidential communications made to them in their professional capacity.[39] Maryland's attorney-client privilege is written similarly, but it is not limited to attorneys.[40] Some states,[41] like Rhode Island,[42] follow the Federal Rules of Evidence's lead on applying common law.[43]

The Supreme Court has heard only a handful of cases on attorney-client privilege.[44] Only two are relevant to this

party of common interest, (4) representatives of the client, and (5) attorneys representing the same client. The only, slight difference between states adopting attorney-client privileges similar to Alabama is the inclusion or exclusion of "representatives" as those who are included in the privilege. *Compare* ALA. R. EVID. 502 with NEV. REV. STAT. ANN. §§ 49.035–49.115 (West 1971). Representatives are usually defined as someone with authority to obtain legal services or act on legal advice on behalf of the client or a person who makes or receives a confidential communication while working for the client. *See, e.g.*, ALA. R. EVID. 502. This inclusive application does not stop at the widely adopted Alabama rule. It is also used in states like Colorado, who apply the attorney-client privilege to secretaries, clerks, and paralegals. *See* COLO. REV. STAT. ANN. § 13-90-107(1)(b) (West 2017). Including representatives extends liability to law firms and corporations for disclosing confidential client communication.

39. IND. CODE ANN. § 34-46-3-1(1) (West 1998). This implies that attorneys may choose to testify about confidential communications.

40. *See* MD. CODE ANN., CTS. & JUD. PROC. § 9-108 (West 1973). Maryland's privilege states, "A person may not be compelled to testify in violation of the attorney-client privilege." This implies everyone involved in the representation, like secretaries, assistants, and clerks.

41. MI RULES MRE 501; SC R. REV. Rule 501; VA. R. PROF. COND. 1-6 (2016); W. VA. R. EVID. 501.

42. R.I. R. EVID. 501.

43. FED. R. EVID. 501. Federal Rule of Evidence 501 states the common law rules privilege, including the attorney-client privilege.

44. *See generally* United States v. Jicarilla Apache Nation, 564 U.S. 162 (2011); Mohawk Indust., Inc. v. Carpenter, 558 U.S. 100 (2009); Swidler & Berlin v. United States, 524 U.S. 399, 410 (1998); United States v. Zolin, 491 U.S. 554 (1989); Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343 (1985); Upjohn Co. v. United States, 449 U.S. 383, 397 (1981); Fisher v. United States, 425 U.S. 391 (1976); Tierney v. United States, 409 U.S. 1232 (1972). These laws that boot determining privilege requirements to the judiciary could be

article,[45] *Swidler & Berlin v. United States* and *Upjohn Co. v.* United States.[46] In *Swidler*, the Court decided that the attorney-client privilege applies after death.[47] In *Upjohn*, the Court decided that the attorney-client privilege applies in the corporate setting to workers communicating to corporate attorneys.[48]

III. CRIME-FRAUD EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE

In its most basic form, the crime-fraud exception to the attorney-client privilege prevents clients from obtaining advice from a lawyer to commit a crime or fraud.[49] The crime-fraud exception exists to protect the professional relationship between lawyer and client because if a client tries to obtain advice to commit a crime or fraud, the attorney's work is contrary to the system established to help citizens navigate

problematic. The common law can be inconsistent among courts, even within the same system. For example, a court in the Ninth Judicial Circuit of Illinois may apply a previous Illinois Supreme Court decision more liberally than a court in the Tenth Judicial Circuit of Illinois. This inconsistent legal decision-making makes the law unfair, with different decisions based on where a case happens to be within the state. The other states with statutory guidelines provide a basis for the common law to build upon. The law helps maintain a universal boundary on all courts within the state.

45. These Supreme Court cases are focused on because of their binding applicability to all courts across the nation. While federal and state cases are interesting and informative, they only bind their jurisdiction, thus applicability is limited.

46. *Swidler*, 524 U.S. 399 (1998); *Upjohn*, 449 U.S. 383 (1981).

47. *Swidler*, 524 U.S. at 410.

48. *Upjohn*, 449 U.S. at 397. The current test from *Upjohn* applies the attorney-client privilege to communication (1) at the direction of a superior (2) to a corporate attorney (3) regarding a matter within the scope of employment. The communication must be made with the intent to assist a corporate attorney in: evaluating whether the employee's conduct would bind the corporation, assessing the legal consequences of the employee's conduct, or formulating a legal response to the employee's conduct.

49. PAUL F. ROTHSTEIN, FEDERAL TESTIMONIAL PRIVILEGES § 2:36, Westlaw (database updated Nov. 2018).

the legal system.[50] As the Sixth Circuit stated in *In re Antitrust Grand Jury*, "all reasons for the attorney-client privilege are completely eviscerated when a client consults an attorney not for advice on past misconduct, but for legal assistance in carrying out a contemplated or ongoing crime or fraud."[51]

The rules surrounding the crime-fraud exception reflect this pro-legal system policy. For example, the court examines the client's intent in obtaining legal services, rather than the attorney's intent in giving the advice.[52] "The privilege is not lost if the client innocently proposed an illegal course of conduct to explore with his counsel what he may or may not do. Only when a client knowingly seeks legal counsel to further a continuing or future crime does the crime-fraud exception apply."[53]

In addition to the attorney-client privilege, Figure One includes the various crime-fraud exceptions to the attorney-client privilege, as adopted by states through statutes and court rules.[54] The most common crime-fraud exception is the one adopted by Alaska.[55]

Ohio and Puerto Rico have the most expansive crime-fraud exceptions.[56] In Ohio, the crime-fraud exception

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50. *Attorney-Client Privilege in the United States*, *supra* note 13, at § 8:2.

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

52. *Attorney-Client Privilege in the United States*, *supra* note 13, at § 8:5.

53. *Id.* (quoting United States v. Doe, 429 F.3d 450 (3d Cir. 2005).

54. *See infra* app. Fig. One.

55. ALASKA R. EVID. 503. Alaska is referenced simply because it is one of the first entries in the appendix figure. It is not indicative of time or importance. Alaska's crime-fraud exception states that information sought, obtained, or used by the client to enable anyone to commit or plan a crime or fraud negates the attorney-client privilege. The client needs to have known or should have known that the person's actions were a crime or fraud. Interestingly, this crime-fraud exception is not limited to the client's actions. It encompasses the actions of anyone the client assists with the information, meaning that this waives the client's attorney-client privilege when he or she is an accomplice or co-conspirator.

56. P.R. LAWS ANN. tit. 32 Ap. IV, § 25(c)(1); OHIO REV. CODE. ANN.

includes actions in "bad faith" as a waiver to the attorney-client privilege.[57] This is the broadest statutory interpretation of the crime-fraud exception.[58] The second most broad is Puerto Rico, which includes seeking advice to enable or aid anyone to commit a crime, tortious act, or fraud.[59]

California has the most unique, topic-specific crime-fraud exception.[60] There is a clarification clause on cannabis because recreational marijuana use is legal within the state.[61] California specifies that the crime-fraud exception does not apply to confidential communications on medical cannabis or adult-use cannabis so long as the lawyer advises the client on federal law conflicts.[62]

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§ 2317.02(A) (West 2017). While Puerto Rico is not a state in the United States, it is a jurisdiction within the federal system. Therefore, it is included in the analysis.

57. OHIO REV. CODE. ANN. § 2317.02(A) (West 2017). Black's Law Dictionary defines "bad faith" as "dishonesty of belief, purpose, or motive." *Bad Faith*, BLACK'S LAW DICTIONARY (10th ed. 2014). This crime-fraud exception includes more conduct than what is proposed in this paper.

58. *E.g.*, *compare* OHIO REV. CODE. ANN. § 2317.02(A) (West 2017), *with* ALASKA R. EVID. 503.

59. P.R. LAWS ANN. tit. 32 Ap. IV, § 25(c)(1). This crime-fraud exception includes more conduct than what is proposed in this paper, as it includes all tortious conduct, not just intentional torts. However, this is the closest to the proposed crime-fraud-tort exception. *Id.*

60. *See* CAL. EVID. CODE § 956 (West 2018).

61. Theresa Waldrop, *Californians line up to legally buy recreational pot*, CNN (Jan. 2, 2018, 6:23 AM), http://www.cnn.com/2018/01/01/us/california-marijuana-sales/index.html.

62. Almost every state has legalized some type of marijuana use and more states are considering jumping on the bandwagon this year. Linley Sanders, *Marijuana Legalization 2018: Which States Might Consider Cannabis Laws This Year?*, NEWSWEEK (Jan. 2, 2018, 8:00 AM), http://www.newsweek.com/marijuana-legalization-2018-which-states-will-consider-cannabis-laws-year-755282.
However, while states legalized marijuana, it is still illegal on the federal level. 21 U.S.C.A. § 841 (2010). With the conflicting federal and state laws on marijuana, more states may pass similar amendments to their crime-fraud exceptions, like California, in order to protect their citizens from attorney disclosure of confidential communications. If they do not pass such amendments, attorneys may be forced to testify about communications that the client thought would remain confidential. He or she may not realize they are committing a crime

There are many states without statutory crime-fraud exceptions.[63] Assumptively, these states follow the same path as the Federal Rules of Evidence, leaving the crime-fraud exception solely to common law. Some states, like Connecticut, do not specify the crime-fraud exception in the statute itself, but provide guidance in research references.[64]

The common law builds upon these statutory rules, like the attorney-client privilege itself. While the rules provide a baseline, the application of each state's crime-fraud exception may vary by court and government level. Common law precedent plays an important role in shaping the crime-fraud exception by building onto the state statutes. The timing of the client's criminal or fraudulent intention affects crime-fraud exception application.[65] Regardless of impossibility, the crime or fraud generally needs not to have occurred for the crime-fraud exception to apply.[66] However, in *In re Sealed Case*, the D.C. Circuit held that for the crime-fraud exception to apply, the proponent of the exception must establish that the client *carried out* the crime or fraud, otherwise, the court reasoned, it would deter the very purpose of the attorney-client privilege—achieving legal

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because of the state law legalizing marijuana.

63. Twenty-three states do not have statutory crime-fraud exceptions, including New York.

64. CONN. GEN. STAT. ANN. § 51-84 (West 1982) (Research Refs.); *see also* MD CODE ANN. CTS. & JUD. PROC., § 9-108 (West 1973).

65. *Attorney-Client Privilege in the United States*, *supra* note 13, at § 8:2. For example, if a client legitimately enters into an attorney-client relationship for legitimate legal services, then intentionally uses the lawyer for illegal or fraudulent purposes, courts disregard the crime-fraud exception. Instead, they examine the action as a waiver. However, if the client comes to the lawyer for illegal and legitimate legal services combined, the court applies the crime-fraud exception. *In re* Grand Jury Investigation, 445 F.3d 226 (3d Cir. 2006). Additionally, if the crime or fraud was not committed because of an intervening factor, the crime-fraud exception still applies. Impossibility does not negate the intention of the individual. However, the intervening factor application is complicated if impossibility is a defense to the criminal charge. The crime-fraud exception would not apply, as there is no case against the individual who sought the advice.

66. *Id.*

compliance through legal advice.[67]

At the federal level, some circuits require a *prima-facie* showing of a violation of the attorney-client privilege violation.[68] The burden is on the government to show that the communication falls outside the attorney-client privilege.[69]

> To overcome an established privilege using the crime-fraud exception, the government must show that the communications (i) were made for an unlawful purpose or to further an illegal scheme and (ii) reflect an ongoing or future unlawful or illegal scheme or activity. Importantly, the purported crime or fraud need not be proved either by a preponderance or beyond a reasonable doubt. Rather, the proof "must be such as to subject the opposing party to the risk of non-persuasion of the evidence as to the disputed fact is left unrebutted."[70]

To meet this *prima-facie* burden, the government may use inadmissible evidence, such as hearsay, so long as it has been lawfully obtained and is not otherwise privileged.[71]

Parties may also use the attorney-client communications at issue to meet the crime-fraud exception's *prima-facie* burden, which utilizes *in camera* review.[72] In *United States v. Zolin*, the IRS requested tapes and other evidence from a county clerk in order to aid a current investigation.[73] The tapes were from a previous case, *Church of Scientology of California v. Armstong*.[74] When the IRS requested the tapes, members of the Church of Scientology filed a temporary

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67. *Id.* This precedent is still good law.

68. *In re* Antitrust Grand Jury, 805 F.2d 155, 165 (6th Cir. 1986) (citing *In re* Grand Jury Proceedings, 731 F.2d, 1032, 1039 (2d Cir. 1984); *In re* Int'l Sys. & Controls Corp., 693 F.2d 1235, 1242 (5th Cir. 1982)).

69. United States v. Lentz, 419 F. Supp. 2d 820, 831 (E.D. Va. 2005).

70. *Id.* (citing Union Camp Corp. v. Lewis, 385 F.2d 143, 144–45 (4th Cir. 1967)).

71. *Id.*

72. United States v. Zolin, 491 U.S. 554, 565 (1989).

73. *Id.* at 557.

74. *Id.*

restraining order preventing the tapes from being turned over to the IRS.[75] The IRS filed a petition in federal district court in order to enforce the summons, but the court refused to enforce it, reasoning that the tapes contained confidential attorney-client matters and that the crime-fraud exception did not apply.[76] The IRS appealed, claiming that the district court erred in denying the IRS's request for *in camera* review[77] of the tapes to determine if the crime-fraud exception applied.[78]

On appeal, the Supreme Court decided that the Federal Rule of Evidence allows *in camera* review to determine whether the crime-fraud exception would apply.[79] However, before *in camera* review, the party asserting the crime-fraud exception must show there is a "'[f]actual basis adequate to support a good faith belief by reasonable person' that in camera review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies."[80] In other words, the government must present evidence, in addition to the communications, for the court to even consider if the crime-fraud exception applies.[81]

Burdens of proof vary slightly across circuits. For example, as stated above, the D.C. Circuit requires the

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75. *Id.* at 557–58.

76. *Id.* at 558–59.

77. *In camera* review is when the court views potential evidence privately to determine its admissibility. *See In Camera Inspection Law and Legal Definition,* USLEGAL, https://definitions.uslegal.com/i/in-camera/ (Last visited Jun. 19, 2019).

78. *Zolin,* 491 U.S. at 560.

79. *Id.* at 568 ("[w]e shall not interpret Rule 104(a) as categorically prohibiting the party opposing the privilege to crime-fraud grounds from relying on the results of an *in camera* review of the communications.").

80. *Id.* at 572 (quoting Caldwell v. District Court, 644 P.2d 26, 33 (Colo. 1982)).

81. This is like requiring corroborative evidence. Therefore, while there is not a burden of proof for the crime fraud-exception to apply, *see Attorney-Client Privilege in the United States*, *supra* note 13, at § 8:2, there is a heavy requirement.

defendant to have committed the crime or fraud.[82] However, within the Second and Fourth Circuit "it is simply immaterial whether the defendant actually succeeded in completing the crime or fraud in question; rather, solicitation [of the attorney] alone triggers the exception."[83] The slight differences in the crime-fraud exception application only exist in the second part of the rule, stated below and thus the rule generally remains unchanged for *in camera* review.

Based on *Zolin*, the rule for determining if a court may apply the crime-fraud exception is as follows: the party asserting the crime-fraud exception may present evidence based on a reasonable belief that *in camera* review of the communications may provide enough evidence to apply the crime-fraud exception. The evidence presented must be relevant, lawfully obtained, and non-privileged.[84] If that burden is met, then the circuit-specific crime-fraud exception rules apply to determine if there is an actual crime-fraud exception.

An extension of the attorney-client privilege, the work product doctrine, is often discussed in crime-fraud exception cases. The work product doctrine originated in a 1947 Supreme Court case, *Hickman v. Taylor* and stands for the proposition that an attorney's physical work on a case, like notes, is generally undiscoverable.[85] For the crime-fraud

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82. *Attorney-Client Privilege in the United States*, *supra* note 13, at § 8:2 (citing *In re* Sealed Case, 107 F.3d 46, 49 (D.C. Cir. 1997)).

83. *Lentz*, 419 F. Supp. 2d at 830 (citing *In re* Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1039 (2d Cir. 1984)).

84. *See Zolin,* 491 U.S. at 574–75.

85. Hickman v. Taylor, 329 U.S. 495 (1947). In *Hickman*, after a tugboat crash, the tugboat owners' attorney interviewed witnesses. *Id.* at 498–99. In an interrogatory, the opposing party requested the witness names and statements, but the tugboat owners' attorney refused to turn over his documentation on the witnesses' statements. *Id.* The Court ruled that the attorney could not be forced to turn over the statements with his personal notes because of the attorney's duty to "work for the advancement of justice, while faithfully protecting the rightful interest of his clients." *Id.* at 510. However, the Court noted the rule that an attorney's work is free from discovery is not absolute. *Id.* at 511–12. Courts could make an exception "[w]here relevant and non-privileged facts remain hidden in

exception, the work product doctrine does not protect the work completed by the lawyer, as the information was to further a crime or fraud.[86] Like the crime-fraud exception applies to conversations, it applies to writing.

IV. EXTENSION OF THE CRIME-FRAUD EXCEPTION TO INTENTIONAL TORTS

Some courts have embraced expanding the crime-fraud exception to intentional torts. As their name implies, intentional torts require an intentional act by the defendant.[87] Intentional torts are similar to crimes, but exist in civil rather than criminal law. They are more serious than negligent torts, due to increased culpability.[88] "Intentional" means that "[a]n actor . . . brings about harm either purposefully or knowingly";[89] the intention is not in the harm, but in doing the activity.[90] This requirement affects

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an attorney's file and where production of those facts is essential to the preparation of one's case." *Id.* at 511. The rule and exception laid the foundation of the work product doctrine, encompassed in Rule Twenty-Six of the Federal Rules of Civil Procedure. *See* G. Michael Halfenger, *The Attorney Misconduct Exception to the Work Product Doctrine*, 58 U. OF CHI L. R. 1079, 1080 (1991).

86. *See In re* Grand Jury Matter #3, 847 F.3d 157 (3d Cir. 2017); Tri-State Hosp. Supply Corp. v. United States, 238 F.R.D. 102, 104 (D.D.C. 2006) (citing *In re* Sealed Case, 107 F.3d 46, 51 (D.C. Cir. 1997)).

87. Beyond showing intention, each intentional tort has different elements. *See Intentional Tort*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/intentional_tort (last visited Mar. 20, 2018). For example, to prove intentional infliction of emotional distress in New York, the plaintiff must prove "(1) extreme and outrageous conduct, (2) intent to cause severe emotional distress, (3) a causal connection between the conduct and injury, and (4) severe emotional distress." Dorn v. Maffei, 386 F. Supp. 2d 479, 486 (S.D.N.Y. 2005). However, to prove slander, the plaintiff must prove (1) there was a defamatory statement, (2) published to a third party, (3) concerning the plaintiff, (4) with the applicable level of fault (intentional), (5) causing special harm or constituting slander per se, (6) not protected by privilege. Albert v. Loksen, 239 F.3d 256, 265–66 (2d Cir. 2001).

88. *See Intentional Tort*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/intentional_tort (last visited Mar. 20, 2018).

89. RESTATEMENT (THIRD) OF TORTS: GEN. PRINCIPLES § 1 DD (AM. LAW INST. 1999).

90. *Intentional Torts*, LEGAL DICTIONARY https://legaldictionary.net/

the proof needed to be fulfilled to bring the claim.[91] The definition of intention is different from "negligence," which means "the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation."[92] Negligence does not include intentional, wanton, or willful conduct.[93]

Some courts embrace intentional torts as part of the crime-fraud exception, while others reject it.

A. *Acceptance of and Arguments for the Crime-Fraud-Tort Exception*

While the original meaning of the crime-fraud exception includes crimes and frauds, an increasing number of courts now apply the crime-fraud exception to intentional torts. In 1950, the idea of the crime-fraud exception applying to torts was first discussed, in dictum, in *United States v. United Shoe Machinery Corp.*[94] From *United Shoe*, the idea of

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intentional-tort/ (last visited Mar. 20, 2018).

91. The best example of this is a car accident. In example one, Donna is driving down the road and pulls up to an intersection. At the intersection, she believes she has the green light; Donna actually has the red light. She drives into the intersection and collides with Vanessa. Vanessa is injured by the impact. This is an example of a negligent tort. In example two, Donna is driving down the road and pulls up to an intersection. At the intersection, she sees Vanessa, whom she despises because last week Vanessa stole her wallet. Donna decides she is going to stop Vanessa to get her wallet back, so she drives into Vanessa's car. Vanessa is injured by the impact. This is an example of an intentional tort. Donna's intention to hit Vanessa's car is relevant; her lack of intent to injure Vanessa is irrelevant.

92. *Negligence*, BLACK'S LAW DICTIONARY (10th ed. 2014).

93. *Id.*

94. United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358–59 (D. Mass. 1950). United Shoe involved an anti-trust action, where counsel opposed the introduction of hundreds of exhibits on the basis that the corporations and their officers consulted counsel to commit a crime or tort. *See id.* The court decided this assertion was unfounded, but included torts in their crime-fraud analysis. This analysis created a rule: "(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of

applying the crime-fraud exception to torts popped up in courts around the nation.[95]

After Congress adopted the Federal Rules of Evidence,[96] more courts applied the crime-fraud exception to tortious conduct.[97] In *United States v. American Tel. & Tel. Co*., the District Court for the District of Columbia decided that the exception has been applied to crimes; crimes and fraud; and crimes, fraud, and torts.[98] However, it did not matter which definition was used in the case, as the violation of the Sherman Antitrust Act encompassed all three, a crime, fraud, and tort.[99] In *Diamond v. Stratton*, the Southern District of New York applied the crime-fraud exception to intentional infliction of emotional distress.[100] The court supported their decision by quoting Professor Wigmore:

> To deny the protection of the privilege to communications in aid of fraud while granting it to communications in aid of another intentional tort would draw a too "crude boundary", as characterized by Wigmore, who also questions "how the law can protect a deliberate plan to defy the law and oust another person of

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strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client." *Id.*

95. *See, e.g.*, Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1172 (D. S.C. 1974) ("The attorney-client privilege was not meant to protect such communications intended to foster criminal, fraudulent, or tortious conduct."), *aff'd* 540 F.2d 1215, 1217 (4th Cir. 1976); *In re* Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 4-71 Civ. 435, 1971 WL 601 at *4 (D. Minn. Oct. 1, 1971) ("There is no attorney-client privilege 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, tort, or fraud.").

96. FED. R. EVID., Historical Note, *supra* note 22.

97. *See* 24 Fed. Prac. & Proc. Evid. § 5501 n.207 (last updated Apr. 2019) (listing various attorney-client cases involving intentional torts).

98. United States v. Am. Tel. & Tel. Co., 86 F.R.D. 603, 624 (D.D.C. 1979) ("The law of attorney-client privilege has long recognized an exception. . . . [t]he prohibited purpose that triggers the unveiling has been described as a 'crime,' 'crime or fraud,' and 'crime, fraud, or tort.'").

99. *Id.*

100. Diamond v. Stratton, 95 F.R.D. 503, 505 (S.D.N.Y. 1982).

his rights, whatever the precise nature of those rights may be."[101]

Then, in 1983 in *Irving Trust Co. v. Gomez*, the Southern District decided communications in furtherance of the "tortious conduct" of a credit scam were not protected by the attorney-client privilege.[102]

In 1985, the Supreme Court acknowledged a respondent's argument pertaining to the exception to the attorney client privilege.[103] However, the Court did not discuss the "ordinary torts" language, and took up the issue based on fraud instead.[104] The same year, the D.C. Circuit decided spoliation of evidence, a misconduct other than a crime or fraud, could be applied to the crime-fraud exception.[105] The court stated, "Communications otherwise protected by the attorney-client privilege are not protected if the communications are made in furtherance of a crime, fraud, or *other misconduct*."[106] In 1997, the D.C. District followed the Circuit's lead in *Recycling Solutions, Inc. v. District of Columbia*, deciding that "other misconduct" in *In re Sealed Case* applied to the furtherance of racial or ethnic discrimination.[107] However, they also noted that the rest of the country had not completely caught up the D.C. Circuit

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101. *Id.* (quoting 8 WIGMORE, EVIDENCE § 2298, at 577 (McNaughton rev. 1961)).

102. Irving Trust Co. v. Gomez, 100 F.R.D. 273, 276 (S.D.N.Y. 1983).

103. Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 354 (1985) ("They point out that the privilege does not shield the disclosure of communications relating to the planning or commission of ongoing fraud, crimes, and ordinary torts."). *Commodity* involved a debtor's trustee attempting to waive a corporation's attorney-client privilege in a bankruptcy matter. *Id.* at 345.

104. *Id.* at 354 (deciding that the respondents did not make the threshold showing of fraud to apply the crime-fraud exception to the attorney-client privilege).

105. *See In re* Sealed Case, 754 F.2d 395, 399–400 (D.C. Cir. 1985).

106. *Id.* at 399 (emphasis added) (citing Clark v. United States, 289 U.S. 1, 14 (1933)); *In re* Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1038 (2d Cir. 1984); *In re* Sealed Case, 676 F.2d 793, 812 (D.C. Cir. 1982)).

107. Recycling Sols., Inc. v. District of Columbia, 175 F.R.D. 407, 409 (D.D.C. 1997).

precedent.[108]

The expansion of the crime-fraud exception continued into the millennium. In *Rambus, Inc. v. Infineon Techs. AG*, a spoliation case, the Eastern District of Virginia stated, "The term 'crime/fraud exception,' however, is a 'bit of a misnomer,' . . . as many courts have applied the exception to situations falling well outside of the definitions of crime or fraud."[109] Then, in *Safety Today, Inc. v. Roy* the Southern District of Ohio determined that the crime-fraud exception would apply to tortious interference with a contract.[110] The court concluded:

> Ohio courts have, and will continue to, analyze wrongful conduct not strictly falling into the category of either crimes or frauds on a case-by-case basis to determine if the conduct involves similar elements of malicious or injurious intent and deliberate falsehood. If it does, there is no reason why the law should prevent disclosure of the role an attorney may have played in assisting his or her client to commit that type of act, which itself has no social value.[111]

In addition to support from the cases above, intentional torts as part of the crime-fraud exception would positively impact legal social policy, as intentional torts serve no purpose to society, like crime.[112] By including intentional torts in the crime-fraud-tort exception, clients will be unable to use attorneys to perpetuate socially unacceptable activities, such as sexual harassment and defamation, as their attorney could disclose discussions about such activities.

While "sexual harassment" can include crimes, some parts of sexual harassment consist of tortious conduct, like intentional infliction of emotional distress and defamation.

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108. *Id.*

109. Rambus, Inc. v. Infineon Techs. AG, 222 F.R.D. 280, 288 (E.D. Va. 2004) (quoting Blanchard v. EdgeMark Fin. Corp., 192 F.R.D. 233, 241 (N.D. Ill. 2000)).

110. Safety Today, Inc. v. Roy, No. 2:12-cv-510, 2013 WL 5597065, *6 (S.D. Ohio 2013).

111. *Id.* at *5.

112. Diamond v. Stratton, 95 F.R.D. 503, 505 (S.D.N.Y. 1982).

For suits regarding sexual harassment, the crime-fraud-tort exception can step in to determine if certain organizations covered up alleged misconduct. An example of this is the USA Gymnastics case involving Larry Nassar.[113] Aly Raisman, a former decorated Olympian, brought suit against USA Gymnastics for its alleged involvement in covering up Nassar's actions.[114] Additionally, McKayla Maroney, another former decorated Olympian, claimed that she was paid off by USA Gymnastics to keep quiet on Nassar's actions, meaning that USA Gymnastics knew about Nassar's actions prior to his criminal case.[115] If Nassar consulted a USA gymnastics

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113. Jen Kirby, *The sex abuse scandal surrounding USA Gymnastics team doctor Larry Nassar, explained*, VOX (May 16, 2018, 4:45 PM), https://www.vox.com/identities/2018/1/19/16897722/sexual-abuse-usa-gymnastics-larry-nassar-explained; *see generally Larry Nassar sex abuse scandal*, BBC NEWS (Apr. 26, 2019 at 2:50 PM), https://www.bbc.com/news/topics/clwx28lpp90t/larry-nassar-sex-abuse-scandal.

114. Christine Brennan, *Ally Raisman's lawsuit against U.S. Olympics Committee, USA Gymnastics to serve as silver lining*, USA TODAY (Mar. 2, 2018, 5:51 PM), https://www.usatoday.com/story/sports/columnist/brennan/2018/03/02/aly-raismans-lawsuit-against-u-s-olympic-committee-usa-gymnastics-serve-silver-lining/390825002/; Darren Reynolds, *Aly Raisman files lawsuit against USOC, USA Gymnastics over handling of Larry Nassar*, ABC NEWS (Mar. 2, 2018, 11:15 AM) https://abcnews.go.com/US/aly-raisman-files-lawsuit-usoc-usa-gymnastics-handling/story?id=53453469; *See also* Eddie Pells, *51 Women are Suing the U.S. Olympic Committee for Failing to Prevent Abuse By Larry Nassar*, PBS (Mar. 15, 2019, 5:12 PM), https://www.pbs.org/newshour/nation/51-women-sue-u-s-olympic-committee-for-failing-to-stop-nassar-abuse. Importantly, Michigan needed to extend the statute of limitations for these suits against Nassar. Jay Tokasz, *What you need to know about New York's Child Victims Act*, BUFFALO NEWS (Feb. 8, 2019), https://buffalonews.com/2019/02/08/ new-york-state-child-victims-act-frequently-asked-questions/. Other states have similarly extended the statute of limitations for sexual assault and harassment cases. *Id.* Most recently, New York passed the Child Victims Act, with the focus on priest sexual abuse. Elizabeth Joseph*, 'This is society's way of saying we are sorry,' New York Governor tells survivors of sex abuse before signing Child Victims Act into law*, CNN (Feb. 14, 2019, 4:59 PM), https://www.cnn.com/2019/02/14/us/new-york-child-victims-act-signed/index.html. The analysis for Nassar could easily apply to the Catholic Church's alleged cover-ups. *See Pennsylvania grand jury finds some police and district attorneys helped Catholic church cover up priest abuse*, THE MORNING CALL (Sept. 1, 2018), https://www.mcall.com/news/pennsylvania/mc-nws-grand-jury-law-enforcement-priests-20180823-story.html,

115. Richard Winton et al., *McKayla Maroney accuses USOC and USA*

lawyer about how to get around the law and continue his sexual crimes and torts, the conversations would be discoverable in the civil case if a crime-fraud-tort exception were implemented.[116] This would make it easier to prove Nassar's guilt and could show that USA Gymnastics is liable for helping Nassar perpetuate his inappropriate sexual behavior.[117]

In the age of social media, defamation is a common occurrence.[118] A crime-fraud-tort exception could have an impact on these suits, especially against major corporations, like news outlets, or political actors, as they have attorneys on call to consult before acting. If the defamer consulted an attorney, the conversations could be discoverable, making it easier to prove defamation.

The prior case law since the 1950s and the lack of social value of intentional torts, similar to crimes, demonstrates

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Gymnastics of covering up sexual abuse with secret settlement, L.A. TIMES (Dec. 21, 2017, 12:05 PM) http://www.latimes.com/local/lanow/la-me-maroney-gynnastics-settlement-20171220-story.html; *see also* Tracy Connor & Sarah Fitzpatrick, *Gymnastics scandal: 8 times Larry Nassar could have been stopped*, NBC News (Jan. 28, 2018, 8:34 PM) (explaining how Nassar could have been stopped sooner within USA Gymnastics and Michigan State University) https://www.nbcnews.com/news/us-news/gymnastics-scandal-8-times-larry-nassar-could-have-been-stopped-n841091.

116. Important to remember however, is the *Upjohn* requirement for businesses. Upjohn Co. v. United States, 449 U.S. 383, 397 (1981). Nassar's conversations may not be protected anyway if he was not told to consult the lawyer by his superior or the conversation was not to figure out the legal implications and response by USA Gymnastics. *See id.* at 394.

117. This can also apply to other situations in the Me Too Movement. *See generally* Christen A. Johnson & KT Hawbaker, *#MeToo: A timeline of events*, CHI. TRIBUNE (May 19, 2019, 2:10 PM), https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmlstory.html.

118. *See, e.g.*, Luke Barr, *Trump wants to get to the 'bottom of' alleged anti-conservative bias on social media*, ABC NEWS (Mar. 20, 2019 6:00 AM), https://6abc.com/trump-wants-to-get-to-the-bottom-of-alleged-anti-conservative-bias-on-social-media/5207595/; Michelle Kaminsky, *As Infowars' Alex Jones Fights Defamation Lawsuits, Let's Talk Media Literacy Programs*, FORBES (Aug. 1, 2018, 5:40 AM), https://www.forbes.com/sites/michellefabio/2018/08/01/as-infowars-alex-jones-fights-defamation-lawsuits-lets-talk-media-literacy-programs/#55f0577b13ad.

strong support to include intentional torts in the crime-fraud exception.

B. *Resistance of and Arguments Against the Crime-Fraud-Tort Exception*

While multiple courts have applied the crime-fraud exception to intentional torts, some courts have resisted the trend.[119] Generally, this resistance has developed in two forms. Either the court claims it does not have the power to extend the crime-fraud exception out to intentional torts,[120] or the court claims that the evidence does not fulfill the required showing under the traditional *prima-facie* standard.[121]

Coleman v. American Broadcasting Cos. and *Martin v. American Bankers Life Assur. Co. of Florida* demonstrate the first form of resistance, the courts' lack of power.[122] In *Coleman*, the court refused to apply the crime-fraud exception to a sexual harassment and retaliation concealment allegation.[123] The court acknowledged that courts have expanded the crime-fraud exception, but in business related, intentional tort areas.[124] However, the court reasoned that no court had gone so far as to extend the crime-fraud exception to sexual harassment and retaliation, and thus it could not do so itself.[125] Similarly, in *Martin*, the District Court of the Virgin Islands decided that the crime-fraud exception did not apply to the furtherance of a bad faith insurance claim because the plaintiff did not provide

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119. *E.g.*, Martin v. Am. Bankers Life Assur. Co., 184 F.R.D. 263, 265 (D.V.I. 1998); Coleman v. Am. Broad. Cos., 106 F.R.D. 201, 209 (D.D.C. 1985).

120. *E.g.*, *Coleman*, 106 F.R.D. at 209.

121. *E.g.*, Constand v. Cosby, 232 F.R.D. 494, 500 (E.D. Pa. 2006).

122. *Martin*, 184 F.R.D. at 265; *Coleman*, 106 F.R.D. at 209.

123. *See Coleman*, 106 F.R.D. at 209.

124. *Id.* at 208.

125. *See id.* at 208–09.

precedent that bad faith is a tort.[126] The problem was not in applying the crime-fraud exception to a tort, but the court's ability to do so within the constraints of common law.[127]

Constad v. Cosby demonstrates the second form of resistance: failure to fulfill the *prima-facie* standard.[128] In *Constad*, the court decided that there was not a strong enough showing that the defendant used their attorney to continue the alleged defamation.[129] In *Constad*, the court's reasoning was summed up in a sentence, without any guidance on how it decided the alleging party did not fulfill the crime-fraud *prima-facie* showing.[130] However, it is important to keep in mind that in many crime-fraud exception cases, the alleging party generally does not successfully make the *prima-facie* showing.[131]

In addition to the above cases, critics may claim that including intentional torts in the crime-fraud exception will chill clients' willingness to communicate with their attorney about intentional torts they have committed or to seek advice to avoid committing.[132] While this may chill client communication, it will not do so any more than what is already chilled by the current crime-fraud exception.

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126. *Martin*, 184 F.R.D. at 265.

127. *Id.*; *see also* Ferrara & DiMercurio, Inc. v. St. Paul Mercury Ins. Co., 173 F.R.D. 7, 13–14 (D. Mass. 1997) (similarly holding that there was no precedent to apply the crime-fraud exception to a tort).

128. Constand v. Cosby, 232 F.R.D. 494, 500 (E.D. Pa. 2006).

129. *Id.* This decision can be categorized in two ways—as an out from applying the crime-fraud exception to an intentional tort or as a true failure to meet the required prima-facie showing.

130. *See id.*

131. *See, e.g.*, *In re* Grand Jury Subpoenas Duces Tecum, 773 F.2d 204, 207 (8th Cir. 1984) (holding that the proof of the crime-fraud exception was "too speculative").

132. For a parallel argument supporting adoption of psychotherapist-patient privilege, s*ee* Jaffee v. Redmond, 518 U.S. 1, 11–12 (1996) ("If the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation.").

Additionally, there is no need to protect communications that further intentional torts. If the client is seeking advice to avoid committing an intentional tort, like under the current crime-fraud exception,[133] they do not waive the attorney-client privilege. The crime-fraud exception seeks to prevent socially unacceptable conduct, not to punish those that are attempting to comply with the law.

Critics may also claim that including intentional torts in the crime-fraud-intentional tort exception would render the Model Professional Rules and state professional rules ineffective, as they work hand in hand with the attorney-client privilege. However, the attorney-client privilege and confidentiality vary greatly.[134] Confidentiality and privileges have their own sources, scope, method of enforcement, and exceptions.[135] A change in an exception to privilege would not inherently affect confidentiality. Additionally, the statutory change would be easy—simply adding "intentional tort" to each state's statute.

V. HOW TO INCLUDE INTENTIONAL TORTS IN THE CRIME-FRAUD EXCEPTION

If torts are added to the crime-fraud exception, it should only encompass intentional torts, rather than negligent and intentional torts, as negligent torts do not involve the culpability that intentional torts require.[136] If negligent torts are included, the exception would encompass acts where the actor failed to use proper care.[137] Therefore, only intentional torts should be included in the crime-fraud-tort exception.

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133. *Attorney-Client Privilege in the United States*, *supra* note 13, at § 8:2 (explaining that the client's intent must be for an illegal or fraudulent purpose).

134. LISA G. LERMAN & PHILIP G. SCHRAG, ETHICAL PROBLEMS IN THE PRACTICE OF LAW 202 (4th ed. 2016).

135. *Id.*

136. *See Intentional Torts*, *supra* note 90.

137. *Id.* If the actor simply acted carelessly, they did not intend to commit the act. If they did not intend it, they could not have sought out advice to commit an improper act.

This would balance the social policy of confidential attorney-client communications on one hand, and the other social policy of preventing societal wrongs on the other, without unfairly including careless acts.

There are three practical options to add intentional torts to the crime-fraud exception: (1) add the crime-fraud-tort exception to the Federal Rules of Evidence, (2) let common law continue to develop it, or (3) have the Supreme Court rule on it. While each route can be used, the Supreme Court is the most effective route.

A. *Federal Rules of Evidence*

Option one, adding the exception to the Federal Rules of Evidence, is the most unlikely and unhelpful option for many reasons. First, neither the attorney-client privilege, nor the crime-fraud exception are outlined in the Federal Rules of Evidence.[138] While Rules 501 and 502 explain aspects of the attorney-client privilege, they do not lay out the attorney-client privilege themselves.[139] This would mean that Congress would need to add the attorney-client privilege *and* crime-fraud-tort exception. It seems that if Congress took this path, it would need to add all the privileges acknowledged in federal court.

Second, it is difficult to believe that Congress would be willing to amend the Federal Rules of Evidence so greatly because it already decided to avoid incorporating privileges when it first adopted the Federal Rules of Evidence.[140] Third, the Federal Rules already state what to do when confronted with an attorney-client privilege problem: refer to common law.[141] Fourth, Congress does not greatly amend the Federal

138. *See* FED. R. EVID.

139. *See* FED. R. EVID. 501, 502; *see also* Bartholomew, *supra* note 26, at 1020–21.

140. Bartholomew, *supra* note 26, at 1020–21.

141. *Id.*

Rules of Evidence.[142]

However, if Congress decides to amend the Federal Rules of Evidence to add a crime-fraud-tort exception, it should be as follows:

503: Attorney-Client Privilege: Crime-Fraud-Tort Exception

(a) The attorney-client privilege includes any situation where:

(1) legal advice is sought,

(2) from a professional legal adviser in his capacity,

(3) the communication relating to that purpose,

(4) made in confidence,

(5) by the client,

(6) are at his insistence permanently protected,

(7) from disclosure by himself or by the legal adviser,

(8) except the protection be waived.[143]

(b) The attorney-client privilege applies to all attorney-client communication, except:

(1) Crime. Where the client seeks information from the professional legal adviser to commit or continue a crime. Crimes within state and federal statutes shall

142. For example, the 2018 amendments to the Federal Rules of Evidence included only three changes: revising the text of the ancient documents exceptions to hearsay in Rule 803 and adding two e-discovery self-authenticating requirements to Rule 902. *Federal Rules of Evidence Amendments for 2018,* FEDERAL RULES OF EVIDENCE (Aug. 9, 2017), https://www.rulesofevidence.org/federal-rules-of-evidence-amendments-for-2018/. While adding e-discovery is a substantial change, incorporating the entire the attorney-client privilege would be a larger and more difficult feat. To amend a federal rule of evidence, a congresswoman or congressman would need to bring the matter in front of Congress. RICHARD S. BETH, CONG. RESEARCH SERV., RS20617, HOW BILLS AMEND STATUTES (2003), https://fas.org/sgp/crs/misc/RS20617.pdf. Unfortunately, as the crime-fraud exception varies based on jurisdiction, a congressman or congresswoman will not likely be flagged as to the inconsistency as it is not an intra-jurisdictional issue.

143. NICHOLAS, *supra* note 5, at 291 (citing 8 WIGMORE, EVIDENCE § 2292, at 554 (McNaughton rev. 1961)) (listing the above elements).

apply to this exception.

(2) Fraud. Where the client seeks information from the professional legal adviser to commit or continue a fraud. Frauds within state and federal statutes shall apply to this exception.

(3) Tort. Where the client seeks information from the professional legal adviser to commit an intentional tort. An intentional tort is a harm to another, intentionally, rather than negligently, recklessly, or knowingly.

(c) If an exception to the privilege applies, the attorney can be compelled to testify regarding the communication between herself and her client.

B. *Common Law*

Option two, letting common law continue to develop the crime-fraud exception, is practical, but unhelpful. The problem with the current crime-fraud exception is inconsistency.[144] The federal government looks to state law to determine the attorney-client privilege, and in this case, the crime-fraud exception. However, states are inconsistent on the crime-fraud exception.[145] States do not have the same crime-fraud exception statute requirements, some states do not have a crime-fraud exception statute at all, and other states leave the crime-fraud exception solely to common law.[146] While there is a trend in applying the crime-fraud exception to intentional torts,[147] some courts have refused to

144. *Compare In re* Sealed Case, 754 F.2d 395, 399–400 (D.C. Cir. 1985) (holding that the crime-fraud exception applies to "other misconduct") *with* Coleman v. Am. Broad. Cos., 106 F.R.D. 201, 209 (D.D.C. 1985) (holding that the crime-fraud exception had not previously been applied to defamation, and therefore they could not apply the exception in this case).

145. *Compare* ALA. R. EVID. 502(b) *with* OHIO REV. CODE. ANN. § 2317.02(A) (West 2017).

146. *See infra* app. Fig. One.

147. *See supra*, Part V.

do so.[148] This system creates inconsistent rulings, all based on the physical location of the federal court. If an across the board crime-fraud-tort exception is created, without waiting on common law to develop it, crime-fraud exception application would be more consistent.[149]

C. *Supreme Court*

Option three, a Supreme Court ruling on the crime-fraud-tort exception, is the most realistic and useful option to create a consistent system. There are many reasons to choose this option. First, Congress would not have to battle over the terms of an amendment; the Supreme Court can issue a decision by a majority of nine, rather than two houses of Congress. Second, a case does not have to be developed like an amendment; case are organically created. Third, out of seven thousand cases appealed to the Supreme Court each year,[150] there is bound to be a crime-fraud exception case within the next few years.[151] Fourth, and most importantly,

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148. *See supra*, Section V.A.

149. While many areas of law are inconsistent between jurisdictions, the crime-fraud exception should particularly be consistent because of its impact on attorneys themselves, not just clients. For example, states differ on marijuana legality. *Marijuana Overview*, NCSL, http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx (last visited July 6, 2019). This solely impacts the client's liability. However, differing crime-fraud exceptions impact what an attorney can consider privileged, not just the client's liability.

150. *About the Supreme Court*, UNITED STATES COURTS, http://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/about (last visited Mar. 21, 2018).

151. While the Supreme Court has not addressed the attorney-client privilege since 2011, United States v. Jicarilla Apache Nation, 564 U.S. 162 (2011), it has regularly decided evidentiary issues. *E.g.,* Turner v. United States, 137 S. Ct. 1885 (2017); Warger v. Shauers, 135 S. Ct. 521 (2014); Williams v. Illinois, 567 U.S. 50 (2012). Additionally, the crime-fraud exception has recently become a hot topic among lawyers due to the Trump-Cohen relationship controversy. Paul Rosenzweig, *Michael Cohen, Attorney-Client Privilege and the Crime-Fraud Exception*, LAWFARE (Apr. 10, 2018, 12:36 PM), https://www.lawfareblog.com/michael-cohen-attorney-client-privilege-and-crime-fraud-exception; Ugonna Eze, *The Cohen case and attorney-client privilege*, CONSTITUTION CTR. (Apr. 13, 2018), https://constitutioncenter.org/blog/the-cohen-case-and-attorney-client-privilege.

the Supreme Court already successfully created a uniform system around part of the crime-fraud exception in *Zolin*.[152] *In camera* review is consistent in both state and federal courts because the Supreme Court created guidelines. The Court can do the same for the crime-fraud-tort exception generally.

If the Supreme Court were to create guidelines for the crime-fraud-tort exception, they should be as follows:

> The crime-fraud exception, as generally adopted by common law, currently applies to clients attempting to receive advice from a lawyer to assist in continuing, covering up, or committing a crime or fraud. Some courts have extended the application to intentional torts. To create consistency in common law application, courts should apply the crime-fraud exception to situations involving a client attempting to receive advice from a lawyer to assist in continuing, covering up, or committing an intentional tort.

For the purposes of judicial application of the crime-fraud-tort exception, intentional torts should be construed narrowly, as to exclude wanton, willful, and reckless behavior.[153] This behavior includes when "a person acts or fails to act, with a conscious realization that injury is a probable . . . result of such conduct."[154] Additionally, "intentional tortious conduct is when an ordinary, reasonable, prudent person would believe an injury was substantially certain to result from his conduct."[155] Intentional conduct requires more than the knowledge and appreciation of risk.[156] This is not just a "foreseeable risk which an ordinary, reasonable, prudent person would avoid," as that would be ordinary negligence.[157] Current state and

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152. United States v. Zolin, 491 U.S. 554 (1989).

153. Melanie L. Carpenter, *Petersen v. Sioux Valley Hospital: Reckless Infliction of Emotional Distress*, 39 S.D. L. REV. 359, 372 (1993).

154. *Id.* at 373 (quoting VerBouwens v. Hamm Wood Prods., 334 N.W.2d 874, 876 (S.D. 1983)).

155. *Id.*

156. *Id.*

157. *Id.*

federal statutes and rules must be made consistent with this guideline.

While application of this guideline may not be perfect, as no guideline application ever is, it should provide guidance in an area where none has been established by a court higher than the district level. A broad standard diminishes the ability for circuit splits and will help uphold *stare decisis*.

As noted at the end of the guideline, state and federal congresses may need to update laws to include torts in the crime-fraud-tort exception. This change should not be too difficult, as the amendment would only require adding "intentional tort" to the list of applicable exceptions.

VI. CONCLUSION

Given the current political climate and news, and the trend toward accepting intentional torts as part of the crime-fraud exception to the attorney-client privilege, intentional torts should officially be included in the crime-fraud exception. The attorney-client privilege is a pillar of American democracy that should not be tainted by a relationship based on intentional torts—a negative aspect of society. A crime-fraud-tort exception would increase discovery of materials to help fight injustices that should not be hidden behind the shield of the attorney-client privilege. The sooner the exception is broadened, most easily by the Supreme Court, the sooner we increase access to these injustice-fighting materials.

VII. APPENDIX

Figure One[158]

State	*Attorney-Client Privilege (Statute or Court Rule)*	*Crime-Fraud Exception*
Alabama	Client privilege holder: prevents disclosure of confidential communications for professional legal services between: (1) the client/client's representative and the attorney/attorney's representative, (2) the attorney and the attorney's representative, (3) the client/client's representative, the attorney/attorney's representative, and an attorney/attorney's representative representing another party of common interest, (4) representatives of the client, and (5) attorneys representing the same client[159]	Information sought to commit or plan to commit a crime or fraud[160]

158. Imwinkelried, *supra* note 17, at app. D (providing the list of state attorney-client privilege statutes and court rules).

159. ALA. R. EVID. 502(b).

160. ALA. R. EVID. 502(d)(1).

Alaska	*See* Alabama[161]	Information sought, obtained, or used by the client to enable anyone to commit or plan a crime or fraud waives the attorney-client privilege. This applies when the client knew or should have known the action was a crime or fraud.[162]
Arizona	In a civil case, an attorney cannot be examined regarding communication by his or her client or the attorney's advice in the course of the attorney's employment. An attorney's secretary, paralegal, legal assistant, stenographer, or clerk who acquired knowledge through professional capacity must obtain employer's consent to be examined.[163]	N/A
Arkansas	*See* Alabama[164]	*See* Alaska[165]
California	The client has the privilege to refuse to	Lawyer's services sought or obtained

161. ALASKA R. EVID. 503(b).

162. ALASKA R. EVID. 503(d)(1).

163. ARIZ. REV. STAT. ANN. § 12-2234 (1994).

164. ARK. R. EVID. 502(b).

165. ARK. R. EVID. 502(d)(1).

	disclose and prevent the lawyer from disclosing a confidential communication between the lawyer/client.[166]	to aid anyone to plan or commit a crime or fraud; the exception does not apply to confidential communications on medical cannabis or adult-use cannabis if the lawyer advises the client on conflicting federal law.[167]
Colorado	An attorney cannot be examined regarding communication by his or her client or the attorney's advice in the course of the attorney's employment. An attorney's secretary, paralegal, legal assistant, stenographer, or clerk who acquired knowledge through professional capacity must obtain employer's consent to be examined.[168]	N/A
Connecticut	Communications are privileged when made in confidence between a client and an attorney for the purpose of seeking or	N/A

166. CAL. EVID. CODE § 954 (West 1965).

167. CAL. EVID. CODE § 956 (West 2018).

168. COLO. REV. STAT. ANN. § 13-90-107(1)(b) (West 2017).

	giving legal advice.[169]	
Delaware	*See* Alabama[170]	*See* Alaska[171]
Dist. Of Columbia	There is no clear attorney-client privilege, however there is a statute regarding attorney-client privilege for the government. It provides, in part: "Nothing in [this law] shall limit, waive, or abrogate the scope or nature of the attorney-client privilege, . . . with respect to communications between attorneys employed by the Office of the Attorney General and subordinate agency personnel, or legal advice given by Office of the Attorney General attorneys to subordinate agency personnel before the date of the appointment of these attorneys to positions in the subordinate agencies."[172]	N/A
Florida	A client may prevent anyone from disclosing confidential	Information sought, obtained, or used by the client to enable

169. CONN. GEN. STAT. ANN. § 5-2 (West 2017).

170. DEL. R. EVID. 502(b).

171. DEL. R. EVID. 502(d)(1).

172. D.C. CODE § 1-608.66 (2013).

	information made in the course of legal services.[173]	anyone to commit or plan a crime or fraud waives the attorney-client privilege. This applies when the client knew the action was a crime or fraud.[174]
Georgia	Public policy requires that communications between attorney and client are excluded from evidence.[175]	N/A
Guam	The attorney-client privilege exists.[176]	N/A
Hawaii	*See* Alabama[177]	*See* Alaska[178]
Idaho	*See* Alabama[179]	*See* Alaska[180]
Illinois	Except as provided by the U.S. Constitution, Illinois Constitution, or the Supreme Court rules, privileges are governed by common law, interpreted by Illinois courts.[181]	N/A
Indiana	Attorneys are not required to testify about confidential	N/A

173. FLA. STAT. ANN. § 90.502(2) (West 2000).

174. FLA. STAT. ANN. § 90.502(4)(a) (West 2000).

175. GA. CODE ANN. § 24-5-501 (West 2014).

176. GUAM R. EVID. 502.

177. HAW. R. EVID. 503(b).

178. HAW. R. EVID. 503(d)(1).

179. IDAHO R. EVID. 502(b) (repealed 2018).

180. IDAHO R. EVID. 502(d)(1).

181. ILL. R. EVID. 501 (providing a general rule where Rule 502 reflects Fed. R. Evid. 502).

	communications made to them in their professional capacity.[182]	
Iowa	A practicing attorney, who obtained confidential communication by reason of his or her employment, cannot testify.[183]	N/A
Kansas	A client has the privilege to prevent confidential attorney/client communications from being disclosed by himself, his attorney, or any other witness who has knowledge of the communication.[184] This knowledge comes from the attorney-client communication itself, in a manner not reasonably anticipated by the client, or from a breach of the attorney-client privilege.[185]	The communication is not privileged if the judge finds sufficient evidence, in addition to the communication itself, that legal services was "sought or obtained in order to enable or aid the commission or planning of a crime or tort."[186]
Kentucky	*See* Alabama[187]	*See* Alaska[188]
Louisiana	A client has the privilege to refuse	There is no privilege if the

182. IND. CODE ANN. § 34-46-3-1(1) (West 1998).

183. IOWA CODE ANN. § 622.10 (West 2015).

184. KAN. STAT. ANN. § 60-426(a) (West 2011).

185. *Id.*

186. KAN. STAT. ANN. § 60-426(b)(1) (West 2011).

187. KY. R. EVID. 503(b).

188. KY. R. EVID. 503(d)(1).

	disclosing or allowing another to disclose confidential communication for legal services when the communication is: (1) between the client/client's representative and the lawyer/lawyer's representative, (2) between the lawyer and lawyer's representative, (3) by the client/lawyer/ representative to a lawyer/lawyer's representative who represents another common interest party, (4) between client representatives or between the client and representative, (5) among lawyers and representatives working for the same client, or (6) between lawyers' representatives.[189]	communication was made in furtherance of a crime or fraud.[190]
Maine	*See* Alabama[191]	*See* Alaska[192]
Maryland	"A person may not be compelled to testify in violation of the attorney-client	N/A

189. LA. CODE EVID. ANN. art. 506(B) (1993).

190. LA. CODE EVID. ANN. art. 506(C)(1)(b) (1993).

191. ME. R. EVID. 502(b).

192. ME. R. EVID. 502(d)(1).

	privilege."[193]	
Massachusetts	*See* Alabama[194]	*See* Alaska[195]
Michigan	"Privilege is governed by the common law, except as modified by statute or court rule."[196]	N/A
Minnesota	Unless the client consents, an attorney and the attorney's employee cannot be examined on any communication from the client to the attorney or any professional advice given in response to the communication.[197]	N/A
Mississippi	*See* Alabama[198]	*See* Alaska[199]
Missouri	Attorneys, regarding their client's communication to them or their advice in response, are incompetent to testify. However, the attorney may testify if the client consents.[200]	N/A
Montana	An attorney cannot be	N/A

193. MD. CODE ANN., CTS. & JUD. PROC. § 9-108 (West 1973).

194. MASS. R. EVID. 502(b).

195. MASS. R. EVID. 502(d)(1).

196. MICH. COMP. LAWS ANN. R. EVID. 501 (West 1978).

197. MINN. STAT. ANN. § 595.02(b) (West 2013).

198. MISS. R. EVID. 502(b).

199. MISS. R. EVID. 502(d)(1).

200. MO. ANN. STAT. § 491.060(3) (West 1977).

	examined regarding communication by his or her client or the attorney's advice in the course of the attorney's employment. A client cannot be examined, unless he or she volunteers.[201]	
Nebraska	*See* Alabama[202]	*See* Alaska[203]
Nevada	The client has the privilege to prevent himself or another person from disclosing confidential communications: (1) between the client/client's representative and the lawyer/lawyer's representative, (2) between the client's lawyer/lawyer's representatives, (3) made for legal services to the client, by the client or the lawyer to another lawyer representing another individual in a common matter.[204]	"There is no privilege 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."[205]

201. MONT. CODE ANN. § 26-1-803 (West 2009).

202. NEB. REV. STAT. ANN. § 27-503(2) (West 1975).

203. NEB. REV. STAT. ANN. § 27-503(4)(a) (West 1975).

204. NEV. REV. STAT. ANN. § 49.095 (West 1971).

205. NEV. REV. STAT. ANN. § 49.115(1) (West 1971).

New Hampshire	*See* Alabama[206]	See Alaska[207]
New Jersey	Attorney-client communications, made in professional confidence, are privileged. The client has the privilege to refuse to disclose it or let the attorney/witness disclose it. The witness must have obtained knowledge in the communication between attorney/client, in a manner not reasonably anticipated, from a breach of the lawyer/client relationship, or from a privileged communication between the client and witness.[208]	The privilege does not apply to "[a] communication in the course of legal service sought or obtained in aid of the commission of a crime or fraud. . . ."[209]
New Mexico	*See* Alabama[210]	*See* Alaska[211]
New York	An attorney, employee, or anyone who obtains knowledge about the	N/A

206. N.H. R. EVID. 502(b).

207. N.H. R. EVID. 502(d)(1).

208. N.J. R. EVID. 504(1).

209. N.J. R. EVID. 504(2).

210. N.M. R. EVID. 11-503(b).

211. N.M. R. EVID. 11-503(d)(1).

	confidential communication between the attorney/employee and the client cannot disclose the communication in an action, trial, or hearing. However, they may testify if the client waives the privilege.[212]	
North Carolina	Privileges will be determined in accordance with the law of this State, unless otherwise required by the U.S. Constitution.[213]	N/A
North Dakota	*See* Alabama[214]	*See* Alaska[215]
Ohio	An attorney cannot testify about attorney-client communications and the attorney's advice to the client. However, the attorney may be compelled to testify if the client voluntarily reveals the substance of the communication.[216]	The communication may be subject to *in camera* inspection if the party seeking disclosure makes a *prima-facie* showing of "[b]ad faith, fraud, or criminal misconduct by the client." This is to show the communication by the client to the attorney or by the

212. N.Y. C.P.L.R. 4503(a) (Consol. 2016).

213. N.C. R. EVID. 501.

214. N.D. R. EVID. 502(b).

215. N.D. R. EVID. 502(d)(1).

216. OHIO REV. CODE. ANN. § 2317.02(A) (West 2017).

		attorney to the client to aid or further ongoing/future bad faith by the client.[217]
Oklahoma	*See* Alabama[218]	*See* Alaska[219]
Oregon	*See* Alabama[220]	*See* Alaska[221]
Pennsylvania	An attorney is not permitted to testify regarding confidential communications made to him by his client. The client cannot be compelled to testify, unless the privilege is waived.[222]	N/A
Puerto Rico	The client can prevent another from disclosing a confidential communication between her and her attorney. The privilege may be claimed by the client, client's authorized privilege claimer, and the attorney, if claimed in the interest of the client.[223]	"There is no privilege under this rule if . . . [t]he services of the attorney were sought or obtained to enable or aid anyone to commit or plan to commit a crime, tortious act, or fraud."[224]

217. *Id.*

218. OKLA. STAT. ANN. tit. 12, § 2502(B) (West 2013).

219. OKLA. STAT. ANN. tit. 12, § 2502(D)(1) (West 2013).

220. OR. REV. STAT. ANN. § 40.225(2) (West 2010).

221. OR. REV. STAT. ANN. § 40.225(4)(a) (West 2010).

222. 42 PA. STAT. AND CONS. STAT. ANN. §§ 5916, 5928 (West 1978).

223. P.R. LAWS ANN. tit. 32, § 25(B).

224. P.R. LAWS ANN. tit. 32, § 25(C)(1).

Rhode Island	The privileges in common law are retained.[225]	N/A
South Carolina	Privileges are governed by the common law, as interpreted by the court in light of reason and experience, unless otherwise required by the South Carolina Constitution, U.S. Constitution, or South Carolina statute.[226]	N/A
South Dakota	*See* Alabama[227]	*See* Alaska[228]
Tennessee	An attorney cannot, in giving testimony against a client or individual who consulted the attorney, disclose any suit-pending communication to the attorney to the individual's injury.[229]	N/A
Texas	*See* Alabama[230]	*See* Alaska[231]
Utah	A client has the privilege to refuse to disclose or prevent another person from	*See* Alaska[233]

225. R.I. R. EVID. 501.

226. S.C. R. EVID. 501.

227. S.D. CODIFIED LAWS § 19-19-502(b) (1979).

228. S.D. CODIFIED LAWS § 19-19-502(d)(1) (1979).

229. TENN. CODE ANN. § 23-3-105 (West 2009).

230. TEX. R. EVID. 503(b).

231. TEX. R. EVID. 503(d)(1).

233. UTAH R. EVID. 504(d)(1).

	disclosing confidential communications. If the communications were for professional legal services and the communications were between and among: the client/client's representatives, lawyers/lawyer's representatives, or lawyers representing another in a common matter, then the privilege applies.[232]	
Vermont	*See* Alabama[234]	*See* Alaska[235]
Virginia	The attorney-client privilege is governed by common law, interpreted by Virginia courts in light of reason and experience, unless otherwise provided in statute.[236]	N/A
Virgin Islands	The common law governs privileges.[237]	N/A
Washington	*See* Missouri[238]	N/A
West Virginia	Unless otherwise provided in the U.S. Constitution, West Virginia Constitution,	N/A

232. UTAH R. EVID. 504(b).

234. VT. R. EVID. 502(b).

235. VT. R. EVID. 502(d)(1).

236. VA. R. EVID. 2:502.

237. V.I. R. EVID. 501 (mirroring FED. R. EVID. 501).

238. WASH. REV. CODE ANN. § 5.60.060 (West 2018).

	rules by the Supreme Court of Appeals of West Virginia, or West Virginia statutes, common law governs privilege.[239]	
Wisconsin	*See* Alabama[240]	*See* Alaska[241]
Wyoming	An attorney cannot testify about a communication made by a client or his advice to the client. He may testify if the client gives consent. He may be compelled to testify if the client voluntarily testified.[242]	N/A

239. W. VA. R. EVID. 501.

240. WIS. STAT. ANN. § 905.03(2) (West 2014).

241. WIS. STAT. ANN. § 905.03(4)(a) (West 2014).

242. WYO. STAT. ANN. § 1-12-101(a)(i) (West 1977).