Ethical lawyering, attorney-client privilege, and dual–purpose communications in light of *In re Grand Jury*

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Introduction

Attorney–client privilege protects communications between attorneys and clients made to obtain or provide legal advice.[1] When a client engages in full and frank communication with their attorney, the attorney is better situated to provide "sound legal advice or advocacy," which ultimately "serves public ends."[2] However, not all attorney–client communications are purely legal in nature. In many contexts, attorneys provide advice that has both legal and non-legal components and purposes. These dual–purpose communications occupy a no-man's land when it comes to privilege because there is no clear statement in the Constitution, federal statutes, or binding precedent that treats dual–purpose communications uniformly in federal courts.[3]

State law governs attorney–client privilege when the underlying cause of action is grounded in state law.[4] When a dispute arises in federal courts and the claim is not founded in state law, "the common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege" unless the United States Constitution, federal statutes, or rules prescribed by the Supreme Court say otherwise.[5] None of the aforementioned have directly contemplated extending the attorney–client privilege to dual–purpose communications.

The murkiness surrounding privilege for dual–purpose communications may chill the attorney–client relationship. Uncertainty in the privilege can hamstring attorneys, causing their counsel to be less candid and valuable to their clients. As a function of this reduced value, clients may be less honest with their attorneys. Clients may also be less forthright because they fear their attorneys will have to

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1. United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358–59, (D. Mass. 1950).
2. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).
3. If there was a clear statement from the Constitution, a federal statute or rule, or binding Supreme Court precedent, no circuit split on this issue could exist. *See* Petition for Writ of Certiorari at 27, *In re* Grand Jury, 598 U.S. ___ (2023).
4. Fed. R. Evid. 501.
5. *Id.*

disclose sensitive non-legal information in a dual–purpose communication. Governed by a code of professional responsibility, attorneys have a moral and professional duty to provide candid advice and competent representation. This Note will analyze the approaches three circuit courts of appeals use to determine whether a dual–purpose communication is privileged. It will argue that among the three approaches, the D.C. Circuit's approach best empowers attorneys to provide effective legal services and comply with Model Rules of Professional Conduct Rules 1.1[6], 1.2(d)[7], 1.6(c)[8], and 2.1.[9]

I. OVERVIEW OF THE CIRCUIT SPLIT

Three different circuits have adopted distinct approaches to dual–purpose communications. The Supreme Court heard a case to resolve this particular split in January 2023.[10] Some believed that the Court could craft a narrow decision applicable only in the tax context, or fashion a new approach entirely.[11] Others thought that it would adopt a method used by one of the circuits.[12] In its actual decision, the Court ruled that *certiorari* had been improvidently granted, leaving in place the Ninth Circuit's decision as well as the circuit split.[13] Although Justice Kagan, during oral argument, said that "if it ain't broke, don't fix it,"[14] suggesting that "federal courts are already applying the proper test,"[15] the split remains and is

6. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2018) [hereinafter MODEL RULES]. ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

7. MODEL RULES R. 1.2(D). ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.").

8. MODEL RULES R. 1.6(C). ("A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.").

9. MODEL RULES R. 2.1. ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.").

10. SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalJanuary2023.pdf (last visited Dec. 15, 2022) [https://perma.cc/9MQA-793E].

11. Robert Anello, *Do In-House Attorneys Talk 'Two' Much? - SCOTUS Will Decide*, FORBES (Oct. 26, 2022), https://www.forbes.com/sites/insider/2022/10/26/do-in-house-attorneys-talk-two-much-scotus-will-decide/?sh=6514acc6c9f4 [https://perma.cc/9NU5-S9PG].

12. Wendy Hughes, Samantha J. Monsees, Jeffrey Shapiro & Jeremy F. Wood, FP SCOTUS PREDICTIONS: WILL THE SUPREME COURT SHRED ATTORNEY-CLIENT PRIVILEGE CLAIMS – INCLUDING FOR INSIDE COUNSEL? (Jan. 11, 2023), https://www.fisherphillips.com/news-insights/fp-scotus-predictions-supreme-court-shred-attorney-client-privilege-claims.html. [https://perma.cc/UP5T-4SY9].

13. *In re* Grand Jury, 598 U.S. ___ (2023).

14. Transcript of Oral Argument at 33, *In re Grand Jury*, 598 U.S. ___ (2023) (No. 21-1397).

15. Kimberly Strawbridge Robinson, *Justices Toss Case Seeking Clarification of Attorney Privilege*, BLOOMBERG L., (Jan. 23, 2023) https://www.bloomberglaw.com/product/tax/bloombergtaxnews/us-law-week/XCQ5SHE4000000?bna_news_filter=us-law-week#jcite [https://perma.cc/CV9T-SY6X].

likely to "leave[] corporate counsel navigating an uncertain landscape for attorney–client privilege."[16]

A. D.C. CIRCUIT

The D.C. Circuit utilizes "*a* primary purpose" test and recognizes as privileged a dual–purpose communication if one of the significant purposes of the communication is obtaining or providing legal advice.[17] Under this approach, a court must evaluate the purposes of a communication and determine whether it has a significant legal purpose.[18] If the communication has a significant legal purpose, the privilege applies.[19] The communication will not be privileged if it has only an insignificant or nonexistent legal purpose.

B. NINTH CIRCUIT

The Ninth Circuit has adopted a "*the* primary purpose" balancing test, which requires a court to compare a communication's legal purpose to its non-legal purposes.[20] Under this approach, a court will assess the purposes of a communication and determine which purposes are significant.[21] Attorney–client privilege will protect a communication if its legal purpose is more significant than any other identified non-legal purpose.[22] If its non-legal purpose is more significant than any legal purpose, the communication will not be privileged.

C. SEVENTH CIRCUIT

In contrast, the Seventh Circuit declines to extend the privilege to communications that are not solely legal in character.[23] As an attorney and accountant, Richard Frederick provided both legal representation and tax preparation services to his clients.[24] After the IRS launched an investigation into one of Frederick's clients, it demanded from Frederick documents relevant to the investigation. Frederick refused.[25] In *Frederick*, the Seventh Circuit held that "a dual–purpose document—a document prepared for use in preparing tax returns and for use in litigation—is not privileged."[26] The court reasoned that in extending the privilege

16. Kate Azevedo, *ANALYSIS: Did Lawyers Miss Their Chance at A-C Privilege Reform?,* BLOOMBERG L., (Feb. 21, 2023) https://www.bloomberglaw.com/product/blaw/bloomberglawnews/bloomberg-law-analysis/BNA%2000000186-2d84-d466-a1de-bfff6d940000?bwid=00000186-2d84-d466-a1de-bfff6d940000 [https://perma.cc/CV9T-SY6X].

17. *See* FTC v. Boehringer Ingelheim Pharms., Inc., 892 F.3d 1264 (D.C. Cir. 2018).

18. *Id. at* 1268.

19. *Id.*

20. *In re* Grand Jury, 23 F.4th 1088, 1094 (9th Cir. 2021).

21. *Id.* at 1091.

22. *Id.* at 1092.

23. United States v. Frederick, 182 F.3d 496, 501 (7th Cir. 1999).

24. *Id.*

25. *Id.*

26. *Id.* at 501.

to a dual–purpose document, "people in or contemplating litigation would be able to invoke, in effect, an accountant's privilege" so long as their attorney prepared the document. If a client discusses both legal strategy and tax return preparation with their attorney, this communication automatically becomes discoverable because it contains non-legal information.[27] While the Seventh Circuit has not yet expanded its holding to other practice areas, the categorical approach it uses limits the attorney–client privilege to only those communications related solely to obtaining and providing legal advice.[28]

II. PROBLEMS WITH THE INCONSISTENCY IN ATTORNEY–CLIENT PRIVILEGE FOR DUAL–PURPOSE COMMUNICATIONS

Although the case before the Court concerns tax practitioners, dual–purpose communications are widespread, and the nature of modern legal practice means that untangling legal and non-legal purposes in any particular communication is challenging.[29] Uncertainty in a protection many attorneys and clients alike consistently relied on may weaken reliance on the protection.[30] If attorney–client privilege is an integral part of the administration of justice, weakening the privilege may hamper it.[31]

A. DUAL–PURPOSE COMMUNICATIONS ARISE IN MANY PRACTICE AREAS

Dual–purpose communications arise in a number of practice areas, including insurance coverage, tax, patents, and frequently for in-house counsel. The widespread nature of dual–purpose communications and the circuit split can chill the ability of attorneys to perform their functions effectively.[32] A uniform standard for dual–purpose communications can help attorneys work with more confidence that their communications will be privileged and protected.[33]

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27. *Id.* ("[Client] undoubtedly benefited from having their lawyer do their returns, but they must take the bad with the good; if his legal thinking infects his worksheets, that does not cast the cloak of privilege over the worksheets; they are still accountant's worksheets, unprotected no matter who prepares them.").

28. *See id.*

29. FTC v. Boehringer Ingelheim Pharms., Inc., 892 F.3d 1264, 1267 (D.C. Cir. 2018). (discussing how it can be inherently impossible to identify the one primary purpose of a communication when communications have overlapping purposes.).

30. Rory K. Little, *An Under-the-Radar Threat to the Attorney-Client Privilege*, NATIONAL LAW JOURNAL (2023), https://www.law.com/nationallawjournal/2023/01/05/an-under-the-radar-threat-to-the-attorney-client-privilege/ [https://perma.cc/6AEB-ZFP6].

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

32. Although attorney-client privilege and work-product protections protect from disclosure different documents, the policies underlying both are supported by similar rationales. *C.f.* Joy A. Williamson, *The Scope and Application of the Work Product Doctrine as Applied to Dual–Purpose Doctrine*, 30 VA. TAX REV. 715, 741 (2011) ("If the work product doctrine is interpreted narrowly to only provide protection in cases where the document serves a particular function in litigation, the communications between attorneys and their clients will be chilled.").

33. Without a uniform standard, attorneys may struggle to know which communications will be privileged because different circuits apply different standards. This becomes a problem in federal multi-district litigation, as it can be difficult to know beforehand which jurisdiction's privilege principles will be applied. For an

1. INSURANCE COVERAGE

Attorneys communicate with insurance companies for internal investigations,[34] investigating insurance claims,[35] and to provide general legal counsel unrelated to a particular insurance claim.[36] When an attorney is retained for a particular insurance claim, an attorney can expect the following communications to be privileged: legal opinions about claims the insurance company could assert, legal advice about communications the insurer sends to the insured, and legal advice relating to the extent to which a claim is covered by an existing policy.[37] At times, it can be difficult to untangle the privileged legal purposes and unprivileged purposes in a communication. Some portions of a communication about an insurance claim have "aspects of 'legal advice'" but discussing claims is in the very nature of an insurance company's business.[38]

2. INTERNAL INVESTIGATIONS

When acting as investigators to provide legal and business advice, attorneys rely on their legal knowledge and skills. However, not all investigations for which attorneys are retained become "legal." For the attorney–client privilege to apply, a court looks for whether the "investigation's purpose [is] to provide information from which the attorney can develop legal advice," documentation that shows the "investigation was necessary so that counsel could provide . . . legal advice," and that the investigation was "not to enable management to make decisions [but] so counsel can provide legal advice."[39] Unlike in investigations where the sole purpose is to provide legal advice, mixed-purpose investigations give rise to mixed-purpose communications.[40] The legal purpose has to be to find information from which an attorney could provide legal advice.[41] A legal purpose can be established using documentation that establishes the provision of legal advice as the

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example of the choice of law analysis a court engages in to determine which privilege principles apply, see *Wolpin v. Phillip Morris Inc.*, 189 F.R.D. 418, 422–423 (C.D. Cal. 1999) and *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981) ("But if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected."). *See generally*, Alan Whaley, *Whaley: 'Multi-Jurisdictional' Cases Complicate Attorney–Client Privilege Analysis,* THE INDIANA LAWYER (Apr. 22, 2014), https://www.theindianalawyer.com/articles/33976-whaley-multi-jurisdictional-cases-complicate-attorney-client-privilege-analysis [https://perma.cc/9TBM-VX3T].

34. *See Upjohn Co.*, 449 U.S. at 386.

35. Menapace v. Alaska Nat'l Ins. Co., 2020 U.S. Dist. LEXIS 191695, at *10–11 (D. Colo. 2020).

36. LEMONADE INSURANCE COMPANY, *Job Notice for Associate General Counsel, Insurance* https://www.legal.io/jobs/5342082/Associate-General-Counsel-Insurance [https://perma.cc/Q8UZ-REQD].

37. *See* Reliance Ins. Co. v. American Lintex Corp., 2001 WL 604080, at *6–7 (S.D.N.Y. 2001).

38. JOHN W. GERGACZ, Attorney-Corporate Client Privilege, 294 (Thomson Reuters, Fall 2022 ed. 2022).

39. *Id.* at 264-66.

40. *In re* Gen. Motors LLC Ignition Switch Litig., 80 F. Supp. 3d 521, 529–30 (S.D.N.Y. 2015).

41. *Id.* at 529.

investigation's purpose, and the investigation itself must be used so counsel can provide legal advice to the client.[42]

3. PATENTS

Historically, patent attorneys did not act as attorneys for the purposes of privilege when they provided patent-related counseling.[43] Patent lawyers spent less time applying "rules of law to facts" but more on "questions of business policy, of competition as disclosed by facts derived from third persons, of the scope of public patents and of the application of patent law."[44] Treated as nothing more than a "mere conduit between the inventor and the patent office," neither the assisting attorney nor the inventor enjoyed the attorney–client privilege.[45] More recently, attorney–client privilege has been extended to patent attorneys.[46] Patent attorneys are more frequently treated like their non-patent attorney brethren when it comes to questions of privilege, but *United Shoe* still "has not been repudiated,"[47] leaving some uncertainty in this area.

4. IN–HOUSE COUNSEL

As in-house counsel, attorneys may

> "serve as company officers, with mixed business–legal responsibility; whether or not officers, their day-to-day involvement in their employers' affairs may blur the line between legal and nonlegal communications; and their advice may originate not in response to the client's consultation about a particular problem but with them, as part of an ongoing, permanent relationship with the organization."[48]

For in-house counsel, it is essential to construe the privilege narrowly so that businesses cannot "seal off disclosure" and "obstruct[] the truth-finding process" by involving attorneys where they need not participate.[49]

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42. *See* AMERICAN BAR ASSOCIATION, THE ATTORNEY-CLIENT PRIVILEGE IN CIVIL LITIGATION, 199–200 (Oscar Rey Rodriguez ed., 7th ed. 2019). *See also Visa U.S.A., Inc. v. First Data Corp.*, 2004 U.S. Dist. LEXIS 17117, *19–27 (N.D. Cal. Aug. 23, 2004) (holding that attorney-client privilege or work-product protections did not attach to documents attorney prepared that would have looked substantially identical even if attorneys were not involved).

43. *See* United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 357 (D. Mass. 1950).

44. *Id.* at 360–61.

45. *In re* Gabapentin Patent Litig., 214 F.R.D. 178, 181 (D.N.J. 2003).

46. Advanced Cardiovascular Sys., Inc. v. C.R. Bard, Inc., 144 F.R.D. 372, 376–377 (N.D. Cal. 1992) (holding that inventor-counsel communications received attorney client privilege because 1) inventors come to counsel with the expectation that communications will be confidential even if some communications become public in the patent, 2) patent attorneys play a primarily legal role in the patent process, and 3) patent attorneys have to provide legal opinions about prior art, the patent application itself, and possible litigation). For other cases that have applied this reasoning, see *Rohm and Haas Co. v. Brotech Corp*, 815 F. Supp. 793, 796 (D.Del. 1993) and *Knogo Corp. v. United States*, No. 194-79, 1980 WL 39083 *5 (Ct. Cl. Feb. 16, 1980).

47. GERGACZ, *supra* note 38 at 249.

48. Rossi v. Blue Cross and Blue Shield of Greater New York, 73 N.Y.2d 588, 592–593 (1989).

49. *Id.* at 593.

5. TAX

Tax attorneys provide tax-related legal advice, whether it is regarding a particular transaction or complying with the legal demands of tax returns. The Ninth Circuit briefly cast into question whether the privilege exists in this context, when it held that "normal tax advice—even coming from lawyers—is generally not privileged."[50] It later amended its opinion, replacing "advice" with "tax return preparation assistance."[51] The revision doesn't clarify the privilege because "advice" and "assistance" encompass similar types of conduct. In the tax context, the attorney–client privilege may be under attack to "obtain evidence of fraud,"[52] and carving out an exception in the privilege for tax attorneys chips away at an important feature because the *Model Rules* already prohibit attorneys from assisting in or concealing crime and fraud.[53]

B. THE CIRCUIT SPLIT WEAKENS RELIANCE ON THE PRIVILEGE

The circuit split means that federal courts will have different answers to the same question regarding the privilege for dual–purpose communications. What may be privileged in one circuit may not be privileged in another or be subject to an *ex post* balancing of subjective factors.[54] This creates uncertainty because attorneys and clients cannot predict if and where they will be involved in litigation and if the content of communication has a significant enough legal purpose.[55] Uncertainty in privilege makes clients and attorneys less likely to communicate candidly, making it difficult for both parties to rely on the privilege when communicating with one another.

C. THE CIRCUIT SPLIT HAMPERS THE POLICY UNDERLYING THE PRIVILEGE

The attorney–client privilege "encourages clients to make full and frank disclosures to their attorneys."[56] Full and frank disclosures help attorneys provide effective advice and representation; without knowing all the relevant facts, attorneys are limited in their effectiveness.[57] Having effective legal advocates is an

50. *In re* Grand Jury, 13 F.4th 710, 717 n. 5. (9th Cir. 2021).

51. *In re* Grand Jury, 23 F.4th 1088, 1095 n. 5. (9th Cir. 2022).

52. Charles Ruchelman and Akiva Mase, *What's the IRS Criminal Investigation Division Telling Us About Its Priorities and Update on the Erosion of the Attorney-Client Privilege in Tax Cases.* White Collar Crime Comm. Newsl. (A.B.A., D.C.) March 2022 at 4.

53. MODEL RULES R. 2.1, R. 3.3(b).

54. *See* Swidler & Berlin v. United States, 524 U.S. 399, 409 (1998).

55. As stated in *Upjohn*, attorneys and clients alike "must be able to predict with some degree of certainty whether particular discussions will be protected." Without this certainty, it's unlikely that the purposes of the privileges will be served. *Upjohn Co*., 449 U.S. at 393 (1981).

56. Mohawk Indus. Inc. v. Carpenter, 558 U.S. 100, 108 (2009) (citation omitted).

57. *See* Stephen A. Saltzburg, *Corporate and Related Attorney-Client Privilege Claims: A Suggested Approach*, 12 Hofstra L. Rev. 279, 282–83 (1984).

important component of a well-functioning justice system and facilitates the administration of justice.[58]

Uncertainty in the privilege will discourage disclosure. Clients are less likely to share sensitive, material, and necessary information with attorneys if clients fear that this information may be disclosed in litigation.[59] Attorneys are less effective counselors and advocates when they work without necessary information. They are also less likely to communicate candidly with their clients if they are unsure that privilege will protect their communications.[60]

An attorney who practices in a jurisdiction that privileges dual–purpose communications must be vigilant if their client can be sued in a jurisdiction that does not privilege dual–purpose communications. Similarly, if the attorney has a relationship with a client engaged in interstate commerce, the attorney may have to contend with litigation in a jurisdiction that does not privilege dual–purpose communications. Even if the client is not actually sued in a jurisdiction that does not privilege dual–purpose communications, the mere possibility alone may chill communications. While having a complete and fair understanding of a client's situation is not always sufficient for competent representation, competent representation becomes more challenging if communications are chilled. This makes it challenging to provide competent legal representation.[61] By extension, incompetent legal representation does not advance "broader public interests in the observance of law and administration of justice,"[62] and reduces public trust in the effectiveness of the legal system.

D. MODEL RULES OF PROFESSIONAL CONDUCT IMPLICATED BY THIS ISSUE

Three federal circuits have introduced different tests to determine when dual–purpose communications are protected by attorney–client privilege. Each test makes it more or less difficult to comply with the *Model Rules*.

III. ANALYZING THE THREE APPROACHES

The following section will analyze the approach taken by each Federal Circuit to see how it affects an attorney's ability to adhere to the aforementioned *Model Rules*.

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58. In criminal defense, incompetent or ineffective counsel can be grounds for constitutional error. *See* Strickland v. Washington, 466 U.S. 668 (1984). *See* also Javor v. United States, 724 F.2d 831, 834 (9th Cir. 1984) ("[w]hen a defendant's attorney is asleep during a substantial portion of his trial, the defendant has not received the legal assistance necessary to defend his interests.").

59. *See* Eugene R. Licker & Amanda J. Sherman, *Abolish the Attorney-Client Privilege; It Serves Little Use in Practice While the Work-Product Privilege Offers a Safer Harbor*., 36 NATIONAL LAW JOURNAL & LEGAL TIMES 58 (2014).

60. *See* Deborah L. Rhode, David Luban, Scott L. Cummings & Nora Freeman Engstrom, *Confidentiality and the Attorney-Client Privilege*, LEGAL ETHICS 270 (8th ed. 2020).

61. *Id.*

62. Mohawk Indus. Inc. v. Carpenter, 558 U.S. 100, 108 (2009) (citation omitted).

A. NINTH CIRCUIT

In the Ninth Circuit, the court resolves the issue of privilege for dual–purpose communications by assessing its purposes for both legal and non-legal purposes.[63] The court identifies the "legal and non-legal reasons for making a communication, and then weigh[s] the relative importance of those reasons to determine the most significant purpose of the communication."[64] If the court finds that there is both a significant legal and non-legal purpose, the legal purpose must be greater than the non-legal purpose for communication to be privileged.[65] Otherwise, if the non-legal purpose is *the* primary purpose, the communication is not privileged. The importance of the legal purpose, as interpreted by a trial court using a balancing test, determines whether a communication is privileged.

1. RULE 1.1

Because the Ninth Circuit's balancing test empowers the court to decide between two significant purposes,[66] it creates considerable uncertainty in whether sensitive information will be subject to discovery. Although a significant-enough legal purpose for a communication means it is privileged, it is only natural for an attorney to "be hesitant to provide the most comprehensive counsel when there is a risk that his communications will not remain confidential."[67] The preparation necessary for competent representation is also hindered because clients are less likely to provide all relevant information to their attorneys, including sensitive information, if they know that there is a risk that the sensitive information could be obtained by an adverse party.[68] This is because there is no way to conclusively determine – before a district court rules on a discovery order – which dual–purpose communications will be discoverable later because the ultimate determination depends on a balancing test.

2. RULE 1.2(D)

Without candor in the attorney–client relationship, caused by concerns that sensitive information will be discoverable, attorneys are limited in how effectively they "counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."[69] Similarly, before discussing the legal consequences of a course of conduct, an attorney needs to understand

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63. *In re* Grand Jury, 23 F.4th 1088, 1094 (9th Cir. 2021).
64. Petition for Writ of Certiorari at 3, *In re* Grand Jury, 598 U.S. ___ (2023).
65. 23 F.4th at 1091.
66. *Id*. at 1094.
67. Petition for Writ of Certiorari at 19, *In re* Grand Jury, 598 U.S. ___ (2023).
68. Promoting full and frank disclosures between attorneys and clients is the animating reason for attorney–client privilege. Mohawk Indus. Inc. v. Carpenter, 558 U.S. 100, 108 (2009) (citation omitted). When the privilege is uncertain, clients and attorneys will be less likely to speak frankly.
69. MODEL RULES R. 1.2(d).

the conduct, including its factual context. When the factual context of conduct is integral to the legal consequences and the legal consequences can shape the course of conduct, it is not easy to separate the two.[70] Additionally, the possible disclosure of a proposed course of conduct may have consequences for the client that the client wishes to avoid.[71] Because the balancing test introduces uncertainty to the privilege of dual–purpose communications, it makes attorneys and clients less willing to discuss and determine how the law will apply to ongoing and proposed conduct.[72]

3. RULE 1.6(C)

While an attorney should take reasonable efforts to prevent inadvertent disclosures of information relating to the representation of a client, the Ninth Circuit balancing test makes it difficult for attorneys to consistently follow this rule. Because the court ultimately decides whether a communication is privileged,[73] an attorney who seeks to protect their communications can try to ensure they have a predominantly legal purpose, but cannot ultimately guarantee that a court will view a communication the same way.

While a client or attorney's appetite for risk varies—some clients may want more comprehensive legal counsel even if it increases the possibility that sensitive non–legal discussions may be disclosed—the Ninth Circuit's balancing test introduces even more uncertainty in this area than the D.C. Circuit's test and may be more impractical than the Seventh Circuit's *per se* approach. At least in the Seventh Circuit, attorneys and clients have clear notice that sensitive information will not be protected if part of a dual–purpose communication.[74] While the *per se* approach has its flaws, it is clear and uncompromising in this regard—no dual–purpose communications are privileged.[75] The Ninth Circuit approach, on its

70. *In re* Kellogg Brown & Root, Inc., 756 F.3d 754, 759 (D.C. Cir. 2014). Then-Judge Brett Kavanaugh went so far as to say that "it is often not useful or even feasible to try to determine whether the purpose" was singular or plural.

71. A company may wish to control when and where it discloses information contained in public relations documents, such as press releases. *See, e.g.*, *In re* Johnson & Johnson Talcum Powder Prods. Mktg., Sales Pracs., & Prods. Liab. Litig., 2021 WL 3144945, at *7 (D.N.J. July 26, 2021) (finding that documents relating to public relations with comments from in-house counsel were privileged when "prepared to address a specific case or threatened litigation" and even "if the underlying document was designed to generally foster [the company's] reputation."). A more modern development in this area concerns the disclosure of metadata, which provides data about the data. Embedded in most electronic documents, metadata can reveal information that is not contained on the face of a document, which a client may wish to keep secret. In *Lake v. City of Phoenix*, 218 P.3d 1004, 1005 (Ariz. 2009), a police officer requested documents containing performance notes as well as embedded metadata as the officer suspected the documents were backdated. The metadata would reveal whether the documents were in fact, backdated.

72. Rory K. Little, *An Under-the-Radar Threat to the Attorney-Client Privilege*, NATIONAL LAW JOURNAL (2023), https://www.law.com/nationallawjournal/2023/01/05/an-under-the-radar-threat-to-the-attorney-client-privilege/ [https://perma.cc/6AEB-ZFP6].

73. *In re* Grand Jury, 23 F.4th 1088, 1094 (9th Cir. 2021).

74. *See* United States v. Frederick, 182 F.3d 496, 499 (7th Cir. 1999).

75. *Id.*

face, privileges communications with a significant non-legal purpose but only if a court determines that the significant legal purpose outweighs its non-legal purpose or purposes.[76] If the court errs in its determination, any sensitive information for which the privilege was sought is toothpaste already squeezed.

a. Possible Relief in Mandamus

Even when a District Court weighs competing purposes and finds that a communication's most primary purpose was not legal, not all denials of the attorney–client privilege are final.[77] The D.C. Circuit found that the writ of mandamus was an appropriate form of relief when the District Court's denial of privilege was clearly erroneous in *Kellogg Brown & Root*, but noted that mandamus is a "drastic and extraordinary" and "reserved for really extraordinary causes."[78] To justify the writ, a Court of Appeals must find that "(1) the mandamus petitioner must have "no other adequate means to attain the relief he desires," (2) the mandamus petitioner must show that his right to the issuance of the writ is "clear and indisputable," and (3) the court, "in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances."[79]

Because interlocutory appeals are unavailable in privilege disputes and certifying privilege questions are left to a district court's discretion, the first factor "will often be" satisfied in attorney–client privilege cases.[80]

Satisfying the second factor is difficult using the "*the* primary purpose" test. The District Court in *Kellogg Brown & Root* erred because it applied the incorrect test. While utilizing the incorrect test is a clear error, identifying clear error when the correct test is applied is a more challenging task. Because the Ninth Circuit approach uses a balancing test, which requires a district court to weigh multiple subjective factors, a court of appeals, "on the entire evidence" must be "left with the definite and firm conviction that a mistake has been committed." [81] If the district court's determination is "plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the tier of fact, it would have weighed the evidence differently."[82] Even then, identifying *a* primary purpose under the D.C. Circuit's test is more straightforward than identifying *the* primary purpose; by extension, finding clear error under the "*a* primary purpose" test is simpler than for the "*the* primary purpose" test because the latter is a balancing test, and clear error has to "strike [an appellate court] as wrong with the force of a five-week-old, unrefrigerated dead

76. *In re* Grand Jury, 23 F.4th 1088, 1091–1092 (9th Cir. 2021).
77. *See In re* Kellogg Brown & Root, Inc., 756 F.3d 754, 760 (D.C. Cir 2014).
78. *Id*. at 760.
79. *Id*.
80. *Id*. at 761.
81. Anderson v. City of Bessemer City, 470 U.S. 564, 573–74 (1985).
82. *Id*.

fish."[83] Arguing that the outcome of a subjective-factor balancing test is as wrong as old fish may be as challenging as eating that old fish.

On first glance, the Ninth Circuit's test looks more flexible and accommodating than the Seventh Circuit's categorical approach, leaving open the possibility that dual–purpose communications will be privileged. However, the balancing test fares no better in helping attorneys prevent the inadvertent disclosure of private client communications. Having the option of mandamus will not be of relief to many attorneys or clients because it will be difficult to show that a district court clearly erred in finding a communication did not have a predominant legal purpose.

4. RULE 2.1

In providing candid advice, an attorney may need to refer to and discuss with a client the moral, economic, social, and political factors relevant to client's legal problem.[84] Depending on the legal question, providing purely legal counsel is not valuable to a client. This is especially true "where practical considerations, such as cost or effects on other people, are predominant."[85] In the course of providing candid advice, the legal content of communications can vary, with some being primarily legal and others completely non-legal and discussing only the practical considerations or the aforementioned factors. The middle of the spectrum, where the legal and non-legal purposes are roughly equivalent, is an area of uncertainty because a district court makes the ultimate determination on what the most significant purpose is.[86] Because determining which purpose dominates is not readily quantifiable and scientific, these decisions are necessarily unpredictable. Against this backdrop, attorneys may not be inclined to provide candid advice informed by the relevant non-legal factors because the client and attorney may wish to keep private the discussions about non-legal factors and minimize the risk that sensitive information is disclosed.[87]

B. SEVENTH CIRCUIT

Under the Seventh Circuit's approach, attorneys would hesitate to draw from the full gamut of moral, economic, social and political factors that are relevant to their clients. Because the Seventh Circuit's approach declines to extend attorney–

83. Parts & Elec. Motors, Inc. v. Sterling Elec., Inc., 866 F.2d 228, 233 (7th Cir. 1988).

84. MODEL RULES R. 2.1.

85. MODEL RULES R. 2.1 cmt. 2.

86. Petition for Writ of Certiorari at 3, *In re* Grand Jury, 598 U.S. ___ (2023).

87. When a lawyer or client is uncertain that what they say will be privileged and confidential, it's unlikely that they will say what they want to say, especially if what they say can hurt the client later. *See generally* Rory K. Little, *An Under-the-Radar Threat to the Attorney-Client Privilege*, NATIONAL LAW JOURNAL (2023), https://www.law.com/nationallawjournal/2023/01/05/an-under-the-radar-threat-to-the-attorney-client-privilege/ https://perma.cc/6AEB-ZFP6].

client privilege to communications that have non-legal aspects,[88] a court may find that a communication with a legal component and other non-legal factors is not protected by attorney–client privilege because the communication is not purely legal. While the particular approach in *Frederick* has not been employed by the Seventh Circuit beyond the tax preparation context, nothing in its holding circumscribes the reasoning in the holding to tax attorneys or the tax context.[89] Although it remains an open question as to whether the privilege holding extends beyond tax practitioners or is a one-off for tax advice, it is difficult for an attorney to comply with the *Model Rules* under the Seventh Circuit's approach.

1. RULE 1.2(D)

Drawing from the foregoing discussion of contexts in which dual-purpose communications arise, attorneys who provide patent counseling may face exceptional challenges under this approach. It is unclear how patent attorneys could counsel their clients and provide candid advice because economic factors in patent counseling cannot be brushed aside by a patent attorney.[90] Research and development is costly and is an investment decision that is affected by the uncertainty of market returns.[91] To know whether a return is guaranteed, one must first ascertain the "potential for risk and reward"[92] by evaluating what is and isn't patented and the infringement risks that come from investing in a particular area. The likelihood that a patent will be granted, a legal matter, is directly linked to the advisability of pursuing that patent and the likelihood of payoff, a business matter.[93] Nevertheless, under this approach, the attorney may hesitate to refer to economic and business factors when counseling a client because these factors are significant to the legal purpose but may convert a single-purpose communication to an unprotected dual–purpose communication.[94] Discussing prior art, business

88. U.S. v. Frederick, 182 F.3d 496, 501 (7th Cir. 1999) ("Put differently, a dual-purpose document—a document prepared for use in preparing tax returns *and* for use in litigation—is not privileged.").

89. *See id.*

90. FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, LLP, https://www.finnegan.com/en/work/practices/portfolio-and-market-strategy/opinions-and-counseling.html [https://perma.cc/ZQJ3-CYPT] ("We regularly partner with our clients' legal, business, and technical staffs to identify the potential for risk and reward, from idea to revenue-generating portfolios."); FISH AND RICHARDSON P.C. https://www.fr.com/services/strategic-patent-counseling-and-opinions/ [https://perma.cc/JZT5-Y2FW] ("Why obtain a patent opinion? To decide whether to invest in patent prosecution, To evaluate infringement risks, To determine the need to license a patent."); STERNE, KESSLER, GOLDSTEIN & FOX PLLC, https://www.sternekessler.com/services/opinions-advice/opinions-counsel [https://perma.cc/LE44-THRB] ("Opinions range from formal opinions of counsel, upon which clients have successfully relied at trial, to less formal letter opinions, all of which provide strategic advice for making critical business decisions."). (all last visited Mar. 14, 2023).

91. Dirk Czarnitzki & Andrew A. Toole, *Patent Protection, Market Uncertainty, and R&D Investment,* 93 REV. OF ECON. & STAT. 1, Feb. 11, 2011 at 147, 159 (2011).

92. *See* FINNEGAN, *supra* note 90.

93. Brief for New York Intellectual Property Law Association as Amici Curiae Supporting Neither Party at 12, *In re* Grand Jury, 598 U.S. ___ (2023) [hereinafter Brief for NYIPLA].

94. A communication with more than one purpose is not privileged. *See* U.S. v. Frederick, 182 F.3d 496, 501 (7th Cir. 1999).

policy, and capital expenditures are both tied up in the "legal consequences of any . . . proposed course of conduct,"[95] but few communications in this area will have a purely legal purpose. If this is the case, it is unclear how patent attorneys can communicate only the legal consequences of any proposed course of conduct when that conduct is investing in research and development.

2. RULE 1.1

Patent attorneys, much like any other type of attorneys, have a professional duty to provide competent representation, drawing from skill, thoroughness, and preparation.[96] The text of the rule does not constrain the attorney to draw from thoroughness in the law and preparation in the law, nor has this rule been interpreted in this manner.[97] To understand the factual basis of a legal problem, the attorney needs to "receive and consider business and commercial information."[98] If disclosure is chilled because it is impossible to untangle the dual or multiple purposes in a communication, it becomes more challenging for an attorney to have the information necessary to provide competent representation.[99]

3. RULE 2.1

When attorneys provide advice, they are permitted and even encouraged to go beyond purely technical legal advice.[100] Because counseling clients about the likelihood of successful patent prosecution or the viability of pursuing a particular direction in research and development requires the consideration of non-legal factors, non-legal factors are inherently present in these communications.[101] Without a discussion of existing patents, emerging trends, market forces, and patent strategies—all of which may be found as irrelevant to a "legal" purpose—the quality of legal counsel suffers.[102] Advice that the attorney is able to provide under the Seventh Circuit may be limited or transformed by the lack of a dual–purpose privilege, and this very possibility is discussed in the *Model Rules*, which notes that by construing advice strictly through the lens of the law, advice may

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95. MODEL RULES R. 1.2(d).

96. MODEL RULES R. 1.1.

97. MODEL RULES R. 1.1 cmt. 5 ("Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.").

98. Brief for NYIPLA at 12.

99. *See* MODEL RULES R. 1.1 cmt 5 ("Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.").

100. *See* MODEL RULES R. 2.1 cmt 2. ("Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice.").

101. Brief for NYIPLA at 11 ("IP lawyers routinely engage in dual-purpose communications.").

102. Brief for NYIPLA at 13.

not be useful to the client.[103] At times, it is insufficient to provide purely technical legal advice, and yet the Seventh Circuit's approach would require it.[104]

4. RULE 1.6(C)

For example, in *In re General Motors LLC Ignition Switch Litigation*, attorneys conducted an internal investigation into an alleged defect in an ignition system, and the issue of privilege was in dispute for notes and memoranda from witness interviews.[105] These documents were created in connection with the litigation.[106] The investigation had a non-legal purpose: identifying and correcting the defect that led to a mass recall.[107] The Department of Justice had also launched a criminal investigation into the company.[108] For this, the company retained attorneys to "represent New GM's interests and to provide legal advice to New GM in a variety of matters relating to the recalls, including the DOJ investigation and other government investigations and civil litigation."[109] In an investigation with two intertwined and significant purposes, crafting communications so only one purpose is discussed "can be an inherently impossible task."[110] And yet, if any one communication discusses both the legal and business consequences of the findings, all of the sensitive information becomes discoverable.[111] To ensure that attorneys minimize inadvertent disclosures under the Seventh Circuit's approach, an attorney would need to cease communications as soon as the client discusses non-legal matters.[112] It is absurd to think about how attorneys and clients alike would need to reorganize their communications so that discussions are limited strictly to legal advice without discussing the facts underlying the legal problem itself, especially when the facts can serve dual purposes.[113]

This approach is at odds with the reality of the modern legal profession and the multidisciplinary approach that attorneys must bring to their clients, not only because clients demand it,[114] but also because a multidisciplinary approach is inherent in the meaning of "competent representation," and understanding non-legal purposes are critical to understanding the legal problem. Declining to extend the privilege to dual–purpose communications would require

103. MODEL RULES R. 2.1 cmt. 2.
104. *Id.*
105. *In re* Gen. Motors LLC Ignition Switch Litigation, 80 F. Supp. 3d 521, 523 (S.D.N.Y. 2015).
106. *Id.* at 532.
107. *Id.* at 523.
108. *Id.* at 524.
109. *Id.*
110. *In re* Kellogg Brown & Root, Inc., 756 F.3d 754, 759 (D.C. Cir. 2014).
111. If a dual–purpose communications are privileged, unless another protection is in place, it will become discoverable. *See* U.S. v. Frederick, 182 F.3d 496, 501 (7th Cir. 1999).
112. Because dual-purpose communications are not privileged, they would become discoverable. *Id.*
113. Communications can have overlapping purposes. FTC v. Boehringer Ingelheim Pharms., Inc., 892 F. 3d 1264, 1267 (D.C. Cir. 2018).
114. *See* Michele DeStefano Beardslee, *Taking the Business out of Work Product*, 79 FORDHAM L. REV. 1869, 1936 (2011).

attorneys and clients alike to restructure the way they communicate with each other, possibly leading to compartmentalization to minimize the risk of inadvertent disclosures.[115]

C. D.C. CIRCUIT

The test employed by the D.C. Circuit requires courts to evaluate the legal purpose of a communication and determine if it is significant.[116] If the legal purpose is significant, the communication is privileged regardless of how significant other purposes are because "trying to find *the* one primary purpose for a communication motivated by two sometimes overlapping purposes (one legal and one business, for example) can be an inherently impossible task."[117]

1. RULE 1.6(C)

Of the approaches compared, the D.C. Circuit's "*a* primary purpose" test makes it easier for attorneys to prevent the inadvertent disclosure of client information. Using the internal investigation from *General Motors* above, a district court applying this test would only determine if "whether obtaining or providing legal advice was *one* of the significant purposes."[118] Investigations instigated with the purpose of obtaining legal advice and all communications made pursuant will satisfy this requirement. Although a trial court makes the final decision on privilege, attorneys can take measures to ensure that communications keep this primary purpose in mind and are not unrelated to the legal purpose of an engagement.[119] Unlike the two methods discussed above, the "*a* primary purpose" test enables attorneys to be more certain that their communications are privileged and information will not be disclosed against their client's intention.

If a privilege holder wishes to challenge the district court's ruling on privilege, establishing the "clear and indisputable" right to writ is less challenging than for either the Seventh or Ninth Circuit's approaches. This is because it is, at least theoretically, easier to find that the district court missed *a* primary purpose than it is to find that the district court missed *the* primary purpose where more than one is identified. Although the writ is neither guaranteed nor commonly approved,[120] the D.C. Circuit's approach leaves open this possibility, providing a remedy if an attorney or client believes that the district court has erred. Mandamus also acts as

115. *See Frederick* at 501.

116. FTC v. Boehringer Ingelheim Pharms., Inc., 892 F.3d 1264, 1267 (D.C. Cir. 2018).

117. *Id.*

118. *Id.*

119. Jackie Unger, *Maintaining the Privilege: A Refresher on the Important Aspects of the Attorney-Client Privilege*, AM. BAR ASSOC: BUS. L. TODAY, (Oct. 31, 2013) https://www.americanbar.org/groups/business_law/publications/blt/2013/10/01_unger/?login [https://perma.cc/6SA5-VQKD]. ("To ensure privilege is maintained, the attorney should try to keep the roles from overlapping by offering legal advice and business advice separately when possible, be clear when legal advice is being rendered, and make sure the client understands that simply forwarding confidential information to the attorney does not make it privileged.").

120. *In re* Kellogg Brown & Root, Inc., 756 F.3d 754, 760 (D.C. Cir. 2014).

a final backstop for the efforts an attorney takes to prevent disclosure of client information.[121] The tests discussed above effectively preclude mandamus and render final district court rulings that may otherwise be reviewed.

2. RULE 2.1

If attorneys know that a communication will have a significant legal purpose, discussing relevant but not legal factors in that communication will not give cause for concern under the "*a* primary purpose" test. Referring to moral, economic, social, political, and even business factors that are relevant and perhaps equally significant to a communication's purpose can improve the relevance and usefulness of advice contained in the communication.[122] Knowing that information disclosed in a communication will not be discoverable, clients can be frank with their attorneys, and attorneys are better positioned to provide candid advice.[123]

Under the D.C. Circuit's test, communications like those disputed in *General Motors* would be protected by attorney–client privilege. Even if a district court found that one of the company's purposes for the investigation (and ensuing communications) was identifying and correcting a product defect, so long as the company also retained the attorneys for obtaining legal advice, say for a federal investigation and ensuing litigation, there would also be a sufficient "legal" primary purpose.[124] Therefore, attorneys and clients would be free to discuss other factors important to but not centrally located in the law.

3. RULE 1.2(D)

In assisting a client to determine the meaning or application of law, an attorney may need to discuss non-legal factors. The D.C. Circuit's test ensures that attorneys and clients do not have to contort their communications to untangle the non-legal from the legal in a given communication.[125] Because attorneys and clients can rely on an expectation that dual–purpose communications will be privileged, both sides can discuss everything relevant to the legal consequences of a course of conduct and necessary to ascertaining the meaning and application of law.[126]

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121. *See id.* In granting mandamus, an appeals court can vacate a district court's document production order, protecting disclosure of communications made between an attorney and their client.

122. MODEL RULES R. 2.1.

123. In contrast, when the privilege is unclear and unreliable, clients and lawyers may be less inclined to speak frankly with each other. *See* Eugene R. Licker & Amanda J. Sherman, *Abolish the Attorney-Client Privilege; It Serves Little Use in Practice While the Work Product Privilege Offers a Safer Harbor*., 36 NAT'L. L. & LEGAL TIMES 58 (2014).

124. 756 F.3d at 758–59.

125. *See, e.g.*, FTC v. Boehringer Ingelheim Pharms., Inc., 892 F.3d 1264, 1267 (D.C. Cir. 2018).

126. Although attorneys are prohibited from "knowingly counseling or assisting a client to commit a crime or fraud, they are permitted to give their "honest opinion about the actual consequences that appear likely to result from a client's conduct." MODEL RULES R. 1.2 cmt. 9

4. RULE 1.1

Being able to discuss relevant non-legal factors empowers attorneys to provide comprehensive counsel about the meaning and application of the law as it applies to a client's particular situation.[127] Knowing that the purpose of an engagement and subsequent communications is primarily legal, attorneys can rely on the fact that what they communicate will not be inadvertently disclosed or discoverable during litigation.[128] The candor that this enables facilitates competent representation because clients can disclose information necessary for the attorney to prepare thoroughly for the representation.[129] When the flow of information between attorneys and clients is restricted, attorneys are less able to prepare for a representation because they will ostensibly have less access to information as clients are less likely to have candid conversations with their attorneys.[130] When speech is not chilled in this way, these concerns fade away.

The D.C. Circuit's approach best enables attorneys to comply with the *Model Rules* and provide competent representation, taking into consideration all relevant factors to determine how a client's circumstances interface with the law in light of the multidisciplinary nature of modern legal practice.[131] Clients are able to rely on the privilege and communicate openly with their attorneys, and attorneys can rest assured that – as long as there exists a substantial legal purpose for a communication – information disclosed in the communication will not be discoverable. If the privilege holder believes that a district court declines to extend the privilege to a communication with a clear legal purpose, establishing clear error is simpler for the D.C. Circuit's test than for the approaches other circuits have followed.

IV. CONCLUSION

As the Supreme Court dismissed the writ of certiorari for *In re Grand Jury*,[132] the treatment of dual-purpose communications remains inconsistent across circuits. Whether the Court will reconsider this issue later remains to be seen. As the split remains, of the approaches discussed, the D.C. Circuit's "a primary purpose"

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127. Inquiry and analysis of factual and legal elements aren't always neatly circumscribed into purely legal factors. *See* MODEL RULES R. 1.1 CMT. 5 ("Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.").

128. Reliance on the privilege is what helps attorneys and clients communicate frankly with each other. *See* Rory K. Little, *An Under-the-Radar Threat to the Attorney-Client Privilege*, NATIONAL LAW JOURNAL (2023), https://www.law.com/nationallawjournal/2023/01/05/an-under-the-radar-threat-to-the-attorney-client-privilege/ [https://perma.cc/6AEB-ZFP6].

129. Stephen A. Saltzburg, *Corporate and Related Attorney-Client Privilege Claims: A Suggested Approach*, 12 Hofstra L. Rev. 279, 282–83 (1984).

130. Eugene R. Licker & Amanda J. Sherman, *Abolish the Attorney-Client Privilege; It serves little use in practice, while the work-product privilege offers a safer harbor*., 36 NATIONAL LAW JOURNAL & LEGAL TIMES 58 (2014).

131. *See supra* Part IV.B.4.

132. *In re Grand Jury*, 598 U.S. ___ (2023).

test empowers attorneys to comply with the *Model Rules* and provide effective legal assistance to their clients.

There are concerns that expanding the attorney–client privilege to dual–purpose communications permits clients to shield information that would otherwise be out of place in a single–purpose communication by placing it in a dual–purpose communication.[133] In the tax context, the attorney–client privilege is already cribbed.[134]

Attorneys are already under an affirmative duty to refrain from counseling clients to engage in criminal or fraudulent behavior.[135] If an attorney discovers that a client has engaged in fraud or criminal behavior, they are permitted to disclose this information,[136] and may do so even if fraud or criminal behavior has not yet been committed.[137] Representation can be terminated if a client commits crimes or fraud[138] or has used the attorney's legal counsel to perpetuate a crime or fraud.[139] Engaging in conduct that involves "dishonesty, fraud, deceit or misrepresentation" is itself professional misconduct[140] that must be reported to the relevant professional authority. Given the robust incentives to avoid fraud, fears that a more robust attorney–client privilege will shield criminal or fraudulent conduct may be overblown.

Ultimately, ensuring that attorney–client privilege is not misused to hamper the proper administration of justice is left up to the conscience of attorneys and clients alike. With the strong policy reasons for having the privilege in the first place and the fact that the privilege promotes the administration of justice, the benefits of extending attorney–client privilege to dual–purpose communications outweigh the concerns that expanding the privilege will encourage its abuse.

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133. For example, the DOJ pointed out how Google had manufactured false privilege claims by instructing its employees to shield sensitive business communications by sending communications through an attorney with a privilege label and a generic request for legal advice, regardless of whether the legal advice request was genuine. Jon Brodkin, *Google routinely hides emails from litigation by CCing attorneys, DOJ alleges*, ARSTECHNICA, (Mar. 22, 2022, 3:15 PM), https://arstechnica.com/tech-policy/2022/03/google-routinely-hides-emails-from-litigation-by-ccing-attorneys-doj-alleges/ [https://perma.cc/MBM8-JWZN]. *See also* Todd Presnell, *To CC or Not to CC: That Is the Privilege Question*, TODAY'S GENERAL COUNSEL (Dec. 27, 2020), https://www.todaysgeneralcounsel.com/to-cc-or-not-to-cc-that-is-the-privilege-question/ [https://perma.cc/Z25B-WSTP].

134. *See United States v. Frederick*, 182 F.3d 496 (7th Cir. 1999).

135. MODEL RULES R. 1.2.

136. MODEL RULES R. 1.6(b)(2), R. 3.3 (including an applicable tribunal).

137. MODEL RULES R. 1.6(b)(3).

138. MODEL RULES R. 1.6(b)(2).

139. MODEL RULES R. 1.16(b)(3).

140. MODEL RULES R. 8.4.