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CONTENTS

With the Editors vii

ARTICLES

Amendments of the Federal Rules of Civil Procedure, 1961–1963 (I) . *Benjamin Kaplan* . . 601

Improving Financial Protection of the Public Against the Hazards of Nuclear Power . . . . . *David F. Cavers* . . 644

COMMENT

Federal Preemption and State Conservation in *Northern Natural Gas* *Charles J. Meyers* . . 689

NOTES

Regulation of Program Content by the FCC 701

State Constitutional Limitations on the Power of Eminent Domain 717

The Future Crime or Tort Exception to Communications Privileges 730

Unreason in the Law of Damages: The Collateral Source Rule 741

RECENT CASES

Choice of Law — Usury — Whether Transaction Is Sale or Loan Is Determined by Law of State of Making but Legality of Interest Rate is Governed by Law of State of Performance (*DeKorwin v. First Nat'l Bank*, 7th Cir. 1963) 754

Corporations — Stockholders — Stockholder May Enjoin Act Leading to Stock Exchange Delisting Where It Is Without Business Justification (*United Funds, Inc. v. Carter Prods., Inc.*, Cir. Ct. Baltimore City, Md., 1963) 757

THE FUTURE CRIME OR TORT EXCEPTION TO COMMUNICATIONS PRIVILEGES

As a rule, confidential communications from a client in the course of a professional relationship may not be the subject of an attorney's testimony without the client's consent.[1] A similar rule applies to communications from patient to physician, from penitent to priest, between husband and wife, and among jurors.[2] These privileges are justified on the grounds that the relationships involved are important, confidence is essential to sustain them, and the apprehension of judicially compelled disclosure would inhibit complete confidence. However, litigation's just appetite for relevant evidence demands the careful restriction of these privileges within bounds set by their legitimate purposes. Thus a communication is not protected if it is not made in confidence [3] or if it is so far outside the class of exchanges normally demanded for purposes of the relationship that the particular roles of the parties are merely incidental.[4]

Communications knowingly made in the service of an illegal purpose not only usually fall outside the protected class, but encounter a strong interest in preventing the use of privileged relationships to abet unlawful activity. On this foundation rests the well-established exception to the attorney-client privilege for consultations in which aid is sought in furtherance of a future crime or tort.[5] The precise dimensions of this exception are less surely settled than its principle, and the uncertainty increases when its operation is extended to other privileges — as is done by the Uniform Rules of Evidence.[6] Since the exception rests primarily on a finding that certain communications are outside the class which a particular privilege is designed to protect, the dimensions of the exception should vary as it is applied to different privileges, each representing a separate congeries of interests. Common to the application of the exception to any of the privileges is the problem of the degree to which an apparently privileged statement may be used in court to establish its maker's improper purpose and thus vitiate the putative privilege. This Note will examine both the question of the exception's dimensions and the problem of proving its applicability.

I. Scope of the Exception

A. The Professional Privileges

The attorney-client privilege has always been subject to the qualification that protection is denied to communications wherein a lawyer's

[1] See McCormick, Evidence §§ 91–100 (1954) [hereinafter cited as McCormick]; 8 Wigmore, Evidence §§ 2290–329 (McNaughton rev. ed. 1961) [hereinafter cited as Wigmore].

[2] See 8 Wigmore §§ 2380–91 (doctor-patient), 2394–96 (priest-penitent), 2332–41 (hubsand-wife), 2346 (petit jurors), 2360–63 (grand jurors).

[3] See, *e.g.*, Wilcoxon v. United States, 231 F.2d 384 (10th Cir.), *cert. denied*, 351 U.S. 943 (1956).

[4] See, *e.g.*, 8 Wigmore §§ 2296–97 (nonlegal advice from an attorney); Annot., 4 A.L.R.2d 835 (1949) (business communications between spouses).

[5] Uniform Rule of Evidence 26(2); see Annot., 125 A.L.R. 508 (1940).

[6] Uniform Rules of Evidence 27(6), 28(2)(e) (doctor-patient and marital privileges). *But see* Uniform Rule of Evidence 29 (priest-penitent privilege).

assistance is sought in activity that the client knows to constitute a crime or tort.[7] The knowledge requirement minimizes the effect of the exception on proper communications; absent this requirement legitimate consultations would be inhibited by the risk that their subject matter might turn out to be illegal and therefore unprivileged.[8] Moreover, counseling against unfounded claims or illegal projects is an important part of the lawyer's function. The exception comprehends a number of different situations — actual conspiracy between attorney and client,[9] overt solicitation of illegal assistance which the attorney refuses,[10] and performance of legal services for a client who conceals a tortious or criminal purpose.[11] The rationale for the exception in these cases is analogous to that which excludes from protection communications made to a lawyer acting as a business adviser or witness to a transaction: the type of professional relationship that the privilege was designed to foster is absent.[12] A fourth situation generally considered to lie within the future crime or tort exception involves the subsequent appropriation to an illegal end of legal services originally obtained for a proper purpose.[13] This application of the doctrine may be viewed as analogous to the doctrine of waiver. Just as out-of-court disclosures by the client vitiate a previously valid claim of privilege on the ground that a later revelation has the same practical effect as an initial lack of confidentiality,[14] the subsequent formation of criminal intent should be held to destroy a preexisting privilege. Although there might be some loss of frankness in the original communication due to the client's fear that his later application of the attorney's work to an illegal purpose will result in a loss of privilege, the loss is likely to be marginal. And this inhibition, rooted in the contemplation of future activities known to be unlawful, seems unworthy of legal protection.

In the course of its history, the future crime or tort exception has taken on several arbitrary limitations. Older cases — partly out of the desire to ensure that the knowledge requirement was met — restricted the exception to acts involving "moral turpitude" or offenses malum in se.[15] In 1891, the Supreme Court held that the exception applied only in litigation concerning the same illegal transaction for which the attorney was consulted.[16] These limitations are completely without support in the theory of the exception and have not been followed.[17]

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[7] See generally Gardner, *The Crime or Fraud Exception to the Attorney-Client Privilege*, 47 A.B.A.J. 708 (1961).

[8] See Cummings v. Commonwealth, 221 Ky. 301, 298 S.W. 943 (1927). *But see* State v. Richards, 97 Wash. 587, 167 Pac. 47 (1917).

[9] *E.g.*, SEC v. Harrison, 80 F. Supp. 226 (D.D.C. 1948).

[10] *E.g.*, Sawyer v. Barczak, 229 F.2d 805 (7th Cir.), *cert. denied*, 351 U.S. 966 (1956).

[11] *E.g.*, Sawyer v. Stanley, 241 Ala. 39, 1 So. 2d 21 (1941).

[12] See Regina v. Cox, 14 Q.B.D. 153, 168 (1884). Compare, *e.g.*, United States v. United Shoe Mach. Corp., 89 F. Supp. 357 (D. Mass. 1950) (business adviser).

[13] See, *e.g.*, Fidelity-Phenix Fire Ins. Co. v. Hamilton, 340 S.W.2d 218 (Ky. 1960); Note, 56 Nw. U.L. Rev. 235, 254–55 (1961).

[14] See, *e.g.*, Holland v. State, 17 Ala. App. 503, 86 So. 118 (1920); Uniform Rule of Evidence 37.

[15] *E.g.*, Supplee v. Hall, 75 Conn. 17, 52 Atl. 407 (1902) (moral turpitude); Bank of Utica v. Mersereau, 3 Barb. Ch. 528 (N.Y. 1848) (malum in se).

[16] Alexander v. United States, 138 U.S. 353 (1891).

[17] See Sawyer v. Barczak, 229 F.2d 805 (7th Cir.), *cert. denied*, 351 U.S. 966 (1956); 8 Wigmore § 2298 n.1.

Some writers contend that the attorney-client privilege should be removed upon proof merely that the lawyer was informed by his client of an intention to commit a future offense, without the further demonstration that the lawyer's assistance was requested or given.[18] If the intended wrongful act involves some use, open or concealed, of the lawyer's services, it falls within the traditional exception. Accordingly an indication by a client that he plans to bribe a witness or perjure himself in litigation to be conducted by the attorney is not privileged.[19] Continuing to defend an individual or members of an organization knowing that their criminal activity is to continue may cease at some point to be protected legal service, for the attorney becomes in effect a coconspirator.[20] But often, particularly when an attorney defends a professional criminal, he may learn of planned illegal activity that in no way involves his participation or complicity.[21] Even in such a case there is reason to terminate the privilege. Before the consummation of the offense, at least, the Canons of Professional Ethics make it clear that the attorney is released from his duty to maintain confidence in order "to prevent the act or protect those against whom it is threatened." [22] In some circumstances, the lawyer may even have a duty to speak.[23] The preventive policy underlying the canon makes it inapplicable after the wrongful act is completed,[24] but because preventive disclosure is permitted or even encouraged, a denial of the evidentiary privilege for statements of intention to commit a wrong would add but little to the discouragement of such confidences. And an extension of the exception to these cases would not ordinarily affect legitimate professional communications, since the revelation of a design to consummate an action known to be illegal is usually irrelevent to consultations for any proper purpose.

However, where the communication contains protected elements not severable from the revelation of future illegal intent, the arguments for extending the exception do not apply. For example, if the client is engaged in a continuing offense, a statement of intention to continue is necessarily inseparable from a confession of past conduct. A statement with inseparable elements of both confession and declaration of future intention is also likely when the client is engaged in a series of repeated offenses. Only a statement about an isolated wrongful act revealed to a lawyer during its preparation would seem admissible without endangering protected confidential communications.

The degree to which successful application of the exception modifies

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[18] See 8 WIGMORE § 2299 (report of ABA committee). See also *In re* Stein, 1 N.J. 228, 62 A.2d 801 (1949).

[19] See Gebhardt v. United Rys., 220 S.W. 677 (Mo. 1920). *But see* People v. Singh, 123 Cal. App. 365, 11 P.2d 73 (Dist. Ct. App. 1932).

[20] See *In re* Davis, 252 App. Div. 591, 299 N.Y. Supp. 632 (1937).

[21] See In the Matter of Selser, 27 N.J. Super. 257, 99 A.2d 313 (App. Div. 1953).

[22] ABA, CANONS OF PROFESSIONAL AND JUDICIAL ETHICS, canon 37 (1937); see ABA, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES, opinions 155–56, at 322–25 (1957) [hereinafter cited as ABA OPINIONS].

[23] ABA OPINIONS, opinion 156, at 324.

[24] ABA OPINIONS, opinion 202, at 406, held that once a fraud is consummated the exception of canon 37 is inapplicable. *But cf.* WILLIAM NELSON CROMWELL FOUNDATION, OPINIONS OF THE COMMITTEES ON PROFESSIONAL ETHICS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AND THE NEW YORK COUNTY LAWYERS' ASSOCIATION, opinion 84, at 559 (1956).

the otherwise privileged relationship varies. If the attorney is consulted solely for an illegal purpose, the absence of a professional relationship leads to a denial of privilege for all communications by the client — including those not germane to the unlawful activity.[25] On the other hand, where an underlying professional relationship exists in which the attorney performs normal legal services for his client, an illegal request or hidden illicit purpose opens up only communications related to that purpose. For example, if a lawyer preparing a defense in one proceeding is asked to bribe an official to influence decision in another matter, it would seem that only the improper communication should be admitted. In other cases, particularly those involving a concealed purpose, the drawing of a line between privileged and unprivileged statements is more difficult. Concern for professional relationships dictates that all doubtful questions be resolved in favor of privilege, even when the statement lacks close relationship to either the proper or improper end. Hence, the exception when applied in these cases should admit only communications which are in furtherance of the illegal purpose. In situations involving merely a statement of intention to commit a crime, that statement alone should be admissible.

The two other professional privileges recognized in a majority of jurisdictions shield the confidences between doctor and patient, and priest and penitent. Although the justifications for a future crime or tort exception are, for the most part, as sound in the context of these relations as with lawyer and client, there is but limited authority for the exception in these areas.[26] The reason may be that, for most purposes, a lawyer is a more useful partner in crime than a doctor or priest. Indeed, it is difficult to imagine a situation in which a priest would be asked for illegal assistance, and it is perhaps for that reason that the Uniform Rules create no exception to that privilege.[27] The patient's privilege, however, is made subject to the exception, in line with the view taken by most commentators.[28] Thus, it has been held that a request to a physician for a criminal abortion is not covered by privilege,[29] and the Uniform Narcotics Act permits doctors to testify to any attempt at procurement of narcotics by a patient.[30]

The arguments made for admissibility of statements of intention to commit crime apply equally to the normal physician-patient relation. The issue is much harder with declarations to a priest or to a doctor providing psychiatric care. It is important that persons intending crime be encouraged to consult either psychiatrist or priest, and the proper functions of both relationships would seem to include the dissuasion of antisocial conduct. Hence, the privilege should cover statements of illegal intent as well as confessions of past acts. If the priest or psychiatrist does not succeed in diverting the unlawful purpose he may feel

[25] See, *e.g.*, State v. Childers, 196 La. 554, 199 So. 640 (1940).

[26] The relatively few cases recognizing the exception to the doctor-patient privilege are collected in 8 WIGMORE § 2385 n.2.

[27] UNIFORM RULE OF EVIDENCE 29; see Nolan, *The Law of the Seal of Confession*, in 13 CATHOLIC ENCYCLOPEDIA 649 (1912).

[28] UNIFORM RULE OF EVIDENCE 27(6); see MCCORMICK § 102, at 213; 8 WIGMORE § 2385.

[29] *E.g.*, Cramer v. State, 145 Neb. 88, 15 N.W.2d 323 (1944).

[30] UNIFORM NARCOTIC DRUG ACT § 17(2) (adopted in 47 states, the District of Columbia, Puerto Rico, and the Virgin Islands).

authorized or even compelled to reveal his knowledge in order to prevent the offense; in this regard, the situation is no different from that of an attorney.

B. The Marital Privilege

Traditionally the law of evidence has demonstrated a degree of solicitude toward the intimacy of marriage not manifested with regard to other protected relationships. Until the late nineteenth century the privilege for confidential communications between spouses was not separated from the broader principle that neither husband nor wife was competent to testify to any facts against the other.[31] In some jurisdictions even the modern rule is not strictly a privilege for confidential statements, but rather prevents the spouse from testifying to any information gained on account of the marital relation.[32] With this history of broad protection one would expect the future crime or tort exception to be narrower in this area than with other privileges, and the decisions show almost no trace of the exception.[33] One of the earliest cases clearly to recognize a marital privilege involved a wife's request to her husband to commit forgery.[34] The general failure to recognize the exception may in part be traced to the tenacity of the old rule of incompetency which could admit no exception.[35] Even when the principle of incompetency has been discarded, there remains a broad policy of protecting matrimonial harmony. Because of the intimacy of husband-wife communications, any exception to marital privilege results in intrusion upon an individual's privacy greater than that occurring in any of the other protected relationships. Out of concern for this unique intimacy, and in line with the general reluctance of courts to attach sanctions to any act or statement within the normal marital relation, the future crime or tort exception should not be applied to the marital privilege so as to withdraw protection from communications concerning activity which is not on its face unlawful. It follows that a mere statement of a spouse's criminal plans should not be outside the privilege.[36] On the other hand, conduct sought by one spouse that is unambiguously illegal would seem outside the area of desired husband-wife intimacy, so that the admission of related communications would be unlikely to hinder favored discussion. For example, open solicitation of a wife's assistance in forging an instrument, in contrast to asking her help in transporting her husband, should be held outside the marital privilege. Where both spouses are substantial participants in patently illegal activity, even the most expansive view of the marital privilege should not prevent testimony. The few decisions which recognize a

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[31] See Stapleton v. Crofts, 18 Q.B. 367, 374, 118 Eng. Rep. 137, 140 (1852); 8 WIGMORE § 2333, at 644.

[32] See, *e.g.*, State v. Robbins, 35 Wash. 2d 389, 213 P.2d 310 (1950).

[33] See People v. Coleman, [1945] Ir. R. 237, 247–48 (Ct. Crim. App.), where the attorney privilege was held inapplicable to a document due to the future crime or tort exception while the marital privilege was refused on other grounds.

[34] Lady Ivy's Trial, 10 How. St. Tr. 555, 628 (1684).

[35] See Dickinson v. Abernathy Furniture Co., 231 Mo. App. 303, 96 S.W.2d 1086 (1936).

[36] See Nash v. Fidelity-Phenix Fire Ins. Co., 106 W. Va. 672, 146 S.E. 726 (1929).

future crime or tort exception to the husband-wife privilege seem to fit this latter category.[37] But even in these cases, it seems proper that the lines of admissibility be drawn tightly to include only the improper act and the communications directly relating to it.[38]

C. *The Juror's Privilege*

The shape of a future crime exception to the juror's privilege is an uncertain matter because of the unclear status of the privilege itself. Although Wigmore maintains that communications of a juror to the other members of the panel have all the requisites for privilege,[39] the inadmissibility of such evidence is more frequently governed by the rule of *Vaise v. Delaval*[40] that no juror's testimony as to jury misconduct is competent, or by the parol evidence rule which brands as immaterial the negotiations and motives leading up to the verdict, a legally operative act.[41] There is little doubt that the policy of privilege helps to sustain these other rules,[42] but where they have released their hold, no trace of privilege appears. The so-called Iowa rule, adopted by the Uniform Rules, permits juror testimony about overt acts and statements so long as they do not inhere in the verdict.[43] The rationale of this rule of liberal admissibility is related to one which underlies the future crime or tort exception to the other privileges — an unwillingness to allow privilege to cloak the perpetration of a wrong.

In those jurisdictions where the doctrine of privilege is applied to juror confidences, there has developed an exception similar in policy and operation to the future crime or tort exception. The rule was framed by Mr. Justice Cardozo in *Clark v. United States*.[44] There it was held that a juror's expressions of bias during deliberations could be testified to by her fellows, it being shown that she had wrongfully failed to admit bias on *voir dire*. Although Mr. Justice Cardozo expressed the view that "the privilege does not apply where the relation giving birth to it has been fraudulently begun or fraudulently continued,"[45] the *Clark* rule is not coextensive with the attorney-client exception. It does not except the statements of a juror who made no misrepresentations on *voir dire* but later came under an improper influence,[46] while analogy to the case of postconsultation misappropriation of a lawyer's services would call for that exception. Since there is hardly an interest in protecting one who causes or participates in an improper verdict — the wrongful act to which a future crime or tort exception in this area would apply — a

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[37] See, *e.g.*, Tobias v. Adams, 201 Cal. 689, 258 Pac. 588 (1927). However, such cases may only be a special manifestation of the rule excepting all business transactions from the privilege.

[38] Moeckel v. Heim, 134 Mo. 576, 36 S.W. 226 (1896); UNIFORM RULE OF EVIDENCE 28(2)(e).

[39] 8 WIGMORE § 2346.

[40] 1 Term R. 11, 99 Eng. Rep. 944 (K.B. 1785).

[41] See Ellis v. Deheer, [1922] 2 K.B. 113, 121 (C.A.) (dictum).

[42] See McDonald v. Pless, 238 U.S. 264, 267–68 (1915).

[43] UNIFORM RULE OF EVIDENCE 41; see Perry v. Bailey, 12 Kan. 539, 544–45 (1874).

[44] 289 U.S. 1 (1933).

[45] *Id.* at 14.

[46] *Compare* People v. Castaldia, 51 Cal. 2d 569, 335 P.2d 104 (1959), *with* Kollert v. Cundiff, 50 Cal. 2d 768, 329 P.2d 897 (1958).

strict privilege analysis would result in rejecting the *Clark* distinction. However, a prudential argument may be made in support of the distinction: to ensure that wholesale charges of improper conduct, which may be generated by the stress of jury deliberations, do not prevent the jury from reaching a verdict which will stand, it may be wise to limit narrowly jurors' opportunities to accuse one another.

II. The Proof Dilemma

A. Evidence To Secure the Exception

The existence of the relationship requisite for privilege is a question of preliminary fact that under the usual evidentiary rule is decided by the trial judge.[47] Although in general such initial determinations may be unhampered by rules of evidence, it is regularly asserted that they may not rest upon evidence protected by the various privileges because the protected interests "would suffer as greatly from forced public revelations to a judge as from like revelations to a jury."[48] But the best — frequently the only — evidence to prove that a communication was made in connection with a future wrong lies in its own content. Thus if the apparently privileged statements are admitted in deciding upon the exception, the consequence is the incurable harm of unjustified disclosure in those instances where allegations of criminal purpose turn out to be unsupported. On the other hand, if the privilege must be honored unless the exception is overwhelmingly established by other evidence, the exception could operate in but few cases. Some guide to the treatment of this proof dilemma can be found in the handling of privileges in general, since the question whether to use challenged evidence to resolve the issue of its own admissibility is raised by several other criteria for the invocation of a privilege — for example, the existence of a professional relationship or the confidential nature of a communication.

In most cases, apparently privileged statements have been excluded on the question of admissibility and reliance placed upon presumption and inference from available extrinsic evidence. The confidential quality of a communication is presumed from the marriage relationship[49] or from the circumstances of a visit to an attorney or doctor,[50] but the presumption may be overcome by proof that others were present during the exchange.[51] And the professional character of a meeting can be refuted by evidence of the parties' longstanding friendship and the nonbusiness hour and circumstances of the visit.[52] The method adopted by the Uniform Rules of Evidence for invoking the future crime or tort exception is

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[47] See, *e.g.*, Robinson v. United States, 144 F.2d 392 (6th Cir. 1944), *aff'd*, 324 U.S. 282 (1945).

[48] Maguire & Epstein, *Rules of Evidence in Preliminary Controversies as to Admissibility*, 36 Yale L.J. 1101 (1927). See also Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 Harv. L. Rev. 165, 169 (1929); Annot., 4 A.L.R.2d 835, 837–38 (1949).

[49] See, *e.g.*, Blau v. United States, 340 U.S. 332 (1951).

[50] See, *e.g.*, SEC v. Harrison, 80 F. Supp. 226, 230 (D.D.C. 1948).

[51] See, *e.g.*, Wolfle v. United States, 291 U.S. 7 (1934).

[52] See, *e.g.*, Ranger, Inc. v. Equitable Life Assur. Soc'y of U.S., 196 F.2d 968 (6th Cir. 1952).

consistent with this approach. As to the attorney-client privilege, it provides: "Such privilege shall not extend . . . to a communication if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding [of illegal purpose] . . . ." [53] The source of this procedure is the English case of *O'Rourke v. Darbishire*,[54] in which the court denied an application for a bill of discovery, which merely alleged that communications between client and solicitor were in furtherance of a wrongful act, on the ground that "there must be something to give colour to the charge . . . . some prima facie evidence that it has some foundation in fact." [55] Thirteen years later, the Supreme Court endorsed the rule in the context of a dispute over the admissibility of juror testimony,[56] but only a small number of cases have held rigidly to this requirement that a foundation for the exception be laid solely in extrinsic evidence.[57]

No matter how light the burden of proof which confronts the party claiming the exception, there are many blatant abuses of privilege which cannot be substantiated by extrinsic evidence. This is particularly true, it would seem, of the marital privilege and all other situations in which an alleged illegal proposal is made in the context of a relationship which has an apparent legitimate end. The number of such instances has produced strong pressure for some examination of the communication by the judge, and authority for such examination exists, at least as to the professional privileges, in some jurisdictions. Whether the communications are confidential and within the prescribed professional relationship is examined by permitting or directing at least limited inquiry into the purpose and circumstances of the transaction. Lord Hanworth, M. R., stated in *Minter v. Priest*: "[I]t is not sufficient for the witness to say, 'I went to a solicitor's office.' . . . Questions are admissible to reveal and determine for what purpose and under what circumstances the intending client went to the office." [58] In the United States it appears to be common court practice for an attorney or doctor to be compelled to describe in general terms the nature of his particular dealings with the person claiming privilege, in order to apply such distinctions as that between consultation as an attorney and consultation as a business adviser or friend.[59] And it is to this practice, rather than to the protective Uniform Rules of Evidence rule, that the majority of cases involving the future crime or tort exception conform.[60] There seems to be no interest which supports the use of allegedly privileged material on other issues of admissibility and not in the application of

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[53] UNIFORM RULE OF EVIDENCE 26(2).

[54] [1920] A.C. 581.

[55] *Id.* at 604.

[56] Clark v. United States, 289 U.S. 1, 14 (1933).

[57] See, *e.g.*, United States v. Bob, 106 F.2d 37 (2d Cir.), *cert. denied*, 308 U.S. 589 (1939).

[58] [1929] 1 K.B. 655, 668-69.

[59] See, *e.g.*, Record, pp. 340–45, 362–64, Prichard v. United States, 181 F.2d 326 (6th Cir. 1950); Record, vol. 2, pp. 1032–33, Robinson v. United States, 144 F.2d 392 (6th Cir. 1944).

[60] See, *e.g.*, Ott v. State, 87 Tex. Crim. 382, 222 S.W. 261 (1920); Record, pp. 74–84, Sawyer v. Barczak, 229 F.2d 805 (7th Cir.), *cert. denied*, 351 U.S. 966 (1956).

the exception, although English law appears to embody this inconsistency.[61]

Even if only extrinsic evidence is used to decide other issues of privilege, there is justification for more liberal treatment of the future crime or tort exception. In the first place, the disclosure necessary to resolve this issue is often minimal. When the exception is created by an unknowing contribution by one party to another's scheme or by a rejected solicitation of unlawful assistance, the litigant attacking the privilege would usually have a willing witness on his side. With knowledge of the communication, the attacking party can often elicit proof of the declarant's improper purpose by a single narrow question — for example, "Did your client ask you to bribe a juror?" Even where the witness is reluctant, the circumstances of a known consultation may provide the basis for such an inquiry. If the witness is a doctor who allegedly was approached by a woman seeking an abortion, he may be asked simply whether she requested him to perform the operation; the request, if made, is prima facie a wrong, so that an affirmative answer would lead to a removal of privilege.[62] A denial that such question was asked, of course, reveals little about the actual subject of the allegedly privileged statements. Proof from the witness in support of the exception is possible by means of equally narrow investigation even though the discussion was not in furtherance of activity illegal on its face. Extrinsic evidence may show that the alleged request if made, or advice if sought, was to further an improper purpose. After introduction of such evidence the party attacking the claim of privilege should be permitted to ask whether such a communication was made. For example, if a foundation in outside evidence indicates that the client committed a certain offense, the party attacking the claim of privilege should be permitted to ask specifically whether the attorney had previously been asked about the penalties for that offense.

Establishing the exception by narrow inquiry may become quite difficult in cases in which the illegal purpose appears only as a reasonable inference from the full course of dealings between the parties.[63] Frequently these are instances in which the evidence if obtainable would be extremely useful. For example, revelations to an attorney which are divergent from the client's subsequent testimony are strong support for a charge of perjury, particularly when the client has indicated a willingness to change his story to strengthen his claim.[64] In a jurisdiction permitting the use only of extrinsic evidence on other privilege issues, the policy of protection would seem to prohibit the fishing that may be necessary in order to elicit strong support for the exception in this case. However, after extrinsic evidence and information gleaned from questions concerning the general purpose and nature of the parties' consultation provide some support for an allegation of unlawful purpose, it seems proper that the judge hear the witness' full testimony *in camera* before making the ultimate finding on the question of the presence of such a purpose.

[61] *Compare* O'Rourke v. Darbishire, [1920] A.C. 581, 604, *with* Minter v. Priest, [1929] 1 K.B. 655, 668–69.

[62] See Seifert v. State, 160 Ind. 464, 471, 67 N.E. 100, 102 (1903).

[63] See Strong v. Abner, 268 Ky. 502, 105 S.W.2d 599 (1937).

[64] See Gebhardt v. United Rys., 220 S.W. 677 (Mo. 1920).

This second step of *in camera* examination of the entire communication would seem appropriate as a final safeguard in any case — even when a single narrow question has elicited strong support for the exception — to prevent the admission of properly privileged evidence in the few cases in which the full context of consultations shows that the first impression of unlawful purpose was erroneous. A fortiori, in jurisdictions adhering to the Uniform Rules of Evidence procedure and using solely extrinsic evidence in passing on the exception, the two-step process ought to be employed. If testimony is promptly admitted on the merits after only a prima facie showing in outside evidence, as appears to be current practice in some jurisdictions, there remains a significant risk that statements deserving protection will be heard by the jury. *In camera* hearings have been used in some jurisdictions to decide the question of admissibility where privilege is claimed for trade or state secrets,[65] but courts have as yet failed to utilize them in the determination of the validity of claims of privilege for confidential communications. The interest in protecting actually privileged utterances can further be recognized by pledging the parties to secrecy concerning both the general examination which is the first step in deciding a claim of the exception and the final review of the full consultation which precedes admission — a measure for which there is some precedent.[66]

B. Standard of Proof

A problem complementary to the question of the type of evidence available to a party raising the future crime or tort exception is the determination of the degree of proof which he must introduce to establish his claim. If the foundation for the exception must be laid solely with extrinsic evidence — as under the Uniform Rules — the difficulties of establishing a prima facie case by such proof militate in favor of a relatively light burden of proof. There will be cases, of course, in which a prima facie case will be relatively easy to construct. Convincing evidence exists if the communication is overheard by a third party, but the rules of privilege may require exclusion of such testimony [67] and, in practice, it will normally be unavailable. Occasionally, inferences of improper consultation can be drawn with a fair degree of certainty; for example, the fact of consultation and the patient's pregnancy, together with facts that show a motive for seeking an abortion, should suffice to support the allegation that a doctor was requested to perform an illegal operation.[68] But usually the inferences from circumstances are more ambiguous. Moreover, some courts have tended to require more circumstantial evidence of wrongful purpose than is normally possible to provide. In *SEC v. Harrison*,[69] the defendant was charged with inducing a collusive lawsuit in order to avoid his obliga-

[65] *E.g.*, John T. Lloyd Labs., Inc. v. Lloyd Bros. Pharmacists, Inc., 131 F.2d 703, 707 (6th Cir. 1942).

[66] *Cf.* Goodman v. United States, 108 F.2d 516 (9th Cir. 1939); Federal Deposit Ins. Corp. v. Alter, 106 F. Supp. 316 (W.D. Pa. 1952).

[67] Hunter v. Hunter, 169 Pa. Super. 498, 83 A.2d 401 (1951). *But see* Nash v. Fidelity-Phenix Fire Ins. Co., 106 W. Va. 672, 146 S.E. 726 (1929).

[68] Compare Sawyer v. Stanley, 241 Ala. 39, 1 So. 2d (1941) (attorney); People v. Castaldia, 51 Cal. 2d 569, 335 P.2d 104 (1959) (juror).

[69] 80 F. Supp. 226 (D.D.C. 1948).

tions under an underwriting agreement, and the SEC produced the defendant's statements indicating his eagerness to find a way out of the agreement as well as evidence of phone calls between his lawyer and the attorney for the plaintiffs in the allegedly collusive suit. Nevertheless, the court refused to admit the testimony of the defendant's lawyer under the future crime or tort exception because another reasonable inference could be derived from the circumstances besides that of a purpose to induce a collusive suit.[70] More scope would be given to the exception if a prima facie case could be based on the most reasonable inference rather than the only reasonable inference from extrinsic evidence.

As to the first step of the two-step procedure for ruling on the exception outlined above, a stricter burden of proof appears appropriate where the attacking party would establish the exception by a single narrow question than where only extrinsic evidence may be used. Here the standard of proof will in effect determine the degree to which the question is allowed to impinge upon allegedly privileged material. The party urging the exception may ask only a question which if yielding an affirmative answer would, together with the extrinsic evidence introduced as a foundation for the question, establish with the requisite certainty the improper purpose alleged. In the case where illegal purpose appears only from the general course of dealings between attorney and client and cannot be established by a single question, the interest in minimizing unnecessary disclosure on the first step of the preliminary hearing suggests a lower threshold of proof to allow the communication to be examined *in camera* by the judge. Again, a line of examination of the witness should be permitted only if affirmative results would meet the burden established; such a burden might require that the party claiming the exception have given some color to his allegation of unlawful purpose by adducing evidence from which one might infer a reasonable likelihood of the truth of the allegation.

In the second step of the two-stage procedure advocated earlier in this Note, a more rigorous burden of proof ought to apply. Although most discussion of problems of proof relating to the exception focuses primarily on the degree of proof which the party attacking privilege on the basis of the exception must produce, the general rule is that the overall burden of production and persuasion on questions of privilege lies with the person invoking privilege.[71] This overall burden is eased considerably by certain presumptions,[72] which may have the effect of shifting at least a burden of production to the party claiming that the future crime or tort exception applies. In the suggested two-step procedure, this burden of production is applied in the first step, to determine whether the judge will examine the allegedly privileged communication. Once this burden has been met and the second step reached, it would seem that the ultimate burden of persuasion ought to return to the person claiming privilege, since in theory the future crime or tort exception is simply an expression of the general requirements that define and justify a given privilege.

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[70] *Id.* at 232.

[71] McKnew v. Superior Court, 23 Cal. 2d 58, 142 P.2d 1 (1943); McCORMICK § 92, at 184.

[72] See p. 736 *supra*.