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Parsing Privilege: Does the Attorney–Client Privilege Attach to an Angry Client's Criminal Threat Voiced During an Otherwise Privileged Attorney–Client Consultation?

Edward J. Imwinkelried†

"Lawyers tend to pay far too little attention to the feelings of their clients. Typically, lawyers . . . see themselves solely as 'gatherers of facts.' . . . [F]eelings are perceived as irrelevant or objects to be removed from the discussion. . . . [However,] empathy, the real mortar of any relationship, requires hearing, understanding, and acceptance of feelings which are part and parcel of any situation. . . . [T]he problems people bring to lawyers do not come in nice, neat, rational packages devoid of . . . emotional content. Problems evoke feelings and any solutions which the lawyer fashions must effectively deal with feelings."

—David A. Binder & Susan C. Price, *Legal Interviewing and Counseling: A Client-Centered Approach* 25–26 (1977)

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Introduction

Privilege doctrine is an especially important area of evidence law. Most evidentiary doctrines, such as authentication and the hearsay rule, deal with the courts' institutional policy of ensuring the reliability of the evidence that findings of fact are based on.[1] In contrast, privilege law rests on extrinsic social policy.[2] During the 1973 hearings on the then-proposed Federal Rules of Evidence, former Supreme Court Justice Arthur Goldberg distinguished privilege doctrine from other evidentiary rules:

> [Privilege law] is the concern of the public at large. . . . [Privileges] involve the relations between husband and wife. As the Supreme Court suggested in *Griswold v. Connecticut* [381 U.S. 479 (1965),] the marital privilege constitutes the basis of the

1. *See* T.P. Gallanis, *The Rise of Modern Evidence Law*, 84 Iowa L. Rev. 499, 501, 517–19 (1999).

2. Edward J. Imwinkelried, 2 The New Wigmore: A Treatise on Evidence: Evidentiary Privileges § 4.1 (4th ed. 2021), Westlaw (database updated 2021).

> family relation and antedates even the adoption of our Constitution. They involve the relations between lawyer and client, a privilege that long antedates the adoption of our Constitution.
>
> . . . .
>
> . . . They relate to the fundamental rights of citizens.[3]

In the final House report on the proposed rules, Representative Elizabeth Holtzman remarked that "unlike most evidentiary rules, privileges protect interpersonal relationships outside of the courtroom."[4] The Supreme Court hands down a relatively small number of decisions each year, and understandably the Court endeavors to select cases that have social significance and impact. Since the enactment of the Federal Rules of Evidence, the Supreme Court has handed down more decisions dealing with privileges than with any other part of the Federal Rules.[5] In early 2021, the Supreme Court added to its body of privilege jurisprudence when it rendered its decision in *U.S. Fish & Wildlife Service v. Sierra Club, Inc.*,[6] dealing with the deliberative-process privilege.[7]

Although there are numerous privileges in contemporary American law, the attorney–client doctrine was the first to be recognized in English law.[8] American courts have waxed poetic about the privilege. They have described it as "sacrosanct,"[9] "the most sacred of all legally

3. Rules of Evidence, Spec. Subcomm. on Reform of Fed. Crim. L., Comm. on the Judiciary, 93 Cong. 143–44 (1973) (testimony of Hon. Arthur H. Goldberg).

4. Comm. on the Judiciary, Federal Rules of Evidence, H.R. Rep. No. 93-650, at 28 (1973) (statement of Hon. Elizabeth Holtzman).

5. Molly Rebecca Bryson, Note, *Protecting Confidential Communications Between a Psychotherapist and Patient:* Jaffee v. Redmond, 46 Cath. U. L. Rev. 963, 963 n.1 (1997) (citing Note, *Making Sense of Rules of Privilege Under the Structural (Il)Logic of the Federal Rules of Evidence*, 105 Harv. L. Rev. 1339, 1339 (1992)).

6. 141 S. Ct. 777 (2021).

7. *Id.* at 783.

8. Imwinkelried, *supra* note 2, § 2.2; Gennusa v. Shoar, 879 F. Supp. 2d 1337, 1347 (M.D. Fla. 2012) (referring to attorney–client privilege as "the oldest of the privileges for confidential communications known to the common law." (quoting Cox v. Adm'r U.S. Steel & Carnegie, 17 F.3d 1386, 1414 (11th Cir. 1994))), *aff'd sub nom.* Gennusa v. Canova, 748 F.3d 1103 (11th Cir. 2014); Pampered Chef v. Alexanian, 737 F. Supp. 2d 958, 963 (N.D. Ill. 2010) (same).

9. Don R. Berthiaume, *"Just the Facts": Solving the Corporate Privilege Waiver Dilemma*, 46 Crim. L. Bull. 5, 15 & n.59 (2010) (suggesting that the privilege is "venerated" and that "[o]ne simply has to Google the query 'attorney client privilege is sacrosanct' to see the number of commentators who make this claim and to see that it is widely accepted").

recognized privileges,"[10] and the "most fundamental of the common law privileges."[11] If the privilege claimant can establish the necessary *prima facie* case—that a holder is asserting the privilege for a confidential communication not only between attorney and client but also incident to the relation[12]—the privilege is "absolute."[13] The opponent cannot defeat the prima facie case by making an ad hoc showing of a compelling need for the information; rather, the privilege can be defeated only by showing a waiver by the holder or the applicability of an exception to the scope of the privilege.[14]

Given the long history of the attorney–client privilege, it is surprising that one of the most fundamental questions relating to the privilege has received little attention: the unit of analysis for a confidential "communication." Suppose that a privilege claimant can show that the primary purpose[15] for an attorney–client exchange was facilitating the rendition of legal services by the attorney to the client. If the exchange took the form of a writing such as a letter from the client to the attorney, does the privilege automatically protect the entirety of the letter? If the exchange was oral, does the privilege shield every statement made by the client during the consultation? Or does the judge have the power to "parse" privilege, that is, to review the writing or oral exchange line by line,[16] separately apply the privilege's requirements to each sentence or clause, and treat discrete passages as unprivileged?

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10. *In re* Grand Jury Proceedings Grand Jury No. 97-11-8, 162 F.3d 554, 556 (9th Cir. 1998) (quoting United States v. Bauer, 132 F.3d 504, 510 (9th Cir. 1997)).

11. *In re* Grand Jury Investigation, 810 F.3d 1110, 1113 (9th Cir. 2016) (quoting *In re* Napster, Inc. Copyright Litig., 479 F.3d 1078, 1090 (9th Cir. 2007)).

12. *See* 1 Kenneth S. Broun, George E. Dix, Edward J. Imwinkelried, David H. Kaye & Eleanor Swift, McCormick on Evidence § 89, at 628–30 (Robert P Mosteller ed., 8th ed. 2020) [hereinafter McCormick on Evidence] (explaining that the attorney–client privilege protects attorney communications that would tend to reveal client confidences).

13. *See* Admiral Ins. Co. v. U.S. Dist. Ct. for the Dist. of Ariz., 881 F.2d 1486, 1491 (9th Cir. 1989); Mine Safety Appliances Co. v. N. River Ins. Co., 73 F. Supp. 3d 544, 571 (W.D. Pa. 2014) (stating that "the attorney–client privilege is an absolute privilege . . . ." (quoting Muller v. Nationwide Mut. Ins. Co., 31 Pa. D. & C. 4th 23, 31 (Ct. Com. Pl. 1996))).

14. Imwinkelried, *supra* note 2, § 3.2.4.

15. Although a few courts insist that that purpose be the "sole" motivation for the interaction, the overwhelming majority view is that it is sufficient if that motivation is "primary" or "predominant." *Id.* § 6.11.2.

16. "Line by line" analysis could conceivably take the form of clause–by–clause analysis, not merely sentence-by-sentence review. For instance, suppose that after discussing a contemplated offer to buy a business, the client says to the attorney: "Of course, I want you to keep the details of the offer—especially

There has been little discussion of this fundamental question. The Supreme Court has never directly addressed the question. However, that very issue arose in a 2020 decision by the United States Court of Appeals for the Eighth Circuit, *United States v. Ivers,*[17] described in detail in Part I. Ivers was charged with making a criminal threat against a federal judge.[18] The federal judge in question had ruled against Ivers in an earlier civil action against an insurance company.[19] Ivers then consulted two volunteer attorneys from the local pro se project to learn whether he had a right to file a second, related suit and whether they would represent him in the proposed second suit.[20] Ivers and the two attorneys had a thirty-minute telephone conference.[21] It was clear that the primary purpose of the conference was to obtain the attorneys' assessment of the legal merit of a second suit.[22] During the conference, Ivers allegedly threatened to kill the judge.[23]

During a subsequent prosecution for the threat, over the defense's attorney–client privilege objection, the presiding judge heard the attorneys' testimony about the consultation and reviewed the notes taken by one of the attorneys.[24] After doing so, the judge decided to admit not only evidence of the threat itself but also related angry statements by Ivers, such as "I had overwhelming evidence" and the earlier judge had "stacked the deck" against him.[25] The Eighth Circuit did not deny that the predominant purpose of the telephone conference related to the rendition of legal services to Ivers.[26] However, the court upheld the trial judge's ruling that six individual statements stating Ivers's feelings, including the threat, were unprivileged because they did not seek

the price and my preferred closing date—confidential; but if the current owner asks, you can tell them I'm interested." In the first clause of the sentence, the client has manifested an intent to maintain the confidentiality of the price and closing date discussed with the attorney. However, in the second clause, the client has indicated that the fact of his interest in the property need not remain confidential.

17. 967 F.3d 709, 716–17 (8th Cir. 2020), *cert. denied*, 141 S. Ct. 2727 (2021) (mem.).

18. *Id.* at 712.

19. *Id.*

20. *Id.* at 714.

21. *Id.*

22. *Id.*

23. *Id.*

24. United States v. Ivers, No. 18-cr-00090 (RWP/CFB), 2018 WL 11025541, at 4 (D. Minn. Jun, 26, 2018) (denying motion to exclude allegedly privileged attorney–client information).

25. *Ivers*, 967 F.3d at 716.

26. *Id.*

legal advice.[27] On the fundamental question of the unit of analysis, the court held that the trial judge had the power to apply the privilege requirements to individual statements that Ivers made during the attorney–client consultation.[28]

The thesis of this short article is that in *Ivers,* the Court of Appeals reached several correct conclusions about privilege doctrine but erred in other, important respects. Part I of this article is a detailed description of the *Ivers* litigation at both the District Court and Court of Appeals levels. Part II turns to the neglected question of whether the trial judge is authorized to dissect an attorney–client exchange line by line even when it is clear that the primary purpose of the exchange was to obtain legal services. It argues that the Eighth Circuit correctly concluded that trial judges possess that power. Part III then takes up the question of when it is appropriate for trial judges to exercise that power. Although the party opposing the privilege claim is not entitled to in camera review as a matter of course, the judge should undertake such a review when the party presents specific facts establishing that the review would be more than a fishing expedition. Like Part II, Part III concludes that on the particular facts of the case, the Eighth Circuit reached the correct result in upholding the trial judge's decision to conduct a line-by-line review in *Ivers.*

Finally, Part IV addresses the question of whether the District Court and Court of Appeals properly denied privilege protection on the ground that Ivers's statements expressing his feelings were not incident to the attorney–client relationship. It contends that both Judge Pratt and the Court of Appeals applied an unduly strict, legalistic conception of the incidence requirement. Although on their face Ivers's statements voicing his angry feelings did not concern the merit of his legal claims, an effective legal counselor must elicit and deal with the client's emotions related to the facts of the case. Part IV argues that instead of relying on a strict incidence requirement, to vindicate the countervailing policy of protecting human life, the courts should have recognized a carefully circumscribed, categorical exception for illegal threats. Part IV concludes that under such an exception, it was justifiable to admit evidence of the criminal threat itself but not the testimony of Ivers's related, angry statements.

I. A Description of the *Ivers* Litigation

Although the attorney–client privilege issues arose in the criminal case against Ivers, as the Introduction noted, the issues originated in two civil actions. Mr. Ivers initially filed a lawsuit in Minnesota state

27. *Id.* at 717.

28. *Id.*

court against a life insurance company for breach of contract.[29] The case was subsequently removed to federal court.[30] The case was eventually assigned to Judge Wilhelmina Wright of the District of Minnesota.[31] Before trial, she entered an order granting summary judgement to the defendant insurer on all but one of Ivers's claims.[32] The following month, Mr. Ivers sent her some handwritten notes.[33] The notes included the following statements, inter alia:

- "I do not know where I am fucking sleeping tonight! Think about it!";
- "I want my fucking money . . . .";
- "I am in dire fucking straits!"; and
- "I am becoming a very dangerous person!!!"[34]

Judge Wright forwarded the notes to the United States Marshals Service (USMS).[35] Deputy Marshal Jeffrey Hattervig met with Ivers. Although Ivers told Hattervig that his notes were intended to speed up the proceedings, Ivers added that if he did not receive satisfaction, "he would 'be a walking bomb.'"[36] After his conversation with Ivers, Hattervig arranged for increased security at the trial on Ivers's remaining count. At the bench trial, Judge Wright entered judgment in favor of the insurer.[37]

After the trial, Ivers wrote to the Chief Judge to request a new trial.[38] In his letter to the Chief Judge, Ivers asserted that Judge Wright was biased against him.[39] Ivers sent a copy of the letter to Judge Wright.[40] On that copy of the letter, he wrote: "You cheated me and I will not stop smearing your name until I get redress."[41] Ivers also telephoned the Chief Judge's chambers. When Ivers was informed that his only option was to appeal, he responded that he "was not happy with

29. *Id.* at 712.

30. *Id.* (citing Defendant's Motion of Removal at 1, Ivers v. CMFG Life Ins. Co., No, 15-CV-01577, 2016 WL 5842447 (D. Minn. Sept. 30, 2016), 2015 WL 13667066.

31. *Id.*

32. *Id.*

33. *Id.* at 712–13.

34. *Id.* at 713.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

that" and "was crazy mad."[42] Ivers then mailed additional letters, including a letter to the Chief Judge. The letters stated that "Judge Wright is a Corrupt! [sic] Judge."[43] Deputy Marshal Hattervig again visited Ivers.[44] Hattervig "hoped that Ivers would . . . say, okay, I realize that I crossed the line and I won't do it any more."[45] But Ivers did not. Instead, Ivers again stated that he was a "walking bomb."[46] He added that if Judge Wright was "living in fear, too fucking bad."[47]

Ivers then filed a second lawsuit in federal court against the same insurer.[48] The assigned Magistrate Judge found that Ivers's complaint failed to state a claim for relief and referred him to the district's Pro Se Project to explore the possibility of filing an amended complaint. Ivers then met with two volunteer attorneys, Anne Rondoni Tavernier and Lora Friedemann. After the two conferred, they decided that res judicata barred the new complaint and that they therefore would not take Ivers's case.[49] They then scheduled a telephone call to inform Ivers of their decision. During the first part of the approximately thirty-minute call, the attorneys explained that the new lawsuit would likely be unsuccessful. At that point, Ivers began ranting about Judge Wright. Friedemann made written notes of some of Ivers's statements, including:

- "This fucking judge stole my life from me";
- "I had overwhelming evidence";
- "Judge 'stacked the deck' to make sure I lost this case";
- "Didn't read the fine print and missed the 30 days to seek a new trial—and 'she is lucky.' I was 'going to throw some chairs'"; and
- "You don't know the 50 different ways I planned to kill her."[50]

42. *Id.*

43. *Id.* (alteration in original).

44. *Id.* at 714.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* (citing Defendant's Motion of Removal at 1, Ivers v. CMFG Life Ins. Co., No, 15-CV-01577, 2016 WL 5842447 (D. Minn. Sept. 30, 2016), 2015 WL 13667066.

49. *Id.*

50. *Id.* In two opinions, Judge Pratt described Ivers's statement as including the word "plan," not "planned." United States v. Ivers, No. 18-cr-00090 (RWP/CFB), 2018 WL 11025541, at *1 (D. Minn. June 26, 2018) (denying motion to exclude allegedly privileged attorney–client information), *aff'd*, 967 F.3d 709 (8th Cir. 2020); United States v. Ivers, No. 18-cr-00090 (RWP/CFB), slip op. at 1 (D. Minn. Aug. 1, 2018) (denying motion to

The attorneys did not talk while Ivers was speaking; and when he stopped speaking, they concluded the call.[51]

Friedemann was frightened because she thought that Ivers had made what she described as "a death threat against Judge Wright."[52] Consequently, after consulting an ethics advisor, the attorneys contacted the coordinator of the Pro Se Project to inform her of the threat. In turn, the coordinator informed Judge Wright and alerted the Marshals.[53] When deputy marshals visited Ivers, he told them to "get the fuck out of here."[54] He said that he was "crazy fucking angry." He added that if Judge Wright "doesn't sleep very good, fuck her."[55] "Ivers was later indicted for threatening to murder a federal judge . . . ."[56]

A. The Original In Limine Motion to Exclude in the Federal District Court

Judge Robert Pratt oversaw the criminal proceedings based on the charge of threatening Judge Wright.[57] Before trial in the criminal case, the defense filed two motions. The first was a motion to exclude any testimony by the two attorneys about statements that Ivers made during the thirty-minute telephone conversation.[58] The motion argued that the statements were inadmissible because they were protected by the attorney–client privilege. Judge Pratt denied the motion.[59] Before ruling, he listened to the attorneys' testimony and reviewed the written notes of the conference. In his order denying the motion, Judge Pratt emphasized that since privileges "are in derogation of the search for

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clarify). Moreover, during trial testimony, both of the attorneys, Lora Friedemann and Anne Rondoni Tavernier, were unsure about whether Ivers had used the present tense. Transcript of Jury Trial—Volume III at 424–25, 428, 487–88, *Ivers*, 2018 WL 11025541. If Ivers had used the present tense, it would be clearer that his statement was a threat to attack Judge Wright in the future. However, in its description of the statement, the Court of Appeals used the verb "planned" and stated that that was the wording that Ms. Friedemann had transcribed in the notes she took during the telephone conference. 967 F.3d at 714.

51. *Ivers*, 967 F.3d at 714.

52. *Id.*

53. *Id.* at 715.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 712 n.1.

58. *Id.* at 715.

59. United States v. Ivers, No. 18-cr-00090 (RWP/CFB), 2018 WL 11025541, at *5 (D. Minn. June 26, 2018) (denying motion to exclude allegedly privileged attorney–client information), *aff'd*, 967 F.3d 709 (8th Cir. 2020).

truth," they are not "expansively construed."[60] He then announced that he would not consider the "entire" telephone call "a single communication."[61] Rather, he focused on a smaller unit of analysis; he proceeded to examine the various "portions" of the call.[62] He stated that he would "parse out the individual statements made during the call and determine whether each statement is privileged."[63] On the facts, he found that certain statements by Ivers were unprivileged because they were not incidental to the attorney–client relation; in Judge Pratt's words, "the threatening statements [that Ivers made during the telephone conference] were clearly not made for the purpose of obtaining legal advice and thus are not privileged."[64] As precedent, he cited several district court cases finding particular portions of attorney–client communications to be unprivileged.[65] In addition, he pointed to *United*

60. *Id.* at *2 (quoting United States v. Nixon, 418 U.S. 683, 710 (1974)).

61. *See id.* at *2–3.

62. *Id.* at *3.

63. *Id.* at *2. Judge Pratt also used the verb "parse" in his later ruling clarifying the ruling on the motion to exclude. United States v. Ivers, No. 18-cr-00090 (RWP/CFB), slip op. at 2 (D. Minn. Aug. 1, 2018) (denying motion to clarify).

64. *Id.*

65. Judge Pratt stated that

> numerous . . . cases . . . support the Government's argument that statements not made in pursuit of legal advice can be separated from those statements that are, and the statements not made for the purpose of seeking legal advice will not be protected by the attorney–client privilege. *See Rohlik v. I-Flow Corp.*, 2012 WL 1596732, *4 (E.D.N.C. 2012) ("[I]f only certain portions of withheld documents relate to legal advice, only those portions should be withheld or redacted and the remaining portions produced."); *F.C. Cycles Int'l, Inc. v. Fila Sport, S.p.A*, 184 F.R.D. 64, 71–72 (D. Md. 1998) (examining documents paragraph by paragraph and ordering the disclosure of those portions that related more to business strategy than legal advice); *United States v. Chevron Corp.*, No. C 94-1885, 1996 WL 444597, at *2 (N.D. Cal. 1996) (observing "the long recognized rule that the attorney–client privilege applies to discrete communications contained within a document," and "[t]hus despite the overall nature of the document, the client may assert the attorney–client privilege over isolated sentences or paragraphs within a document"); *Cuno, Inc. v. Pall Corp.*, 121 F.R.D. 198, 204 (E.D.N.Y. 1988) (holding a portion of a document was privileged where it set forth "a direction to counsel to pursue a legal course of action [or a] legal opinion of counsel"); *Barr Marine Prods, Co., Inc. v. Borg-Warner Corp.*, 84 F.R.D. 631, 639–40 (E.D. Pa. 1979) (discussing "partially privileged" attorney–client communications and holding portions of mixed communications were privileged); *Merrin Jewelry Co. v. St. Paul Fire & Marine Ins. Co.*, 49 F.R.D. 54, 57 (S.D.N.Y.1970) (finding

States v. Alexander,[66] a Ninth Circuit opinion that ruled that the privilege did not apply to threats that a defendant had voiced to his court-appointed attorney.[67] Further, Judge Pratt analogized to *Nix v. Whiteside,*[68] a case involving the ethical duty of confidentiality.[69] There, the Supreme Court held that an attorney had not rendered ineffective assistance when he told his client that he would inform the court of the defendant's intention to commit perjury.[70] Judge Pratt acknowledged that *Nix* involved an ethical duty, not a privilege, but he nevertheless felt that *Nix* lent support to his decision to hold Ivers's threats unprivileged.[71]

B. The Subsequent Motion for Clarification in the Federal District Court

After losing the motion in limine, the defense filed a motion to clarify the scope of Judge Pratt's ruling on the motion in limine. More specifically, the defense sought a pretrial order that the only statement that would be admitted was Ivers's reference to "fifty different ways I plan to kill" Judge Wright.[72] Judge Pratt entered a second order, denying the motion to clarify.[73] The judge eventually ruled that six of Ivers's statements during the conference were unprivileged:

- "I had overwhelming evidence";
- "Didn't read the fine print and missed the 30 days to seek a new trial";
- "This fucking judge stole my life from me";
- "Judge 'stacked the deck' to make sure I lost this case";.
- "'[S]he is lucky.' I was 'going to throw some chairs'"; and
- the alleged threat itself: "You don't know the 50 different ways I planned to kill her."[74]

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only two paragraphs of a multi-page report to be protected by the attorney–client privilege).

United States v. Ivers, No. 18-cr-00090 (RWP/CFB), 2018 WL 11025541, at *2 (D. Minn. June 26, 2018) (denying motion to exclude allegedly privileged attorney–client information), *aff'd*, 967 F.3d 709 (8th Cir. 2020).

66. 287 F.3d 811 (9th Cir. 2002).

67. *Ivers*, 2018 WL 11025541, at *4 (citing *Alexander*, 287 F.3d at 815, 821).

68. Nix v. Whiteside, 475 U.S. 157, 173–74 (1986).

69. *Ivers*, 2018 WL 11025541, at *4 (citing *Whiteside*, 475 U.S. at 173–74).

70. *Whiteside*, 475 U.S. at 175–76.

71. *Ivers*, 2018 WL 11025541, at *4.

72. United States v. Ivers, No. 18-cr-00090 (RWP/CFB), slip op. at 1 (D. Minn. Aug. 1, 2018) (denying motion to clarify).

73. *Id.* at 2.

74. United States v. Ivers, 967 F.3d 709, 714, 716 (8th Cir. 2020), *cert. denied*, 141 S. Ct. 2727 (2021) (mem.).

A jury ultimately convicted Ivers, and Judge Pratt denied Iver's motion for acquittal or a new trial.[75]

C. The Decision by the Court of Appeals for the Eighth Circuit

On appeal, the Eighth Circuit upheld Judge Pratt's ruling on the initial in limine motion to exclude and affirmed Ivers's conviction.[76] The Supreme Court denied Ivers's petition for certiorari on June 7, 2021.[77]

II. The Threshold Policy Question: Does the Trial Judge Have the Power to Review an Attorney–Client Exchange Line by Line to Determine Whether a Specific Passage Is Privileged Even When It Is Clear that the Primary, Overall Purpose of the Exchange Was to Obtain Legal Services?

In *Ivers,* it was relatively clear that the overall purpose of Ivers's consultation with the two attorneys was to obtain their legal evaluation of the prospects for the second lawsuit that Ivers had filed. However, Judge Pratt was not content to analyze the application of the attorney–client privilege at that level of generality. Rather, he dissected Ivers's exchange with the attorneys and identified six individual statements that he deemed unprivileged. The threshold question is the fundamental issue identified in the Introduction: the unit of analysis. Does the trial judge have the power to conduct a line-by-line[78] analysis of the attorney–client exchange even when the privilege claimant establishes that the primary purpose of the exchange was incidental to a request for legal services? To answer that question, we shall consider the available precedents and then address the pertinent policy considerations.

A. The Precedents Relevant to the Question

In some cases, a privilege attaches to an entire writing or exchange if the communication has a proper primary purpose. When a litigant claims that a statutory privilege protects a certain type of report to the government, such as a required accident report, the issue is one of statutory construction.[79] If the legislation uses sweeping language, seemingly shielding all the contents of the report without suggesting

75. United States v. Ivers, No. 18-cr-00090 (RWP/CFB), 2019 WL 78940, at *1, *5 (D. Minn. 2019), *aff'd*, 967 F.3d 709.

76. *Ivers*, 967 F.3d at 716–17.

77. *Ivers*, 141 S. Ct. 2727.

78. *See, e.g.*, Story of Stuff Project v. U.S. Forest Serv., 366 F.Supp. 3d 66, 79 (D.D.C. 2019) (referring to "a page-by-page and line-by-line" review).

79. *See* Imwinkelried, *supra* note 2, § 7.2.

any exceptions, the language may dictate that given a proper motivating purpose, the entire report is privileged.[80] Occasionally, the same result obtains at common law. For example, there is respectable authority that when the presidential privilege attaches to a document, the privilege extends to all the contents of the document.[81] More to the point, as the defense noted in its petition for certiorari to challenge the Eighth Circuit's decision, there are several attorney–client decisions that use broad language indicating that if the privilege claimant can satisfy the primary-purpose requirement, the privilege applies to all the parts of an attorney–client exchange.[82]

However, the courts in the presidential-privilege cases may be so emphatic about the protection of the entire document precisely because they appreciate that that approach is atypical. In the case of most statutory and common-law privileges, appellate courts have authorized trial judges to conduct a line-by-line analysis to determine the scope of the privilege protection. By way of example, in the case of the medical and psychotherapy privileges, by virtue of the patient–litigant exception, the judge may refuse to extend privilege protection to the parts of an otherwise privileged exchange relevant to a condition that the holder has injected into the litigation.[83] Similarly, under the dangerous-patient exception to the psychotherapy privilege, the privilege does not apply to a patient's statement embodying a threat to a third party.[84] In the case of the deliberative-process privilege discussed in the Supreme

80. *See id.*

81. *See* Loving v. Dep't of Def., 550 F.3d 32, 37–38 (D.C. Cir. 2008); Loving v. U.S. Dep't of Def., 496 F.Supp. 2d 101, 107 (D.C. Cir. 2007). However, it must be remembered that unlike the attorney–client privilege, presidential privilege is qualified. In its landmark decision, *United States v. Nixon*, 418 U.S. 683, 713 (1974), the Supreme Court ruled that a litigant may defeat a prima facie claim of Presidential privilege by establishing a compelling, case-specific need for the information.

82. Petition for a Writ of Certiorari at 21, *Ivers*, 141 S. Ct. 2727 (2021) (No. 20-7304) (first citing Alomari v. Ohio Dep't of Pub. Safety, 626 F. App'x 558, 570 (6th Cir. 2015) ("[T]he privilege . . . covers all communications from the June 2010 *meeting* because its purpose was to acquire legal advice." (emphasis added)); then citing *In re* Cnty. of Erie, 473 F.3d 413, 420–21 (2d Cir. 2007) ("The predominant purpose of a communication cannot be ascertained by quantification or classification of one passage or another . . . ."), *vacated*, 546 F.3d 222 (2d Cir. 2008); and then citing Rush v. Columbus Mun. Sch. Dist., 234 F.3d 706, at *2 (5th Cir. 2000) ("[T]he attorney–client privilege protects all communications during a *meeting* between a school board and its attorney for the purpose of obtaining legal advice, even those communications not addressed directly to the attorney." (emphasis added))). The Eighth Circuit's decision is *United States v. Ivers*, 967 F.3d 709 (8th Cir. 2020), *cert. denied sub nom.* 141 S. Ct. 2727 (2021) (mem.).

83. *See* Imwinkelried, *supra* note 2, § 6.13.3.

84. *Id.* § 6.13.4, (citing Cal. Evid. Code § 1024 (West 2009)).

Court's 2021 decision, *U.S. Fish & Wildlife Service v. Sierra Club, Inc.*,[85] it is well-settled that even if a government document is both predecisional and deliberative in character, the privilege does not shield the purely factual content of the writing.[86] Tellingly, even when a writing relates to the vital national interests protected by the military- and state-secrets privilege, the judge has the power to scrutinize the writing's contents and "disentangle[]" the protected portions of the writing from the unprivileged sections.[87] When a judge makes a final ruling on the question of whether the crime/fraud exception applies to an attorney–client exchange, the judge allows discovery of the client's statements related to the client's purpose of obtaining advice to facilitate the client's criminal or fraudulent purpose, but shields the remainder of the exchange.[88] And, as Judge Pratt pointed out in his opinion, there are numerous authorities allowing line-by-line review of documents alleged to be covered by the attorney–client privilege.[89]

B. *The Policy Merits of the Question*

The question is whether Judge Pratt's decision and the cases he relied on are consistent with the policy underlying the attorney–client privilege. There are both systemic efficiency considerations and policies related to the rights of the individual privilege holder.

1. The Macrocosm: Systemic Considerations

At the systemic level, there are certainly cases in which it is much more efficient for the court to focus on the higher level of generality and limit its inquiry to whether the claimant had demonstrated that the primary purpose of the exchange satisfied the incidence requirement.[90] In the modern era of pretrial discovery of electronic data, production events can be massive:

85. 141 S. Ct. 777, 783 (2021).

86. *See* Imwinkelried, *supra* note 2, § 7.7.2 (collecting tens of cases so holding).

87. *Id.* § 8.4.4 (collecting cases).

88. *Id.* § 6.13.2, (citing Dick Thornburgh, Attorney–Client Privilege and the "Crime-Fraud" Exception: The Erosion of Business Privacy 29 (1999) (relying on Restatement (Third) of the Law Governing Lawyers 613–14 (The Am. L. Inst. 2000)); Paul Matthews & Hodge M. Malek, Disclosure 240 (2d ed. 2000) ("Where the principle applies, it does not deprive the client of all legal professional privilege, but only that in respect to documents which are part or in furtherance of the fraud; all other legal privilege . . . remains unaffected.")).

89. *See supra* note 65 and accompanying text.

90. Judge Pratt acknowledged that consideration in his order of the United States District Court for the District Court of Minnesota denying motion to exclude allegedly privileged attorney–client information. United States v. Ivers, No 18-cr-00090 (RWP/CFB) 2018 WL 11025541, at *3 (D. Minn.

> Perhaps no case could be a more monumental example of the reality of modern e-discovery than the . . . Viacom copyright infringement lawsuit against YouTube filed back in 2008. In that dispute, the judge ordered that 12 terabytes of data be turned over, according to Matthew Knouff.
>
> "People often say that one terabyte equals 50,000 trees, and 10 terabytes would be the equivalent of all the printed collections of the Library of Congress," says Knouff, who is general counsel of Complete Discovery Source, a New York City-based electronic discovery services provider. For the Viacom/YouTube case then, the demand was for the printed equivalent of the entire Library of Congress. And then some.[91]

If the party in possession of the documents asserts privilege for even a small fraction of the documents in such a case, mandating line-by-line review would impose a crushing burden on the trial court. In some extreme cases, trial courts have resorted to sampling techniques and, based on the analysis of a sample from the population of allegedly privileged documents, ruled on privilege claims.[92]

2. The Microcosm: The Legitimate Interests of the Individual Privilege Holder

The Supreme Court has declared that the purpose of the attorney–client privilege is to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."[93] The recognition of the privilege can further those objectives in two distinct ways: (1) encouraging clients to disclose all the relevant facts to attorneys to enable the attorneys to provide sounder legal advice; and (2) building trust between clients and attorneys to make the client more likely to accept the attorney's advice, especially advice counseling against a contemplated course of action by the client that would entail serious

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June 26, 2018), *aff'd*, 967 F.3d 709 (8th Cir. 2020). He noted that in some cases "it would be difficult to comb through millions of documents to determine whether each sentence or paragraph was protected by the privilege." *Id.* (citing Krueger v. Ameriprise Fin., Inc., Civil No. 11-2781, 2013 WL 12139425, at 16–17 (D. Minn. Aug. 15, 2013)).

91. Joe Dysart, *The Trouble with Terabytes: As Bulging Client Data Heads for the Cloud, Law Firms Ready for a Storm*, A.B.A. J., April 2011, at 33, 33.

92. *See In re* Vioxx Prods. Liab. Litig., 501 F. Supp. 2d 789, 790 (E.D. La. 2007), *aff'd*, 388 F. App'x 391 5th Cir. 2010), *cert. denied sub nom.* Dier v. Merck & Co., Inc., 562 U.S. 1217 (2011) (mem.); *see also* Paul Trapani, Recent Development, In re Vioxx Products Liability Litigation*: Circumventing Due Process Concerns by Allowing Individualization in Sampling Procedures*, 82 Tul. L. Rev. 2517, 2522–23 (2008).

93. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

illegality.[94] As Professor Landesman has remarked, in the real world privileged relationships such as attorney–client need "space" to promote those objectives.[95]

However, Judge Pratt's ruling reflects a somewhat narrow, traditional view of the attorney as a gatherer of facts[96]—the facts that the attorney needs to formulate sound advice for the client. This view emphasizes that attorneys are not psychiatrists.[97] The attorney supposedly ought to seek only legally salient facts[98] that are devoid of emotional content.[99] According to this conception of the attorney's role, the attorney needs to pay little or no attention to the client's feelings, which can get in the way of the client's description of the facts.[100] In the 1950s and 1960s, one of the most popular television programs in the United States was *Dragnet*, a series about a Los Angeles detective, Sgt. Joe Friday, played by Jack Webb.[101] Sgt. Friday is often apocryphally referenced as the origin of the phrase: "Just the facts, Ma'am."[102] An attorney subscribing to the traditional view of a client interview adopts a similar approach.

The rub is that that view is both incomplete and outmoded. During an interview, the attorney–client interaction[103] is much more psychologically[104] complex[105] than the traditional view posits. The modern view of the interview interaction is that the typical client has an overpowering need to discuss both the legally relevant facts and the accompanying

94. *See id.* at 389–90, 392.

95. Bruce M. Landesman, *Confidentiality in the Lawyer-Client Relationship, in* The Good Lawyer: Lawyers' Roles and Lawyers' Ethics 191, 205 (David Luban ed., 1984).

96. David A. Binder & Susan C. Price, Legal Interviewing and Counseling: A Client-Centered Approach 25 (1977).

97. *Id.* at 32.

98. *Id.* at 12.

99. *Id.* at 26.

100. *Id.* at 25.

101. Daniel Moyer & Eugene Alvarez, Just the Facts, Ma'am: The Authorized Biography of Jack Webb 45, 55, 61 (2001).

102. *Id.* at 61. Curiously, Friday never spoke those precise words. He did say, "All we know are the facts, Ma'am." *Sgt. Joe Friday Never Actually Said "Just the Facts, Ma'am" on Dragnet*, MeTV Cleveland (Jan. 17, 2020, 2:37 PM) (citing *Dragnet: The Big Lease* (NBC television broadcast 1953)), https://www.metv.com/stories/sgt-joe-friday-never-actually-said-just-the-facts-maam-on-dragnet [https://perma.cc/38UJ-JLTP]).

103. Binder & Price, *supra* note 96, at 1.

104. *Id.* at 9.

105. *Id.* at 15.

emotions, such as anger.[106] Facts come associated with feelings.[107] The client almost always has some emotional reaction to a legally pertinent event,[108] and in many cases the client's thoughts about the event will be intensely emotionally charged.[109] The practicing attorney is much more than a legal technician who merely analyzes facts as if he or she were taking a law school examination. As the American Bar Association has emphasized, the practitioner must be a counselor who (a) advances the client's private interests through effective representation and (b) promotes the public interest by persuading the client to comply with the law.[110]

If the attorney does not allow the client to express those emotions and feelings during the interview process, the client may withhold[111] or hold back[112] legally relevant factual information. Denying the client that opportunity will inhibit the flow of information between client and attorney.[113] The contemporary view is that the attorney should not merely passively listen to the client's statements of associated emotions.[114] Rather, the attorney ought to adopt a general approach of affirmatively encouraging such expressions.[115] Doing so increases the flow of information between client and attorney and enhances the attorney's ability to promote the observance of law. To begin with, if the attorney helps the client overcome the psychological impediments to full disclosure, the attorney is likely to obtain more information.[116] Without full disclosure, the attorney may be unable to properly safeguard the individual client's interests. Moreover, if during the interview the client gains the sense that the attorney understands and empathizes with the client's feelings, the client is much more likely to be receptive to the attorney's advice. If at the end of the interview process the client does not believe that the attorney understands him or her as a person, why should the client accept the attorney's advice, such as an urging to fulfill his or her public duty to comply with the law?

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106. *Id.* at 21.

107. *Id.*

108. *Id.*

109. *Id.* at 27.

110. Task Force on Att'y-Client Privilege, Am. Bar Ass'n, ABA Task Force Recommendation for Attorney Client Privilege 1 (2005), *quoted in* Imwinkelried, *supra* note 2 § 6.12.5.

111. *Id.* at 9.

112. *Id.*

113. *See id.*

114. Binder & Price, *supra* note 96, at 23.

115. *Id.* at 6–19.

116. *Id.* at 9.

To implement this general approach, one of the classic modern texts on legal interviewing, *Legal Interviewing and Counseling: A Client-Centered Approach* by Binder and Price, proposed the technique of "active listening."[117] One author, David Binder, was a UCLA law professor while the other, Susan C. Price, was a clinical professor at the UCLA Neuropsychiatric Institute. Price and Binder began to integrate modern psychological insights into the practice of legal interviewing. The thesis of their seminal work was that to facilitate the client–attorney interaction,[118] during the interview the attorney ought to make statements reflecting that he or she understands not only the facts the client is relating but also the accompanying emotions and feelings.[119] After the attorney convinces the client that the attorney has that dual understanding, the attorney is in a much better position to perform the private and public roles promoted by the attorney–client privilege.[120]

To begin with, this approach better enables the attorney to perform his or her private role advancing the individual client's interests. Again, Professors Price and Binder argue that when the attorney employs this technique, the attorney must encourage the client to voice his or her feelings about the legal topic.[121] Without such encouragement, the client will likely make only partial disclosure.[122] Price and Binder frankly acknowledge that with such encouragement, the client may make statements such as: He or she was angry,[123] the opposing litigant is "a double-crosser" or a "bastard," and the client would like "to punch him out"[124]—statements strikingly similar to most of the statements that the trial judge admitted in *Ivers*.[125] Even though the typical listener might find such statements upsetting, Price and Binder contend that the attorney must go the length of encouraging the client to make such statements by making reflective comments such as "I imagine you were very angry . . . ."[126] and I can understand that that made you "really furious."[127] The client's anger may be blocking full disclosure. Until the client unburdens himself or herself in this manner and the attorney reflects an understanding of the client's emotions, the client may

117. *Id.* at 25–37.

118. *Id.* at 6, 14, 19, 20, 25.

119. *Id.* at 15, 25.

120. *Id.* at 15, 25, 35, 36.

121. *Id.* at 15, 25.

122. *Id.* at 15, 25, 36.

123. *Id.* at 13, 22.

124. *Id.* at 22.

125. *See supra* text accompanying note 50.

126. Binder & Price, *supra* note 96, at 25, 27, 30.

127. *Id.* at 31.

withhold from the attorney salient facts that the attorney desperately needs to give the client sound legal advice.[128]

This approach also increases the attorney's ability to fulfill his or her public role. Reflective statements by an attorney are non-judgmental in nature[129] but manifest an empathetic understanding back to the client.[130] On the one hand, they are non-committal[131] in the sense that if the client threatens to act out illegal conduct[132] such as punching the opposing litigant,[133] the attorney stops short of saying that he or she condones the act.[134] On the other hand, it is imperative that the attorney grant the client permission to voice the feelings associated with the legally relevant facts.[135] After inviting the client to do so, the attorney can often ride out[136] the outpouring of emotion by the client.[137] The attorney can promote the observance of the law only if the attorney realizes the emotions that may tempt the client to violate the law. In many cases after the client has the emotional release of venting his or her feelings, the emotions recede.[138] If the attorney remains calm and convinces the client that the attorney understands the feelings the client is experiencing, the attorney will often be in a position to help the client regain emotional composure;[139] and at that point, the attorney can help the client realize the need to control the emotions and perform their duty to observe the law.

In this light, an opponent of line-by-line review might argue that it is a mistake to empower trial judges to dissect attorney–client exchanges as Judge Pratt did and, more specifically, to characterize particular angry-client statements as unprivileged because they do not seek legal advice. The argument would run that in the main, it best effectuates the policies underlying the privilege to limit the judge's inquiry to the primary, overall purpose of the exchange. The prospect of atomistic, line-by-line review may deter attorneys from employing active listening and encouraging clients to express the emotions that

128. *Id.* at 35, 36.

129. *Id.* at 15, 25.

130. *Id.* at 14–16, 20–21, 25, 28.

131. *Id.* at 24.

132. *Id.* at 34.

133. *Id.* at 22.

134. *Id.* at 34, 35.

135. *Id.* at 13.

136. *Id.* at 35.

137. *Id.* at 34.

138. *Id.* at 35.

139. *Id.*

the attorney needs to identify to properly advance the client's individual interests and promote the public interest in compliance with the law; the attorney will be afraid that by utilizing active listening, the attorney may be creating evidence against their client. According to this line of argument, if the privilege claimant can persuade the judge that the predominant purpose of the consultation was to obtain legal services, the judge's inquiry should end; and the judge ought to refrain from a line-by-line dissection of the attorney–client exchange.

C. The Resolution of the Threshold Question

On the threshold question, *Ivers* reaches the right result, empowering trial judges on at least some occasions to engage in exacting, line-by-line review. It is true that in rare cases, the number of allegedly privileged documents might be so large that line-by-line review of the documents or a detailed review of the oral attorney–client exchanges is impractical. However, in the typical case judicial efficiency concerns will not completely preclude in-depth review.

Nor should policy concerns about the individual privilege holder's rights invariably bar line-by-line review. As we shall see in Part III, those concerns can largely be allayed by making line-by-line review the exception rather than the rule and identifying an appropriate trigger for such review. In the run-of-the-mill case in which the holder can satisfy the primary purpose requirement and there are no facts raising questions about the legitimacy of the statements exchanged in the attorney–client interaction, the opponent should not be entitled to demand that the judge conduct a line-by-line review. Confining line-by-line review to exceptional fact situations, as recommended by Part III, provides considerable "space" for frank attorney–client exchanges that touch on the client's relevant feelings as well as the facts in the client's possession; and specifying the types of extraordinary circumstances warranting such review can add another measure of protection. If judges can engage in detailed review of the contents of documents containing military and state secrets that implicate the nation's safety and survival, it is difficult to justify automatically foreclosing in-depth view of attorney–client exchanges.

III. The Next Policy Question: When Is It Appropriate for the Trial Judge to Exercise the Power to Engage in Line-by-Line Review of the Contents of Otherwise Privileged Document or a Similar Review of Oral Attorney–Client Exchanges?

Assume that as a matter of policy, the judge should be accorded the power to conduct a line-by-line review of either an allegedly privileged letter or oral exchange between attorney and client. The next question that arises is when it is appropriate for the judge to exercise

that power. Distinguish between situations in which the judge has discretion to do so and those in which the opponent has a right to have the judge do so.

A. Review in the Trial Judge's Discretion

In the situations we are discussing, a litigant claims to be a privilege holder and contends that he or she has established a prima facie case for invoking the attorney–client privilege. The validity of the claim turns on a number of preliminary or foundational facts. Federal Rules 104(a)–(b) prescribe the procedures for determining preliminary facts conditioning the admissibility of evidence. In pertinent part, those provisions read:

> (a) In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.
>
> (b) Relevance That Depends on a Fact. When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist.[140]

The Conditional Relevance Procedure Under Rule 104(b). It is often said that the judge uses the 104(a) procedure to determine the competence of an item of evidence while he or she resorts to the 104(b) procedure to decide the conditional relevance of evidence.[141] Initially, consider Rule 104(b). Under Rule 104(b), "the judge plays a limited, screening role . . . . The judge must accept the [proponent's foundational] testimony at face value . . . ."[142] The judge inquires only whether, if believed by the jury, the testimony has sufficient probative value to support a logical, permissive inference of the preliminary fact.[143] Federal Rule of Evidence 602 applies this procedure to the preliminary question of whether a lay witness possesses personal knowledge of the fact he or she proposes testifying to,[144] and Rule 901(a) extends the same procedure to the preliminary question of the authenticity of an exhibit such as a letter.[145] If on its face the foundational testimony possesses adequate probative worth to support such an inference, the

140. Fed. R. Evid. 104.

141. 1 Edward J. Imwinkelried, Paul C. Giannelli, Francis A. Gilligan, Fredric I. Lederer & Liesa Richter, Courtroom Criminal Evidence §§ 133–34 (6th ed. 2016).

142. McCormick on Evidence, *supra* note 12, § 53, at 440–43.

143. *Id.*

144. Fed. R. Evid. 602.

145. Fed. R. Evid. 901.

judge admits the proffered item of evidence; and, if the opponent disputes the witness's personal knowledge or the exhibit's authenticity, the judge instructs the jury to decide the question after considering both sides' evidence.[146]

Why does Rule 104(b) limit the judge's scrutiny and reserve the final decision to the jury? Suppose that after considering both sides' evidence, the jury decides that a lay witness does not have personal knowledge of a traffic accident; the witness is either lying or confused. Once the jury decides that the witness "doesn't know what he's talking about," common sense will naturally lead the jury to disregard the witness's testimony during deliberations.[147] Alternatively, assume that after considering both sides' evidence, the jury decides that the proffered letter is a forgery. Once the jury decides that the exhibit "isn't worth the paper it's written on," again common sense will prompt them to disregard the exhibit.[148] It is not just that the lay jurors are competent to decide whether a witness saw an event or whether an asserted author wrote a letter. More importantly, we can trust the jury to make that determination without calling into question the integrity of the jury's deliberations.[149] After deciding at a conscious level that the witness lacks personal knowledge or that the exhibit is inauthentic, the jury will put the proffered evidence out of mind; the jury's exposure to the evidence and the related foundational testimony will not distort their deliberations.[150] These facts condition the relevance of the evidence in such a fundamental sense that even a lay juror lacking any legal training can appreciate that if the witness lacked personal knowledge or the writing is a forgery, the evidence has absolutely no bearing on the decision in the case. Consequently, Rule 104(b) restricts the trial judge's inquiry and assigns the real decision to the jury.

The Competence Procedure under Rule 104(a). Contrast Rule 104(a), the competence procedure.[151] This procedure controls when, for example, an accused objects that certain testimony is inadmissible as privileged. The text of Rule 104(a) expressly states that that provision governs the decision whether "a privilege exists."[152] Suppose that the evidence in question is a third party's testimony that in a large elevator she heard the accused admit to his attorney that he, the accused, had in fact raped a young child. Would it be safe to apply the Rule 104(b) procedure and allow the jury to make the ultimate determination

146. McCormick on Evidence, *supra* note 12, § 53, at 445–47.

147. *Id.* at 447.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 440–41.

152. Fed. R. Evid. 104(a).

whether there was sufficient physical privacy that the accused had a reasonable belief that his conversation with the defense attorney was confidential? Even if at a conscious level the jury decided that the belief was reasonable and the testimony therefore technically privileged, could we trust the jury to put the testimony out of mind during the balance of their deliberations? Realistically, at a subconscious level some jurors would be unable to perform that mental gymnastic, and others might be unwilling to do so.[153] Consequently, Rule 104(a) assigns the final decision on the facts conditioning privilege objections to the judge.

The significance of that conclusion is that unlike a judge applying Rule 104(b), a judge applying Rule 104(a) can pass on the credibility of the foundational testimony.[154] In the words of the Advisory Committee Note to Rule 104(a), "the judge acts as a trier of fact."[155] While under Rule 104(b) the trial judge considers only the proponent's foundational testimony, under 104(a) the judge considers both sides' testimony before ruling; that difference explains why a litigant has a right to conduct voir dire in support of a Rule 104(a) objection.[156] The judge needs to be able to listen to both sides' foundational testimony before resolving a preliminary question falling under Rule 104(a). Having done so, the judge can resolve any credibility question and make a plenary fact finding.[157]

Assume that in a case such as *Ivers,* while the accused asserts the attorney–client privilege, the prosecution argues that an element of the prima facie case, such as confidentiality or incidence, is missing or that an exception applies. The defense counsel submits foundational testimony in support of the privilege objection; as in *Ivers,* the defense presents testimony that the primary purpose of the consultation in question was to obtain legal services.[158] However, since 104(a) governs, the prosecution may dispute the defense testimony; and the trial judge need not accept the defense testimony at face value. It follows that to resolve the credibility question, the trial judge should be empowered to conduct an in camera, line-by-line review of any written or oral foundational testimony. The upshot is that under Rule 104(a), the judge has the discretion to conduct such a review whenever the judge has a bona fide doubt about the truth or truthfulness of the testimony supporting

153. McCormick on Evidence, *supra* note 12, § 53, at 440–43.

154. *Id.*

155. Fed. R. Evid. 104(a) note (Advisory Committee on Proposed Rules).

156. McCormick on Evidence, *supra* note 12, § 53, at 440–43.

157. *Id.*

158. United States v. Ivers, 967 F.3d 709, 715 (8th Cir. 2020), *cert. denied*, 141 S. Ct. 2727 (2021) (mem.).

the privilege objection.[159] Unlike Rule 104(b), Rule 104(a) does not compel the judge to credit the supporting testimony; in his or her discretion, the judge can go beyond the proffered foundational testimony to examine the allegedly privileged communication itself.[160]

B. The Opposing Party's Entitlement to a Review

Under 104(a), the party opposing a privilege objection can invoke the judge's discretion and request that the judge review the allegedly privileged material.[161] However, are there any situations in which the party is entitled to have the judge conduct a line-by-line review? The point of agreement is that to establish such a right, it is not enough for the party to speculate that a line-by-line review might reveal that some of the contents of the material are unprivileged.[162]

An analogous question arises under the crime/fraud exception to the attorney–client privilege. As the Supreme Court explained in its 1989 decision, *United States v. Zolin*,[163] a party contending that the crime/fraud exception renders certain material unprivileged sometimes has a right to have the judge review the material in camera before ruling on the privilege objection.[164] However, the Court did not make in camera review available as a matter of course. Rather, the Court held that the party opposing the privilege claim must present sufficient facts to support a good-faith belief that in camera examination "may yield" facts establishing the applicability of the exception.[165] Admittedly, that standard is "very relaxed."[166] However, the party resisting the privilege claim cannot rely on sheer conjecture; the party must present some facts to trigger the right to in camera review.[167]

The courts could adopt a parallel approach to deciding whether the privilege opponent is entitled to have the judge engage in a line-by-line review of the allegedly privileged material. By way of example, assume

159. McCormick on Evidence, *supra* note 12, §53, at 443.

160. *Id.*

161. *Id.* at 440–43.

162. Rock River Commc'ns v. Universal Music Corp., 730 F.3d 1060, 1069–70 (9th Cir. 2013), *amended, reh'g en banc denied,* 745 F.3d 343 (9th Cir. 2014).

163. 491 U.S. 554 (1989).

164. *Id.* at 564.

165. Imwinkelried, *supra* note 2, § 6.13.2. *See* Bethany Lipman, *Invoking the Crime Fraud Exception: Why Courts Should Heighten the Standard in Criminal Cases*, 52 Am. Crim. L. Rev. 5905, 614 (2015).

166. United States v. Gorski, 807 F.3d 451, 460 n.3 (1st Cir. 2015) (quoting In re Grand Jury Proceedings, 417 F.3d 18, 22 (1st Cir. 2005)).

167. Geraldine Gauthier, *Dangerous Liaisons: Attorney–Client Privilege, the Crime-Fraud Exception, ABA Model Rule 1.6 and Post-September 11 Counter-Terrorism Measures*, 68 Brook. L. Rev. 351, 360 (2002).

that a litigant makes an attorney–client privilege objection to a consultation between the litigant–client and an attorney. The litigant testifies that he or she consulted the attorney to obtain some legal advice. To be protected by the privilege, the communication must occur incident to the protected relationship; the client must consult the attorney *qua* attorney rather than in some other capacity,[168] such as accountant.[169] Suppose that the party opposing the objection presents testimony that: The attorney in question is also an accountant; the attorney devotes most of her professional time to her accountancy practice; and the consultation in question occurred a few days before the April 15 deadline for filing income taxes. Given those facts, the party opposing the objection has a plausible argument that in camera review may reveal that at least part of the consultation was devoted to non-legal matters and therefore unprivileged.

At the end of Part II, we concluded that in *Ivers,* the Court of Appeals correctly concluded that a trial judge has the power to conduct a line-by-line review of allegedly privileged material. But did the court err in deciding that *Ivers* was an appropriate fact situation in which to exercise that power? There is a strong argument that here, too, the court reached the right result. In *Ivers,* the prosecution claimed that in camera review of the oral exchange between Ivers and the two attorneys would reveal threatening language, directed at Judge Wright.[170] That claim was hardly sheer speculation. Before Ivers's consultation with the two attorneys,

- after Judge Wright initially granted summary judgment to the insurer on all but one of Ivers's claims, he sent her a note stating "I am becoming a very dangerous person!!!";
- when the United States Marshals Service (USMS) later visited him, he showed no remorse for his statements about Judge Wright and added that he was "a walking bomb";
- after Judge Wright ruled against him at the trial on his last claim, he wrote to Judge Wright to state that "[y]ou cheated me" and to the Chief Judge to add that he was a "crazy mad" "walking bomb";
- when the USMS revisited Ivers after the trial, Ivers said that he was a "ticking time bomb" and that if Judge Wright was "living in fear, too fucking bad"; and
- when the USMS revisited him again shortly after his consultation with the two attorneys, Ivers called Judge Wright "'that fucking judge who stole' his life" and added

168. Imwinkelried, *supra* note 2, § 6.11.1.

169. United States v. Bisanti, 414 F.3d 168, 172 (1st Cir. 2005).

170. United States v. Ivers, 967 F.3d 709, 714 (8th Cir. 2020), *cert. denied*, 141 S. Ct. 2727 (2021) (mem.).

> that the deputies could report that he remained "crazy fucking angry."[171]

The telephone consultation in question concerned the very same litigation that all of Ivers's other statements related to. By presenting evidence of the language that Ivers used repeatedly both before and after the consultation, the government established that it was not requesting that the judge launch a mere fishing expedition. Rather, the evidence demonstrated an ample basis for a good-faith belief that the review would reveal unprivileged evidence supporting a threat prosecution, if not an actionable threat.

IV. The Final Policy Question: In Conducting an In Camera Review in Cases Involving Threats, Should the Judge Apply a Strict Incidence Requirement to Decide Whether the Client's Language Is Unprivileged, or Is It Preferable to Adopt a Categorical Exception Limited to Criminal Threats?

Part II concluded that in *Ivers,* the Court of Appeals correctly found that the unit of privilege analysis is the individual statement and that trial judges have the power to conduct line-by-line reviews of allegedly privileged material even when the primary purpose of the overall attorney–client exchange was to obtain legal services. Next, Part III concluded that the court also reached the right outcome in deciding that on the facts in *Ivers,* the government's evidence of Ivers's conduct before and after the consultation made it appropriate for the judge to engage in a detailed review of the contents of Ivers's exchange with the two attorneys. However, those two conclusions do not end the analysis. The remaining question is what standards the judge should use in conducting the review to decide whether individual statements by the client are privileged.

A. *The Approach Taken by Judge Pratt and the Eighth Circuit: The Strict Application of the Incidence Requirement*

In their opinions, both Judge Pratt and the Court of Appeals relied on the incidence requirement as the justification for holding that the six statements that Ivers made during the telephone conference and that were admitted into evidence at trial were unprivileged.

In his opinion on the original defense motion to exclude, Judge Pratt stated:

> [T]he Court concludes that because the alleged angry and threatening statements Defendant made to Attorney A on February 27 were not "made for the purpose of facilitating the rendition of

171. *Id.* at 713–15.

> legal services to" Defendant, the statements are not protected by the attorney–client privilege.[172]

The judge used essentially the same language in his order on the clarification motion:

> The Court noted Attorney A had testified that Defendant made angry and threatening statements during their February 27 phone call that did not relate to the purpose of the call, which was to obtain legal advice in a pending civil action, but that instead were directed toward a certain federal judge. The Court held that because the alleged angry and threatening statements "were not 'made for the purpose of facilitating the rendition of legal services to' Defendant, the statements are not protected by the attorney–client privilege."[173]

Similarly, the Court of Appeals relied on the incidence requirement as the premise for its decision:

> Ivers's statements . . . were in no way necessary to further his civil lawsuit or made in order to obtain guidance in filing an amended complaint. For these reasons, it is clear that the statements at issue were not for the purpose of obtaining legal advice about his pending lawsuit against an insurance company and are not protected by the attorney–client privilege.[174]

The court's use of the adjective "necessary" is telling. The court is certainly correct that strictly speaking, Ivers did not need to make his threatening statements in order to obtain the attorneys' advice during the telephone conference. Moreover, since privileges obstruct the search for truth, most courts balk at construing the scope of privileges expansively; that policy bias cuts in favor of rigorous enforcement of the incidence requirement.[175] Nevertheless, the two courts' opinions reflect a narrow, legalistic conception of the incidence requirement. Given Binder and Price's insights, courts should adopt a broader view of the

172. United States v. Ivers, No. 18-cr-00090 (RWP/CFB), 2018 WL 11025541, at *4 (D. Minn. June 26, 2018) (quoting United States v. Horvath, 731 F.2d 557, 561 (8th Cir. 1984)) (denying motion to exclude allegedly privileged attorney–client information), *aff'd*, 967 F.3d 709 (8th Cir. 2020).

173. United States v. Ivers, No. 18-cr-00090 (RWP/CFB), slip op. at 2 (D. Minn. Aug. 1, 2018) (quoting *Ivers*, 2018 WL 11025541, at *4) (denying motion to clarify).

174. *Ivers*, 967 F.3d at 714.

175. *See In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 918 (8th Cir. 1997) (stating that "[p]rivileges . . . 'are not lightly created nor expansively construed, for they are in derogation of the search for truth'") (quoting United States v. Nixon, 418 U.S. 683, 710 (1974)); *Ivers*, 967 F.3d at 716; *Ivers*, 2018 WL 11025541, at *4.

requirement to both facilitate the client's willingness to disclose facts to the attorney and enhance the client's receptivity to the attorney's advice, including advice to observe the law. For an attorney and a client to form an effective working relationship—one in which the client discloses all the facts in his or her possession and develops enough trust in the attorney to take the attorney's advice seriously—the attorney and client need "space" in their interactions.[176] In the client's mind, facts are often associated with feelings; and before the client feels comfortable enough with the attorney to candidly reveal all the facts—good, bad, and indifferent—the client may have to unburden by voicing the associated feelings, including and sometimes especially feelings of anger.[177] It is true that as a matter of strict logic, the client's feelings are not necessarily tied to the facts; but there can be a very real psychological tie.[178] The unexpressed feelings may be a huge impediment to the client's full, frank disclosure of facts that are highly relevant in a legal sense.

Moreover, although the attorney need not endorse the client's negative feelings,[179] to be receptive to the attorney's advice, the client must sense that the attorney at least has an empathetic understanding of the feelings.[180] Without that sense, the client may be unwilling to accept even the attorney's perfectly sound legal advice or the attorney's admonition to refrain from illegal conduct. Until the client gets the negative emotions "off his[or]her chest," they might refuse to listen to reason.[181] In most cases, the attorney should encourage the client's outpouring of related feelings;[182] after the attorney rides out the client's expression of emotion,[183] the attorney can frequently help the client regain composure.[184] However, until the client is allowed to vent his or her related feelings, the client may not be in a frame of mind to listen carefully to the attorney's advice. The modern, psychologically sound view of the attorney–client relation is that without the trust that can be built only by dealing with the client's emotions, the attorney cannot effectively advance either the private or public interests that the attorney–client privilege is intended to promote.[185]

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176. Bruce M. Landesman, *Confidentiality and the Lawyer-Client Relationship*, Utah L. Rev. 765, 783, 786 (1980).

177. Binder & Price, *supra* note 96, at 15, 21–23, 30.

178. *Id.* at 15, 21–23, 30.

179. *Id.* at 31 ("non-judgmental").

180. *Id.* at 14–15.

181. *Id.* at 35.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 36.

As Part I pointed out, at trial Judge Pratt admitted six statements that Ivers made during the telephone conference with the two attorneys.[186] Consider several of the statements:

- At the trial in the first lawsuit, "I had overwhelming evidence."[187] To be sure, this statement expressed Ivers's frustration. However, any attorney counseling Ivers about the viability of the second lawsuit would want to hear that statement. If Ivers is going to eventually accept the attorney's advice to abandon the second lawsuit, the attorney needs to be in a position to explain to Ivers why he did not have the right type of evidence or why even his seemingly "overwhelming" evidence fell short of satisfying the legal burden of proof. A client who believes that they lost despite "overwhelming evidence" is not going to be inclined to readily accept an attorney's advice to terminate the litigation.
- "Judge 'stacked the deck' to make sure that I lost the case."[188] If Ivers voices that feeling to the attorney, the attorney can follow up by asking how in particular Ivers believes that the judge acted unfairly. The attorney can then explain why the specific judicial acts and rulings that Ivers found troublesome were defensible applications of accepted legal rules and practices. However, if the client does not express this sentiment to the attorney and does not receive that explanation, the client may be left with the impression that the outcome at the trial in the first lawsuit was a blatant miscarriage of justice. A client harboring such an impression is much less likely to follow the attorney's advice to abandon the litigation.
- Ivers did not "read the fine print and missed the 30 days to seek a new trial."[189] The relatively short thirty-day period may strike a layperson as a minor, procedural technicality. But any attorney counseling Ivers needs to understand Ivers's view of the filing period. If Ivers does not voice his anger about the short filing period, Ivers's attorney is not in a position to explain to him that his untimely filing absolutely forecloses a second lawsuit. However, once the client has vented by expressing that anger and the attorney provides the necessary explanation, a calmer client may appreciate that it is a waste of time, money, and emotion to pursue the litigation further.

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186. *See supra* text accompanying note 50.

187. *Id.*

188. *Id.*

189. *Id.*

Did the attorneys need to hear any of these expressions of Ivers's anger to formulate their advice to him that he should abandon the second lawsuit? The answer to that question is "No." In a legalistic sense, those statements were not incident to the attorneys' performance of the legal service of providing advice about the viability about the second lawsuit. Even without the benefit of those statements, the attorneys could have formulated the basic advice that they ultimately gave Ivers.

However, again, the attorney–client privilege is intended to foster both clients' private interest in obtaining accurate advice and the public interest in promoting compliance with the law.[190] If Ivers's attorneys are going to convince him to abandon the second lawsuit and end the waste of valuable public judicial resources, they need to hear those statements. At the end of the telephone conference, the attorneys essentially invited Ivers to express his feelings about the litigation,[191] and to some degree his statements were responsive to the invitation to voice the emotions that the attorneys needed to learn to serve as effective counselors. If the attorneys allow those statements to go unsaid and permit Ivers to continue to harbor presumably unwarranted grievances about the prior proceedings, the attorneys may be unable to promote the public interest that the privilege is intended to advance. The bottom line is that if we posit a broader incidence standard reflecting the contemporary understanding of the psychological dynamics of attorney–client interactions, at least some of the District Court's rulings would be erroneous.

B. An Alternative Approach: The Recognition of a Categorical Exception for Criminal Threats Stated During Attorney–Client Consultations

As Subpart A explained, both Judge Pratt and the Court of Appeals conceptualized the issue in *Ivers* as the question of whether Ivers's statements were incident to his attorney–client relationship with the two lawyers he spoke with; Judge Pratt and the Court of Appeals denied privilege protection for the stated reason that Ivers had not established an element of the prima facie case for a privilege claim, that is, the satisfaction of the incidence requirement.[192] However, another

190. *See supra* text accompanying notes 93–139.

191. Transcript of Jury Trial—Volume III, *supra* note 50, at 451 ("At that point I had made the determination that I would kind of let him speak, you know, wanting to make sure that he had felt like his—like he had been heard, that we could have a chance to explain, you know, what he thought had occurred, you know, despite what we had decided from a legal standpoint, to kind of just have that conversation and allow him to speak. So I mostly let him speak unhindered.").

192. United States v. Ivers, 967 F.3d 709, 712 & n.1, 716–17 (8th Cir. 2020), *cert. denied*, 141 S. Ct. 2727 (2021) (mem.).

approach is possible. As previously stated, even when a litigant can establish a prima facie case for a privilege claim, the opponent seeking disclosure of the communication can prevail by demonstrating a waiver by the holder or the applicability of an exception to the scope of the privilege. It is submitted that in cases such as *Ivers,* it is far preferable for the courts to apply a categorical exception for criminal threats than examine the facts through the lens of the incidence requirement.

It is appropriate to recognize an exception when three factors concur.

First, the fact situation implicates a contrary "countervailing" policy; the court does not deny privilege protection because the general policies underlying the privilege are inapplicable but rather because the facts trigger another extrinsic policy that comes into conflict with those policies. For example, while the courts ordinarily are extremely protective of psychotherapy confidentiality,[193] many jurisdictions require therapists to report child abuse even when the therapist has learned about the abuse only through otherwise protected communication with a patient.[194] In these situations, all of the elements of a prima facie case for asserting the privilege are present; but the enforcement of the privilege is at odds with the policy of protecting innocent children from abuse.

Second, the countervailing policy is a weighty one. The policies underpinning evidentiary privileges are both legitimate and substantial; to protect those policies, the courts are willing to invoke privileges even when doing so leads to the end result of suppressing relevant, reliable evidence that would be useful to the trier of fact.[195] To trump those policies, the countervailing interest must be a very important one, such as the protection of innocent children or, in the case of the dangerous-patient exception to the psychotherapy privilege,[196] preventing impaired patients from injuring themselves or third parties.[197]

Third, ideally the scope of the exception can be formulated in clear, bright line terms. In his famous discussion of the criteria for recognizing privileges, Dean Wigmore argued that privilege rules, including exceptions to the scope of privileges,[198] must be stated in those terms.[199] He feared that laypersons such as clients would be reluctant to consult with

193. Imwinkelried, *supra* note 2, § 6.2.7(b).

194. *Id.* § 6.13.2(c).

195. *Id.* § 6.2.7(a).

196. *Id.* § 6.13.4(b).

197. Cal. Evid. Code § 1024 (West 2009); People v. Cordova, 358 P.3d 518, 547 (Cal. 2015), *cert. denied*, 578 U.S. 926 (2016) (mem.); Ewing v. Goldstein, 15 Cal. Rptr. 3d 864, 872 (Cal. Ct. App. 2004).

198. Steven R. Smith, *Constitutional Privacy in Psychotherapy*, 49 Geo. Wash. L. Rev. 1, 48 (1989).

199. Imwinkelried, *supra* note 2, § 3.2.3.

and confide in professionals such as attorneys if they could not be assured that their communications would be protected from later compelled judicial disclosure.[200] The available empirical studies of the impact of privileges strongly suggest that Wigmore's fear was overstated.[201] However, the overwhelming majority of courts, including the United States Supreme Court, still concur with Wigmore and stress the need to state privilege rules in carefully articulated terms. In *Swidler & Berlin*[202] in 1998, the majority declared that "uncertain privileges are disfavored."[203] Even more emphatically, in *Upjohn Co. v. United States,*[204] the Court asserted that the client "must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which [merely] purports to be certain . . . , is little better than no privilege at all."[205]

As we shall now see, all three of these factors cut in favor of recognizing a carefully circumscribed, categorical exception to the attorney–client privilege for client statements that amount to criminal threats to commit acts that will cause serious personal injury to or the death of a third party.

1. The Countervailing Nature of the Interest

Although both Judge Pratt and the Court of Appeals couched the dispositive question in *Ivers* in terms of a formal element of the prima facie case for a privilege claim—that is, the incidence requirement[206]—the real stakes in *Ivers* are obvious. Neither Judge Pratt nor the Court of Appeals denied that the primary purpose of Ivers's consultation with the two attorneys was to obtain their legal advice about the viability

200. *See generally* Melanie B. Leslie, *The Costs of Confidentiality and the Purpose of Privilege*, 2000 Wis. L. Rev. 31, 49 (2000).

201. Imwinkelried, *supra* note 2, § 5.2.2 (collecting the studies of the attorney–client and psychotherapist–patient privileges); Edward Imwinkelried, *Questioning the Behavioral Assumption Underlying Wigmorean Absolutism in the Law of Evidentiary Privileges*, 65 U. Pitt. L. Rev. 145 (2004); Edward J. Imwinkelried, *A Psychological Critique of the Assumptions Underlying the Law of Evidentiary Privileges: Insights from the Literature on Self-Disclosure*, 38 Loy. L.A. L. Rev. 707 (2004); Edward Imwinkelried, *The Rivalry Between Truth and Privilege: The Weakness of the Supreme Court's Instrumental Reasoning in* Jaffee v. Redmond, *518 U.S. 1* (1996), 49 Hastings L.J. 969 (1998). Simply put, in the typical layperson's mind, the world may not revolve around the courtroom to the extent that Dean Wigmore assumed.

202. 524 U.S. 399 (1998).

203. *Id.* at 402.

204. Upjohn Co. v. United States, 449 U.S. 383, 393 (1981).

205. *Id.*; *see also* Jaffee v. Redmond, 518 U.S. 1, 18 (1996) (quoting *Upjohn*, 449 U.S. at 393).

206. *See* United States v. Ivers, 967 F.3d 709, 719–20 (8th Cir. 2020), *cert. denied*, 141 S. Ct. 2727 (2021) (mem.).

of his second lawsuit against the insurance company.[207] Even if that purpose did not motivate all of Ivers's statements during the telephone conference, the consultation itself undeniably implicated the core legitimate policies that justify the recognition of the attorney–client privilege.

On the facts, though, those policies were pitted against the policy of preventing threatened injuries or killings. This is the very same type of conflict that has led so many jurisdictions to recognized true exceptions from the psychotherapy privilege for reports of child abuse[208] and patient statements indicating that the patient has become a danger to himself or herself or innocent third parties.[209] Rather than leaving it to individual judges to force disclosure of such statements on an ad hoc basis by applying the incidence requirement, these jurisdictions concluded that the appropriate approach was the enunciation of a full-fledged exception to the scope of the privilege.[210] Realistically, in their opinions, Judge Pratt and the Court of Appeals were not so much attempting to set a new standard for rigorous enforcement of the incidence requirement; rather, ultimately, they were attempting to vindicate the preeminent interest in safeguarding innocent human life. Framing a categorical exception for criminal threats is a much more reliable and straightforward method of upholding that interest.

2. The Magnitude of the Interest

As so many areas of law reflect, that interest is certainly a considerable one. To begin with, that interest underpins the decision to make certain types of threats to cause injury or death a crime. Again, the charge in *Ivers* was threatening to murder a federal judge.[211] Tort law is in accord. In its celebrated *Tarasoff* decision,[212] the California Supreme Court ruled that the psychotherapy privilege did not preclude imposing on the therapist a duty to warn when his or her patient makes a credible threat against an identified third party.[213] Similarly, the rules

207. *Id.* at 714.

208. Imwinkelried, *supra* note 2, § 6.13.2(c).

209. *Id.* § 6.13.4(b).

210. *Id.*

211. *Ivers*, 967 F.3d at 712; 18 U.S.C. § 115(a)(1)(B). Ivers was also charged with interstate transmission of a threat to injure the person of another, in violation of 18 U.S.C. § 875(c). *Ivers*, 967 F.3d at 712.

212. Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 347 (1976).

213. *Id.*; *see also* Alan R. Felthous & Claudia Kachigian, *The Fin de Millénaire Duty to Warn or Protect*, 46 J. Forensic Sci. 1103, 1111 (2001); George C. Harris, *The Dangerous Patient Exception to the Psychotherapist–Patient Privilege: The* Tarasoff *Duty and the* Jaffee *Footnote*, 74 Wash. L. Rev. 33, 34 (1999); Elisia Klinka, Note, *It's Been a Privilege: Advising Patients of the* Tarasoff *Duty and Its Legal Consequences for the Federal Psychotherapist–Patient Privilege*, 78 Fordham L. Rev. 863, 903 (2009).

of legal ethics reflect that this interest can trump the client's interest in the protection of the confidentiality of his or her communications with their attorney. ABA Model Rule of Professional Conduct 1.6(b)(1) provides: "A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to prevent reasonably certain death or substantial bodily harm . . . ."[214] In justifying the provision, the official Comment does not argue that a client's statements threatening assault or killing can never be deemed incident to the attorney–client relationship; instead, the Comment appeals to "the overriding value of life and physical integrity."[215] For that matter, some jurisdictions have gone to the length of recognizing full-fledged comparable privilege exceptions. By way of example, California Evidence Code § 1024 codifies a dangerous-patient exception to the psychotherapy privilege;[216] and the same code creates a similar exception to the attorney–client privilege.[217] Even without the benefit of legislation, the Texas Court of Criminal Appeals concluded that in that jurisdiction, the attorney–client privilege must yield when there is "a reasonable possibility of the occurrence of a continuing or future crime likely to result in serious bodily injury or death."[218]

If anything, the case for recognizing a categorical exception for client statements amounting to illegal threats is stronger than the case for the well-settled crime/fraud exception to the attorney–client privilege. By virtue of the latter exception, the privilege does not attach to the client's statements seeking advice that will enable the client to facilitate an ongoing or future crime or fraud.[219] However, unless the client goes further and solicits the attorney's involvement in the crime

214. Model Rules of Prof. Conduct r. 1.6(b)(1) (Am. Bar Ass'n 2020).

215. *Id.* at cmt. 6. In its opinion, the Court of Appeals pointed to the corresponding provision of the Minnesota Rules of Professional Conduct. United States v. Ivers, 967 F.3d at 716 n. 2.

216. Cal. Evid. Code § 1024 (West 2009) reads:

> There is no privilege under this article if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger.

217. *Id.* § 956.5:

> There is no privilege under this article if the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in the death of, or substantial bodily harm to, an individual.

218. Henderson v. State, 962 S.W.2d 544, 557 (Tex. Crim. App. 1997), *cert. denied*, 525 U.S. 978 (1998) (mem.).

219. McCormick on Evidence, *supra* note 12, § 95.

or fraud, the client's statement itself does not amount to a crime.[220] Furthermore, in the case of fraud, the interest protected by the exception is usually monetary in nature.[221] In contrast, by its terms this exception can be restricted to statements that constitute criminal threats; and even then the exception can be limited to situations in which the threat is of serious bodily injury or death. In both respects, the case for an exception for threats is more compelling.

3. A Carefully Circumscribed Exception Stated in Bright-Line Terms

The final question is the scope and phrasing of the exception. As previously stated, in *Ivers* Judge Pratt not only admitted evidence of the alleged threat: "You don't know the 50 different ways I planned to kill her." He also allowed the prosecution to introduce testimony about Ivers's statements that "I had overwhelming evidence," the "[j]udge stacked the deck" against him, and the "judge stole my life from me."[222] While those statements are disturbing and disrespectful, none of them amounted to an illegal threat. Binder and Price take the position that during a consultation, the attorney should not only permit but also invite the client to express angry feelings about the case.[223] An expression of generalized frustration, anger at the outcome, or even anger at the judge falls far short of an illegal threat or criminal conduct.

It is true that another of Ivers's statements was that "'she is lucky.' I was 'going to throw some chairs.'"[224] That statement is closer to the line. However, on its face that statement threatens only a disruption of the proceeding or at most property damage. In their discussion of allowing the client to vent in order to build up the necessary attorney–client trust, Price and Binder contend that it is even useful for an angry client to vent by telling the attorney that he, the client, wants to "punch . . . out" the opposing litigant[225]—an act that could result in personal injury. Again, though, the Model Rule of Professional Conduct permits the attorney to disclose only when the client threatens "reasonably certain death or substantial bodily harm."[226] For that matter, in the minority of jurisdictions that have already carved out an analogous exception to the attorney–client privilege by statute or case law, the

220. Model Rules of Prof. Conduct r. 1.2(d) (Am. Bar Ass'n 2020).

221. Restatement (Third) Torts § 9 cmt. a (Am. L. Inst. 2020).

222. United States v. Ivers, 967 F.3d 709, 714 (8th Cir. 2020), *cert. denied*, 141 S. Ct. 2727 (2021) (mem.).

223. Binder & Price, *supra* note 96, at 22–23, 27, 30–31, 35.

224. *Ivers*, 967 F.3d at 714.

225. Binder & Price, *supra* note 96, at 22.

226. Model Rules of Prof. Conduct r. 1.6(b)(1) (Am. Bar Ass'n 2020).

exception is restricted to threats of "serious"[227] or "substantial"[228] bodily injury.

When the exception is cabined in that manner, the strength of the countervailing interest is at its zenith, it is far easier for the attorney to know when to alert the client that the client is about to go over the brink, and during any in camera examination it will be much less difficult for the trial judge to identify the statements that do not deserve privilege protection. Ivers's threatening reference to "50 different ways . . . to kill her" was his only statement that directly implicated the policy of protecting innocent human life.[229] Given a bright line standard, a judge could readily single out that statement out as a threat. Moreover, an attorney could more readily sense that a client's outburst was escalating to the point that the client was about to cross the line and preemptively both warn and remonstrate with the client.

CONCLUSION

Reflecting back on *Ivers*, it probably would not have affected the outcome if the court had conceptualized the issue as an exception problem rather than an exercise in applying the incidence requirement. Suppose that Judge Pratt had excluded the other five statements and admitted only Iver's statement about the "50 different ways . . . to kill her."[230] The prosecution did not need the testimony about the other five statements Ivers made during the telephone conference to prove that Ivers's threat was serious. As the Court of Appeals' decision recites, the prosecution had other evidence that:

- The month after Judge Wright entered her order granting the insurer summary judgment on all but one of Ivers's claims, Ivers sent Judge Wright a note that "I am becoming a very dangerous person!!!";
- After a bench trial was scheduled on the remaining count, Ivers sent the court a letter, demanding a jury trial and stating "I smell a rat!";
- When the USMS visited him before the trial, he described himself as "a walking bomb";
- After the trial, in a letter to the Chief Judge, Ivers wrote that "I was cheated by one of your federal judges";
- In a call to the Chief Judge's chambers, Ivers stated that he was a "crazy mad" "walking bomb";

227. Henderson v. State, 962 S.W.2d 544, 556 (Tex. Crim. App. 1997), *cert. denied*, 525 U.S. 978 (1998) (mem.).

228. Cal. Evid. Code § 956.5 (West 2009).

229. *Ivers*, 967 F.3d at 714.

230. *Id.*

- A few days later, he sent out another round of letters asserting that Judge Wright was "[c]orrupt";
- When the USMS once again visited Ivers, he refused to retract his prior statements, used the phrase "walking bomb," and commented that if Judge Wright was "living in fear, too fucking bad"; and
- When the USMS contacted Ivers after his telephone conference with the attorneys, he ranted about Judge Wright, said he was "crazy fucking angry," and added that if Judge Wright "doesn't sleep very good, fuck her."[231]

For that matter, there is a strong argument that so long as they did not reveal the substantive content of Ivers's other statements during the consultation,[232] based on their perception of Ivers's tone of voice during the consultation under Rule 701, the attorneys could have given lay opinion testimony that Ivers appeared to be very angry.[233]

It is true that the prosecution could have used Ivers's other statements during the telephone consultation as more immediate context for interpreting the "fifty ways to kill her" statement as a genuine threat. However, even if Judge Pratt had excluded testimony about the other five statements, the defense would have been hard pressed to convince the jury that Ivers made the "fifty ways to kill her" remark in jest. In all likelihood, the jury would have convicted even if they had not heard testimony about the five statements; and applying this circumscribed exception, the appellate court would have found no error in admitting the "fifty ways" threat.

Looking forward after *Ivers*, recognizing a limited, categorical exception for criminal threats is a preferable method of approaching fact situations such as Ivers's case. The proposed exception rests on a strong, countervailing interest. In their opinions, Judge Pratt and the Court of Appeals took a strict, very legalistic approach to the application of the incidence requirement to attorney–client consultations. However, we

231. *Id.* at 712–15.

232 Imwinkelried, *supra* note 2, § 6.7.1.

233. McCormick on Evidence, *supra* note 12, § 11; 1 Imwinkelried et al., *supra* note 141, § 1401 (describing the admissibility of lay opinion testimony about a person's emotional state); People v. Smith, 347 P.3d 530, 551 (Cal. 2015) (noting that based on his or her perception of a person, a witness may "describe [the person's] behavior as being consistent with a state of mind" (quoting People v. Chatman, 133 P.3d 534, 572 (2006)). Although the record does not indicate that there was an opinion objection, at trial Ms. Friedemann testified that during the consultation, Ivers was "very angry" and in a "rage." Transcript of Jury Trial—Volume II at 379–80, United States v. Ivers, No. 18-cr-00090 (RWP/CFB), 2018 WL 11025541 (D. Minn. June 26, 2018) (denying motion to exclude allegedly privileged attorney–client information), *aff'd*, 967 F.3d 709 (8th Cir. 2020). Similarly, Ms. Rondini Tavernier testified that Ivers had engaged in "an angry rant." Transcript of Jury Trial—Volume III, *supra* note 50, at 451.

should not encourage attorneys to interview their clients the way Sergeant Joe Friday questioned witnesses on *Dragnet*: Just give me the legally relevant facts and forego the messy associated emotions. As Price and Binder have shown, as a counselor an attorney cannot be blind to the client's associated feelings, even negative feelings of anger.[234] If the attorney does not encourage the client to voice those feelings, the pent-up feelings may impede the attorney's effort to obtain all the relevant facts and advance the client's private interests by providing fully informed advice. Moreover, if the attorney fails to do so, the attorney and client may never develop the trust necessary to persuade the client to be receptive to the attorney's advice, especially advice that serves the public interest by urging the client to comply with the law.[235] As previously stated, a competent practitioner has to be a counselor, not a mere legal technician.[236] To be an effective counselor, the attorney must be attuned to the psychological dynamics of interactions with his or her client.[237] A legalistic application of the incidence requirements can make it hazardous for the attorney to do so.[238] In sharp contrast, sculpting a carefully circumscribed, bright line exception for criminal threats will afford the latitude that both a sensitive attorney and a troubled client need.

234. *See supra* text accompanying notes 117–39.

235. *See supra* text accompanying notes 176–83.

236. *See supra* text accompanying note 110.

237. Binder & Price, *supra* note 96, at 9.

238. *See supra* text accompanying notes 172–91.