Appeal No. 19-CF-0687

DISTRICT OF COLUMBIA COURT OF APPEALS

BRIAN E. MOORE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the Superior Court of the District of Columbia
Criminal Division

AMICUS BRIEF IN SUPPORT OF APPELLANT

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STATEMENT OF AMICUS CURIAE

In this appeal from Mr. Moore's convictions for threatening a public official and obstruction of justice, the Court granted rehearing en banc to determine whether the threats that Mr. Moore was convicted of uttering to his attorney are protected by attorney-client privilege. *See* Order, Appeal No. 19-CF-687 (D.C. May 25, 2023). This issue is important to clients of the Public Defender Service for the District of Columbia (PDS). The parties have given their consent to the filing of this brief.

STATEMENT OF FACTS

Brian Moore was convicted of threatening to harm the assistant attorney general assigned to prosecute him for criminal contempt of a civil protective order, as well as obstruction of justice in relation to the same threats. According to the evidence presented below, Mr. Moore made the statements in question to the lawyer appointed to represent him in the underlying contempt case, John Harvey, on two separate occasions—once on April 12, 2018, and again on June 29, 2018—in the hallway outside of the courtroom where the proceedings in his contempt case were being held. All of the statements in question came in response to revelations about the government's efforts to subject Mr. Moore to additional GPS ankle monitoring, a condition of release to which he strenuously objected.

A. MR. MOORE'S APRIL 12 STATEMENTS

On the morning of April 12, 2018, before trial started for the day, Mr. Harvey informed Mr. Moore that the government would be asking the court to reinstate GPS monitoring during the ensuing proceedings. *See* 5/30/19 Tr. 88-89. Mr. Moore, in turn, became "very agitated," and began saying things like "[f]uck that bitch" and "I

hate this bitch," in reference to the prosecutor. *Id.* at 89. Mr. Harvey tried to get Mr. Moore to calm down by explaining that it was "just silly" for Mr. Moore to get mad at the prosecutor for doing her job. *Id.* However, this explanation only further angered Mr. Moore, who added "I'll shoot that bitch" to his prior statements. *Id.*

In response, Mr. Harvey asked, "Man, what are you talking about?" and Mr. Moore answered, "That's right, Harvey. I'll shoot that bitch." *Id.* When Mr. Harvey told Mr. Moore he was "starting to . . . think [Mr. Moore was] serious," Mr. Moore stated, "God damn right, Harvey. Fuck that bitch. I'll shoot that bitch." *Id.* Mr. Harvey then told Mr. Moore he would have to withdraw from the case and left to call Bar Counsel. *Id.* at 90.

After consulting with Bar Counsel, Mr. Harvey sought to withdraw from the case. He told the court it was "ethically impossible" for him to continue representing Mr. Moore. R. 24 at 23.[1] When asked if he could disclose why he and Bar Counsel believed further representation would be unethical, Harvey stated, "No, ma'am." *Id.* at 23-24. When asked for the ethical rule that he thought would bar further representation, Mr. Harvey responded that Bar Counsel had specifically advised him not to provide that information, as doing so would invite judicial scrutiny of the "concern" that motivated him to seek withdrawal in the first place. *Id.* at 26 ("I was advised I can't."); *see id.* at 36 ("You have indicated that Bar Counsel has informed you that you need to withdraw and also told you that you should not inform the Court

[1] "R. **" refers to docket entries in the appellate record based on the number assigned by the Appeals Coordinator on May 29, 2019. "Moore App." refers to items in appellant's limited appendix filed in this case on July 21, 2020.

of the applicable rule."). He made no reference to any basis for breaching confidentiality under Rule 1.6, nor did he suggest that Bar Counsel advised him that he had discretion to disclose statements made to him by Mr. Moore.

Eventually, Mr. Harvey suggested that he might "reasonably believe" that Mr. Moore was using his services to perpetrate crime or fraud, consistent with the mandatory withdrawal provision of Rule 1.16(b). *Id.* at 27-28. However, when the court sought to probe this belief, Mr. Harvey stated unequivocally: "There's no information that I can share. And there's no way to get around that issue." *Id.* at 30 (affirming that there was "no other factual information that [he could] provide"). Mr. Harvey held to this position, even after the trial judge reminded him that, depending on the nature of his concerns, Rule 1.6 might allow him to "disclose some client confidences," *id.* at 38-39 ("[T]o the extent that what you're about to do is disclose some client confidences, I think that the rules allow you to do that."). After calling Bar Counsel a second time to inquire about whether he could "give the court additional information," *id.* at 41, Mr. Harvey maintained that he could not "reveal to the court what the issue is." *Id.* at 42.

In the end, the court denied the motion to withdraw for want of a more specific foundation. *See id.* at 38. In a hallway after the hearing, Mr. Harvey agreed to continue representing Mr. Moore on the condition that he refrain from threats:

> You will never, ever use this kind of language with me about anybody because, from this point forward, I'm going to believe you. So if you decide you want to go shoot somebody, you need to keep that to yourself and don't make me a part of it. . . . [I]f you can agree to those terms, I can continue to represent you in this case[.]

5/30/19 Tr. 92. Mr. Moore, in turn, reassured Mr. Harvey that he was "just bullshitting." *Id.*

B. MR. MOORE'S JUNE 29 STATEMENTS

After Mr. Moore missed the next scheduled hearing, citing the need to attend job training, the court scheduled an interim status hearing for June 29. At the June 29 hearing, the AAG asked the court to either hold Mr. Moore in jail pending the disposition of trial or to reinstate GPS ankle monitoring as a condition of his pretrial release. The trial court granted the AAG's request for ankle monitoring at around 4:45 p.m., by which time it was too late for CSOSA to fit Mr. Moore with an ankle monitor. Because the hearing took place on a Friday, the court ordered Mr. Moore to return on the following Monday for the fitting. This development greatly angered Mr. Moore, as it meant that he would miss job training that he planned to attend on Monday morning. When Mr. Moore voiced his frustration with the order, Mr. Harvey admonished him to "chill out," lest the judge "step [him] back on the spot." 5/30/19 Tr. 98-99.

Although Mr. Harvey got Mr. Moore to "chill out" for the remainder of the hearing, *id.* at 99, Mr. Moore lost his composure outside of the courtroom, after the hearing had adjourned. *Id.* at 175. Once the parties were excused, Mr. Harvey and the AAG left to discuss trial-related matters with the CPO attorney in the hallway. After signing his notice to return to court, Mr. Moore announced that he "need[ed] to speak with [his] attorney," and left to find Mr. Harvey. Moore App. at 35.

Stepping out into the hallway, Mr. Moore looked "pissed off." 5/30/19 Tr. 103. Thereafter, the following exchange took place:

[Moore:] Harvey, Harvey, if I lose my job, I'm going to bust a cap in this bitch, I'm going to bust a cap in this bitch.

[Harvey:] Man, what are you doing?

[Moore:] Man, fuck this bitch. If I lose my job, I'm going to bust a cap in this bitch. [gesturing to simulate a gun]

[Harvey:] I told you what I was going to do if you ever said something like that to me again.

[Moore:] Fuck her. Fuck you.

Id. at 103-04, 105. At this point, Mr. Harvey advised Mr. Moore that he was "getting ready to go in [the courtroom] and withdraw from [the] case" and that he was "going to tell the judge," to which Mr. Moore responded, "Fuck it, let's go." *Id*. at 105.

Mr. Harvey then walked into court and renewed his motion to withdraw, stating: "I can't represent him. And if you force me to tell you [the reason], then I'll just have to tell you this time." Moore App. at 33. Upon the court's order, Mr. Harvey explained: "He's threatening to shoot her. I ain't representing him. We are adversaries but I respect [the AAG]. I'm not representing that man. He said it again. I cannot represent him. So whatever needs to happen[,] needs to happen but I believe him this time." *Id.* Thereafter, the court revoked Mr. Moore's conditions of release. *Id.* at 35-36. In so doing, the court made clear that Mr. Harvey had not elected to disclose Mr. Moore's statements voluntarily, and that he had only done so with "objection," in order to comply with the court's order. *Id.* at 35.

At the subsequent hearing to decide Mr. Harvey's motion to withdraw, Mr. Harvey opined that he was still unable to disclose Mr. Moore's statements to the AAG because he remained obligated "to keep his secrets." *Id.* at 45. When the trial court pressed him as to why withdrawal was necessary in light of Mr. Moore's statements, Mr. Harvey insisted that he could not "zealously represent" Mr. Moore,

given his "belie[f]" that Mr. Moore was "capable of that." *Id.* at 51-52. He further described his relationship with Mr. Harvey as "toxic," adding that their attempts to communicate had led both of their "skin" to "boil." *Id.* at 55. Ultimately, the court permitted Mr. Harvey to withdraw.

C. MR. MOORE'S MOTION IN LIMINE

Mr. Moore was charged with threatening a government official and obstruction of justice in relation to the statements Mr. Harvey alleged he made. Prior to trial, he moved in limine to preclude Mr. Harvey from testifying, citing the attorney-client privilege. R. 24. In opposition, the government argued that Mr. Moore's threats were insufficiently related to the purpose of seeking legal advice to be protected by the attorney-client privilege because they were not "necessary to obtain informed legal advice." *See, e.g.*, R. 26 at 8-9 (quoting *Fisher v. United States*, 425 U.S. 391, 403 (1976)) (internal quotation marks omitted). Mr. Moore replied that the government's narrow, piecemeal approach to assessing whether his statements were covered by attorney-client privilege would "defeat the very purpose[s] of the privilege—to encourage clients to actively and openly participate in their court proceedings, and . . . 'to enhance the ability of lawyers to dissuade'" them from any crime or fraud they may propose in the course of the representation. R. 25 at 3 (citation omitted).

At the hearing on this motion, Mr. Moore added that although clients may confide to their attorneys "things that are untoward," and "things that society as a whole would rather have out in the open [or] see prosecuted," 2/25/19 Tr. 12, authorities had recognized that according privilege to such statements was necessary

to ensure that defendants "fe[lt] comfortable enough to say ill-advised things" to their lawyers and that their lawyers, in turn, had "the credibility and the trust to convince [them] not to do these things." *Id.* at 19. Thus, Mr. Moore argued that his claim of privilege was supported by society's interest in protecting the "ability [of] defendants to have honest and real reactions to" the legal advice they receive and the proceedings to which they are or may become a party. *Id.* at 12-13.

The motions judge rejected these arguments, focusing instead on a single question—whether Mr. Moore's statements could "be construed as being made for the purpose of seeking legal advice"—which the court believed was required to establish attorney-client privilege under *Jones v. United States*, 828 A.2d 169 (D.C. 2003). 2/25/19 Tr. 20; *accord id.* at 11 ("[H]ow is that for the purpose of seeking legal advice?"). In response, Mr. Moore noted the *Jones* test was not "whether or not the specific line or phrase . . . [was made] for the purpose of seeking legal assistance"—in other words, whether it "seek[s] legal assistance." *Id.* at 32; *see also id.* at 18 ("The communication does not have to be specifically to get legal advice about a specific issue."). Rather, the test was whether the statements in question were "related to" the defendant's broader purpose of "seeking legal advice" or representation in a "legal proceeding[.]" *Id.* at 13; *id.* at 16 (". . . *Jones* and *In Re: PDS* are sort of the seminal cases on this issue and *Jones* says the communication related to that purpose."). Thus, Mr. Moore urged that the court could not "just pull out bits and pieces" of a case-related consultation—for instance, a meeting to "recount . . . what happened in a trial or what happened [during] a contract negotiation," *id.* at 13, or to explain "how [an impending] legal proceeding[] [will]

work" or "why . . . [opposing counsel] [is] taking [certain] actions," *id.* at 10—and determine whether each "bit[]" or "piece[]" is privileged, solely by reference to whether it constituted a "request[] for legal advice." *Id.* at 13.

The motions judge disagreed. Quoting *Jones*, the court framed the relevant test as one predominantly concerned with the purpose of the "communication in question" and whether it was "significantly that of obtaining legal assistance." *Id.* at 32; *id.* at 30 ("*Jones* says whether a purpose is significantly that of obtaining legal assistance or is for a nonlegal purpose depends upon the circumstances, including the nature of the communications in question."). When Mr. Moore pointed the court to language in *Jones* suggesting that the "significant purpose" analysis also "depends upon [other] circumstances," including whether there is any pre-existing attorney-client relationship,[2] the court dismissed this circumstance as irrelevant, stating that "clearly [Mr. Harvey] had previously been representing [Mr. Moore]. That was the question in *Jones*. That was not a question here." *Id.* at 32.

The motions judge ultimately denied Mr. Moore's motion in limine because it did not "see any legal assistance sought by the statement I'm going to kill her or things to that effect." *Id.* at 36 ("[E]ven if there is some legal purpose, . . . I don't find that to be significantly for the purpose of seeking legal advice."); *id.* at 23 ("Clearly a statement I'm going to kill her, I'm going to shoot her, I'm going to put a cap on her is not seeking legal advice. It's stating an intention."). Although the

[2] *See Jones*, 828 A.2d at 175 (quoting Rep.'s Note, Restatement (Third) of the Law Governing Lawyers § 72 (2000)) (noting the relevance of "whether or not the person had previously provided legal assistance relating to the same matter").

court initially tied its ruling to Mr. Harvey's testimony that he warned Mr. Moore not to threaten the prosecutor again after the April 12 incident, *see, e.g.*, *id.* at 24, the court ultimately clarified that this warning was not decisive, and that its absence did not mean that the April 12 statements were protected by attorney-client privilege.

In the court's view, although Mr. Moore "clearly" had been "seeking legal advice" on April 12, when he asked Mr. Harvey why the AAG was seeking to have him put back on GPS monitoring, *id.* at 39, his "extended monologue" in response to Mr. Harvey's explanation was different. *Id.* at 41. The court found that those statements were an expression of "anger based on the legal advice," not a statement made "for the purpose of seeking legal advice or done in the course of seeking legal advi[c]e or related to the legal advice that was sought." *Id.* at 41, 42-43. In this regard, the court distinguished statements "related to the obtaining of legal advice" from those "related to anger at the prosecutor for pursuing what is understood to be her job." *Id.* at 41. In the court's view, although such "anger [was] completely understandable, and . . . not . . . unreasonable in any way," it did not mean that Mr. Moore was "continuing to seek legal advice" by expressing it. *Id.* Because Mr. Moore's statements had not been "related to the legal advice about how to proceed at trial[,] . . . to trial strategy[,] . . . to defenses[,] . . . to cross examination of witnesses[,] . . . [or] to anything except the desire to kill the prosecutor," the court concluded that they were not protected by attorney-client privilege. *Id.* at 42.

SUMMARY OF ARGUMENT

This Court should hold that Mr. Moore's statements about the prosecutor are

privileged because, as the division reasoned, they were made in the context of an existing attorney-client relationship and were related to Mr. Moore's "significant purpose to obtain legal assistance" about "the government's effort to alter his conditions of release." *Moore v. United States*, 285 A.3d 228, 251 (D.C. 2022). The significant purpose test does not require Mr. Moore to prove that his "significant purpose" in making any individual statement "was that of obtaining legal advice." Rather, Mr. Moore only needed to show (1) that his "significant purpose[] . . . in communicating with a lawyer" at the time of the statements in question was "that of obtaining legal assistance," *Jones*, 828 A.2d at 175 (internal quotation marks and citation omitted), and (2) that the statements in question were "relat[ed] to," 8 J. Wigmore, Evidence § 2292, at 554 (McNaughton rev. 1961), and "made as *a part of the purpose* . . . to obtain advice," *id.* § 2310, at 599. Mr. Moore's statements satisfy both of these tests because they were made to his attorney during case-related consultations and because they were expressions of anger that were relevant to the representation, alerting counsel to the importance he assigned to certain case-related outcomes. Because no established exception to the attorney-client privilege applies, the statements were protected. This Court should reject the government's proposal to create a new exception to the privilege for criminal threats.

ARGUMENT

"The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citing 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961)).

"Its purpose 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." *Id.* "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.* "In the criminal context, . . . the privilege acquires Sixth Amendment protection." *In re Pub. Def. Serv.* (*In re PDS*), 831 A.2d 890, 900 (D.C. 2003) (internal quotation marks and citation omitted).

This Court has adopted the blackletter formulation of the attorney-client privilege set forth in Professor Wigmore's treatise. Pursuant to this test, attorney-client privilege is limited to circumstances "(1) where legal advice of any kind is sought (2) from a professional legal advisor in his [or her] capacity as such." *Jones*, 828 A.2d at 175 (citing 8 Wigmore, Evidence § 2292). Where these two conditions are met, privilege attaches to "(3) the communications relating to that purpose" — i.e., obtaining legal advice—as long as they were "(4) made in confidence (5) by the client." *Id*.

This Court applied the Wigmore test in *Jones*, 828 A.2d 169, when it was called upon to determine whether statements to an ex-girlfriend who was also an attorney were privileged. In that context—where it was not clear whether the communications sought advice from a professional legal advisor "in [her] capacity as such"—this Court held that "the privilege [will] appl[y] if one of the significant purposes of a client in communicating with a lawyer is that of obtaining legal assistance." *Id*. at 175 (citing Rep.'s Note, Restatement (Third) of the Law Governing Lawyers § 72 (2000)). "Whether a [client's] purpose is significantly that

of obtaining legal assistance or is for a nonlegal purpose depends upon the circumstances, including the extent to which the person performs legal and nonlegal work, the nature of the communication in question, and whether or not the person had previously provided legal assistance relating to the same matter." *Id.* (citing Cmt. c, Restatement (Third) of the Law Governing Lawyers § 72). While this Court ultimately concluded that the inquiries in *Jones* were not sufficiently "legal" to establish that the conversation fell within the attorney-client privilege, it recognized that articulation of the same concerns might well "fall within the privilege if they were expressed in a communication within a clearly established attorney-client relationship." *Id.* at 176-77. Such is the situation presented here.

I. MR. MOORE HAS DEMONSTRATED A "SIGNIFICANT PURPOSE" TO OBTAIN LEGAL ADVICE.

Mr. Moore's statements about the prosecutor satisfy the significant purpose test because Mr. Moore made them to a person with whom he had an existing lawyer-client relationship (appointed counsel) at a time when "his significant purpose in speaking to Mr. Harvey" was "[u]ndoubtedly" "to obtain legal assistance" about "the government's effort to alter his conditions of release." *Moore*, 285 A.3d at 251. Contrary to the motions judge's suggestion, 2/25/19 Tr. 36, the applicable test did not require Mr. Moore to prove that his "significant purpose" in uttering any isolated statement was "that of obtaining legal assistance." Such a standard would be incompatible with Wigmore's formulation, which provides that a "communication" may be privileged so long as it "relat[es] to" the purpose of obtaining legal advice. *See infra*. Rather, Mr. Moore needed to show at most that at the time of the

statements in question, his "significant purpose[] . . . in communicating with a lawyer" was "that of obtaining legal assistance," *Jones*, 828 A.2d at 175 (internal quotation marks and citation omitted)—in other words, that he had "consult[ed] [Mr. Harvey] for the purpose of obtaining legal assistance and not predominantly for another purpose." Cmt. c, Restatement (Third) of the Law Governing Lawyers § 72.

This interpretation is consistent with the use of the significant purpose test to differentiate between cases where a client seeks a lawyer's advice in the lawyer's capacity as a professional legal advisor and those where the lawyer operates in a non-legal capacity. When attorneys wear both legal and nonlegal hats with respect to the same client or matter, courts look beyond the bare fact of an attorney-client relationship to determine whether the significant purpose of a specific interaction was to obtain legal advice.[3] In such cases, enforcing a "significant purpose" requirement helps to prevent privilege "funneling"—the process of manufacturing privilege by relaying information to, or through, an attorney, Edward J. Imwinkelried, New Wigmore: Evidentiary Privileges § 6.112, at 1136-37 (3d ed. 2016)—and other attempts to "lease" the privilege, by engaging licensed attorneys to perform non-legal work. *id.* § 6.11.1, at 1125.

But no such concerns exist here. Notably, Wigmore's treatise suggests that such purpose-based analysis is entirely superfluous in circumstances where, as here, there is no doubt as to the existence of an attorney-client relationship and the

[3] *See FTC v. Boehringer Ingelheim Pharms., Inc.*, 892 F.3d 1264, 1267 (D.C. Cir. 2018); *United States v. Mett*, 178 F.3d 1058, 1062 (9th Cir. 1999); Cmt. c, Restatement (Third) of the Law Governing Lawyers § 72 (noting the relevance of "the extent to which the person performs legal and nonlegal work").

attorney's only duty to the client is to render legal services. In his view, the decision to "commit[]" "a [specific] matter . . . to a professional legal adviser" constitutes "*prima facie*" evidence that the matter was "*so committed for the sake of the legal advice* . . . unless [the matter] clearly appears to be lacking in aspects requiring legal advice." 8 Wigmore, Evidence § 2296, at 567. This Court should join the majority in following Wigmore's lead. *See Moore*, 285 A.3d at 246 (recognizing "a strong presumption that, any time [a] client speaks to their court-appointed lawyer, a significant purpose of that communication is to receive legal advice in the case for which the lawyer has been appointed to represent them" because "the typical relationship between a defendant and their court-appointed counsel has only one objective: representation in the ongoing criminal case").

But even if Mr. Moore needed to show that "one of [his] significant purposes . . . in communicating with" Mr. Harvey at the time of his statements about the prosecutor was "that of obtaining legal assistance," *Jones*, 828 A.2d at 175 (internal quotation marks and citation omitted), he has done so. As the lower court found, Mr. Moore "clearly [was] seeking legal advice" on April 12, when he asked Mr. Harvey why the AAG was seeking to reinstate GPS monitoring. 2/25/19 Tr. 39. There is no basis to infer that Mr. Moore abandoned this purpose when, in response to Mr. Harvey's statement that it was "just silly" to get mad, Mr. Moore became "very agitated" and said, "I'll shoot that bitch." 5/30/19 Tr. 89. As the lower court found, this statement was an angry response to the legal advice that Mr. Harvey was trying to deliver. 2/25/19 Tr. 43. Such anger, in the lower court's view, was not "unreasonable" and "completely understandable." *Id.* at 41. Whether or not the

threats may have constituted a digression in the conversation from Mr. Harvey's perspective, they cannot be viewed as unrelated to the legal advice the trial court found Mr. Moore was "clearly seeking" from Mr. Harvey at the time. 2/25/19 Tr. 36; *see Jones*, 828 A.2d at 176 ("[T]he intent of the person seeking advice is assessed from that person's viewpoint, not that of the attorney." (citation omitted)).

The record likewise supports that Mr. Moore was trying to obtain legal advice when he allegedly threatened the prosecutor on June 29. After the judge granted the government's request for ankle monitoring, Mr. Moore announced that he "need[ed] to speak with [his] attorney," and left the courtroom to find Mr. Harvey. Moore App. at 35. Upon locating him, Mr. Moore broached the trial court's ruling by stating that if he "los[t] [his] job" because of it, he was "going to bust a cap in this bitch," i.e., the prosecutor. 5/30/19 Tr. 103. Because Mr. Harvey had been appointed to represent Mr. Moore, and because the order was a legal issue within Mr. Harvey's purview,[4] Mr. Moore's decision to approach Mr. Harvey, after announcing that he "need[ed] to speak with [his] attorney," Moore App. at 35, was "*prima facie*" evidence of his purpose to obtain legal advice. 8 Wigmore, Evidence § 2296, at 567. Contrary to the government's suggestions, *see Moore*, 285 A.3d at 247-48, "[a]dvice or a legal

[4] The trial court's order clearly implicated Mr. Harvey's role as a "professional legal advisor," as it did not "lack[] in aspects requiring [such] advice," 8 Wigmore, Evidence § 2296, at 567. After an adverse ruling, clients naturally look to counsel for insight into whether and how negative consequences might be avoided. Someone in Mr. Moore's position may wonder about the possibility of obtaining an eleventh hour stay that would allow him to attend the job training he was worried about missing. It is for precisely this reason that "communications retrospectively reflecting on past legal services" "after a trial" fall "within the privilege." Cmt. b, Restatement (Third) of the Law Governing Lawyers § 72.

opinion need not be expressly requested" in order to satisfy the significant purpose test. *See* Edna Selan Epstein, The Attorney-Client Privilege and the Work-Product Doctrine 222 (4th ed. 2001). Rather, "[i]t is generally sufficient if a request for legal assistance is implicit in the communication. Thus, the privilege may attach . . . if the facts indicate that the expectation or the intent was that the attorney would render a legal opinion on the basis of the communication." *Id.*; *see, e.g.*, *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 404 (8th Cir. 1987) (holding that "[c]lient communications intended to keep the attorney apprised of business matters may be privileged if they embody 'an implied request for legal advice based thereon.'" (quoting *Jack Winter, Inc. v. Koratron Co.*, 54 F.R.D. 44, 46 (N.D. Cal. 1971))). By approaching Mr. Harvey in the hallway after announcing his "need to speak with [his] attorney," Moore App. 35, Mr. Moore conveyed precisely this kind of "intent" and "expectation." Thus, Mr. Moore has demonstrated a significant purpose to obtain legal advice at the time his statements were made.

II. MR. MOORE'S STATEMENTS ABOUT THE PROSECUTOR "RELAT[ED] TO [HIS] PURPOSE" OF SEEKING LEGAL ADVICE.

Mr. Moore's statements about the prosecutor further were "relat[ed] to" his purpose of obtaining legal advice. *Jones*, 828 A.2d at 175 (internal quotation marks and citation omitted). The government argues that Mr. Moore cannot meet this burden because, in its view, under *Fisher v. United States*, 425 U.S. 391, 403-04 (1976), attorney-client privilege "protect[s] only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege." *Moor*e, 285 A.3d at 249-50. However, as the division opinion noted, the

government's interpretation of *Fisher* has been widely criticized because it is predicated on "dictum," 24 Charles Alan Wright & Kenneth W. Graham, Fed. Prac. & Proc. Evidence § 5490, at 441 & n.29 (1986), and because it would lead to an unduly "narrow" and "legalistic" conception of the privilege. Edward J. Imwinkelried, *Parsing Privilege: Does the Attorney-Client Privilege Attach to an Angry Client's Criminal Threat Voiced During an Otherwise Privileged Attorney-Client Consultation?*, 72 Case W. Res. L. Rev. 871, 897 (2022). *Fisher* simply did not decide the issue. *See Moor*e, 285 A.3d at 250. And as Wigmore himself noted, conditioning the privilege on whether a specific disclosure is "*necessary* . . . to some purpose of the consultation" makes little sense, 8 Wigmore, Evidence § 2310, at 598, as "the client [can] hardly be expected to know what facts were 'relevant' to his problem, much less those that were necessary to its solution." 24 Wright & Graham, *supra* § 5490, at 439-40.

Moreover, the government's interpretation relies on "narrow," "incomplete[,] and outmoded" view of the attorney as mere fact-gatherer and dispenser of legal opinion. Imwinkelried, *Parsing Privilege*, *supra* at 886. As courts have long recognized, "it is in the . . . public interest that the lawyer should regard himself as more than [a] predicter of legal consequences." *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 359 (D. Mass. 1950). "The modern, psychologically sound view" is that attorneys must give clients the "space" to communicate about the aspects of a case that matter to them, both to encourage full disclosure of legally relevant information and to foster the trust needed to make clients receptive to their advice. Imwinkelried, *Parsing Privilege*, *supra* at 885-86, 898 (citation omitted);

accord Imwinkelried, New Wigmore § 6.11, at 1094. "Testing for *Fisher* necessity in a segmented, utterance-by-utterance manner" would deprive attorney-client relationships of this *space*, thereby "hollow[ing] out the privilege entirely." 1 Paul R. Rice, *Attorney-Client Privilege in the U.S.* § 5:21 (2022).[5]

Because "the object of the privilege is that [clients] should be unhampered in [their] quest for advice," Wigmore's "test is . . . not whether the fact or the statement is actually necessary or material or relevant to the subject of the consultation, but whether [it was] made as *a part of the purpose of the client* to obtain advice on that subject." 8 Wigmore, Evidence § 2310, at 599; *accord* Wigmore, Code of Evidence § 2437, at 431 (3d ed. 1942).[6] Under this "loose," "minimal" standard, 24 Wright & Graham, *supra* § 5490, at 440-41, "the scope of the privilege is not limited to

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[5] Conditioning the privilege on "case-by-case" determinations of necessity would further deprive it of the predictability that it needs to function effectively, prompting lawyers to warn their clients that statements deemed unnecessary to the representation may be subject to compelled disclosure and prosecution. *See In re Grand Jury Investigation*, 902 N.E.2d 929, 933-34 (Mass. 2009). As discussed further below, "[t]he resulting negative impact on the attorney-client relationship is difficult to overstate." 1 Rice, *supra* § 5:21; *see Upjohn*, 449 U.S. at 393 ("An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.").

[6] For this reason alone, this Court should not follow *United States v. Ivers*, 967 F.3d 709 (8th Cir. 2020), or *United States v. Alexander*, 287 F.3d 811 (9th Cir. 2002). *See* Gov. Reh'g Pet. at 11-12. Both cases were influenced by, if not entirely predicated on, the unduly "narrow" and "legalistic" conception of the privilege that flows from interpreting the Supreme Court's opinion in *Fisher* to require a showing that a statement was "necessary to obtain informed legal advice." Imwinkelried, *Parsing Privilege*, *supra* at 897; 1 Rice, *supra* § 5:21. Moreover, these opinions fail to grapple with any of the negative policy implications of withholding the privilege from a client's threats to engage in crime. *See infra*, Section III.

information directly relevant to the subject of the consultation." Imwinkelried, New Wigmore § 6.11, at 1094. Rather, relevance must be construed liberally and from the privilege holder's perspective. *Id.* ("[J]udge[s] should not apply an overly strict standard of relevance."); 24 Wright & Graham, *supra* § 5490, at 440-41 (noting a judicial trend toward "liberal[] construc[tion]").

Mr. Moore's statements about the prosecutor easily pass this test. As the lower court found, they were expressions of anger related to the legal predicament he found himself facing. *See* 2/25/19 Tr. 43. Contrary to the lower court's suggestions, however, the fact that Mr. Moore's threats were motivated by anger did not preclude a finding that they were "relat[ed] to" the purpose of obtaining legal advice.[7] As even the dissent in this case acknowledged, *Moore*, 285 A.3d at 254 (Thompson, J., dissenting), Mr. Moore's statements about the prosecutor were a reflection of just how angry he was about the idea of having to undergo further ankle monitoring—angry enough to want to shoot the prosecutor. Although Mr. Harvey may not have *needed* this information to do his job, it was still "relat[ed] to" the case in the "loose," "minimal" sense that Wigmore uses those words. 24 Wright & Graham, *supra* § 5490, at 440-41. The record amply supports that Mr. Moore needed to "get[] [these] negative emotions 'off his . . . chest'" before he could "listen carefully to [Mr. Harvey's] advice" and be receptive to it. Imwinkelried, *Parsing Privilege*, *supra* at 898. "[T]he typical client has an overpowering need to discuss both the

[7] Nor does it matter that Mr. Moore was "stating an intention." 2/25/19 Tr. 23. *See In re Pub. Def. Serv.*, 831 A.2d 890, 901 (D.C. 2003) (holding that statements indicative of the intent to falsify evidence are protected by attorney client privilege).

legally relevant facts and the accompanying emotions, such as anger." *Id.* at 886-87. Expressions of anger communicate to a lawyer the depth of concern that a client has about a particular issue in a case. And the lawyer needs to hear the anger, in order to address it and remove it as an obstacle to the client's meaningful participation in the representation. On these facts, Mr. Moore's statements about the prosecutor were "relat[ed] to" his pursuit of legal advice. *See State v. Boatwright*, 401 P.3d 657, 660, 664 (Kan. Ct. App. 2017) (where appellant threatened to kill the complainant in his stalking case during a conference with his court appointed lawyer in the same case, rejecting the government's argument that "the threat had no relationship to [the] representation").[8]

III. THE PUBLIC INTEREST FAVORS APPLYING THE PRIVILEGE TO MR. MOORE'S STATEMENTS ABOUT THE PROSECUTOR.

Given that a traditional privilege analysis covers threats such as the ones

[8] The government argues that *Boatwright* is inapposite because, whereas under Wigmore, a privileged communication must "relat[e] to" the purpose of obtaining legal advice, the *Boatwright* court was applying a statute that extends the privilege to all "communications made in the course of [the attorney-client] relationship." Gov. Reh'g Pet. at 10-11 (quoting Kan. Stat. Ann. § 60-426(a) (Supp. 2016)). However, "in the course of" is a legal term of art that is "generally understood" to imply a "functional" and "temporal" relationship between a person's status and an activity they engage in. 24 Wright & Graham, *supra* § 5490, at 441 & n.26; *see also, e.g.*, Black's Law Dictionary (11th ed. 2019) (defining "in the course of employment" as "having happened . . . on-the-job . . . within the scope of employment"). Thus, it is compatible with Wigmore's "relat[ed] to" test. Indeed, D.C.'s mandatory-reporter law for child abuse and neglect uses this exact language in providing an exception for information covered by the attorney-client privilege. *See* D.C. Code § 4-1321.02(b)(2) (excepting information that "arises solely in the course of [legal] representation").

uttered by Mr. Moore in this case, the final question for this Court to address is whether to fashion an exception for criminal threats—or, more narrowly, for those threats, unlike Mr. Moore's,[9] that a lawyer "reasonably believes [are] likely to result in the death of, or substantial bodily harm to, an individual," such that disclosure is necessary to prevent such death or injury. Imwinkelried, *Parsing Privilege*, *supra* at 904 & nn.217-18 (citations omitted). This Court should not craft such an exception for (at least) four reasons.

First, such a blanket rule would frustrate the purpose of the privilege by "chilling non-threatening [client] expression" regarding case-relevant information. *Counterman v. Colorado*, 143 S. Ct. 2106, 2116 (2023). Announcing such a rule would "prompt [] lawyer[s] to warn a client in advance that the disclosure of certain information may not be held confidential." *Purcell v. Dist. Att'y for Suffolk Dist.*, 676 N.E.2d 436, 440 (Mass. 1997); *accord* 1 Rice, *supra* § 5:21. Clients may, in turn, "swallow words that are in fact not true threats" out of concern for their own inability to predict what their lawyers will deem fit to report and what the

[9] On the record presented, there is no basis to conclude that Mr. Moore's threat's gave rise to a reasonable belief that disclosure was necessary to prevent death or substantial bodily harm, and certainly no judge made such a finding. As the trial judge reminded Mr. Harvey in reviewing his motion to withdraw, R. 24 at 38-39, such a belief would have triggered an exception to Mr. Harvey's duty to maintain Mr. Moore's confidences, which would have allowed him to explain why he thought withdrawal was necessary. *See* D.C. R. Prof. Conduct 1.6(c)(1). Nevertheless, Mr. Harvey repeatedly insisted that he was not at liberty to disclose his reason for seeking withdrawal, even after he consulted with Bar Counsel on that specific question. R. 24 at 42; *see also id.* at 23-24, 30. In the end, Mr. Harvey would only disclose Mr. Moore's threat by court order, Moore App. at 33, pursuant to Rule 1.6(e)(2)(A)'s "required by law" exception. *See Adams v. Franklin*, 924 A.2d 993 (D.C. 2007).

government may deem fit to prosecute. *Counterman*, 143 S. Ct. at 2116 (noting the "ordinary citizen's predictable tendency to steer 'wide[ ] of the unlawful zone.'" (citation omitted)). In the process, attorneys will lose important information about their client's case, their emotions, and the facts that are tied to those emotions. *See* Imwinkelried, *Parsing Privilege*, *supra* at 898.

Second, creating a "threats" exception to the privilege would undermine public safety. As this Court has recognized, "when the client misguidedly contemplates or proposes actions that the client knows to be illegal . . . lawyers are the first and most effective line of defense," both because their "'first duty [in such situations] is to attempt to dissuade the client from the unlawful course of conduct,'" and because "[t]he sincere counsel of a trusted advisor will persuade many clients to comply with the law." *In re PDS*, 831 A.2d at 900-01 (citation omitted). Attorney-client privilege plays a vital role in this process by "encourag[ing] clients to make . . . unguarded and ill-advised suggestions to their lawyers" before pursuing them, *id.* at 901, and by allowing the client to "develop[] enough trust in the attorney to take the attorney's advice." Imwinkelried, *Parsing Privilege*, *supra* at 898.[10] Announcing a rule whereby no threat may fall within the privilege would undermine this process by "chilling free discourse between lawyer and client and reducing the prospect that the lawyer will learn of a serious threat to the well-being of others." *Purcell*, 676 N.E.2d at 440; *see also Newman v. State*, 863 A.2d 321, 333 (Md. 2004).

[10] The free flow of information about contemplated acts of violence is further and especially important in the context of a criminal prosecution, where expressions of irrational hostility may be the first sign of a larger mental health issue requiring the attorney's attention. *Cf. State v. Jenkins*, 79 P.3d 347, 350 (Or. Ct. App. 2003).

Announcing such a rule would also make some lawyers "reluctant to come forward" and make a permissive disclosure under the ethical rules, based on their desire not to harm their clients. *Purcell*, 676 N.E.2d at 440. It is for precisely these reasons that appellate courts have held that "a statement of an intention to commit a crime made in the course of seeking legal advice is protected by the privilege, unless the crime-fraud exception applies," even where, as alleged here, the statement constitutes a completed crime in and of itself. *In re Grand Jury Investigation*, 902 N.E.2d 929, 932-33 (Mass. 2009) (internal quotation marks and citations omitted).[11]

Third, an exception to the attorney-client privilege for the category of "criminal threats" would sweep far broader than any public policy concern about preventing the harm of death or serious injury to others. The District's threats statutes criminalize the utterance of words that convey "a menace or fear of bodily harm to the ordinary hearer." *Postell v. United States*, 282 A.2d 551, 553 (D.C. 1971). The statute is designed to prevent reasonable fear in the hearer, not the danger of serious injury. *See Beard v. United States*, 535 A.2d 1373, 1378 (D.C. 1988)

[11] Although the government purports to be "unaware of any case law that protects under the attorney-client privilege a client's commission of a crime, including the crime of threats, in front of [the] attorney," Gov. Reh'g Pet. at 11, this was precisely the holding of *In re Grand Jury Investigation*, 902 N.E.2d at 933 (holding that the privilege applied where a father had been charged with threatening a judge and witness intimidation, in connection with voicemails left for his attorney, because a contrary holding "not only would hamper attorney-client discourse, but also would discourage lawyers from exercising their discretion to make such disclosures"), and *Boatwright*, 401 P.3d at 660, 664-65 (noting appellant's conviction for "criminal threat"; holding that the threat was privileged, in part, because allowing clients to air such threats "may serve as a springboard for discussion and attempts to dissuade the client on the part of the attorney" (internal quotation marks and citation omitted)).

(threats statute punishes uttering of statements that would "upset" or "intimidate[]" the "ordinary hearer" (citation omitted)).[12] Indeed, there is no requirement of imminence, *see Postell*, 282 A.2d at 553 (conduct constitutes a threat even when "[someone] . . . inten[ds] to carry out the[ir] threat later"), nor is prevention of injury the focus, *see* D.C. Code § 22-1810 (criminalizing threats to damage property as well as to injure persons). For this reason, the fact that a threat is a "completed crime" is truly a red herring. Gov. Reh'g Pet. at 11. If an exception to the privilege is motivated by a desire to prevent an act imminently likely to result in death or bodily harm, then the fact that a "threat" as defined by local statutes has been completed is beside the point.

Finally, an exception to the evidentiary privilege it is not needed to enable counsel to report such serious threats to the proper authorities—D.C. R. Prof. Conduct 1.6(c)(1) serves that purpose. And judicial creation of such an exception would disrupt the policy balance between public safety and attorney-client privilege that the legislature and Bar have struck in other contexts. Notably, although D.C. is one of many jurisdictions that mandates reporting of child abuse and neglect by most professionals, D.C.'s mandatory-reporter law incorporates an exception for those

[12] In addition, attorneys are not the "ordinary hearer[s]" that the legislature sought to protect by enacting criminal penalties for threats. *Postell*, 282 A.2d at 553. Although a threat may be "jarring in isolation, the expression of such frustrations is not an uncommon occurrence in the course of an attorney-client relationship, particularly in an adversarial context[.]" *Boatwright*, 401 P.3d at 664-65 (internal quotation marks and citation omitted). "'[A]bout half of the practice of a decent lawyer is telling would-be clients that they are damned fools and should stop.'" *Id.* at 665 (quoting *McCandless v. Great Atlantic and Pacific Tea Co., Inc.*, 697 F.2d 198, 201-202 (7th Cir. 1983)).

"[e]mployed or supervised by a lawyer who is providing [or who has been engaged to provide] representation in a criminal, civil, including family law, or delinquency matter," so long as the information "arises solely in the course of that representation." D.C. Code § 4-1321.02(b)(2).[13] Likewise, although Rule 1.6(c)(1) permits disclosure "to the extent reasonably necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in death or substantial bodily harm," it does not require disclosure. Nor does it preclude the client from invoking attorney-client privilege as to a statement that has been disclosed pursuant to Rule 1.6(c). *See* D.C. R. Prof. Conduct 1.6 cmts. [6]-[8] ("This rule is not intended to govern or affect judicial application of the attorney-client privilege."). The same recognition regarding the importance of the attorney-client privilege that led the legislature to decide that it should not be pierced even for the reporting of child abuse and neglect, and led the Bar authorities to conclude that lawyers should be permitted, but not required, to disclose communications even when they reasonably believe it necessary to prevent a criminal act that would result in death or serious bodily injury, should cause this Court to reject the government's invitation to create a new exception to the privilege for the exceedingly broad category of criminal threats.

CONCLUSION

This Court should hold that Mr. Moore's statements about the prosecutor were protected by attorney-client privilege.

[13] By contrast, family court judges may breach other kinds of privilege "in the interest of justice." D.C. Code § 4-1321.05.

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CERTIFICATE OF SERVICE

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this 14th day of August, 2023.

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District of Columbia
Court of Appeals

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Pursuant to Administrative Order No. M-274-21 (filed April 3, 2023), this certificate must be filed in conjunction with all briefs submitted in all criminal cases designated with a "CF" (criminal felony), "CM" (criminal misdemeanor), "CT" (criminal traffic), and "CO" (criminal other) docketing number. Please note that although briefs with above designations must comply with the requirements of this redaction certificate, criminal sub-case types involving child sex abuse, cruelty to children, domestic violence, sexual abuse, and misdemeanor sexual abuse will not be available for viewing online.

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A. All information listed in Super. Ct. Crim. R. 49.1(a) has been removed, including:

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B. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

C. All pre-sentence reports (PSRs); these reports were filed as separate documents and not attached to the brief as an appendix.

D. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

E. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

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