No.

IN THE

Supreme Court of the United States

ROBERT PHILLIP IVERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX

BRETT D. KELLEY
KELLEY, WOLTER & SCOTT, P.A.
Centre Village Offices
Suite 2530
431 South Seventh Street
Minneapolis, MN 55415
Tel: (612) 371-9090
Fax: (612) 371-0574
bkelley@kelleywolter.com

**CJA Counsel for Petitioner*
**Counsel of Record*

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

DATED JULY 23, 2020.

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19-1563

UNITED STATES OF AMERICA,
Plaintiff - Appellee.

v.

ROBERT PHILLIP IVERS,
Defendant – Appellant,

Appeal from United States District Court
for the District of Minnesota

Submitted: May 15, 2020
Filed: July 23, 2020.

Before SMITH, Chief Judge, MELLOY and SHEPHERD, Circuit Judges.

Opinion

SHEPHERD, Circuit Judge.

Following a jury trial, Robert Ivers was convicted of one count of threatening to murder a federal judge, in violation of 18 U.S.C. § 115(a)(1)(B), and one count of interstate transmission of a threat to injure the person of another, in violation of 18 U.S.C. § 875(c). The district court[5] sentenced Ivers to 18 months imprisonment with three years of supervised release to follow. Ivers appeals his conviction, arguing that the statements at issue were privileged, that there was insufficient evidence suggesting that he made a true threat of present or future harm, that the district court erred in instructing the jury, and that the district court's cumulative errors deprived him of his right to a fair trial. Having jurisdiction under 28 U.S.C. § 1291, we affirm.

I.

"We recount the relevant testimony and other evidence presented at trial in the light most favorable to the jury's verdict." United States v. Shavers, 955 F.3d 685, 688 n.2 (8th Cir. 2020).

A.

In February 2015, Ivers filed a lawsuit in Minnesota state court against a life insurance company, which was then removed to federal court

[5] The Honorable Robert W. Pratt, United States District Judge for the Southern District of Iowa, sitting by designation in the District of Minnesota.

and eventually assigned to Judge Wilhelmina M. Wright of the District of Minnesota. See Ivers v. CMFG Life Ins. Co., No. 15-cv-1577-WMW-BRT, 2015 WL 13667066 (D. Minn. filed Mar. 23, 2015). In September 2016, Judge Wright entered an order granting summary judgment in favor of the life insurance company on all but one of Ivers's claims. The following month, Ivers mailed Judge Wright a packet of various court-related materials on which Ivers had written notes. These notes included statements such as "I do not know where I am fucking sleeping tonight! Think about it!"; "I am sick and tired of this fucking bullshit!"; "I want my fucking money ...."; "I will not negotiate!!!"; "Have I made myself clear!!!"; "I am in dire fucking straits!"; and "I am becoming a very dangerous person!!!"

Although the case had been scheduled for a settlement conference before Magistrate Judge Becky R. Thorson, the conference was cancelled. And because neither party demanded a jury trial, the case was instead set for a bench trial before Judge Wright. In November 2016, Ivers sent a letter to the court, demanding "a jury trial or [his] fucking money." In that letter he also stated: "I smell a rat! Somebody needs to explain to me what the fuck is going on!?"

Ivers's communications were forwarded to the United States Marshals Service (USMS). Deputy Marshal Jeffrey Hattervig started investigating Ivers and learned that Ivers had previously threatened a Minnesota state court judge who presided over a separate civil action filed by Ivers. Ivers was later

charged in state court with stalking and making terroristic threats, and following a trial, he was convicted of stalking. At the time of his statements to Judge Wright, he was on probation for this offense. Hattervig spoke with Ivers when he appeared at the federal courthouse for a pretrial hearing on January 4, 2017. Although Ivers was cordial and mentioned to Hattervig that his statements to Judge Wright were intended to speed up the proceedings, he signaled his frustration with the defendant life insurance company and stated that he did not want to "carry that hurt around inside" and that he would "be a walking bomb" if he did not vent his frustrations. Although he told Hattervig that he would accept the result of the trial, Hattervig remained concerned about Ivers's lack of remorse for his prior statements. This prompted the USMS to provide increased security at the trial, and Hattervig warned Ivers that sending threatening communications could be a crime.

Following trial, judgment was entered in favor of the life insurance company. Ivers later sent letters to Chief Judge John R. Tunheim and Magistrate Judge Thorson in which he requested a new trial and asserted that Judge Wright acted with bias against Ivers in disposing of the case. He later sent the same letter to Judge Wright and additional copies to Chief Judge Tunheim, Magistrate Judge Thorson, and the Clerk of Court. On the envelopes of some of those letters, he wrote notes stating that: "I was cheated by one of your federal judges and I demand redress." On the letter to Judge Wright, Ivers wrote: "You cheated me and I will not stop smearing your name until I get

redress." Ivers also called Chief Judge Tunheim's chambers to voice his displeasure with Judge Wright's decision and request that Chief Judge Tunheim take action. When Ivers was informed that the proper course of action would be to appeal his case to this Court, Ivers "was not happy with that" and mentioned that he "was crazy mad, and he didn't know what to do with it." Ivers again described himself as a "walking bomb because he was so frustrated." Chief Judge Tunheim's staff, concerned about Ivers's fixation on Judge Wright, contacted the USMS. A few days later, Ivers sent another round of letters, addressing one to "Corrupt Judge Wright" and demanding that she "pay attention." Copies of the letters to Chief Judge Tunheim, Magistrate Judge Thorson, and the Clerk of Court included a statement on the envelopes that said: "Judge Wright is a Corrupt! [sic] Judge."

Ivers's post-trial conduct prompted Deputy Marshals Hattervig and Farris Wooton to visit with Ivers at his residence to discuss his letters and calls. In particular, they were concerned about "the aggressive nature of [Ivers's] letters, the fixation on Judge Wright, the repeated mailings to multiple people, calling her corrupt, and the increased agitation against Judge Wright, coupled with the phrase 'walking bomb.'" Hattervig and Wooton hoped that Ivers would "show some contrition and say, okay, I realize that I crossed the line and I won't do it anymore." However, Ivers did not do that. Instead, he refused to retract his statements, remained visibly angry, and confirmed that he remained a "ticking time

bomb." Ivers also told Hattervig and Wooton to inform the federal judges in the Twin Cities that he was "out of his fucking mind crazy" and mentioned that he was "glad they took [his letters and calls] seriously." Regarding Judge Wright, Ivers told Hattervig and Wooton "that fucking judge—you know, if she's scared and she's fearful, it's not my problem. She made her bed." Ivers remained upset with Judge Wright for "snatch[ing]" the life insurance policy at issue in the lawsuit "right out from under ... [him]." Ivers concluded the conversation by again reiterating that "[he] possibly could be a walking bomb." When Hattervig left his business card in an attempt to prompt Ivers to call him instead of court personnel if Ivers was angry, Ivers refused the card and again stated that: "[I]f they're living in fear, too fucking bad. It's what they deserve."

B.

Ivers later filed a second lawsuit against the life insurance company. See Ivers v. CMFG Life Ins. Co., No. 17-cv-5068-PJS-DTS (D. Minn. filed Nov. 9, 2017). This case was initially assigned to District Judge Patrick J. Schiltz and Magistrate Judge David T. Schultz. Magistrate Judge Schultz initially found that Ivers's complaint failed to state a claim for relief and referred Ivers to the District of Minnesota's Pro Se Project, which matches pro se litigants with private attorneys, to allow Ivers to obtain help in filing an amended complaint. Ivers was later matched with Attorney Anne Rondoni Tavernier, who was assisted

by Attorney Lora Friedemann, a more experienced attorney at Rondoni Tavernier's firm.

Attorneys Rondoni Tavernier and Friedemann determined that Ivers did not have a claim against the life insurance company. They scheduled a call with Ivers to apprise him of their legal conclusions and to inform him that they would not be taking his case. In the first part of the approximately 30-minute call, Attorneys Rondoni Tavernier and Friedemann discussed the pending lawsuit and explained that Ivers would likely be unsuccessful due to the rulings made by Judge Wright in the earlier lawsuit. As they started to discuss the prior lawsuit, Ivers became angry, and he started to yell and use profane language. He started ranting about Judge Wright, and Attorney Friedemann transcribed parts of what he said, including the following statements: "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." The attorneys did not speak while Ivers was ranting, and after Ivers stopped speaking, the attorneys concluded the call. Both attorneys were frightened by what Ivers had said, and Attorney Friedemann would later describe it as "a death threat against Judge Wright."

Following the call, and after consulting with their firm's ethics advisors, Attorneys Rondoni Tavernier

and Friedemann contacted the coordinator of the Pro Se Project to inform her that Ivers "made a threat against Judge Wright." The coordinator, in turn, informed Judge Wright. The USMS was also alerted, and deputy marshals were sent to speak with Ivers. Ivers, however, refused to speak with the deputies and repeatedly came to the front door to shout at them. Although Ivers's sister attempted to intercede and explain to Ivers that the deputies merely "need to know that you're not serious about something like that, killing a judge, because you said it on the phone," Ivers told the deputies to "get the fuck out of here," and he continued to rant about Judge Wright. In addition to calling Judge Wright a racial epithet, he mentioned again that she was "that fucking judge who stole" his life, money, and future. He also said: "[Y]ou want to know what, if she doesn't sleep very good, fuck her," and he instructed the deputies to report that Ivers remained "crazy fucking angry."

C.

Ivers was later indicted for threatening to murder a federal judge, in violation of 18 U.S.C. § 115(a)(1)(B), and for interstate transmission of a threat to injure the person of another, in violation of 18 U.S.C. § 875(c). Ivers moved to exclude all of his statements made during the call with Attorneys Rondoni Tavernier and Friedemann on the grounds that they were subject to the attorney-client privilege. Following an evidentiary hearing, the district court denied Ivers's motion, finding that it could separate the threat statements, which it held were unprotected

by the privilege because they were not made for the purpose of obtaining legal advice, from portions of the call that were made for the purpose of obtaining advice related to Ivers's ongoing lawsuit. Ivers proceeded to trial, and the jury found him guilty on both counts. This appeal follows.

II.

Ivers first argues that the "threat statements" he made on the call with Attorneys Rondoni Tavernier and Friedemann were protected by the attorney-client privilege. This included his declaration that "You don't know the 50 different ways I planned to kill her." The scope of an evidentiary privilege is a mixed question of fact and law which this Court reviews de novo. See United States v. Ghane, 673 F.3d 771, 779-80 (8th Cir. 2012). We review the district court's factual findings underlying the privilege for an abuse of discretion and its legal conclusions de novo. See United States v. Smith, 383 F.3d 700, 706 (8th Cir. 2004). As the party seeking to assert the privilege, Ivers has the burden of showing that the privilege applies, Bouschor v. United States, 316 F.2d 451, 456 (8th Cir. 1963), and must show that the statements at issue were "made for the purpose of facilitating the rendering of legal services to the client." United States v. Spencer, 700 F.3d 317, 320 (8th Cir. 2012).

"The Federal Rules of Evidence provide that evidentiary privileges 'shall be governed by the principles of the common law ... in the light of reason and experience.' " United States v. Jicarilla Apache

Nation, 564 U.S. 162, 169, 131 S.Ct. 2313, 180 L.Ed.2d 187 (2011) (alteration in original) (quoting Fed. R. Evid. 501). "Generally, it is well established under common law that confidential communications between an attorney and a client are privileged and not subject to disclosure absent consent of the client." United States v. Horvath, 731 F.2d 557, 562 (8th Cir. 1984). "[T]he attorney-client privilege is, perhaps, the most sacred of all legally recognized privileges, and its preservation is essential to the just and orderly operation of our legal system." United States v. Bauer, 132 F.3d 504, 510 (9th Cir. 1997). It "is the oldest of the privileges for confidential communications known to the common law." Upjohn Co. v. United States, 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). As explained in Upjohn, the principle behind the 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. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.

Id.

However, "[p]rivileges, as exceptions to the general rule, are not lightly created nor expansively construed, for they are in derogation of the search for

truth." In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 918 (8th Cir. 1997) (internal quotation marks omitted). Accordingly, the attorney-client privilege is narrowly construed and "protects only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege." Fisher v. United States, 425 U.S. 391, 403, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976); see also Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 602 (8th Cir. 1977) ("While the privilege, where it exists, is absolute, the adverse effect of its application on the disclosure of truth may be such that the privilege is strictly construed.").

Threats of violence are not statements that fall under the scope of the attorney-client privilege. The Supreme Court has held that "[a] defendant who informed his counsel that he was arranging to bribe or threaten witnesses or members of the jury would have no 'right' to insist on counsel's ... silence." Nix v. Whiteside, 475 U.S. 157, 174, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986). Indeed, this type of communication is not made for the "purpose of facilitating the rendering of legal services[,]" Spencer, 700 F.3d at 320, but rather, is usually done to harass, intimidate, coerce, warn, or frighten the intended victim of the threat or a person who hears the threat. Therefore, we agree with the Ninth Circuit's observation that a "[defendant's] threats to commit violent acts against [alleged victims are] clearly not communications in order to obtain legal advice."

United States v. Alexander, 287 F.3d 811, 816 (9th Cir. 2002).[6]

Here, there is no dispute that Ivers enjoyed an attorney-client relationship with Attorneys Rondoni Tavernier and Friedemann or that parts of their telephone call were protected by the attorney-client privilege. Instead, the only issue is whether Ivers's threat statements, made towards the end of the call, are protected by the privilege.

The threat statements at issue were not protected by the attorney-client privilege, and we hold that they were properly received into evidence. Again, while the communications made in the first part of the call were indisputably for the purpose of obtaining legal services, as they concerned the merits of Ivers's lawsuit and the attorneys' opinions as to Ivers's prospects for success, Ivers made the threat statements towards the end of the call and only after the attorneys had finished discussing his case with him. Indeed, at the end of the call, Ivers became angry and began ranting about Judge Wright for approximately ten minutes. The attorneys did not engage with him or speak at any time during his tirade, and when he was finished, they simply ended the call. One of the attorneys later testified that

[6] While the scope of the attorney-client privilege and a lawyer's obligation of confidentiality are not coterminous, it is worth noting that, under the Minnesota Rules of Professional Conduct, there is an exception to the lawyer's duty of confidentiality to her client if "the lawyer reasonably believes the disclosure is necessary to prevent reasonably certain death or substantial bodily harm." Minn. R. Prof'l Conduct 1.6(b)(6).

Ivers's statements "weren't specifically relating to the advice" that he had received during the course of the call. Moreover, for the reasons discussed below, Ivers's statements, particularly his comment that "You don't know the 50 different ways I planned to kill her," undoubtedly threatened the life of a federal judge and 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. See United States v. Sabri, 973 F. Supp. 134, 140-41 (W.D.N.Y. 1996) (finding that threat statements made by a defendant to his attorney concerning immigration officials were not protected by the attorney-client privilege).

Although Ivers spends much of his brief discussing the "predominant-motivation" and "sole-motivation" tests for the attorney-client privilege, arguing that these tests demonstrate that the statements were privileged, this argument is without merit.[7] Ivers's argument concerning the predominant-motivation and sole-motivation tests is based on the incorrect

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[7] In order for the attorney-client privilege to protect a communication between a client and his attorney, the predominant-motivation test requires that the client's primary motivation in making the communication to the attorney is to obtain legal advice. See Edward J. Imwinkelried, The New Wigmore: Evidentiary Privileges § 6.11.2 (3d ed. 2020). The sole-motivation test requires that the client's sole motivation in making the communication to the attorney is to obtain legal advice. See id.

assumption that the entire conference call with Attorneys Rondoni Tavernier and Friedemann was privileged. But courts routinely decide which specific communications between a client and his attorneys are privileged, and they often segregate privileged and non-privileged communications in particular conversations or documents. See, e.g., Alexander, 287 F.3d at 815; In re Grand Jury Proceedings, 841 F.2d 230, 233 (8th Cir. 1988). That some parts of the call were privileged does not mean that the entire call was privileged. The first part of the call in which Ivers was actually receiving legal advice is easily severable from the second part of the call, in which Ivers ranted about and threatened Judge Wright.

For these reasons, we see no error in the district court's determination that the threat statements in Ivers's call with Attorneys Rondoni Tavernier and Friedemann were not privileged.[8]

III.

Next, Ivers asserts that there was insufficient evidence presented at trial to prove that he made a "true threat" of present or future harm towards Judge Wright. "[W]e will review the sufficiency of the evidence to sustain a conviction de novo, viewing the evidence in the light most favorable to the jury's verdict and reversing the verdict only if no reasonable jury could have found the defendant guilty beyond a

[8] Because the government did not argue to the district court that the crime-fraud exception to the attorney-client privilege applies, and concedes that it does not apply on appeal, we need not address that issue.

reasonable doubt." United States v. Ramos, 852 F.3d 747, 753 (8th Cir. 2017) (internal quotation marks omitted).

"As a general matter, the First Amendment prohibits governmental actors from directing what persons may see, read, speak, or hear. Free speech protections do not extend, however, to certain categories or modes of expression, such as obscenity, defamation, and fighting words." Doe v. Pulaski Cnty. Special Sch. Dist., 306 F.3d 616, 621-22 (8th Cir. 2002) (en banc) (internal citation omitted). "True threats" are unprotected speech. Id. at 622. But "[w]hat is a [true] threat must be distinguished from what is constitutionally protected speech." Watts v. United States, 394 U.S. 705, 707, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969) (per curiam).

To determine what constitutes a "true threat," "[the fact-finder] must view the relevant facts to determine whether the recipient of the alleged threat could reasonably conclude that it expresses a determination or intent to injure presently or in the future." Pulaski Cnty. Special Sch. Dist., 306 F.3d at 622 (internal quotation marks omitted); see also United States v. Mabie, 663 F.3d 322, 333 (8th Cir. 2011) (noting that the "government need not prove that [defendant] had a subjective intent to intimidate or threaten," rather, it must show "that a reasonable person would have found that [defendant's] communications conveyed an intent to cause harm or injury"). This is for the fact-finder to determine "in the context of the totality of the

circumstances in which the communication was made." United States v. Bellrichard, 994 F.2d 1318, 1323 (8th Cir. 1993). Relevant factors include:

> 1) [T]he reaction of those who heard the alleged threat; 2) whether the threat was conditional; 3) whether the person who made the alleged threat communicated it directly to the object of the threat; 4) whether the speaker had a history of making threats against the person purportedly threatened; and 5) whether the recipient had a reason to believe that the speaker had a propensity to engage in violence.

Pulaski Cnty. Special Sch. Dist., 306 F.3d at 623.

Ivers argues that the evidence was insufficient to demonstrate a true threat against Judge Wright because his statements did not evince a present or future intent to harm Judge Wright. In particular, Ivers focuses on the fact that his statements to Attorneys Rondoni Tavernier and Friedemann, and in particular, his statement that "You don't know the 50 different ways I planned to kill her," used the past tense, suggesting he lacked the intent to cause any present or future harm. Ivers also asserts that his language was intentionally exaggerated and hyperbolic and that he reasonably believed everything he said to his attorneys would remain confidential.

Although Ivers's brief focuses on the statements he made during his call with his attorneys, it is

important to note that his fixation with, and anger towards, Judge Wright preceded the call by roughly two years. Indeed, during his first lawsuit, Ivers engaged in a campaign of sending threatening or intimidating communications to Judge Wright and others. Specifically, Ivers sent her a warning in which he stated that he was "becoming a very dangerous person" and later demanded "a jury trial or [his] fucking money." He also sent letters to Judge Wright and other judges in the District of Minnesota in which he demanded a new trial, calling Judge Wright corrupt, and stating that he would "smear her name." He later described himself to Chief Judge Tunheim's staff and Deputy Marshal Hattervig as a "walking bomb." When confronted by Hattervig and Wooton, Ivers refused to retract these statements, reiterated his anger, and expressed his pleasure that his statements were being taken seriously and frightening others. He confirmed that he remained "out of his fucking mind crazy." Hattervig also found out that Ivers was then serving a term of probation for threatening a Minnesota state court judge. It was in this context that Ivers, during his call with Attorneys Rondoni Tavernier and Friedemann, explicitly threatened violence against Judge Wright. See Bellrichard, 994 F.2d at 1323 (noting that the threat must be "viewed in textual context and also in the context of the totality of the circumstances in which the communication was made").

Contrary to Ivers's arguments, a jury could have reasonably concluded that, under the totality of the circumstances, Ivers's comments constituted a "true

threat" of present or future violence. Ivers explicitly threatened Judge Wright's life during his call with Attorneys Rondoni Tavernier and Friedemann—it was reasonable to interpret his statement that "You don't know the 50 different ways I planned to kill her" as a death threat. During the call, Ivers began ranting about Judge Wright, and his tone and manner of speaking were threatening and of "barely controlled rage." He made other troubling statements, including the following: "This fucking judge stole my life from me," and "I was going to throw some chairs." Similarly, when deputy marshals later confronted Ivers about the call, he initially refused to speak with them; shouted at them; referred to Judge Wright by a racial epithet; stated that Judge Wright was "that fucking judge who stole" his life, money, and future; and confirmed that he remained "crazy fucking angry." Even after Ivers's sister explained to him that the deputy marshals were only there to confirm that he did not actually mean to threaten the life of a federal judge, Ivers refused to retract his statements or assuage the fears of law enforcement.

It is important to note the effect of Ivers's statements and letters on those who heard or read them. See United States v. J.H.H., 22 F.3d 821, 827 (8th Cir. 1994) ("Evidence showing the reaction of the victim of a threat is admissible as proof that a threat was made."). At trial, several government witnesses testified that they found Ivers's statements to be threatening and frightening. Attorney Friedemann testified that she interpreted Ivers's statements as "a death threat against Judge Wright" and that nothing

from the call indicated to her that Ivers had abandoned his plans to kill Judge Wright. Attorney Rondoni Tavernier testified that, based on the intensity of Ivers's anger, she was even worried for her own safety. Similarly, Deputy Marshal Wooton stated that he was concerned about the statements and that Ivers's conduct suggested that he could act on his threat.

Accordingly, because of the intensity of Ivers's expressed anger towards Judge Wright, his tone and demeanor, his prior conduct, his history of letters and communications to Judge Wright and others, and Judge Wright's prior rulings in Ivers's first lawsuit, the jury could reasonably infer a true threat of present or future harm from, among other statements, Ivers's comment that he "planned to kill [Judge Wright]."

Finally, we find unpersuasive Ivers's remaining arguments that there was insufficient evidence to sustain the verdict. Although we acknowledge that Ivers made some of his statements in the call using the past tense, this fact is not, by itself, dispositive in light of the "textual context and also in the context of the totality of the circumstances." Bellrichard, 994 F.2d at 1323. Similarly, that Ivers believed his communications to Attorneys Rondoni Tavernier and Friedemann would remain confidential is not dispositive—again, whether the statement at issue is made directly to the intended victim is but one factor to consider in determining whether it is a threat. See Pulaski Cnty. Special Sch. Dist., 306 F.3d at 623. In view of the totality of the circumstances, the

jury could reasonably conclude that Ivers made a true threat against Judge Wright, even if he did not think anyone other than Attorneys Rondoni Tavernier and Friedemann would hear it. And even if Ivers never had any intention of acting on the threat, that fact is irrelevant. See Bellrichard, 994 F.2d at 1324. Further, Ivers's repeated comments that he was "out of his fucking mind crazy" and concerning his desperation and financial circumstances could lead one to believe he would act upon his threat. Deputy marshals repeatedly visited with Ivers and told him to stop, but this did not stop Ivers nor did he retract his comments or show any remorse for them. Finally, we are unconvinced by Ivers's argument that he was exaggerating or employing rhetorical hyperbole, such as through boasting of "50 different ways" to murder Judge Wright. "That correspondence containing threatening language is phrased in outrageous terms does not make the correspondence any less threatening." Id. at 1322.

For the foregoing reasons, we conclude that sufficient evidence supports the jury's verdict.

IV.

Ivers also claims that the district court erred in instructing the jury on Count 1, threatening to murder a federal judge, in violation of 18 U.S.C. § 115(a)(1)(B), and Count 2, interstate transmission of a threat to injure the person of another, in violation of 18 U.S.C. § 875(c). Specifically, he contends that, as to Count 1 the district court failed to instruct the jury that he must have subjectively intended his statement

to be a threat. He also asserts that the district court failed to correctly define "threat" as to both Counts 1 and 2 because the jury instructions failed to include the requirement that the threat convey present or future harm. "We review a district court's formulation of jury instructions for abuse of discretion and consider whether the instructions correctly state the applicable law." United States v. Walker, 428 F.3d 1165, 1171 (8th Cir. 2005) (internal quotation marks omitted). "When viewing the instructions as a whole in light of the evidence and applicable law, we determine whether the instructions fairly and adequately submitted the issues in the case to the jury." United States v. Brede, 477 F.3d 642, 643 (8th Cir. 2007) (internal quotation marks omitted).

First, we find unpersuasive Ivers's argument that the district court erred by failing to instruct the jury that Ivers must have subjectively intended his statement to be a threat in order to convict him of Count 1. Ivers relies heavily on Elonis v. United States, 575 U.S. 723, 135 S. Ct. 2001, 192 L.Ed.2d 1 (2015), in which the Supreme Court held that 18 U.S.C. § 875(c) requires the jury to find that the defendant subjectively intended to threaten his victim. However, we have previously noted that Elonis "did not announce a universal definition of 'threat' that always requires the same *mens rea*," United States v. Harper, 869 F.3d 624, 626 (8th Cir. 2017), and our decision in United States v. Wynn, 827 F.3d 778 (8th Cir. 2016) forecloses Ivers's argument. In Wynn, we rejected the same argument that Ivers now makes, observing that the only mens

rea requirement in 18 U.S.C. § 115(a)(1)(B) is "the intent to retaliate against the [federal judge] on account of the performance of official duties." Id. at 785 (internal quotation marks omitted). Accordingly, the government was not required to prove that Ivers subjectively intended his statement to be a threat—rather, the government needed to prove that Ivers made a true threat with the intent to retaliate against Judge Wright on account of the performance of her official duties. See id.; see also Elonis, 135 S. Ct. at 2010 ("[W]e read into the statute only that *mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct." (internal quotation marks omitted)).

Second, we reject Ivers's argument that the district court erred by incorrectly defining "threat" for Counts 1 and 2 because it failed to specifically include a temporal requirement that the threat convey present or future harm. See Pulaski Cnty. Special Sch. Dist., 306 F.3d at 622 (noting that a true threat is one that conveys an intent to cause present or future harm). Instruction No. 10 informed the jury that "[a]n expression to injure in the past may be circumstantial evidence of intent to injure in the present or future." Moreover, Ivers repeatedly argued to the jury that he could not be convicted for a past threat, that "[a] threat is now or in the future[,]" and that he lacked any future intent to harm Judge Wright. He also cross examined several witnesses about the distinction between the words "plan" and "planned," further demonstrating that the jury heard both argument and evidence concerning the distinction between past

threats and threats of present or future harm. See Penry v. Johnson, 532 U.S. 782, 800, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001) (observing that jury instructions should be reviewed in the context of the comments made by the government and defense counsel and "with a commonsense understanding ... in the light of all that has taken place at the trial" (internal quotation marks omitted)). In light of Instruction No. 10 and the defense's arguments and evidence at trial, there was a sufficient basis from which the jury could infer that a threat must evince an intent to harm someone in the present or future. See United States v. Pereyra-Gabino, 563 F.3d 322, 329 (8th Cir. 2009) (noting that "jury instructions need not be technically perfect or even a model of clarity" (internal quotation marks omitted)). Accordingly, the district court did not abuse its discretion in failing to instruct the jury on the temporal requirement of a true threat with the specificity suggested by Ivers.

V.

Finally, Ivers contends that the cumulative effect of the district court's errors deprived him of a right to a fair trial. "We may reverse where the case as a whole presents an image of unfairness that has resulted in the deprivation of a defendant's constitutional rights, even though none of the claimed errors is itself sufficient to require reversal." United States v. Montgomery, 635 F.3d 1074, 1099 (8th Cir. 2011) (quoting United States v. Samples, 456 F.3d 875, 887 (8th Cir. 2006)). Because we find that Ivers has not

shown that the district court erred with respect to his first three issues on appeal, his cumulative error argument must fall. See United States v. Anderson, 783 F.3d 727, 751 (8th Cir. 2015).

VI.

For these reasons, we affirm the judgment of the district court.

APPENDIX B

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA DENYING MOTION TO EXCLUDE ATTORNEY-CLIENT PRIVILEGED INFORMATION

SIGNED 06/26/2018

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

No. 0:18-cr-00090 (RWP/CFB)

UNITED STATES OF AMERICA,
Plaintiff - Appellee.

v.

ROBERT PHILLIP IVERS,
Defendant – Appellant,

ORDER

ROBERT W. PRATT, Judge

Before the Court are Defendant Robert Phillip Ivers's Motion to Exclude Attorney-Client Privileged Information, ECF No. 24, Motion for Designation of 404(b) Evidence, ECF No. 26, and Motion to Exclude

404(b) Evidence, ECF No. 28. The Government has timely filed responses to Defendant's motions. ECF Nos. 36, 37. The matter is fully submitted.

I. BACKGROUND

The charges alleged here stem from a prior civil action brought by Defendant in 2015 against CMFG Life Insurance Company. *See Ivers v. CMFG Life Ins. Co.*, No. 0:15-cv-01577 (D. Minn. filed Mar. 23, 2015). On June 29, 2017, following a bench trial, a judge in the District of Minnesota entered an order against Defendant and dismissed his claim for breach of contract. *Id.*, ECF No. 104. On November 9, 2017, Defendant filed a new civil action against CMFG Life Insurance Company.[1] *See Ivers v. CMFG Life Ins. Co.*, No. 0:17-cv-05068 (D. Minn. filed Nov. 9, 2017). Magistrate Judge Schultz referred Defendant to the Minnesota Chapter of the Federal Bar Association's Pro Se Project. No. 0:17-cv-05068, ECF No. 6.

On February 27, 2018, Attorney A, a volunteer attorney with the Pro Se Project who is licensed to practice law in the State of Minnesota, and Attorney B, another volunteer attorney, consulted with Defendant regarding the second civil action against CMFG. During the half-hour phone call, Defendant allegedly expressed his dissatisfaction with the district court judge who dismissed his original action against CMFG and made threats to kill the judge.

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[1] This Court dismissed Defendant's second civil action against CMFG Life Insurance Company. *Ivers v. CMFG Life Ins. Co.*, No. 0:17-cv-05068, ECF No. 17 (D. Minn. May 15, 2018).

Defendant allegedly made the following statements to Attorneys A and B: "That judge stacked the deck against me to make sure I lost the case"; "[The judge] is lucky the hearing was canceled because I was going to throw some chairs"; "This fucking judge stole my life"; and "You don't know the fifty different ways I plan to kill [the judge]." ECF No. 51, Attachment A.

As a result of the threats Defendant made in his phone call with Attorneys A and B on February 27, the Government obtained an Indictment from a grand jury sitting in the District of Minnesota on April 18, 2018, charging Defendant with one count of Threatening to Murder a Federal Judge, in violation of 18 U.S.C. § 115(a)(1)(B), and one count of Interstate Transmission of a Threat to Injure the Person of Another, in violation of 18 U.S.C. § 875(c). ECF No. 1.

II. LAW AND ANALYSIS

A. Attorney-Client Privilege

"In the absence of a relevant federal rule, statute, or constitutional provision, federal common law governs questions of privilege in federal criminal proceedings." *United States v. Yielding*, 657 F.3d 688, 706 (8th Cir. 2011) (citing Fed. R. Evid. 501; *United States v. Espino*, 317 F.3d 788, 795 (8th Cir. 2003)). "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Id.* at 706–07 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). "This privilege protects confidential communications between a client and [his] attorney made for the

purpose of facilitating the rendition of legal services to the client." *Id.* at 707. "The privilege belongs to and exists solely for the benefit of the client." *Id.* The party asserting the privilege bears the burden of establishing that the privilege applies to the communications at issue. *Hollins v. Powell*, 773 F.2d 191, 196 (8th Cir. 1985).

"Generally, it is well established under common law that confidential communications between an attorney and a client are privileged and not subject to disclosure absent consent of the client." *United States v. Horvath*, 731 F.2d 557, 562 (8th Cir. 1984). "A communication is not privileged simply because it is made by or to a person who happens to be a lawyer." *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 602 (8th Cir. 1977). "While the privilege, where it exists, is absolute, the adverse effect of its application on the disclosure of truth may be such that the privilege is strictly construed." *Id.*; *see also In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 918 (8th Cir. 1997) ("Privileges, as exceptions to the general rule, '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))).

Defendant asserts the threatening statements are privileged because (1) there was an attorney-client relationship between Defendant and Attorney A; (2) the February 27, 2018 phone call was confidential; and (3) the primary purpose of the phone call was to discuss Defendant's pending civil action. ECF No. 24,

at 3; ECF No. 57 at 2–3. Defendant acknowledges that some of the statements he made during the phone call were not made for the purpose of seeking legal advice but nevertheless argues the entire phone call is privileged and he has not consented to a waiver of that privilege. ECF No. 24, at 3. Defendant contends examining individual statements made in a single communication "is contrary to the purpose of privilege." ECF No. 47 at 5 (citing *Upjohn Co.*, 449 U.S. at 389 ("[The] purpose [of the attorney-client privilege] is to encourage full and frank communication between attorneys and their clients.")).

The Government does not appear to dispute that an attorney-client relationship existed between Defendant and Attorney A or that portions of the February 27 confidential phone conversation in which Defendant was seeking or receiving legal advice are privileged. *See* ECF Nos. 36 at 5–10, 51 at 5. Instead, the Government argues that, rather than assuming the entire phone call is privileged, the Court should parse out the individual statements made during the call and determine whether each statement is privileged. Doing so, the Government contends, demonstrates that the threatening statements were clearly not made for the purpose of obtaining legal advice and thus are not privileged.

In support of his argument that this Court should apply the primary-purpose test to the phone call, Defendant relies on two civil cases decided in this

District.[2] In the first case, the court briefly addressed the defendant's claim that certain portions of documents were protected by the attorney-client privilege. *Cardenas v. Prudential Insurance Company of America*, Nos. Civ. 99-1421, Civ. 99-1422, Civ. 99-1736, 2004 WL 234404, at *2 (D. Minn. Jan. 30, 2004). The court generally concluded the defendant had failed to establish the documents had been "prepared to seek or impart legal advice," and discussed one document in particular, stating that although "one paragraph of the document reflects opinion work-product, the document in its entirety ... was made for business purposes, rather than legal advice." *Id.* The court then cited an unpublished case from the Eastern District of Pennsylvania that held, "[b]ecause in-house counsel may play a dual role of legal advisor and business advisor, the privilege will apply only if the communication's primary purpose is to gain or provide legal advice." *Kramer v. Raymond Corp.*, Civ.

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[2] At oral argument, Defendant suggested a third case supported his position: *United States v. Zolin*, 491 U.S. 554 (1989). *Zolin*, however, describes how in camera review can be used to determine whether the crime-fraud exception applies to allegedly privileged communications. The Government is not asserting the crime-fraud exception; therefore, *Zolin* does not apply here.

Additionally, the Court is not persuaded by Defendant's argument that unless the entire phone call is treated as privileged, there would be no reason for the crime-fraud exception. The Court envisions many circumstances in which the crime-fraud exception would still apply to an otherwise privileged communication.

No. 90-5026, 1992 WL 122856 (E.D. Pa. May 29, 1992).

The second is another unpublished civil case before the court on a motion to compel discovery that involved millions of documents that would need to be examined for relevancy and privilege. *Krueger v. Ameriprise Fin., Inc.*, Civ. No. 11-2781, 2013 WL 12139425 (D. Minn. Aug. 15, 2013). In a footnote, the court discussed the attorney-client privilege and noted that, for the "privilege to apply, the legal advice must predominate over the business advice, and not be merely incidental." *Id.* at *7 n.12 (citing district court cases from Kansas, California, and Washington, D.C., in which the courts held that when business and legal advice are inextricably intertwined, the legal advice must predominate over the business advice in order to be protected by the privilege).

The Eighth Circuit has not considered whether courts should apply the primary-purpose test or examine each statement contained within a communication between an attorney and his or her client. The Court acknowledges that a large number of cases involving the attorney-client privilege are civil in nature and agrees with Defendant that the privilege applies equally to civil and criminal matters. *See* ECF No. 57 at 2. Still, the two civil cases cited by Defendant are merely persuasive and are not binding on this Court. The Court understands how, in a case like *Krueger*, it would be difficult to comb through millions of documents to determine whether each sentence or paragraph was protected by the

privilege. But here, the Court has a single, half-hour phone call to review.[33] The Court is more persuaded by the numerous other cases—mostly civil cases, in fact—that 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

[3] The Court also agrees with Defendant that, for evidentiary purposes, written and oral statements are indistinguishable and the attorney-client privilege should be applied uniformly to both types of communications. *See* ECF No. 57 at 2.

"a direction to counsel to pursue a legal court 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 only two paragraphs of a multi-page report to be protected by the attorney-client privilege). Thus, the Court concludes it may examine the individual statements made by Defendant in his conversation with Attorney A to determine whether they are protected by the attorney-client privilege.

The Court finds the Ninth Circuit's opinion in *United States v. Alexander*, 287 F.3d 811 (9th Cir. 2002), to be instructive in its analysis. In that case, the defendant made threats to harm or kill specific individuals to his court-appointed attorney during communications relating to his pending criminal proceedings. *Alexander*, 287 F.3d at 815. The defendant's attorney asserted the attorney-client privilege on his client's behalf when he was subpoenaed to testify before a grand jury regarding the defendant's threats. *Id.* The court ordered the attorney to testify regarding the defendant's threats but to be careful not to reveal any communication unrelated to the threats, requiring the attorney to redact any information from his records and files that was not directly related to the threats made by the defendant. *Id* The attorney's testimony was limited to the threats the defendant had made. *Id.* Based upon

the attorney's testimony before the grand jury, the defendant was indicted on one count of obstruction of justice and eight counts of communicating interstate threats to injure others. *Id.* At trial, the attorney again testified regarding the threats the defendant made. *Id.* at 816. Following his conviction on five of the eight counts of communicating interstate threats, the defendant appealed, arguing his attorney violated the attorney-client privilege by testifying regarding the threats before the grand jury and at trial and by disclosing information contained within the attorney's files pertaining to the threats. *Id.* The Ninth Circuit held the defendant "failed to demonstrate ... the privileged nature of the threats during his communication with his attorney." *Id.*

Defendant does not claim he made the alleged threatening statements for the purpose of obtaining legal advice; rather, he complains that *Alexander* and the Government's other cited cases misinterpret and incorrectly rely on *Nix v. Whiteside*, 475 U.S. 157, 173–74 (1986), which involved a criminal defendant's claim that his attorney rendered ineffective assistance when the attorney advised the defendant that he would inform the court of the defendant's intention to perjure himself. Although the Court agrees that the ethical duty of confidentiality discussed in *Nix* does not equate to the attorney-client privilege at issue here, it nevertheless believes the *Alexander* court was correct in holding that a defendant's "threats to commit violent acts against ... others [a]re clearly not communications in order to obtain legal advice." 287 F.3d at 816; *see also United States v. Stafford*, No. 17-

20037, 2017 WL 1954410, at *3 (E.D. Mich. May 11, 2017); *United States v. Sabri*, 973 F. Supp. 134, 140–41 (W.D.N.Y. 1996); *State v. Thomson*, Nos. 94-30083, 94-30085, 1995 WL 107300, at *1 (D. Or. 1995). The privilege, while designed "to encourage full and frank communication," *Upjohn Co.*, 449 U.S. at 389, was not designed to protect every statement made to an attorney, *Diversified Indus.*, 572 F.2d at 602, and certainly not threats to murder someone.

Here, Attorney A testified at the hearing on these motions regarding a phone call between herself, another attorney, and Defendant on February 27, 2018, the purpose of which was for Defendant to obtain legal advice in a pending civil lawsuit. Attorney A testified that, during the phone call, Defendant made angry and threatening statements directed toward a federal judge that were unrelated to the attorneys' assistance in the civil action. Based upon this record, the 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 legal services to" Defendant, the statements are not protected by the attorney-client privilege. *Horvath*, 731 F.2d at 561 (emphasis omitted). Accordingly, Defendant's motion to exclude these statements is denied.

B. Rule 404(b) Evidence

Defendant requests that the Court order the Government to designate the character evidence it intends to introduce at trial as soon as possible, ECF

Nos. 26, 27, and further asks the Court to exclude particular anticipated evidence, ECF Nos. 28, 29.

The Government responds that Defendant's Rule 404(b) motions are premature and it fully intends to provide Defendant with reasonable notice of the evidence it intends to introduce. ECF No. 37. The Government recommends the Court order disclosure of Rule 404(b) evidence no later than ten days before trial. *Id.*

Federal Rule of Evidence 404(b)(2)(A) requires the Government to "provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial." The Government shall provide notice to Defendant of any Rule 404(b) evidence it intends to introduce at trial on or before July 16, 2018.

Additionally, the Court agrees with the Government that Defendant's Motion to Exclude 404(b) Evidence is premature. Nevertheless, the Court seizes this opportunity to remind the parties that in order for evidence of prior bad acts to be admissible under Federal Rule of Evidence 404(b), it must be offered for a purpose other than proving a defendant's propensity to act in accordance with the crimes charged, "such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b). The Eighth Circuit, as well as this Court, expects the Government to specify the particular purpose for offering any evidence of Defendant's prior bad acts, rather than "simply read[ing] the list of

issues for which prior bad acts can be admitted." *United States v. Mothershed*, 859 F.2d 585, 589 (8th Cir. 1988).

III. CONCLUSION

For the reasons stated herein, Defendant's Motion to Exclude Attorney-Client Privileged Information (ECF No. 24) is DENIED. Defendant's Motion for Designation of 404(b) Evidence (ECF No. 26) is GRANTED. The Government shall provide notice to Defendant of any Rule 404(b) evidence it intends to introduce at trial on or before July 16, 2018. Because the Court believes Defendant's Motion to Exclude 404(b) Evidence (ECF No. 28) is premature, the motion is DENIED.

It is further ordered that, pursuant to 18 U.S.C. § 3161(h)(1)(D), trial is continued to July 30, 2018, at 9:00 a.m. before District Judge Pratt in a courtroom to be determined. Counsel shall submit proposed jury instructions, proposed voir dire, trial briefs, trial-related motions, and a list of potential witnesses on or before July 16, 2018.

IT IS SO ORDERED.

APPENDIX C

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA DENYING MOTION TO CLARIFY

SIGNED August 1, 2018

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

No. 0:18-cr-00090 (RWP/CFB)

UNITED STATES OF AMERICA,
Plaintiff - Appellee.

v.

ROBERT PHILLIP IVERS,
Defendant – Appellant,

ORDER

ROBERT W. PRATT, U.S. DISTRICT JUDGE

Before the Court is Defendant Robert Phillip Ivers's Motion to Clarify, filed on July 12, 2018. ECF No. 74. The Government filed a response in opposition on July 18, 2018. ECF No. 75. The matter is fully submitted.

On June 26, 2018, this Court entered an order denying Defendant's Motion to Exclude Attorney-Client Privileged Information (ECF No. 24), granting Defendant's Motion for Designation of 404(b) Evidence (ECF No. 26), and denying Defendant's Motion to Exclude 404(b) Evidence (ECF No. 28). ECF No. 58 at 8–9.

Defendant now seeks clarification of which statements of the February 27, 2018 phone call are not protected by the attorney-client privilege. Defendant asserts that, based upon the Court's analysis and conclusion, only the statement "You don't know the fifty different ways I plan to kill [the judge]" should be admitted because it is the only statement that could be considered a threat. Defendant claims that under *United States v. Alexander*, 287 F.3d 811 (9th Cir. 2002), on which the Court relied in its Order, statements that do not threaten violence against others are still subject to the attorney-client privilege and must be excluded. Specifically, Defendant contends other statements he made to Attorneys A and B during the September 27 phone call—including, "That judge stacked the deck against me to make sure I lost the case"; "[The judge] is lucky the hearing was canceled because I was going to throw some chairs"; and "This fucking judge stole my life"—are not threats and, therefore, are privileged and must be excluded.

In its June 26 Order, the Court determined it could parse out *any* statement not made for the purpose of obtaining legal advice and that any such statement would not be protected under the privilege. ECF No. 58 at 6. Thus, the Court is not restricted to merely

excluding threats, as Defendant urges. 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." ECF No. 58 at 8 (quoting United States v. *Horvath*, 731 F.2d 557, 561 (8th Cir. 1984) (emphasis omitted)). The Court's June 26 Order was clear.

Accordingly, Defendant's Motion to Clarify (ECF No. 74) is DENIED.

IT IS SO ORDERED.

Dated this 1st day of August, 2018.

s/ Robert W. Pratt
ROBERT W. PRATT, Judge
U.S. District Court

APPENDIX D

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DENYING PETITION FOR REHEARING AND REHEARING EN BANC

FILED SEPTEMBER 21, 2020

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19-1563

UNITED STATES OF AMERICA,
Plaintiff - Appellee.

v.

ROBERT PHILLIP IVERS,
Defendant – Appellant,

Appeal from U.S. District Court
for the District of Minnesota (0:18-cr-00090-RWP-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 21, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

_____

/s/ Michael E. Gans

APPENDIX E

EVIDENTIARY HEARING ON DEFENDANT'S MOTION TO EXCLUDE ATTORNEY-CLIENT PRIVILEGED INFORMATION.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,
Plaintiff - Appellee.

v.

ROBERT PHILLIP IVERS,
Defendant – Appellant,

No. 0:18-cr-90 (RWP/CFB)

June 18, 2018

BEFORE THE HONORABLE ROBERT W. PRATT
UNITED STATES DISTRICT JUDGE
(EVIDENTIARY)

APPEARANCES:

For the Plaintiff:
U.S. ATTORNEY'S OFFICE
JULIE ALLYN, AUSA

300 S. 4th St., #600
Minneapolis, Minnesota 55415

For the Defendant:
KELLEY, WOLTER & SCOTT, P.A.
BRETT KELLEY, ESQ.
DANIEL SCOTT, ESQ.
431 S. 7th St., #2530
Minneapolis, Minnesota 55415

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* * *

Q. All right. And you also volunteer with the Federal Pro Se Project?

A. I do. From time to time.

Q. And you helped founded it in 2011 here in Minnesota, correct?

A. Yes.

Q. So let's talk a little bit about the Federal Pro Se Project. Can you tell me kind of what the purpose the project is? What their goals are?

A. The primary goal is to assist the Court and the parties in connecting people who are trying to represent themselves with lawyers who are willing to volunteer and help represent that person or guide them in the proceeding.

Q. So it's to provide legal assistance or advice to pro se civil litigants?

A. Yes.

Q. Okay. So let's talk briefly about the referral process. So, there's a civil pro se litigant, how do they come to be involved with the pro se project?

A. It's by referral only. One of the judges or magistrate judges from this court needs to refer the person to the project. And then there is a coordinator who takes that call, you know, gather some basic background information and then recruits an attorney to assist that person.

Q. Okay. And normally an attorney or law firm would do a conflicts check when they get a case that comes to them, right?

A. Correct.

Q. It's just like you would do for any perspective client?

A. Yes.

Q. Okay. So if there's not a conflict, how do you decide whether or not an attorney or a firm takes a case?

A. Well, the firm never makes anybody volunteer. But assuming that the conflicts check comes out clear, and a lawyers wants to -- to do the work, we would indicate to the coordinator, who's Tiffany Sanders, that we were willing to either engage in full-blown representation, or start with a consult. And in this case, we said we would consult with Mr. Ivers.

* * *

Q. So, did Magistrate Judge Schultz contact you directly or did it come through the coordinator?

A. It came through the coordinator. Magistrate Judge Schultz referred Mr. Ivers to the program. And then the coordinator contacted my colleague, who had indicated interest in being involved in the project.

Q. Is this calling another attorney at Fredrikson?

A. Yes.

Q. And did she help you with Mr. Ivers' case?

A. Yes. She was the lead.

Q. Okay. And what is her name?

A. Her name's Anne Rondoni-Tavernier.

Q. Okay. Thank you. Okay. So, Ms. Sanders from the pro se project contacts, is it Rondoni-Tavernier? Did I say that right?

A. You did very well.

Q. I can't even read my handwriting. But contacts her and says, Would you take Mr. Ivers' case?

A. Yes. Essentially, yes. And Ms. Rondoni-Tavernier is a fairly new lawyer, she mentioned it to me. I said I would be happy to work with her on the case. And we agreed to consult with Mr. Ivers.

Q. Okay. As I understand it, it was Ms. Rondoni-Tavernier that set up the phone call on February 27th?

A. Yes.

Q. Okay. And she did that by calling Mr. Ivers to see if he was available on the 27th?

A. I believe that's correct.

Q. And the purpose was to discuss a civil lawsuit that Mr. Ivers had in front of Judge Schultz?

A. Yes.

Q. And your goal with this consultation was to provide him legal advice on that civil lawsuit in front of Judge Schultz?

A. Yes. To give -- we explained that we were going -- our purpose, we were volunteers. And that our purpose was to answer questions he had and to give him our assessment of the case.

Q. Okay. So fast forward to February 27th. So you and Ms. Rondoni-Tavernier call Mr. Ivers from your law office?

A. Yes.

Q. And it was just the three of you on this phone call?

A. Correct.

Q. So the two attorneys and Mr. Ivers?

A. Yes.

Q. Nobody else listening in from -- either side of the phone, as far as you know?

A. Certainly not on our end.

Q. Okay. Okay. How long was this phone call?

A. I would say it's -- it was around a half an hour, maybe a little less than that.

Q. And without going into the contents of what you guys discussed, the purpose of the phone call was to discuss his civil lawsuit, correct?

A. Yes.

* * *

Q. Okay. So, after the February 27th phone call, did you ask Mr. Ivers for permission to disclose any part of that February 27th communication?

A. No.

Q. Okay. So you didn't ask him on the phone call if you could disclose it?

A. Correct.

Q. And you didn't talk to him afterward about whether or not you could disclose that?

A. Correct.

* * *

THE COURT: Well, Ms. Allyn, I'm operating on the theory from *United States versus Nixon* that the law is entitled to every person's evidence.

I don't see how I can prohibit your questions or Mr. Kelley's questions based upon the privilege.

I would think that Ms. Friedemann, and this is not based on anything other than my sense of fairness, I can't believe that if I order her to respond, which I think I have to, I can't imagine somebody would discipline her if a Judge orders her to reveal a confidence.

I don't know how I'm going to determine if this is privileged without somebody telling me what was said.

* * *

And that's all we're asking for at this stage with this implicit waiver to litigate this matter.

MR. KELLEY: Your Honor, we object to the notion that there's been any waiver here. The waiver -- the privilege belongs to Mr. Ivers. He absolutely has not waived that privilege.

THE COURT: I agree with that, yeah.

MR. KELLEY: Thank you, Your Honor.

* * *

Q. And I guess by other advice, do you mean your attorney advice?

A. Yes. The actual substantive advice on the claim.

Q. What were those threats?

MR. KELLEY: Objection, Your Honor.

THE COURT: Overruled.

BY MS. ALLYN:

A. Mr. Ivers was very angry. He said, and I'll use his words, "That fucking Judge stole my life from me." And he said he had imagined 50 ways to kill her.

Q. Did he say anything about a plan to kill her?

MR. KELLEY: Objection, Your Honor.

THE COURT: Overruled.

BY MS. ALLYN:

A. No.

* * *

Q. So let me just back up a little bit. These sort of angry threatening statements happened, what was immediately said proceeding those threats?

MR. KELLEY: Objection.

THE COURT: Overruled.

BY MS. ALLYN:

A. You know, I don't know exactly. But he -- Mr. Ivers was reacting to our advice with respect to the attempted claim -- basically the attempt to bring a -- the same claim in a different legal box, which we told him would not work.

* * *

MR. KELLEY: Your Honor, before I go on to redirect here, since the Court has been ordering Ms. Friedemann to disclose confidential communications.

THE COURT: Yes.

MR. KELLEY: I want to make sure that it's clear on the record that Mr. Ivers has not waived the privilege. And I'm not waiving it for him.

THE COURT: I don't think there's any hint –

MR. KELLEY: Right.

THE COURT: -- that he's waived the privilege. I don't think there's any hint that you do not have standing to raise his lack of waiver.

MR. KELLEY: Okay.

THE COURT: So if there's evidence that he's waived the privilege, I don't know about it.

* * *

Q. I think you said before that at the end of the phone call when you were wrapping up, you told him about your general legal opinion about the case. Was that before or after?

A. The general legal opinion about the case was before. And then the threats happened. And then we did conclude the call by asking if he had any further questions.

Q. So legal questions?

A. Yes.

Q. Okay. So you're still kind of -- you were still giving legal advice, in a general sense, at the end of the phone call?

A. We gave the opportunity for him to seek legal advice.

Q. So safe to say, even at the end of the phone call, your purpose was still to give him legal advice if he needed it?

A. Yes.

Q. That was the only purpose of the phone call?

A. I don't know if I would say it was the only purpose of the phone call. The primary purpose was for us to advise him.

Q. Okay. One more thing I wanted to touch on. Miss Allyn was talking about the difference between these two cases. There was one case in front of Judge Wright and one in front of Judge Schultz. And they are different causes of action, correct?

A. Yes.

Q. But it is the same underlying set of facts, correct?

A. That's my understanding.

Q. And you advised Mr. Ivers that he couldn't repackage essentially the same cause of action -- or the same set of facts into a different cause of action?

A. Correct.

Q. And that's what he was upset about, right? He was upset about the Judge's reasoning in the first case?

A. Yes. His anger was directed primarily at Judge Wright.

Q. About her decision in the other case?

A. Yes.

Q. Which is basically the same case that's in front of Judge Schultz?

A. Yes.

APPENDIX F

TRIAL TRANSCRIPT – DAY 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,
Plaintiff - Appellee.

v.

ROBERT PHILLIP IVERS,
Defendant – Appellant,

No. 0:18-cr-90 (RWP/CFB)

Sept. 12, 2018

BEFORE THE HONORABLE ROBERT W. PRATT
UNITED STATES DISTRICT JUDGE
(JURY TRIAL – VOLUME II)

APPEARANCES:

For the Plaintiff:
U.S. ATTORNEY'S OFFICE
TIMOTHY RANK, AUSA
JULIE ALLYN, AUSA
300 S. 4th St., #600
Minneapolis, Minnesota 55415

For the Defendant:

KELLEY, WOLTER & SCOTT, P.A.
DANIEL SCOTT, ESQ.
BRETT KELLEY, ESQ.
431 S. 7th St., #2530
Minneapolis, Minnesota 55415

SECOND DAY OF TRIAL
TESTIMONY OF LORA FRIEDEMANN
PAGES 383 Through 384; 401

* * *

Q. And these are things that you wrote down as Mr. Ivers was speaking, correct?

A. Yes.

Q. And what does the first thing say?

A. It says, "this fucking judge stole my life from me."

Q. Below there are quotes at the beginning of that. Maybe they're underneath the bottom of the "g." Are there quotes on the end as well?

A. I believe so. Yes.

Q. And then what is the next statement?

A. "I had overwhelming evidence."

Q. First of all, who is he talking about during this time period?

A. He was talking about Judge Wright.

Q. And when he says, "I had overwhelming evidence," did you understand what he was referring to in that statement?

A. Yes. He was referring to the trial in front of her.

Q. And then it said, "the judge 'stacked the deck' to make sure I lost the case." Is that also about Judge Wright?

A. Yes.

Q. You've got the -- 'stacked the deck' is in quotes. Does that reflect that that's a verbatim quote?

A. It does.

Q. If we go a little further down, there is another portion in there. Can you read what that says.

A. That says, "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."

Q. So, Ms. Friedemann, you are calm right now. You're reading that right now. How was it that Mr. Ivers was delivering this?

A. He was yelling, very angry.

Q. And this is part of what you said, that "barely controlled rage" time period?

A. Yes.

Q. And what was he talking about or did you understand what he was talking about in reference to the didn't read the fine print and missed the 30 days to seek a new trial? What was that about?

A. That was what I was referring to, where he had missed the deadline for him to seek a new trial. And he was talking about what he would've done in the courtroom that day had there been a hearing in front of her.

Q. And that he was going to "throw some chairs"?

A. Yes.

Q. Then moving to the bottom, what does that say?

A. It says, "you don't know the 50 different ways I planned to kill her."

Q. And who was that in reference to?

A. It was in reference to Judge Wright.

* * *

Q. Okay. So you conveyed something different than what you had written down in your notes?

A. I summarized the notes as a threat, a death threat against Judge Wright.

Q. So you call Tiffany Sanders a day later and you tell her there is a death threat against Judge Wright?

A. Yes.

APPENDIX G

TRIAL TRANSCRIPT – DAY 3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,
Plaintiff - Appellee.

v.

ROBERT PHILLIP IVERS,
Defendant – Appellant,

No. 0:18-cr-90 (RWP/CFB)

Sept. 13, 2018

BEFORE THE HONORABLE ROBERT W. PRATT
UNITED STATES DISTRICT JUDGE
(JURY TRIAL – VOLUME III)

APPEARANCES:

For the Plaintiff:
U.S. ATTORNEY'S OFFICE
TIMOTHY RANK, AUSA
JULIE ALLYN, AUSA
300 S. 4th St., #600
Minneapolis, Minnesota 55415

For the Defendant:
KELLEY, WOLTER & SCOTT, P.A.
DANIEL SCOTT, ESQ.
BRETT KELLEY, ESQ.
431 S. 7th St., #2530
Minneapolis, Minnesota 55415

THIRD DAY OF TRIAL
TESTIMONY OF ANNE RONDONI TAVERNIER
PAGES 451; 476; 481; 483

TESTIMONY OF MATTHEW SEYFRIED
PAGE 524

* * *

A. As we had kind of -- or, rather, as I had sort of explained Ms. Friedemann and I's position with regard to his pending case in front of Judge Schiltz, I would say that the conversation kind of shifted a little bit. As I was sort of done explaining our piece, Mr. Ivers began to sort of discuss a little bit about what had happened previously in front of Judge Wright. It was kind of an organic shift, I guess, in the conversation. And at that point he, as we kind of merged on to that topic, he really began to sort of focus and fixate on what had happened in front of Judge Wright and began speaking at length about it.

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 he 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. I didn't interject. And as he spoke, it escalated very quickly and it kind of became essentially just a rant, an angry rant based on -- or discussing what had happened in the case in front of Judge Wright.

* * *

Q. And what was the focus of his anger at that point?

A. It was primarily focused on Judge Wright on, you know, the way that he felt he had been treated by her and, you know, the way that the

lawsuit in front of her had proceeded. It was focused on her.

* * *

Q. Based on your discussion of res judicata and your legal opinion, it was logical for him to be discussing the first case with Judge Wright.

A. Yes.

* * *

A. I recall him saying, "You don't know the 50 different ways" to kill her, that "I planned" or "I thought" or "I conceived" or whatever verb he used. I know that he said, "You don't know the 50 different ways I thought of, planned," whatever, "to kill her.

* * *

A. He didn't start describing his plans to kill her, no.

* * *

Q. So one of those two told you that Mr. Ivers had said to his attorney, "You don't know the 50 different ways I plan to kill her," present tense?

A. Correct. I believe that's correct. I can look at my notes, if you want.

Q. Go ahead. I will -- refresh your memory.

A. That's correct. It's present tense.

Q. Okay. So that's what you were going out of here, is that one statement, plan, present tense?

Yes, sir.

APPENDIX H

FEDERAL RULES OF EVIDENCE

RULE 501, 28 U.S.C.A.

Rule 501. Privilege in General

The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.