Is the "Crime-Fraud Exception" Limited to Crimes and Frauds?

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In his November 20, 2013 “Privilege Points” release, Tom Spahn discusses a broad application of the crime-fraud exception to the attorney-client privilege:

Under what courts call the "crime-fraud exception" to the attorney-client privilege, the privilege does not protect communications between clients and their lawyers which further client wrongdoing. Courts agree that the exception applies to crimes and traditional common law intentional fraud.

Some courts apply the exception more broadly. In Safety Today, Inc. v. Roy, Case No. 2:12-cv-510, 2013 U.S. Dist. LEXIS 147765, at *15 (S.D. Ohio Oct. 11, 2013), the court acknowledged "that there is a split of authority on whether the exception should be expanded beyond actual crimes or frauds to other intentional tortious conduct." The court ultimately concluded that under Ohio law the exception could apply to "wrongful conduct not strictly falling into the category of either crimes or frauds," but which involve "similar elements of malicious or injurious intent and deliberate falsehood." Id. at *16. The court then specifically found that the exception could apply to "alleged tortious interference of a contract or business relations, which is a species of intentional tort under Ohio law." Id. at *17.

Given the uncertainty of some courts' application of the crime-fraud exception, lawyers should remember that a court might order disclosure of communications that otherwise satisfy all of the attorney-client privilege's elements. Significantly, the crime-fraud exception can strip away privilege protection despite the lawyer's innocence – because the exception rests on clients' rather than lawyers' wrongful intent.